

INQUIRY INTO SENTENCING

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

MARCH 2015

REPORT NUMBER 4

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Ms Mary Porter MLA	Member (from 5 August 2014)
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RESOLUTION OF APPOINTMENT

At its meeting on Tuesday, 27 November 2012, the Assembly passed a resolution creating Standing Committees for the Eight Assembly, including the Standing Committee on Justice and Community Safety.

The resolution stated that the Committee was:

To perform a legislative scrutiny role and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.¹

¹ Legislative Assembly for the ACT, *Debates*, 27 November 2012, p.47.

TERMS OF REFERENCE

On Tuesday 7 May 2013 the Chair of the Standing Committee on Justice and Community Safety Mr Doszpot MLA advised the Legislative Assembly that the Committee had resolved to inquire into sentencing in the ACT. The inquiry's Terms of Reference are as follows:

The Committee notes that in the Sixth Assembly the Standing Committee on Legal Affairs, precursor to the present Committee, commenced an inquiry into Sentencing in the Criminal Jurisdiction of the ACT. The inquiry was not completed, and lapsed on 17 October 2008, at the end of the Sixth Assembly.

The Committee resolves to inquire into sentencing in the present—Eighth—Assembly, including into:

1. Sentencing practice in the ACT, its effects and implications, including:
 - a) the law, legal doctrine and rationale of contemporary sentencing practice;
 - b) comparisons with other jurisdictions;
 - c) rates of successful appeals regarding sentences; and
 - d) timeliness in handing-down decisions and sentences.
2. Ways in which contemporary sentencing practice in the ACT affects other parts of the justice system, including:
 - a) the Courts;
 - b) Corrective Services and the Alexander Maconochie Centre;
 - c) ACT Policing;
 - d) the legal profession;
 - e) victims of crime; and
 - f) offenders; and
 - g) community support organisations.
3. The practice and effectiveness of current arrangements in the ACT for:
 - a) parole;
 - b) periodic detention;
 - c) bail;
 - d) Restorative Justice; and
 - e) Circle Sentencing.
4. Alternative approaches to sentencing practice in the ACT.
5. Any other relevant matter.²

² The Committee originally resolved to report in the first sitting week after 1 November 2014: see Legislative Assembly for the ACT, *Debates*, 7 May 2013, p. 1592. On 16 September 2014 it advised the Legislative Assembly that it had resolved to report by the 'by the last sitting day of April 2015': see *Debates*, 16 September 2014, pp.2693-2694.

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RECOMMENDATIONS

RECOMMENDATION 1

3.255 The Committee recommends that the ACT Government propose legislation to the Legislative Assembly that, if passed, would create an ACT Sentencing Council.

RECOMMENDATION 2

3.256 The Committee recommends that this legislation would give an ACT Sentencing Council responsibility to: conduct research on sentencing, recidivism, and related matters in the ACT; draw on, analyse and produce publications using data from the ACT Sentencing Database; engage and educate the ACT community on matters relevant to sentencing and criminal justice; and provide policy advice to Government relevant to sentencing and criminal justice.

RECOMMENDATION 3

3.257 The Committee recommends that the ACT Sentencing Council should be created as an independent statutory body on the model of the Victorian Sentencing Advisory Council.

RECOMMENDATION 4

4.166 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly that would, if passed, see an intensive corrections orders regime established in the ACT.

RECOMMENDATION 5

4.167 The Committee recommends that the ACT Government accurately assess resource requirements for an intensive corrections orders regime in the ACT and ensure that adequate resources are applied to any future intensive orders regime.

RECOMMENDATION 6

4.169 The Committee recommends that the ACT Government investigate reports that the number of custodial sentences had increased in NSW when periodic detention was abolished and with an intensive corrections orders regime in place, and apply any lessons learned to a future ACT intensive corrections orders regime.

RECOMMENDATION 7

4.241 The Committee recommends that the ACT Government propose legislative amendments to the Legislative Assembly that would, if passed, see the ACT adopt *de novo* appeals as employed in NSW, specifically on the pattern of appeals to the NSW District Court regarding cases initially heard by the NSW Local Court.

RECOMMENDATION 8

4.244 The Committee recommends that the ACT Government propose legislative amendments to the Legislative Assembly that would, if passed, see the ACT adopt legislative provisions requiring that appeals be lodged with courts within 28 days of sentence decisions being brought down.

RECOMMENDATION 9

4.261 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would allow greater judicial discretion over sentencing in cases which include forfeiture of property by an offender.

RECOMMENDATION 10

4.289 The Committee recommends that the ACT Government introduce legislation in the Legislative Assembly which, if passed, would provide a remedy in statute for delays causing loss to an accused through no fault of that accused.

RECOMMENDATION 11

5.77 The Committee recommends that the ACT Government propose legislative changes to the Legislative Assembly which, if passed, would increase options available to judicial officers so as to provide alternatives to placing accused persons on remand.

RECOMMENDATION 12

5.83 The Committee recommends that the ACT Government advocate for, encourage and support reform of listing practices in the ACT Magistrates court with the anticipated outcome that cases be resolved in shorter, and more predictable, timeframes.

RECOMMENDATION 13

5.158 The Committee recommends that the ACT Government evaluate all prisoner rehabilitation programs offered by or under the auspices of Corrective Services, and that evaluation is made an integral part of planning and implementation for all future prisoner rehabilitation programs.

RECOMMENDATION 14

5.159 The Committee recommends that evaluations of prisoner rehabilitation programs be tabled in the Legislative Assembly within 90 days of the due date for completion of the evaluation report.

RECOMMENDATION 15

5.209 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly that, if passed, would make ACT legislation consistent with the *Sentencing Act 1995* (WA) in explicitly providing that courts were able to adjourn the sentencing of an offender to enable a Victim Impact Statement to be given to the court.

RECOMMENDATION 16

5.242 The Committee recommends that the ACT Government assess the resources required to adequately fund the Throughcare program and apply that level of resourcing to the program.

RECOMMENDATION 17

5.243 The Committee recommends that the ACT Government institute enhanced reporting on recidivism in the ACT, and focus on measuring performance against those figures.

RECOMMENDATION 18

6.176 The Committee recommends that the ACT Government introduce changes to legislation in the Legislative Assembly which, if passed, would explicitly require courts to consider the Indigenous status of offenders at sentencing.

RECOMMENDATION 19

6.177 The Committee recommends that the ACT Government introduce changes to legislation in the Legislative Assembly which, if passed, would formally recognise the Galambany Circle Sentencing court under statute.

RECOMMENDATION 20

6.178 The Committee recommends that the ACT Government create a specific mechanism for the creation of reports similar to *Gladue* reports in Canada, informing courts of any relationship between an accused's offending and his or her Indigenous status.

RECOMMENDATION 21

6.179 The Committee recommends that the ACT Government ensure that Indigenous case-workers make a significant contribution to the creation of reports informing courts of any relationship between an accused's offending and his or her Indigenous status.

RECOMMENDATION 22

6.180 The Committee recommends that the ACT Government ensure that it engages the ACT Indigenous community, and provides a diversity of sentencing options, so as to foster appropriate pathways for the punishment and rehabilitation of Indigenous offenders and reduce rates of Indigenous imprisonment in the ACT.

RECOMMENDATION 23

6.268 The Committee recommends that the ACT Government introduce legislation to the Legislative Assembly that would, if passed, create a drug court in the ACT as a separate jurisdiction of the ACT Magistrate's Court.

RECOMMENDATION 24

6.269 The Committee recommends that the ACT Government work toward a coordinated suite of drug diversion programs as recommended by the 2012 Evaluation of ACT Drug Diversion Programs, including through the adequate collection of data and ongoing evaluation of programs.

RECOMMENDATION 25

6.270 The Committee recommends that the scope of the ACT Community and Work Order Program be expanded so that it becomes a sentencing option available to courts with respect to drug and drink driving and the Simple Cannabis Offence Notice Scheme (SCON).

RECOMMENDATION 26

6.322 The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, remove the Director of Public Prosecutions' right of veto for dismissal of criminal charges due to mental incapacity under s 334 of the *Crimes Act 1900*, in this way supporting judicial discretion on questions of defendants' mental capacity.

RECOMMENDATION 27

6.323 The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, expand the options open to the ACT Magistrates Court under the *Crimes Act 1900* where it is considered that a charge should be dismissed on grounds of defendant's mental incapacity.

RECOMMENDATION 28

6.324 The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, stipulate in legislation the power of the ACT Magistrates Court to order expert assessment of a defendant's mental capacity to face charges.

RECOMMENDATION 29

6.355 The Committee recommends that the ACT Government introduce in the Legislative Assembly legislative amendments which would, if passed, allow the conditional release in certain circumstances of a detainee who is the primary carer of a young child or young children, to serve sentence in an appropriate and approved environment away from the Alexander Maconochie Centre.

RECOMMENDATION 30

6.356 The Committee recommends that if it is not considered practicable for the primary carer of a young child or young children, to serve sentence in an appropriate and approved environment away from the Alexander Maconochie Centre (AMC), then facilities should be provided, and permission given, so that they can continue to be primary carer within the confines of the AMC.

RECOMMENDATION 31

6.397 The Committee recommends that the ACT Government undertake targeted research on the criminogenic implications of early-life exposure to drug use and frame remedial action to reduce and prevent this exposure.

RECOMMENDATION 32

6.398 The Committee recommends that the ACT Government initiate an ongoing survey of the health and wellbeing of children involved in the youth justice system.

RECOMMENDATION 33

6.399 The Committee recommends that the ACT Government create a coordinating function that ensures that courts and other agencies are provided with up-to-date information on services that are available for the referral of children, young people, and adult offenders in the ACT.

RECOMMENDATION 34

6.400 The Committee recommends that the Attorney-General proclaim Phase 2 of the *Crimes (Restorative Justice) Act 2004*, thus allowing young people to be referred to restorative conferencing for a broader range of crimes.

RECOMMENDATION 35

6.401 The Committee recommends that the ACT Government develop an ACT Diversion Plan for young offenders.

RECOMMENDATION 36

7.112 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would require courts to apply a public interest test as to whether parole should be cancelled in instances where a person is accused of an offence while on parole.

RECOMMENDATION 37

7.113 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would for shorter sentences give courts the power to make parole orders and set parole conditions at the time the offender is sentenced.

RECOMMENDATION 38

7.114 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would in cases of breaches of parole give the Sentence Administration Board a discretion to determine how much of the balance of the sentence ought to be served having regard to when the breach occurred and the nature of the breach.

RECOMMENDATION 39

7.115 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would amend the wording of s 149 of the *Crimes (Sentence Administration) Act 2005* to make it consistent with previous amendments to s 150 and s 151, to require that the breaching offence be committed while the parole order is in force before the section operates to cancel the parole order.

RECOMMENDATION 40

7.116 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would amend the *Crimes (Sentence Administration) Act 2005* so that it sets out the circumstances in which parole can be revoked.

RECOMMENDATION 4 1

7.117 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would require the Sentence Administration Board to publish its decisions as a matter of course.

RECOMMENDATION 4 2

7.118 The Committee recommends that the ACT Government to provide further resourcing to the Sentence Administration Board to support publication of its decisions, if legislation so provides.

RECOMMENDATION 4 3

7.255 The Committee recommends that the ACT Government conduct a review of arrangements for bail in the ACT and introduce in the Legislative Assembly legislative amendments to the *Bail Act 1992* which, if passed, would introduce a focus on risk management, with reasonable and proportionate bail conditions.

RECOMMENDATION 4 4

7.256 The Committee recommends that the ACT Government, as part of proposed amendments to the *Bail Act 1992* to be introduced in the Legislative Assembly, continue to provide legislative foundations for the ACT Family Violence Intervention Program (FVIP).

RECOMMENDATION 4 5

7.277 The Committee recommends that services and programs available to sentenced prisoners be made available to accused persons on bail and prisoners on remand on a voluntary basis.

RECOMMENDATION 4 6

8.168 The Committee recommends that the Attorney-General proclaim 'phase 2 application day' provided for under the *Crimes (Restorative Justice) Act 2004*.

RECOMMENDATION 4 7

8.169 The Committee recommends that the expansion of the ACT restorative justice scheme, subsequent to the Attorney-General's proclamation of 'phase 2 application day', take the form of a stepped or incremental expansion which sees restorative justice applied to 1) more serious offences of which young offenders are accused; and (2) adult offenders, beginning with less serious offences.

RECOMMENDATION 48

8.170 The Committee recommends that the Attorney-General, as responsible minister, ask his officers to generate accurate assessments of the funding and resource cost of supporting restorative justice processes for real-world scenarios, and for this to be reported in the Justice and Community Safety Directorate's annual reports for the next and subsequent reporting periods.

RECOMMENDATION 49

8.171 The Committee recommends that the restorative justice scheme be funded and resourced consistent with these assessments of the funding and resource cost of supporting restorative justice processes for real-world scenarios.

RECOMMENDATION 50

8.172 The Committee recommends that the Justice and Community Safety Directorate report, in its Annual Reports, on costs and savings in other parts of the criminal justice system as a result of the expanded use of restorative justice processes, and its effect on key indicators such as recidivism.

RECOMMENDATION 51

8.173 The Committee recommends that the ACT Government take further steps to formalise the restorative justice scheme so that restorative justice in the ACT develops a more formal series of precedents and conventions; develops its own jurisprudence; and integrates more effectively with the other components of the ACT criminal justice system.

RECOMMENDATION 52

8.209 The Committee recommends that the ACT Government introduce in the Legislative Assembly legislative amendments which would, if passed, result in the Galambany Circle Sentencing Court being provided for and recognised under statute, and that these amendments set out the objects and purposes of the Court.

RECOMMENDATION 53

8.210 The Committee recommends that the Justice and Community Safety Directorate develop and report on key indicators for the Galambany Circle Sentencing Court in its Annual Report for the next and subsequent reporting periods.

RECOMMENDATION 54

8.211 The Committee recommends that the ACT Government further develop, and fund appropriately, the suite of programs to which the Galambany Circle Sentencing Court can refer offenders.

RECOMMENDATION 55

8.225 The Committee recommends that the ACT Government construct and commission the Ngunnawal Bush Healing Farm, to be completed by or before December 2017.

1 INTRODUCTION

CONDUCT OF THE INQUIRY

- 1.1 On 1 May 2013 the Standing Committee on Justice and Community Safety resolved to conduct an inquiry into sentencing in the ACT and agreed to the Terms of Reference presented on p.iii of this report.
- 1.2 In its subsequent advice to the Assembly, the Committee noted that:

in the Sixth Assembly the Standing Committee on Legal Affairs, precursor to the present Committee, commenced an inquiry into Sentencing in the Criminal Jurisdiction of the ACT. The inquiry was not completed, and lapsed on 17 October 2008, at the end of the Sixth Assembly.³
- 1.3 The Committee called for submissions and agreed to hold public hearings for the inquiry. The Committee received 18 submissions and held public hearings on 2, 19 and 26 May, and 14 October, 2014.

STRUCTURE OF THE REPORT

- 1.4 The report employs a structure based on the Terms of Reference for the inquiry, with some modifications, as follows:
 - Chapter 1, which is this introduction;
 - Chapter 2, 'Law and legal doctrine', which describes the Australian courts system; legal doctrine on sentencing; legislation on sentencing in the ACT and other Australian jurisdictions, thus responding to Term 1 (b) and (d) of the inquiry's Terms of Reference;
 - Chapter 3, 'Sentencing indicators and information', presents representations made to the Committee about the measurable aspects of sentencing and related matters in the ACT, and also presents the Committee's deliberations on other third-party sources in this area, thus responding to Term 1 (b);
 - Chapter 4, 'Areas of concern, comparisons with other jurisdictions', deals with mandatory sentencing, suspended sentences, intensive corrections orders, appeals, forfeiture of property and human rights, thus responding to Term 1 (b);

³ *Debates*, Legislative Assembly for the ACT, 2013, Week 6 Hansard (7 May), p.1591.

- Chapter 5, ‘Sentencing and the criminal justice system’, considers the impact of sentencing on the Courts; Corrective Services; ACT Policing; the legal profession; victims of crime; and community support organisations, thus responding to Term 2;
- Chapter 6, ‘Sentencing and offenders’, considers the impact of sentencing on different categories of offender, including Indigenous offenders; offenders with problems with alcohol and other drugs; offenders with a disability; women offenders and youth offenders, thus responding to Term 2 (f);
- Chapter 7, ‘Practice and effectiveness’, considers the practice and effectiveness of sentencing in the ACT in connection with parole; periodic detention; bail; and circle sentencing, thus responding to Term 3 (a), (b), (c) and (e);
- Chapter 8, ‘Alternative approaches’, considers matters relevant to Term 4 of the Terms of Reference, and considers restorative justice; circle sentencing; justice reinvestment and the Ngunnawal Bush Healing Farm, thus responding to Term 3 (d) and Term 4; and
- Chapter 9, ‘Sentencing reform’, considers representations made to the Committee regarding the potential for sentencing reform in the ACT and the ACT Government’s Justice Reform Strategy.

SUMMARIES AND *COMMITTEE COMMENTS*

- 1.5 From Chapter 3 in the report, each section concludes with a summary of arguments put to the Committee in the course of the inquiry, followed by a section entitled ‘Committee comment’ in which the Committee puts its views on the matter under consideration and, where necessary, makes recommendations in relation to that matter.
- 1.6 The Committee’s intention in employing this format is to make it possible for a reader to read the summaries and Committee comments alone in order to get an appreciation of the key arguments considered in the course of the inquiry, and grasp the views and recommendations put forward by the Committee in response.
- 1.7 A reader accessing the report in this way could refer back to the body of the chapter if he or she wanted to see evidence for a particular area or feature set out in greater detail.
- 1.8 Readers are also directed to the summary of recommendations placed immediately after the report’s Table of Contents.

TERMINOLOGY

- 1.9 Contributions to the inquiry refer to ‘Aboriginal and Torres Strait Islander’, ‘ATSI’, and ‘Aboriginal’ people.
- 1.10 The report refers to ‘Indigenous’ people throughout, but does not modify the terminology used in verbatim quotations.

2 LAW AND LEGAL DOCTRINE

INTRODUCTION

2.1 In this chapter the Committee considers:

- the structure and operation of Australian courts;
- legal doctrine on sentencing, including:
 - the principles of sentencing in Australian courts;
 - other common elements in sentencing; and
 - the complexity of the sentencing process;
- Australian sentencing legislation; and
- ACT sentencing legislation.

AUSTRALIAN COURTS SYSTEM

2.2 The Australian Bureau of Statistics publication *Criminal Courts, Australia* provides the following description of the courts system in Australia:

There are different levels of courts, which deal with different types of matters. In addition, all courts are divided into criminal and civil jurisdictions. The civil jurisdiction deals with matters of a non-criminal nature, such as claims for damages.⁴

2.3 *Criminal Courts* describes the function of superior and intermediate courts:

Within the criminal jurisdiction, all states and territories have a Supreme Court that deals with the most serious criminal matters, generally referred to as indictable offences. These offences include murder, manslaughter and drug trafficking as well as serious sexual offences, robberies and assaults. The larger states (New South Wales, Victoria, Queensland, South Australia and Western Australia) also have an intermediate level of court, known as the District Court or County Court, that deals with the majority

⁴ Australian Bureau of Statistics, 4513.0 – *Criminal Courts, Australia 2012-13*, 'Higher, Magistrates' and Children's Courts', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2012-13~Main%20Features~Higher,%20Magistrates%27%20and%20Children%27s%20Courts~5>

of serious offences. In this publication, the Supreme Courts and Intermediate Courts are collectively referred to as the Higher Courts.⁵

2.4 Having a case heard in a superior court means that the case is dealt with in a particular way:

All defendants that are dealt with by the Higher Courts have an automatic entitlement to a trial before a judge and jury. In some states and territories, the defendant may elect to have the matter heard before a judge alone.⁶

2.5 *Criminal Courts* then describes the place and function of lower or Magistrates courts:

The lowest level of criminal court is the Magistrates' Court, also known as the Court of Summary Jurisdiction, Local Court or Court of Petty Sessions. The majority of all criminal cases are heard in these courts. Cases heard in the Magistrates' Courts do not involve a jury as a magistrate determines whether the defendant is guilty or not guilty. This is known as a summary proceeding.⁷

2.6 In addition, Children's Courts form a further layer in the courts system:

Each state and territory has Children's Courts to deal with offences alleged to have been committed by young people. These courts mainly deal with summary proceedings, however in some jurisdictions they also have the power to hear indictable matters. The maximum age that defendants are considered a child or juvenile is under the age of 18 years in all states and territories, except Queensland, where defendants are considered adults if aged 17 years or over at the time the offence was committed.⁸

⁵ Australian Bureau of Statistics, 4513.0 – *Criminal Courts, Australia 2012-13*, 'Higher, Magistrates' and Children's Courts', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2012-13~Main%20Features~Higher,%20Magistrates%27%20and%20Children%27s%20Courts~5>

⁶ Australian Bureau of Statistics, 4513.0 – *Criminal Courts, Australia 2012-13*, 'Higher, Magistrates' and Children's Courts', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2012-13~Main%20Features~Higher,%20Magistrates%27%20and%20Children%27s%20Courts~5>

⁷ Australian Bureau of Statistics, 4513.0 – *Criminal Courts, Australia 2012-13*, 'Higher, Magistrates' and Children's Courts', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2012-13~Main%20Features~Higher,%20Magistrates%27%20and%20Children%27s%20Courts~5>

⁸ Australian Bureau of Statistics, 4513.0 – *Criminal Courts, Australia 2012-13*, 'Higher, Magistrates' and Children's Courts', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2012-13~Main%20Features~Higher,%20Magistrates%27%20and%20Children%27s%20Courts~5>

LEGAL DOCTRINE ON SENTENCING

DEFINITION OF 'SENTENCE'

2.7 The *Encyclopaedic Australian Legal Dictionary* defines 'sentence' as both a verb and a noun:

1. To impose punishment on a person who has been found guilty of, or pleaded guilty to, committing a criminal offence.
2. An order relating to punishment made by a court after a person has been found guilty of, or has pleaded guilty to, a criminal offence.⁹

SENTENCING PRINCIPLES

2.8 In its article on 'Criminal Sentencing', *The Laws of Australia* notes that sentencing principles 'are embodied in the legislation of the Commonwealth and all States and Territories' but 'were first established at common law',¹⁰ and that the 'classical' and 'predominate' principles of sentencing have been identified as:

- retribution;
- deterrence;
- prevention;
- rehabilitation; and
- the objective of 'protection'.¹¹

AN ADDITIONAL PRINCIPLE: RESTORATION

2.9 The *Encyclopaedic Australian Legal Dictionary* notes that despite:

fluctuations in sentencing theories and practices over time, the five classical principles of sentencing remain crucially important to the criminal sentencing exercise across all Australian jurisdictions and in respect of sentencing federal offenders.¹²

2.10 However to this, it suggested, had been added a further imperative by 'restorative theories of justice', which this report will term 'restoration'. This imperative, states the *Dictionary*,

⁹ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 19 September 2014), 'Sentence'.

¹⁰ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, '1 Purposes of Sentencing', [12.1.10].

¹¹ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, '1 Purposes of Sentencing', [12.1.10].

¹² Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, '1 Purposes of Sentencing', [12.1.10].

contrasted with the ‘traditional utilitarian aims of deterrence and rehabilitation’ in sentencing.¹³

COMMON ELEMENTS IN AUSTRALIAN SENTENCING

2.11 *Laws of Australia* identifies common elements in the practice and principles of sentencing in Australian jurisdictions. These include:

- that the protection of the public ‘is a separate goal of sentencing’;¹⁴ is a ‘often classified by courts as the primary purpose of sentencing’;¹⁵ and ‘should take precedence over offender rehabilitation’;¹⁶
- that sentences are ‘imposed to protect the public from [both] violent and non-violent offenders’,¹⁷ a goal which is ‘achieved by incapacitating or detaining the offender’;¹⁸
- that, in general, ‘the goal of protection of the public ... is subject to the principle of proportionality’, meaning that there ‘are restrictions on the weight that can be given to the protection of the community from the possibility of future offending by a convicted offender’;¹⁹
- that Courts have ‘disapproved of a two-stage approach to sentencing that first seeks to establish the outer limits of the possible sentence by reference to the objective facts of the case and at the second stage takes into account only some of the relevant circumstances concerning the offence and circumstances personal to the offender, including antecedents and criminal history, both aggravating and mitigating, to determine the appropriate sentence’ — rather they have supported an “instinctive synthesis” (one-stage) approach to sentencing;²⁰ and that

¹³ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.10].

¹⁴ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.160].

¹⁵ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.170].

¹⁶ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.180].

¹⁷ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.190].

¹⁸ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.200].

¹⁹ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.210].

²⁰ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.220].

- that there are ‘statutory exceptions to the rule that protection of the public ... does not justify a sentence of preventive detention or incapacitation that is disproportionate to the seriousness of the current offence’.²¹

COMPLEXITY OF THE SENTENCING PROCESS

2.12 *Laws of Australia* quotes the judgement in *Veen v The Queen* regarding the complexity of the sentencing process:

“[S]entencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.”²²

2.13 An example is:

a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter.²³

2.14 In relation to such as case:

These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.²⁴

²¹ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.230]. The article notes that ‘New South Wales, South Australia and Victoria have enacted laws ... enabling courts to impose sentences longer than would otherwise be deemed proportionate to the offence in the case of serious repeat offenders’.

²² Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.20], quoting *Veen v The Queen* [No 2] (1988) 164 CLR 465; 62 ALJR 224; 33 A Crim R 230; 77 ALR 385, Mason CJ, Brennan, Dawson and Toohey JJ at 476–477 (CLR).

²³ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.20], quoting *Veen v The Queen* [No 2] (1988) 164 CLR 465; 62 ALJR 224; 33 A Crim R 230; 77 ALR 385, Mason CJ, Brennan, Dawson and Toohey JJ at 476–477 (CLR).

²⁴ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.20], quoting *Veen v The Queen* [No 2] (1988) 164 CLR 465; 62 ALJR 224; 33 A Crim R 230; 77 ALR 385, Mason CJ, Brennan, Dawson and Toohey JJ at 476–477 (CLR).

- 2.15 As the article notes, neither ‘the courts nor the legislatures have attempted to reconcile the overlapping and competing goals of punishment’. The effect of this has been to leave the Courts to determine, in each particular case, how the imperatives of sentencing are balanced and expressed.²⁵

AUSTRALIAN SENTENCING LEGISLATION

- 2.16 Bagaric and Edney’s *Sentencing in Australia* lists the ‘main statutes’ that deal with sentencing in Australian jurisdictions as:

- *Crimes (Sentencing) Act 2005* (ACT);
- *Crimes Act 1914* (Cth), Part 1B (ss 16 - 22A);
- *Crimes (Sentencing Procedure) Act 1999* (NSW);
- *Sentencing Act* (NT);
- *Penalties and Sentences Act 1992* (Qld);
- *Criminal Law (Sentencing) Act 1988* (SA);
- *Sentencing Act 1997* (Tas);
- *Sentencing Act 1991* (Vic); and
- *Sentencing Act 1995* (WA).²⁶

- 2.17 Regarding these statutes, *Sentencing in Australia* states that while ‘there are differences between these statutes, they share many commonalities’.²⁷

- 2.18 Among these commonalities are that they set out:

- ‘the purposes and aims of sentencing’;
- ‘the specific matters that are relevant to the sentence that should be imposed in a particular case’; and
- ‘the type of sanctions that can be imposed on offenders’.²⁸

²⁵ Thomson Reuters, *Laws of Australia* (at 19 September 2014), 12 Criminal Sentencing, ‘1 Purposes of Sentencing’, [12.1.20].

²⁶ Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook, 2014) 4 [1.20].

²⁷ Mirko Bagaric and Richard Edney, *Sentencing in Australia*, (Lawbook, 2014) 5 [1.25].

²⁸ Mirko Bagaric and Richard Edney, *Sentencing in Australia*, (Lawbook, 2014) 5 [1.25].

SENTENCING LEGISLATION IN THE ACT

INTRODUCTION

- 2.19 The *Crimes (Sentencing) Act 2005* is the Act most relevant to sentencing in the ACT.
- 2.20 The broader statutory framework for sentencing in the ACT also includes: the *Crimes (Sentence Administration) Act 2005*, *Criminal Code 2002*, *Corrections Management Act 2007*, *Crimes (Restorative Justice) Act 2004*, the *Bail Act 1992*, and the *Criminal Code 1900* and other Acts which create criminal offences.

THE *CRIMES (SENTENCING) ACT 2005*

- 2.21 The *Crimes (Sentencing) Act 2005* determines the manner and form of sentencing in the ACT.
- 2.22 Chapter 1 of the Act sets out preliminary matters, including the long name of the Act and linkages to Chapter 2 of the *Criminal Code 2002*, ‘General principles of criminal Responsibility’, and the *Legislation Act 2002*, which defines the value of ‘offence penalties that are expressed in penalty units’.²⁹
- 2.23 Chapter 2 of the Act sets out ‘Objects and important concepts’ including, in s 7, the ‘Purposes of sentencing’, that is that a ‘Court may impose a sentence on an offender for 1 or more of the following purposes’:
- (a) to ensure that the offender is adequately punished for the offence in a way that is just and appropriate;
 - (b) to prevent crime by deterring the offender and other people from committing the same or similar offences;
 - (c) to protect the community from the offender;
 - (d) to promote the rehabilitation of the offender;
 - (e) to make the offender accountable for his or her actions;
 - (f) to denounce the conduct of the offender;
 - (g) to recognise the harm done to the victim of the crime and the community.³⁰
- 2.24 Chapter 3 of the Act sets out ‘Sentencing and non-conviction options’, including:
- at Part 3.2, ‘Sentences of imprisonment’; s 11, ‘Periodic detention’; s 12, ‘Suspended sentences’;

²⁹ *Crimes (Sentencing) Act 2005* (ACT), s 5.

³⁰ *Crimes (Sentencing) Act 2005* (ACT), s 7.

- at Part 3.3 ‘Non-custodial sentences’, including s 13, ‘Good behaviour orders’; fines, in ss 14-15A; s 16 ‘Driver licence disqualification orders—motor vehicle theft’; ss 17 and 18, non-conviction orders; and ss 19 and 20, reparation orders;
- at Part 3.4, ‘Non-association and place restriction orders’;
- at Part 3.5, ‘Deferred sentence orders’; and
- at Part 3.6, ‘Combination sentences’.

2.25 Chapter 4 of the Act sets out ‘Sentencing procedures generally’; in particular:

- at s 33 ‘Sentencing—relevant considerations’ and s 34 ‘Sentencing—irrelevant considerations’, which set out what courts may or may not consider relevant in deliberations on sentencing;
- at s 35, ‘Reduction of sentence—guilty plea’, which sets out the ability of the court to impose a lesser sentence where the offender has admitted guilt, with what conditions and by what proportion of a sentence that would otherwise be applied; s 35A, concerning reductions of sentence where the offender has been convicted or found guilty and the defence ‘has assisted in the administration of justice for the offence’; and s 36, regarding reductions in connection with ‘assistance to law enforcement authorities’;
- at Part 4.2, sets out procedure, requirements and mechanism for pre-sentence reports, including:
 - at s 40A a list of ‘Pre-sentence report matters’ that can be addressed in reports
 - at s 40B, provision for review by the ‘court alcohol and drug assessment service’ (CADAS);
 - at s 41, provisions creating the power of courts to order pre-sentence reports; and,
 - at ss 42 and 43, provisions defining the role of assessors in the preparation of pre-sentence reports.
- at Part 4.3, sets out provisions for the creation, consideration and procedure for Victim Impact Statements, including:
 - at s 51 sets out the ‘form and contents’ of such statements; at s 52, their ‘use in court’; and
 - at s 53, sets out ways in which courts may take consideration of Victim Impact Statements when deliberating on sentences.

2.26 Chapter 5 of the Act sets out provisions:

- at Part 5.1, for ‘Imprisonment—start and end of sentences’;
- at Part 5.2, for non-parole periods;
- at Part 5.3, for concurrent and consecutive sentences of imprisonment; and
- at Part 5.4, for periodic detention.

2.27 Chapter 6 of the Act sets out provisions:

- at Part 6.1, for ‘Good behaviour orders—community service conditions’; and
- at Part 6.2, for ‘Good behaviour orders—rehabilitation program conditions’.

2.28 Chapter 7 of the Act sets out provisions for reparation orders.

2.29 Chapter 8 of the Act sets out provisions for ‘Deferred sentence orders’ including:

- at Part 8A.2, good behaviour orders for young offenders.

OTHER ACTS RELEVANT TO SENTENCING IN THE ACT

2.30 As noted, other Acts form part of the legislative framework for sentencing in the ACT. These include:

- the *Crimes (Sentence Administration) Act 2005*, which establishes the Sentence Administration Board (SAB), its scope of action and defines its procedures. The SAB considers applications for parole and determines a course of action where there have been breaches of parole;
- the *Criminal Code 2002*, which sets out burdens of proof and evidential requirements for ACT Courts which are required to consider criminal matters
- the *Corrections Management Act 2007*, which sets out the obligations of Corrective Services towards prisoners in its care, and identifies administrative responsibilities for the care and custody of prisoners;
- the *Crimes (Restorative Justice) Act 2004*, which creates a statutory framework for Restorative Justice processes;
- the *Bail Act 1992*, which sets out the manner, form and requirements for the administration of bail in the ACT; and
- the *Crimes Act 1900*, which defines many—but not all—of the criminal offences and associated penalties for which an offender could be sentenced: other Acts also create criminal offences and penalties.

CONCLUSION

2.31 The purpose of this chapter has been to provide a background for discussion of sentencing in other parts of this report. The matters considered above show that in many respects the ACT is similar to other jurisdictions with respect to sentencing.

2.32 Considering matters dealt with in other parts of this report, in the Committee’s view distinctive features of sentencing in the ACT in terms of the statutory framework include:

- the absence of intermediate-level ‘county’ or ‘district’ courts;
- greater emphasis on restorative justice;

- the persistence, until now, of Periodic Detention as a sentencing option;
- the absence of Intensive Correction Orders or a similar mechanism; and
- the absence of a sentencing council or similar body.

2.33 In addition, there are certain procedural features distinct to the ACT. These include:

- constraints on timelines for sentence appeals; and
- conditions for the role of Victim Impact Statements in court proceedings.

2.34 These are considered below in the body of the report.

3 SENTENCING INDICATORS AND INFORMATION

INTRODUCTION

- 3.1 In this chapter the Committee considers sources which provide information and indicators on sentencing in the ACT.
- 3.2 Two sections of this chapter consider areas in which there is disagreement about the characteristics of sentencing and related matters in the ACT: rates of imprisonment, and timeliness in resolving court cases. In considering these areas contributors express different views on the character of sentencing in the ACT.
- 3.3 A third section considers the ACT Sentencing Database which was launched in December 2013.
- 3.4 A final section, *Committee comment*, presents the Committee's views and recommendations based on the material considered in the chapter.

RATES OF IMPRISONMENT

- 3.5 Contributors to the inquiry raised concerns about rates of imprisonment in the ACT and related matters, adopting different views as to what deductions should be drawn from the information available.
- 3.6 These included concerns about: rates of imprisonment in the ACT; perceptions of a trend toward longer terms of imprisonment being imposed; a larger than expected remand population at the Alexander Maconochie Centre (AMC); and rates of recidivism in the ACT, and are considered below.

DR LORANA BARTELS

- 3.7 Dr Lorana Bartels' submission to the inquiry advised the Committee that:

Statistics from the Australian Bureau of Statistics indicate not only that the ACT has the smallest number of prisoners of any jurisdiction (only 313 out of 29,381 at 30 June 2012)², but also the lowest rate of imprisonment in Australia, at 107 per 100,000 population. The next closest is Victoria (at 112) and the national average is 168.³¹

³¹ Dr Lorana Bartels, Submission No.1, p.3.

3.8 However, the submission advised:

This picture of apparent leniency, however, masks the reality that the ACT's only adult prison is already at capacity.³² In addition, the ACT's imprisonment rate has risen very sharply in recent years, increasing by 43 per cent between 2009 and 2012. By way of comparison, over the same period, the imprisonment rate declined nationally (by 4%), in NSW (by 16%), Queensland (by 5%) and Tasmania (by 11 %).³²

3.9 Regarding this, the submission observed that the ACT 'therefore appears to be part of an unfortunate, and somewhat atypical, upward trajectory' in rates of imprisonment.³³

3.10 When she appeared before the Committee in hearings of 26 May 2014, Dr Bartels again expressed concern that 'the number of people being sent to prison has gone up in recent years'.³⁴ Asked about factors which may account for this, she told the Committee that this may hinge on the opening of the ACT's own prison, the Alexander Maconochie Centre (AMC), in 2009. Previously offenders who had received custodial sentences in ACT courts were placed in NSW prisons. She told the Committee that her perception 'and this was only a perception' was that with the advent of the AMC, ACT judicial officers 'who might previously have experienced some reluctance to send offenders interstate to Goulburn might not feel that reluctance anymore'.³⁵

3.11 In light of the putative rise in rates of imprisonment, Dr Bartels told the Committee that the ACT needed 'to ensure that we are doing this in a responsible and sustainable way', as 'prison systems in New South Wales and Victoria [were] at breaking point', and that it would not in her view 'benefit anyone—offenders, victims or the broader community—if [the ACT] were to follow suit'.³⁶

ACT BAR ASSOCIATION

3.12 The ACT Bar Association put a similar view. Its submission stated that '[l]ike other stakeholders, the Bar notes with concern the increasing rates of imprisonment in the ACT' and referenced the JACS Annual Report for 2012 and 2013 which, it suggested, showed 'that more people are being imprisoned'. This needed investigation as 'overall crime statistics' did not 'reflect a significant increase in crime levels'.³⁷

³² Dr Lorana Bartels, Submission No.1, p.3.

³³ Dr Lorana Bartels, Submission No.1, p.3.

³⁴ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

³⁵ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.148.

³⁶ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

³⁷ ACT Bar Association, Submission No.11, p.2.

3.13 The Bar Association added to these comments when it appeared in public hearings.

3.14 The President of the Bar Association told the Committee that:

There are some statistics which are rather alarming in relation to incarceration rates. Quite contrary to what I heard a moment ago from the Director of Public Prosecutions, the real position is as follows: in December 2009 there were, in the Alexander Maconochie Centre, 107 sentenced prisoners. In March 2014 there were 241. In 2009, including the on-remand prisoners, there were 184. In March 2014 there were 305. The cost of keeping a prisoner in jail is \$313 per day. So that will give you some idea of why it is not a particularly good idea to deliberately fill up your jails if there is an alternative.³⁸

3.15 The Chair of the Association's Criminal Committee told the Committee that:

we think a fairly serious question needs to be asked about what is in fact going on in sentencing practice presently within the territory, what it is that is being done in sentencing, how we have come to a point of such a dramatic increase in incarceration rates that do not reflect a dramatic increase in the commission of crime.³⁹

3.16 He also told the Committee that:

There has not been a legislative change that would explain why there has been such a marked change in the incarceration rates. We note that the legal principle that underlies people going to jail is that it is the option of last resort. The strongest thing that we as a society can do to any society member to mark out wrongdoing is the deprivation of that person's freedom. But we see no marker in changes of legislation which explains how it is that we have come to this particular point.⁴⁰

3.17 The Vice-President of the Association told the Committee that there was a lack of 'fit' between decreasing figures on commission of crime in the ACT, on one hand, and the AMC being filled to capacity, on the other:

It does not fit. The only need for expansion of the AMC is that it has become full, and the principal question is: how has that happened? We do not understand how it has happened. Looking at the AMC, one would say it is big enough for the territory. It ought to have had excess capacity on older sentencing patterns. We do not understand why, when there is a decrease in crime, it has been filled so dramatically. I think there

³⁸ Mr Greg Stretton SC, *Transcript of Evidence*, 19 May 2014, p.65.

³⁹ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.67.

⁴⁰ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.67.

are two answers to the question: yes, it does need to be made bigger because it is now too small, but we do not understand how it can have that need.⁴¹

- 3.18 Consistent with this, the Chair of the Association's Criminal Committee told the Committee that:

Although sometimes public perception might be that there is an avalanche of crime that the courts are dealing with ... in fact the reality is to the contrary, and there is a general trend downwards in relation to most offence categories. It therefore becomes a very interesting and important question to ask why that is so—that, despite that trend downwards in offences, the number of people who are being incarcerated is increasing.⁴²

- 3.19 The Bar Association also responded to comments by the DPP, quoted below, which attributed upward pressures on imprisonment to efforts to clear the courts backlog. The Vice-President of the Bar Association told the Committee that:

in 2009 the backlog had not reached the extremes that it has reached in more recent times. So we were not dealing with such a backlogged system back in 2009. To say that we now have a high rate because the backlog has been dealt with, whereas such a backlog was not present against the low numbers that we have seen in 2009 ... cannot be a sufficient explanation for what has happened.⁴³

ACT LAW SOCIETY

- 3.20 The ACT Law Society's submission put forward similar views, expressing concern at a 'recent upward trajectory in the rate of imprisonment' in the ACT and noted that as imprisonment is 'the sentence of last resort', this should be a matter of concern to the Committee.⁴⁴
- 3.21 The submission proposed that the 'question to be answered is whether the rate reflects an underlying shift in the sentencing jurisprudence of the Territory, or whether it is fuelled by other factors'.⁴⁵ It also raised related questions concerned the 'efficacy of imprisonment in protecting the community'.⁴⁶

⁴¹ Mr Shane Gill, *Transcript of Evidence*, 2 May 2014, p.71.

⁴² Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, pp.65-66.

⁴³ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

⁴⁴ ACT Law Society, Submission No.13, p.6.

⁴⁵ ACT Law Society, Submission No.13, p.6.

⁴⁶ ACT Law Society, Submission No.13, p.6.

- 3.22 In light of this the submission proposed that the ACT ‘should review the conventional wisdom that imprisonment is the sentence of last resort, only to be imposed where there is no other option’.⁴⁷
- 3.23 When the Law Society before the Committee in public hearings of 19 May 2014 it was asked to make further comment on rates of imprisonment in the ACT.
- 3.24 The President of the Society’s Criminal Law Committee told the Committee that in his view, inspection of Australian Bureau of Statistics data on sentencing, as at June 2013, showed that:
- if you leave out the Northern Territory, which had some astronomical amount of sentencing, the differences between the other states and territories were not really very great. If you just looked across the line at where the top of the graph was for each, there was not a significant difference.⁴⁸
- 3.25 However he agreed that the advent of the ACT’s own prison was likely to have influenced sentencing in the ACT, saying that there had been ‘a lot of good reasons why people were not sent to prison in New South Wales in previous times’.⁴⁹
- 3.26 When asked for comment, the Chair of the Society’s Criminal Law Committee agreed that the opening of the AMC had had an influence on sentencing in the ACT, and that:
- Certainly, in terms of there being more shorter sentences of imprisonment, so more in the range of three to maybe six months, anecdotally, I would say I see more of that in court now than, say, five to 10 years ago.⁵⁰

AUSTRALIAN LAWYERS ALLIANCE

- 3.27 When Mr Steve Whybrow of the Australian Lawyers Alliance appeared in hearings of 19 May 2014, he told the Committee that:
- one of the things that we need to address in the territory is recidivism and the fact that people are going into jail increasingly here when the statistics do not represent that.⁵¹
- 3.28 However, he went on to say that:
- I do not see anything sinister in that. I just see that as the rebalancing that one would normally get when we finally have our own jail and the reluctance of judicial officers regarding, in effect, transportation. It has just amounted to a rebalancing. You will see

⁴⁷ ACT Law Society, Submission No.13, p.6.

⁴⁸ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.80.

⁴⁹ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.80.

⁵⁰ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.80.

⁵¹ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

in our submission that while we may have been seen as lenient before, that was a very relevant part to it, and we have evened the keel a bit. That explains, in my view, why it would appear that the ACT's rates of imprisonment have increased while others have come down. We have got ourselves back to a more even keel in terms of sentencing people appropriately.⁵²

DIRECTOR OF PUBLIC PROSECUTIONS

3.29 When he appeared before the Committee in hearings of 19 May 2014 the Director of Public Prosecutions (DPP) told the Committee he disagreed with contributors who claimed a trend of increasing rates of imprisonment in the ACT.

3.30 The DPP addressed this in his opening statement, where he told the Committee that:

The Australian Bureau of Statistics publishes statistics in this area, and the statistics for the ACT show two things: first of all, that the rate of imprisonment in the ACT has been fairly constant over the last decade or so; and, secondly, that consistently the ACT has the lowest rate of imprisonment in the commonwealth.⁵³

3.31 The DPP went on to say that his calculation regarding the long-term average over the 11 years from 2002 to 2012 suggested that 'the rate of imprisonment, which is expressed per 100,000 head of population, in the ACT is about 98 per 100,000', and that this had been 'fairly consistent across that period of time'.⁵⁴

3.32 This low rate of imprisonment, the DPP told the Committee, had 'a lot to do with the socioeconomic status of the community in the ACT':

We know that we are a prosperous and stable community and one would expect in such a community that the rate of imprisonment might be lower than in some other areas. That is just a reflection of what is well known in criminal law—that socioeconomic factors have a great influence on imprisonment rates.⁵⁵

3.33 In addition, the DPP told the Committee that he took 'some issue' with submissions made by Dr Lorana Bartels in which she had 'stated that the imprisonment rate had risen very sharply in recent years, increasing by 43 per cent between 2009 and 2012'.⁵⁶ He told the Committee that '[i]f one selects those two years, that is right', however:

⁵² Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

⁵³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, pp.54-55.

⁵⁴ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁵⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁵⁶ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

2009 was the lowest year on the trajectory, and that is made very clear in the ABS statistics. The rate for that year, which was 74.8, is simply not indicative of the long-term average, which, as I said, is over 98. Therefore it seems that by selecting that lowest point, one can confect a situation that there has been a great increase.⁵⁷

- 3.34 'In fact', he told the Committee, 'long term, I would respectfully suggest that there [had] not been a significant increase'.⁵⁸
- 3.35 Despite these comments, the DPP also made mention of factors that could, potentially, be responsible for exerting upward pressure on rates of imprisonment.⁵⁹
- 3.36 First, the DPP told the Committee that ACT was bringing matters to trial in a more timely fashion. This had resulted in the ACT having 'caught up on the backlog in the Supreme Court', due to 'a lot of very hard work within the courts, within my office and within the legal profession generally'. As a result 'we are now pretty much up to date with the Supreme Court backlog'.⁶⁰ He told the Committee that when he was appointed DPP, late in 2008, 'there was a real issue with the number of trials that were being had in the Supreme Court'. By 2014 the ACT Supreme Court had 'essentially doubled the rate of trials ... taking place in the ACT'. This had had 'the effect of bringing people to sentence' and so 'the clearing up of the backlog' had been 'reflected in an increase in the number of people imprisoned'.⁶¹
- 3.37 Second, the DPP told the Committee that the availability of a gaol in the ACT may have had an effect on rates of imprisonment, as:
- clearly ... everyone concerned in criminal justice must welcome the fact that we have our own jail, that we are now responsible for imprisoning our own prisoners and rehabilitating our own prisoners.⁶²
- 3.38 Third, he told the Committee that that it was 'fair to say that judges and magistrates would be much more willing to send prisoners to the AMC' than to 'commit them to the rather uncertain wiles of the New South Wales system', as had previously been the case, and that this could add to upwards pressure on the ACT's rates of imprisonment.⁶³

⁵⁷ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁵⁸ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁵⁹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁶⁰ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁶¹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁶² Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

⁶³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

REPLY BY DR LORANA BARTELS

- 3.39 Dr Bartels responded to the DPP's comments on her claims when she appeared before the Committee in hearings of 26 May 2014.

I would like briefly to take the opportunity to speak to the evidence that the Director of Public Prosecutions, Mr Jon White, gave last week. In his evidence he referred to a statement in my submission to the effect that the ACT's imprisonment rate had risen very sharply in recent years, and he took issue with that statement on the basis that I had selected 2009, which was the lowest year in the trajectory. What I wanted to say to that is I do not dispute that it was the lowest in the trajectory, but what I did not make clear—this was my omission in my submission—was that I had picked that year because that was the year that the AMC opened. That is obviously a very significant aspect of what we have here in the ACT. If I, through omitting that, gave rise to an inaccurate perception, I am sorry about that.

But the fact remains that was the year that the AMC opened. Obviously, prior to that the imprisonment rate had been high. It had been dropping, and since it has opened it has been going up. It was my thought at the time that probably ACT judicial officers, once the AMC opened, would be less reluctant to send people living in the ACT to prison. I think that may be a factor—not that we have any robust evidence to suggest that—and if we do take that as our benchmark starting point, it has been going up since then, including recently.⁶⁴

- 3.40 She also provided the Committee with data from Australian Bureau of Statistics publications. One table, below, compiled from *Prisoners in Australia*, showed the ACT's 'crude' (that is, not age-adjusted) imprisonment rate as increasing from 98.8 per 100,000 in 2002 to 118.3 per 100,000 in 2013, with some variation in the intervening years.⁶⁵

⁶⁴ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.147.

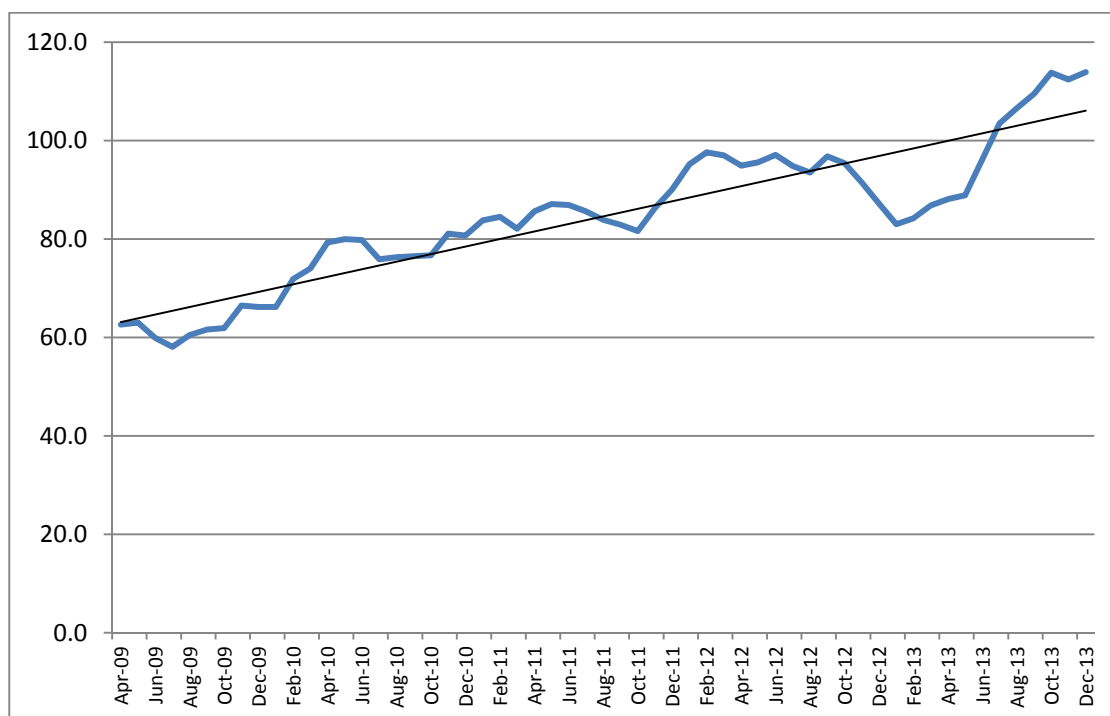
⁶⁵ Taken from Table 4, Australian Bureau of Statistics, *Prisoners in Australia*, 2012, Cat No 4517, 2013.

ACT crude imprisonment rate (per 100,000), 2002-2012

Year	Rate (per 100,000)
2002	98.8
2003	100.9
2004	111.5
2005	108.9
2006	85.0
2007	90.5
2008	93.9
2009	74.8
2010	100.7
2011	106.6
2012	106.9
[2013]	[118.3]

Source: Australian Bureau of Statistics, *Prisoners in Australia*, 2012 (Cat No 4517, 2013) Table 4

- 3.41 Another, also presented below, was compiled by Dr Bartels from different yearly editions of *Corrective Services, Australia*. This showed the age-adjusted imprisonment rate in the ACT more-or-less steadily increasing from just above 60 per 100,000 in April 2009 to its greatest point in December 2013 of approximately 118 per 100,000.

ACT imprisonment rate (per 100,000), March 2009 – December 2013

Source: Australian Bureau of Statistics, *Corrective Services, Australia* (Cat No 4512, various years) Table 3

RATES OF IMPRISONMENT FOR INDIGENOUS PEOPLE

3.42 Contributors to the inquiry made comment on rates of imprisonment for Indigenous people in the ACT.

3.43 The President of the ACT Bar Association told the Committee that:

Amongst the statistics there is an absolute disgrace in relation to Aboriginal and Torres Strait Islander prisoners, who are over-represented in the jail population by approximately 10—that is, approximately 10 times their proportion of the general community are incarcerated.⁶⁶

3.44 This was, he told the Committee, ‘a true blight on our system of looking after the disadvantaged people in our society’.⁶⁷

3.45 Other contributors to the inquiry, including the Aboriginal Legal Service, Mr Anthony Hopkins and Alcohol Tobacco and Other Drug Association ACT (ATODA) also expressed strong concern about rates of imprisonment for Indigenous people in the ACT. They advised the Committee that these were disproportionate to the small component of Indigenous people in the population of the ACT, as they were for Australia overall.⁶⁸

3.46 These comments are considered in greater detail in a section on Indigenous offenders in Chapter 7 of this report.

SUMMARY

3.47 The Committee notes representations made to it regarding trends on numbers imprisoned in the ACT. It also notes the very different views put by different contributors.

3.48 Arguments asserting an atypical increase in numbers imprisoned in the ACT included:

- that ACT judicial officers ‘who might previously have experienced some reluctance to send offenders interstate to Goulburn might not feel that reluctance anymore’;⁶⁹
- that ‘more people are being imprisoned’ despite the fact that ‘overall crime statistics’ did not ‘reflect a significant increase in crime levels’;⁷⁰

⁶⁶ Mr Greg Stretton SC, *Transcript of Evidence*, 19 May 2014, p.65.

⁶⁷ Mr Greg Stretton SC, *Transcript of Evidence*, 19 May 2014, p.65.

⁶⁸ Aboriginal Legal Service NSW/ACT, Submission No.15, pp.1-2; Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6; Mr Anthony Hopkins, Submission No.9, p.2..

⁶⁹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.148.

⁷⁰ ACT Bar Association, Submission No.11, p.2.

- that numbers at the Alexander Maconochie Centre had increased from 107 sentenced prisoners in December 2009 to 241 in March 2014, and the total including on-remand prisoners had increased from 184 in 2009 to 305 in March 2014;⁷¹
- that there had ‘not been a legislative change that would explain why there has been such a marked change in the incarceration rates’;⁷² and
- that statistics from reliable sources, such as the ABS, reflected considerable increases in rates of imprisonment in the ACT.⁷³

3.49 Arguments disagreeing with this view included:

- that trends in imprisonment in the ACT simply reflected ‘the rebalancing that one would normally get when we finally have our own jail and the reluctance of judicial officers regarding, in effect, transportation’;⁷⁴ and
- that there had not ‘been a significant increase’ in rates of imprisonment in the ACT;⁷⁵
- that smaller changes that may be observable stemmed from efforts to clear court backlogs,⁷⁶ and the fact that contemporary ‘judges and magistrates would be much more willing to send prisoners to the AMC’ than to ‘commit them to the rather uncertain wiles of the New South Wales system’ as they were obliged to do before the advent of the Alexander Maconochie Centre.⁷⁷

COMMITTEE COMMENT

3.50 In the Committee’s view it is difficult, on the basis of the information tendered to the inquiry, to explain and elucidate trends for rates of imprisonment in the ACT. There appear to be a number of conflicting assertions and different ways of interpreting available data.

3.51 In the Committee’s view this state of affairs adds weight to arguments in favour of a sentencing council in the ACT which would have a brief to research these trends, provide advice to government, and furnish the general public with high-quality information about the criminal justice system.

⁷¹ Mr Greg Stretton SC, *Transcript of Evidence*, 19 May 2014, p.65.

⁷² Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.67.

⁷³ See tables above prepared by Dr Lorana Bartels.

⁷⁴ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

⁷⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁷⁶ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.55.

⁷⁷ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

SEVERITY OF CUSTODIAL SENTENCES

ACT BAR ASSOCIATION

- 3.52 In its submission the ACT Bar Association registered concern at what it regarded as a trend of more severe custodial sentences being applied in the ACT. The submission suggested that this was anomalous because there was ‘little evidence of more serious crimes becoming more prevalent’. Nor did this ‘accord with general community attitudes in relation to the increased use of imprisonment as a sentencing outcome’. Therefore, the Bar Association suggested ‘this increase seems to reflect a change in sentencing practice’. However it was ‘unclear’ as to why this has occurred ‘given there has been no change to legislation that would warrant such an increase in the number and length of terms imposed’.⁷⁸
- 3.53 When the Bar Association appeared in hearings, the Chair of its Criminal Committee asked why it was that ‘the trend is increasingly towards longer and longer sentences’. He noted relevant information presented in annual reports of the Justice and Community Safety Directorate, in particular ‘raw numbers in relation to those who are in custody’. He noted that the previous year’s annual report had presented some ‘interesting information in last year’s annual report about the length of sentences being imposed’, in which one could ‘see quite drastic increases in the length of terms that have been imposed’.⁷⁹
- 3.54 He expanded on this, telling the Committee that:
- we say that the statistics are quite clear in relation to establishing trends—that the rate of imprisonment has clearly risen, and not only that, but it is the sentencing range that has increased. What is happening is that there is a bigger warehousing effect, if I could call it that. So people are being put in for longer.⁸⁰
- 3.55 He noted, however, that:
- if you look at what they call the admissions—that is, sentenced prisoners and remandees going into jail—you could just about draw a flat line through that over a number of years, the rates at which people are being kept in custody are increasing because you are getting people sentenced to jail more often and for longer periods of time.⁸¹

⁷⁸ ACT Bar Association, Submission No.11, p.2.

⁷⁹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.66.

⁸⁰ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

⁸¹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

3.56 He went on to say that:

If you look at the JACS report from last year, in some of the offence categories there is a 20 or 30 per cent increase in relation to the length of the sentences that are actually being imposed. As Mr Gill said, that is inexplicable. There is no legislative warrant for that sort of change. Quite frankly, we are not sure what the justification for it is.⁸²

DIRECTOR OF PUBLIC PROSECUTIONS

3.57 On the same question the DPP told the Committee that, based on his experience, he did not 'believe there [had] been an increase in severity of sentences across the board in the ACT'.⁸³

3.58 However, he told the Committee that there were 'some areas where [the DPP has] made ... some impact in increasing sentences' particularly 'in the area of sexual offences', by way of the DPP successfully lodging appeals in cases where it was considered that there was an 'inadequacy of sentence'. As a result he thought it 'fair to say in that crime type there has been an increase in the length of custodial sentences that have been imposed' because, he said, the DPP had specifically 'targeted that area'.⁸⁴

3.59 'Apart from this', the DPP told the Committee, he was 'not aware of any evidence to suggest that there is an increase in the severity of custodial sentences'. The ACT remained 'the jurisdiction with the lowest rate of imprisonment' and he thought it no 'secret that our judges are generally viewed to be amongst the more lenient in Australia'.⁸⁵

3.60 In considering the associated question of whether there had been an increase in severity of *crimes*, the DPP again told the Committee that this was 'very difficult to answer', but that 'a large number of the serious matters that [the DPP] prosecute are sexual offences', and that there did 'seem to be an increase in the reporting rates of those offences' and, as a result there were 'more of those going to trial'.⁸⁶

3.61 He went on to tell the Committee that there were:

reasons sometimes why particular offences become more reported. It is quite well known why that would be the case in relation to sexual offences. Probably crimes of domestic violence fall into the same category. And obviously in both respects it is a thoroughly good thing if these matters are now reported and prosecuted.⁸⁷

⁸² Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

⁸³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

⁸⁴ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

⁸⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

⁸⁶ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.62.

⁸⁷ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.62.

3.62 This, the DPP told the Committee, simply meant ‘that ... some crime types ... are more likely to be reported and more likely to be prosecuted’. However, he said it was ‘very difficult to extrapolate’ as to ‘underlying trends’.⁸⁸

SUMMARY

3.63 The Committee notes representations made to it regarding trends on the severity of custodial sentences in the ACT.

3.64 Arguments putting the view that the severity of custodial sentences had increased included:

- that the ‘sentencing range has increased’ in the ACT;⁸⁹
- that ‘people are being put in for longer’;⁹⁰
- that ‘in some of the offence categories there is a 20 or 30 per cent increase in relation to the length of the sentences that are actually being imposed’;⁹¹ and
- that there was ‘no legislative warrant for that sort of change’ — that is, that the changes claimed could not be attributed to changes in statute.⁹²

3.65 Arguments that the severity of custodial sentences had not increased included:

- that there was no ‘evidence to suggest that there is an increase in the severity of custodial sentences’;⁹³
- that if there were any increase in severity it would be due to:
 - ‘some areas where [the DPP has] made ... some impact in increasing sentences’ particularly ‘in the area of sexual offences’;⁹⁴
 - successful appeals by the DPP in instances where it was argued that there was an ‘inadequacy of sentence’;⁹⁵ and
 - an increase in rates of reporting of certain crimes, in particular sex offences and domestic violence, leading to a greater number of prosecutions.⁹⁶

⁸⁸ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.62.

⁸⁹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

⁹⁰ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

⁹¹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

⁹² Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

⁹³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

⁹⁴ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

⁹⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

⁹⁶ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.62.

COMMITTEE COMMENT

- 3.66 Again, as for reflections on rates of imprisonment, the Committee notes the conflicting views put to it regarding severity of sentence in the ACT, and emphasises the importance of establishing a sentencing council for the purpose of clarifying these matters.

RECIDIVISM

ACT BAR ASSOCIATION

- 3.67 The Bar Association's submission noted that recidivism rates remained 'high' in the ACT, noting that in 2010 to 2011 'some 46.64% of those in prison had returned with a new correctional sanction within 2 years', and rates 'were even higher for those subject to a non-custodial sanction'.⁹⁷

- 3.68 The Bar Association acknowledged that 'investigation has been undertaken in respect of the high rates of recidivism',⁹⁸ however:

The explanation given by JACS [the Justice and Community Safety Directorate] that the increase is due to a greater proportion of the released prisoners being subject to supervision orders is not a compelling one. Nor does it explain why it is that such a high proportion of offenders are re-offending.⁹⁹

- 3.69 In the Bar Association's view, a more likely explanation was:

that the Courts have relied on the promise offered by the new initiatives for treating offenders with drug and alcohol problems in a custodial environment and that this may have (inadvertently perhaps) led to more accused people with drug and alcohol problems being sentenced to gaol or sentenced for longer periods.¹⁰⁰

- 3.70 The submission suggested that in particular 'the SOLARIS program has been held up as an effective means of treating those problems in a custodial setting', however the effectiveness of the program had been recently assessed and outcomes, it suggested, had 'been found to be ... poor so far as they relate to issues of post release recidivism'.¹⁰¹

⁹⁷ ACT Bar Association, Submission No.11, p.3.

⁹⁸ ACT Bar Association, Submission No.11, p.3.

⁹⁹ ACT Bar Association, Submission No.11, p.3.

¹⁰⁰ ACT Bar Association, Submission No.11, p.3.

¹⁰¹ ACT Bar Association, Submission No.11, p.3.

3.71 In response, the Bar Association proposed that the Committee:

might more fully investigate whether post release programs (particularly but not limited to post release programs addressing drug and alcohol programs) are working effectively and are adequately funded.¹⁰²

3.72 It also suggested that the Committee ‘access data from that review with a view to determining whether the resources devoted to the SOLARIS program are best spent in the community’.¹⁰³ ‘This should not’, the submission suggested, be ‘interpreted as a call for drug and alcohol services at the AMC to be cut back’. Rather, ‘resources should be effectively targeted’.¹⁰⁴

3.73 In addition, with these matters in mind, the submission suggested that the Committee ‘examine how the Transitional Release Centre at the AMC can be further utilized to facilitate the transition of prisoners to the community’, and suggested the paid work release scheme as ‘an important initiative’ in this context.¹⁰⁵

3.74 The submission also suggested that the Committee ‘how the TRC and the paid release scheme might fit within a form of sentencing disposition’.¹⁰⁶

3.75 In addition, the submission proposed that a ‘more systematic integration of privately funded rehabilitative facilities particularly in the drug and alcohol area needs to be undertaken’.¹⁰⁷ ‘At the very least’, the submission suggested, ‘participation in these programs (particularly when they are residential programs) should be formally recognized in the *Crimes (Sentencing) Act 2005* as a matter relevant to sentence’.¹⁰⁸

3.76 The Bar Association expanded on these comments when it appeared in public hearings. The Chair of the Association’s Criminal Committee told the Committee that the ACT’s recidivism rate, ‘when you match it up with ... other stats, says that those who are going into jail are being taught to commit more offences’.¹⁰⁹

3.77 He told the Committee that:

the JACS [annual report] also talked about the relatively high rates of recidivism that are apparent. I am not sure if the explanation given in the JACS report is particularly persuasive, but it does indicate that, for those who are serving terms of imprisonment,

¹⁰² ACT Bar Association, Submission No.11, p.3.

¹⁰³ ACT Bar Association, Submission No.11, p.3.

¹⁰⁴ ACT Bar Association, Submission No.11, p.3.

¹⁰⁵ ACT Bar Association, Submission No.11, p.4.

¹⁰⁶ ACT Bar Association, Submission No.11, p.4.

¹⁰⁷ ACT Bar Association, Submission No.11, p.4.

¹⁰⁸ ACT Bar Association, Submission No.11, p.4.

¹⁰⁹ Mr Ken Archer, *Transcript of Evidence*, 2 May 2014, p.71.

a substantial proportion of them are returning to custody after being released from jail. The answer in relation to that can, I think, be traced to the absence or the under-resourcing of post-release programs.¹¹⁰

- 3.78 This was, the Chair of the Criminal Committee told the Committee, underscored by the observations of criminal lawyers dealing with these people as clients:

I do not think the stats are available to determine this but we know that those who are released from custody are disproportionately those who are mentally ill and those who have trouble over the journey with drug addiction. Those particular categories of people require assistance when released. The perception within the legal profession is that the process of transition into the community needs to be better resourced. The government has talked about intensive correction orders, and that seems to be a start to that process. But in our submission there is clearly a need for much more intensive resourcing of release into the community—the programs dealing with release of offenders into the community. It seems to us that those resources are much more effectively spent than the very high dollar amounts ... in relation to keeping people in custody.¹¹¹

- 3.79 Further, he went on to observe that, at present:

You have this statistical picture at the moment where you have declining offence rates, increasing numbers in jail and high rates of recidivism. It speaks to us of the misapplication of resources and that it is important that the community dollar is spent most effectively where it is going to have the most result. That does not seem to us to be in paying for people to be at the AMC for greater and longer periods of time.¹¹²

- 3.80 The Vice-President of the Bar Association also commented on recidivism in the ACT. He told the Committee that there is in the ACT ‘a very high rate of recidivism [with more than] 40 per cent of returnees to jail within two years’, and that this showed that there was ‘something in the incarceration and in the post-incarceration treatment of prisoners which is not coming together’.¹¹³

- 3.81 He went on to tell the Committee that:

One of the greatest interests our community can have in offenders is having offenders who, when they come to liberty or remain at liberty, do not commit further offences—that is, offenders who are rehabilitated in some practical sense. If the community has

¹¹⁰ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.66.

¹¹¹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.66.

¹¹² Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.66.

¹¹³ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.67.

such a strong interest in that, yet we are having such a high recidivism rate after incarceration, again, the question has to be asked: what is it that we are doing? ¹¹⁴

3.82 In response, he told the Committee:

It seems that what is required is some concentration on how we deal with questions of rehabilitation, both the legislature in the way that it deals with the judiciary—how the judiciary deals with rehabilitation—and how the executive arms of government deal with rehabilitation. What are the resources? What are the approaches? What is available in prison? What is available without ever going to prison? What is available post release from prison? ¹¹⁵

3.83 He also told the Committee that some time ago there had been a change in legislation which may need review:

Until a point in the 1990s, the ACT legislation stipulated a priority towards rehabilitation in dealing with offenders. That priority was removed at some point during the 1990s. We see that the questions being asked about intensive correction orders are good questions to be asked. That may well be the place that the legislature can make a good difference to this pattern that we see, unfortunately, unfolding. ¹¹⁶

3.84 At this point the Vice-President told the Committee about the possible genesis of ‘the most serious offending’:

We ... note anecdotally that much of the most serious offending that we see involves persons who came to use drugs as children, at young ages of 13, 14 or 15. We ask: what circumstances lead to a child being introduced to drugs and taking drugs at those sorts of ages? We also ask—and this is a matter which is recognised both by the High Court and by our court: what sort of development into adulthood do you have where a child has been introduced to drugs at that age? ¹¹⁷

3.85 He told the Committee this was one aspect of upward pressure on rates of imprisonment:

At the end of the criminal justice system, we see that cocktail being worked out. There is the question of how you go about unscrambling that egg so as to effectively deal with rehabilitation for serious offenders who so often come from that background. ¹¹⁸

¹¹⁴ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.67.

¹¹⁵ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.67.

¹¹⁶ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, pp.67-68.

¹¹⁷ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹¹⁸ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

3.86 Again, in relation to this, he emphasised the significance of rehabilitation in addressing this phenomenon:

Clearly, they have to bear responsibility for their actions, but work has to be put into place to protect the community by giving those people the tools and resources to try and deal with the mess that was generally made at a point in time when they were too young to responsibly make decisions and which has damaged them into adulthood.¹¹⁹

3.87 In view of this, he told the Committee, the Bar Association saw ‘a move towards rehabilitation and perhaps intensive supervision orders’ as a positive one.¹²⁰

3.88 Regarding the proportion of remand to sentenced prisoners at the AMC, the submission noted that ‘that the remand population at the AMC remains quite high’. Indigenous accused on remand were particularly over-represented. The Association put the view that this ‘may reflect the lack of non-custodial options ... that are available in the context of bail determinations’.¹²¹

ACT LAW SOCIETY

3.89 Similarly, the Law Society expressed concerns over the ‘efficacy of imprisonment in protecting the community’.¹²²

3.90 Under the sub-heading ‘Inadequacies in the post sentencing rehabilitation facilities’, the Law Society noted that the ACT had ‘has the highest rate of re-imprisoned offenders within Australia’.¹²³ Anecdotal reports had ‘indicated a dearth of facilities made available to prisoners, in particular directed to education and qualification which may bear upon this rate of recidivism’.¹²⁴

3.91 The submission suggested that in reflecting on ‘the proper functioning of sentencing within the Territory’, it was ‘necessary to consider the practical effects of imprisonment’ and ‘extended periods of remand in cases of the delayed hearing of cases’. In connection with this, it submission expressed concern that ‘effective sentencing’ was being undermined by ‘a lack of implementation of rehabilitative strategies in the prison context’ in the ACT.¹²⁵

¹¹⁹ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹²⁰ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹²¹ ACT Bar Association, Submission No.11, p.3.

¹²² ACT Law Society, Submission No.13, p.6.

¹²³ ACT Law Society, Submission No.13, p.6.

¹²⁴ ACT Law Society, Submission No.13, p.6.

¹²⁵ ACT Law Society, Submission No.13, p.6.

SUMMARY

3.92 The Committee notes representations made to it regarding recidivism in the ACT.

3.93 Arguments included:

- that high rates of recidivism in the ACT were a matter for concern;¹²⁶
- that official explanations of the high rate of recidivism were not compelling;¹²⁷
- that ‘those who are released from custody are disproportionately those who are mentally ill and those who have trouble over the journey with drug addiction’, who ‘require assistance when released’;¹²⁸
- that high rates of recidivism were due to ‘the absence or the under-resourcing of post-release programs’;¹²⁹
- that there was ‘a need for much more intensive resourcing of release into the community’ in order to reduce recidivism;¹³⁰
- that ‘the Courts have relied on the promise offered by the new initiatives for treating offenders with drug and alcohol problems in a custodial environment’ and that this may, among other things, ‘have ... led to more accused people with drug and alcohol problems being sentenced to gaol or sentenced for longer periods’;¹³¹
- that there should be an investigation into ‘whether post release programs (particularly but not limited to post release programs addressing drug and alcohol programs) are working effectively and are adequately funded’;¹³²
- that there should be further investigation of ‘how the Transitional Release Centre [TRC] at the AMC can be further utilized to facilitate the transition of prisoners to the community’, and that this should include consideration of to generate maximum effect from ‘an important initiative’: the paid work release scheme;¹³³
- that there should be investigation of ‘how the TRC and the paid release scheme might fit within a form of sentencing disposition’;¹³⁴
- that ‘more systematic integration of privately funded rehabilitative facilities particularly in the drug and alcohol area needs to be undertaken’;¹³⁵

¹²⁶ ACT Bar Association, Submission No.11, p.3.

¹²⁷ ACT Bar Association, Submission No.11, p.3.

¹²⁸ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.66.

¹²⁹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.66.

¹³⁰ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.66.

¹³¹ ACT Bar Association, Submission No.11, p.3.

¹³² ACT Bar Association, Submission No.11, p.3.

¹³³ ACT Bar Association, Submission No.11, p.4.

¹³⁴ ACT Bar Association, Submission No.11, p.4.

- that ‘a point in the 1990s, the ACT legislation stipulated a priority towards rehabilitation in dealing with offenders [which was] removed at some point during the 1990s’, and that a future move to adopt Intensive Corrections Orders in the ACT could provide an opportunity for such a priority to be expressed, again, in ACT statute;¹³⁶
- that ‘much of the most serious offending that we see involves persons who came to use drugs as children, at young ages of 13, 14 or 15’, and that there should be specific attention toward developing rehabilitation for offenders with this history;¹³⁷ and
- that the relatively high number of prisoners on remand ‘may reflect the lack of non-custodial options ... that are available in the context of bail determinations’.¹³⁸

COMMITTEE COMMENT

- 3.94 Coupled with the Committee’s review of information and indicators, below, the Committee takes the view that there is at minimum a ‘case to answer’ that there are high levels of recidivism in the ACT, and that this is likely to stem, at least in part, from inadequate arrangements for prisoners after release.
- 3.95 It is the Committee’s view that post-release arrangements should be subject to formal review and assessment, preferably by an external evaluator.
- 3.96 It also appears that elements of transitional arrangements, already in place, could be expanded to good advantage: in particular the TRC and work release programs.
- 3.97 In addition, testimony provided to the Committee suggests that there are important criminogenic factors — in particular exposure to drug use early in life — which require further attention by the criminal justice system in general, and Corrective Services in particular.

SENTENCING DATABASE

ACT GOVERNMENT

- 3.98 When he appeared before the Committee and announced the Judice Reform Strategy, the Attorney-General also made reference to the ACT Sentencing Database. He told the Committee that he had launched the database in December 2013 and that, as a result:

¹³⁵ ACT Bar Association, Submission No.11, p.4.

¹³⁶ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, pp.67-68.

¹³⁷ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹³⁸ ACT Bar Association, Submission No.11, p.3.

The ACT judiciary and legal profession now have access to a growing repository of ACT sentencing statistics and information to assist the sentencing process in the ACT.¹³⁹

- 3.99 The Attorney-General went on to describe the ‘implementation and funding of this database by the government’ as ‘an important step in providing tools to the judiciary to assist with and promote consistency in sentencing’.¹⁴⁰
- 3.100 Two submissions to the inquiry, by the ACT Government and the ACT Victims of Crime Commissioner, gave particular focus to the database.
- 3.101 The ACT Government’s submission advised the Committee that the database would be hosted by the NSW Judicial Commission, detailed the budgetary allocation to the project over the next four years, and stated that the database would ‘capture information about sentences handed down by the court, offences, sentencing remarks, practice directions, judgments’ and provide ‘links to relevant legislation’.¹⁴¹
- 3.102 The submission stated that while the database would by the end of the 2013-2014 financial year have accrued two years of data, this would be ‘insufficient to draw reliable conclusions’ for the purposes of the Committee’s present inquiry, given the small size of the ACT jurisdiction. It said that a more representative picture could be generated after the database had captured five years of data.¹⁴²
- 3.103 The submission advised that from ‘late 2013 the ACT [Sentencing Database] will also include information about a range of characteristics of offenders and victims and the circumstances of an offence’ and that ‘39 characteristics have been agreed for inclusion by the ACT Judiciary’.¹⁴³
- 3.104 This data, the submission stated, would ‘support and enhance consistency in sentencing by the judiciary and increase transparency of decision making’, and would lead to a ‘reduction in the number of appeals against sentence as trends emerge in the sentences awarded’.¹⁴⁴
- 3.105 The submission stated that this could be a significant benefit as appeals against sentence to the ACT Supreme Court and the ACT Court of Appeal represented ‘a small but significant portion of the work of these courts’, although it was ‘not possible to estimate the number of

¹³⁹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.3.

¹⁴⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.3.

¹⁴¹ ACT Government, Submission No.12, p.1.

¹⁴² ACT Government, Submission No.12, p.1.

¹⁴³ ACT Government, Submission No.12, p.2.

¹⁴⁴ ACT Government, Submission No.12, p.2.

appeals averted’ as there were ‘a number of factors that drive decisions to appeal a sentence’.¹⁴⁵

3.106 The importance of an ACT sentencing database was also stated in the submission of the ACT Victims of Crime Commissioner, which stated that the database would:

provide our judiciary with information that promotes consistency in sentencing ... a record of subjective and objective circumstances related to each offence; and ... a record of how sentence options are being used by other sentencers’.¹⁴⁶

3.107 The database ‘may also improve the accessibility and transparency of sentencing decision making in the ACT’, and that ‘part of this’ would be supported by public access to the database.¹⁴⁷ Another submission, by Dr Lorana Bartels, also proposed that data from the ACT Sentencing Database, ‘or some form thereof’, be ‘made available to the general public, as occurs with the Commonwealth Sentencing Database’.¹⁴⁸

3.108 The submission contrasted this with the state of knowledge about sentencing in the ACT leading up to the establishment of the database, under which it had been ‘very difficult to analyse the effectiveness of sentences as a sentencing option’, due to ‘poor data collection’.¹⁴⁹

3.109 The submission also noted that the ‘absence of sentencing data [had restricted the submission’s] capacity to comment broadly on sentencing issues in the ACT’ in this instance.¹⁵⁰

SUMMARY

3.110 The Committee notes representations made to it regarding an ACT sentencing database.

3.111 Arguments included:

- that the sentencing database, accessible to the ACT judiciary and legal profession represented ‘a growing repository of ACT sentencing statistics and information to assist the sentencing process in the ACT’;¹⁵¹
- that the ACT Sentencing Database would ‘support and enhance consistency in sentencing by the judiciary and increase transparency of decision making’, and would lead to a

¹⁴⁵ ACT Government, Submission No.12, p.2.

¹⁴⁶ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁴⁷ Victims of Crime Commissioner, Submission No.10, p.12.

¹⁴⁸ Dr Lorana Bartels, Submission No. 1, p.4, citing Lorana Bartels, ‘Sentencing Statistics, Sentencing Councils and the Quest for Data in the Australian Capital Territory’, in Patricia Easteal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 60.

¹⁴⁹ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁵⁰ Victims of Crime Commissioner, Submission No.10, p.3.

¹⁵¹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.3.

‘reduction in the number of appeals against sentence as trends emerge in the sentences awarded’;¹⁵²

- that the database ‘may also improve the accessibility and transparency of sentencing decision making in the ACT’, and that this would be supported by making the database publicly accessible;¹⁵³
- that ‘these data (or some form thereof) being made available to the general public, as occurs with the Commonwealth Sentencing Database’;¹⁵⁴ and
- that data gathered and maintained in a sentencing database was vital for any attempt to ‘analyse the effectiveness of sentences as a sentencing option’.¹⁵⁵

COMMITTEE COMMENT

3.112 The Committee agrees with representations made to the inquiry which attest to the value of the ACT Sentencing Database. However it is also mindful of the limitations on the degree to which data can be viewed as reliable given the small sample sizes involved, and that similar questions may be put in connection with the Commonwealth Sentencing Database, which has been operational for a longer period. These matters are considered in the Committee’s review of information and indicators.

3.113 In the Committee’s view, the most significant point raised by this analysis is the necessity of creating a sentencing council for the ACT which would have the means and responsibility to bring effective modes of analysis to the raw data held in the database. It would appear that small sample size increases the need to bring high-quality tools to bear on the data in order to furnish a reliable basis for relevant areas of policy.

SENTENCING COUNCIL

3.114 Some contributors to the inquiry put the view that there should be a sentencing council, to research and publish information, and engage and inform the public on sentencing, in the ACT.

3.115 Three contributors to the inquiry proposed that a sentencing council be created for the ACT and their views are considered below.

¹⁵² ACT Government, Submission No.12, p.2.

¹⁵³ Victims of Crime Commissioner, Submission No.10, p.12.

¹⁵⁴ Dr Lorana Bartels, Submission No. 1, p.4, citing Lorana Bartels, ‘Sentencing Statistics, Sentencing Councils and the Quest for Data in the Australian Capital Territory’, in Patricia Easteal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 60.

¹⁵⁵ Victims of Crime Commissioner, Submission No.10, p.11.

ACT BAR ASSOCIATION

3.116 In its submission to the inquiry, the ACT Bar Association put the view that such an ‘advisory body’ would be useful in providing ‘ongoing and independent advice to the Government and the Assembly about sentencing matters’.¹⁵⁶ It advised the Committee that:

The establishment of a sentencing database has provided a means of providing meaningful statistical data about sentencing trends in the ACT. A sentencing council could provide the Assembly with commentary that amongst other things would provide that statistical material meaningful context and provide comparisons with sentencing practices and outcomes in other jurisdictions.¹⁵⁷

3.117 When the Bar Association appeared before the Committee in public hearings it added to these comments. The Chair of the Association’s Criminal Committee told the Committee that ‘statistics and information are important’:

The analysis of trends is important so that an appropriate response can be made, both administratively and through the Assembly. At the moment the criminal justice system is dependent on the crude statistical profile that is provided to the Assembly, which talks about some raw numbers. But an important role of the sentencing council would be to analyse those, to give information to this committee and to the Assembly about proposals for change, to identify trends and to allow things to be addressed before they become entrenched.¹⁵⁸

DR LORANA BARTELS

3.118 In her submission to the inquiry, Dr Lorana Bartels stated there was a ‘need for a dedicated sentencing council in the ACT’. Such councils were ‘in place in the majority of Australian jurisdictions and have a critical role to play as a bridge between the criminal justice system and the community’. She noted that a sentencing council had not yet been established despite undertakings by a previous ACT government during the ACT 2008 election campaign. In her view the ACT public deserved not only ‘accessible sentencing data [in the form of the sentencing database] but also a council which can disseminate and contextualise this information’.¹⁵⁹

3.119 Dr Bartels added to this when she appeared before the Committee in public hearings. When asked about the functions and benefits of such a body, Dr Bartels told the Committee that the

¹⁵⁶ ACT Bar Association, Submission No.11, p.5.

¹⁵⁷ ACT Bar Association, Submission No.11, p.5.

¹⁵⁸ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

¹⁵⁹ Dr Lorana Bartels, Submission No.1, p.11.

role of the sentencing councils were ‘twofold’. First, she told the Committee, sentencing councils ‘provide advice to the government of the day around sentencing matters’:

It might be, for example, advice on the desirability of having a particular kind of sentencing option. Topically here it would be something like intensive corrections orders—how that might work and what the research on something like that looks like. As with the advice of any separately constituted body, the government could take that on board or not. But from what I understand, certainly the experience in Victoria has been that there is healthy respect for the work of these councils. I think the work is taken very seriously by governments across the political spectrum.¹⁶⁰

3.120 Second, she told the Committee, sentencing councils engage in ‘public education’:

In Victoria, [this] has manifested itself partly in the publication of sentencing papers—brief snapshots that will, for example, present sentencing patterns for driving while disqualified; they are up on the website and they are accessible to everybody. There are also much more comprehensive reports. They have also done ...a lot of community outreach. It is award winning; there are videos and vignettes. They go to schools and they have community forum events where they can engage with the public and teach them about sentencing and how it works.¹⁶¹

3.121 As to the balance between these functions, Dr Bartels told the Committee, that ‘depends on the composition’ sentencing councils, and ways in which they are constituted in a legal sense.¹⁶²

3.122 Dr Bartels also told the Committee that sentencing councils played an important role in mediating between decision-makers in the justice system and the public, and in this way were able to foster understanding and assent by the community in relation to sentencing decisions:

The research in Australia and overseas shows that the more people know about all the facts of the case and the more they understand about sentencing, the more supportive they are of judicial sentencing practices. I believe that a sentencing council could help bridge that gap between public perceptions, which may be informed by media reports which may or may not be accurate, and a better understanding of sentencing generally.¹⁶³

¹⁶⁰ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, pp.148-149.

¹⁶¹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.149.

¹⁶² Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.148.

¹⁶³ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.147.

VICTIMS OF CRIME COMMISSIONER

3.123 In his submission to the inquiry, the Victims of Crime Commissioner put the view that while the advent and accessibility of the sentencing database was important, this in itself may not be sufficient to promote a broader understanding of sentencing practice ‘because sentencing is a complex process’:

it can commonly be misunderstood by the public [and as a result providing] public access to the database may not, on its own, add to the public's knowledge of the construction of a sentence or norms in sentencing.¹⁶⁴

3.124 The Commissioner suggested that a logical response to this problem was to create a sentencing council which ‘would increase the value of a sentencing database by improving criminal justice literacy among ACT residents’.¹⁶⁵

3.125 The Commissioner observed that it was important to recognise that ‘in the abstract, the public thinks that sentences are too lenient... [but] people have very little accurate knowledge of crime and the criminal justice system’.¹⁶⁶ However public opinion, ‘most especially informed public opinion, about sentencing’ was important for a range of reasons because it influenced ‘public confidence in the system and the government’, because there was ‘a general acceptance that sentencing policy and practice should take into account public opinion’ and because ‘laws can change in response to public opinion’.¹⁶⁷

3.126 He went on to say that there were ‘distinct advantages related to providing accurate, contextualised information to the public about sentencing’. A sentencing council, which was ‘an ideal body to do this’, could also ‘engage the public and develop a better understanding of the ACT community’s perceptions about sentencing’.¹⁶⁸

A sentencing council in the ACT could bridge the gap between the sentencing database and the public by, for example, educating the community about the factors that influence sentencing while also educating the judiciary and Government about public opinion. Furthermore, for victims of crime, increased understanding of how sentencing works will enable them to better understand the process of sentencing and to have realistic expectations about the sentence an offender may receive.¹⁶⁹

¹⁶⁴ Victims of Crime Commissioner, Submission No.10, p.12.

¹⁶⁵ Victims of Crime Commissioner, Submission No.10, p.3.

¹⁶⁶ Victims of Crime Commissioner, Submission No.10, p.12, citing Karen Gelb, ‘Myths and misconceptions: public opinion versus public judgement about sentencing’, Victorian Sentencing Advisory Council, 2006, p.vi.

¹⁶⁷ Victims of Crime Commissioner, Submission No.10, p.12.

¹⁶⁸ Victims of Crime Commissioner, Submission No.10, p.12.

¹⁶⁹ Victims of Crime Commissioner, Submission No.10, p.12.

SUMMARY

3.127 The Committee notes representations made to it regarding a sentencing council in the ACT.

3.128 Arguments included:

- that an ACT sentencing council would be useful in providing ‘ongoing and independent advice to the Government and the Assembly about sentencing matters’;
- that such a council ‘could provide the Assembly with commentary that amongst other things would provide that statistical material [on sentencing with] meaningful context and provide comparisons with sentencing practices and outcomes in other jurisdictions’;¹⁷⁰
- that ‘at the moment’, in the absence of a sentencing council, ‘the criminal justice system is dependent on the crude statistical profile that is provided to the Assembly, which talks about some raw numbers. But an important role of the sentencing council would be to analyse those, to give information to this committee and to the Assembly about proposals for change, to identify trends and to allow things to be addressed before they become entrenched’.¹⁷¹
- that sentencing councils were ‘in place in the majority of Australian jurisdictions’ and had ‘a critical role to play as a bridge between the criminal justice system and the community’;¹⁷²
- that a sentencing council had not yet been established despite undertakings by a previous ACT government during the ACT 2008 election campaign;¹⁷³
- that the ACT public deserved not only ‘accessible sentencing data [in the form of the sentencing database] but also a council which can disseminate and contextualise this information’;¹⁷⁴
- that a sentencing council would provide advice to government; public education; and mediate between decision-makers in the justice system and the public;¹⁷⁵
- that a sentencing council would ‘would increase the value of a sentencing database by improving criminal justice literacy among ACT residents’;¹⁷⁶ and
- that while ‘the public thinks that sentences are too lenient’, in fact ‘people have very little accurate knowledge of crime and the criminal justice system’;¹⁷⁷

¹⁷⁰ ACT Bar Association, Submission No.11, p.5.

¹⁷¹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.68.

¹⁷² Dr Lorana Bartels, Submission No.1, p.11.

¹⁷³ Dr Lorana Bartels, Submission No.1, p.11.

¹⁷⁴ Dr Lorana Bartels, Submission No.1, p.11.

¹⁷⁵ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, pp.148-149.

¹⁷⁶ Victims of Crime Commissioner, Submission No.10, p.3.

- that it was important that a sentencing council engage the public as public opinion influenced ‘public confidence in the system and the government’, because there was ‘a general acceptance that sentencing policy and practice should take into account public opinion’, and ‘laws [could] change in response to public opinion’.¹⁷⁸

COMMITTEE COMMENT

3.129 The Committee has, at a number of points in this Committee comment, stated that the ACT needs a sentencing council. Such a council should be framed in a similar way to those in other jurisdictions. The Committee notes the Victorian Sentencing Advisory Council as an influential model in this respect.

COMMITTEE REVIEW OF INFORMATION AND INDICATORS

3.130 In light of the different views put forward by contributors on rates of imprisonment, recidivism and the severity of custodial sentences handed down in the ACT, the Committee considered sources of information which had not been provided as submissions or exhibits, but which are recognised sources in matters relevant to sentencing.

3.131 These include Australian Bureau of Statistics publications *Prisoners in Australia* and *Criminal Courts*; the ACT Criminal Justice Profile; the Productivity Commission’s *Report on Government Services (ROGS)* 2013 and 2015; the ACT Sentencing Database; and the Commonwealth Sentencing Database. The Committee also considered sentencing councils such as they exist in Australian jurisdictions.

3.132 The areas considered below are:

- rates of imprisonment;
- prevalence of crime;
- severity of custodial sentences;
- recidivism; and
- timeliness in court cases, including consideration of indicators for ‘backlog’ and ‘clearance’ rates for ACT courts.

¹⁷⁷ Victims of Crime Commissioner, Submission No.10, p.12, citing Karen Gelb, ‘Myths and misconceptions: public opinion versus public judgement about sentencing’, Victorian Sentencing Advisory Council, 2006, p.vi.

¹⁷⁸ Victims of Crime Commissioner, Submission No.10, p.12 – as in the case of recent ‘one-punch’ legislation in NSW and WA.

RATES OF IMPRISONMENT

- 3.133 Regarding rates of imprisonment the Committee considered the ABS publication *Prisoners in Australia* (2013). Table 17 provides data on 'Imprisonment Rate' for all Australian jurisdictions, divided into 'crude' (that is, not age-standardised) rate per 100,000 of population and age standardised rates.¹⁷⁹
- 3.134 The table shows that the crude rate for males, at 229.6 per 100,000, is the third lowest, above Victoria at 227.3 and Tasmania at 226.9. The highest is NT at 1,439.3 per 100,000. The crude imprisonment rate for women in the ACT, at 9.9 per 100,000, is the lowest of any jurisdiction.¹⁸⁰
- 3.135 For 'All prisoners (crude rate)', the ACT registers the lowest rate in Australia at 118.3 per 100,000, marginally lower than Victoria (119.8) and considerably less than Australia overall at 170 per 100,000.¹⁸¹
- 3.136 The table also shows that the crude imprisonment rate for Indigenous people in the ACT is 2,044.1 per 100,000: greater than Tasmania, Victoria and Queensland, but less than WA, NT, NSW and for Australia overall.
- 3.137 The crude rate for Non-Indigenous people in the ACT however is at 96.9 per 100,000 the lowest of any jurisdiction, significantly lower than the overall Australian rate of 125.3 per 100,000. The ratio of crude rates—that is, the factor by which the Non-Indigenous rate is multiplied to achieve rate for Indigenous people—is in the ACT 21.1, meaning that Indigenous people are 21.1 times more likely to be imprisoned in the ACT than Non-Indigenous people. This is the second highest figure in Australia, behind WA at 25.6.¹⁸²
- 3.138 For age-standardised data, Non-Indigenous people in the ACT register the lowest rate of imprisonment of any jurisdiction at 92.0 per 100,000 of population. For Indigenous people, the rate is 1,695.8 per 100,000, which is less than WA, SA, NSW and Australia, but higher than

¹⁷⁹ Explanatory notes to *Prisoners in Australia* state that:

Age standardisation is a statistical method that adjusts crude rates to account for age differences between study populations ... There are differences in the age distributions between Australia's Aboriginal and Torres Strait Islander and non-Indigenous populations with the former having a much younger population. In 2001, the proportion of Aboriginal and Torres Strait Islander people aged 18 years and over was 54.6%, compared with 75.8% of non-Indigenous people (and 75.3% of the total Australian population).

Due to these differing age profiles, using crude rates to examine differences between Aboriginal and Torres Strait Islander and non-Indigenous populations may lead to erroneous conclusions being drawn about variables that are correlated with age.

See Explanatory Notes to ABS Cat No.4517, <http://www.abs.gov.au/ausstats/abs@.nsf/exnote/4517.0>.

¹⁸⁰ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 17, 'All prisoners (crude rate)'.

¹⁸¹ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 17, 'All prisoners (crude rate)'.

¹⁸² Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 17, 'All prisoners (crude rate)'.

Tasmania, Victoria, and QLD. This results in a ratio between Non-Indigenous and Indigenous people, in age-standardised rates, of 18.4: the second-highest in Australia behind WA.¹⁸³

3.139 Table 18 of *Prisoners in Australia* (2013) shows 'Age Standardised Imprisonment Rate, Aboriginal and Torres Strait Islander status, 2003–2013'. This shows time-series data year-by-year from 2003 to 2013, for Non-Indigenous people and showing the ratio, as above, of rates of imprisonment for Indigenous people. It shows that over that time, while there are variations, the Non-Indigenous rate per 100,000 in the ACT rose from 87.4 in 2003 to 92.0 in 2013. This was a modest rise: certainly less than an increase in SA from 97.6 to 151.8 per 100,000, or in WA from 132.0 to 159.0 per 100,000 for the same years. In QLD the rate fell, while in other jurisdictions there were modest increases.¹⁸⁴

3.140 However, the ratio of Indigenous to Non-Indigenous people imprisoned rose dramatically in the ACT for these years, more than doubling from a ratio of 7.2 in 2003 to one of 18.4 in 2013. This was the biggest proportional increase in this indicator of any jurisdiction, certainly well in excess of the increase for Australia overall from 10.8 to 14.9.¹⁸⁵

PREVALENCE OF CRIME

3.141 In relation to indicators on the prevalence of crime in the ACT, the Committee considered the ACT Justice and Community Safety Directorate's *Criminal Justice Statistical Profile* of June 2014, which provides information on prevalence of crime in the ACT.¹⁸⁶

3.142 The tables display:

- a steep increase for 'Dangerous or negligent acts endangering persons 5 years to current quarter';
- shallow increases for 'Sexual assaults and related offences 5 years to current quarter' and 'Illicit drug offences 5 years to current quarter';
- a mild increase for 'Bicycle theft 5 years to current quarter';
- a steady-state for 'Public order offences 5 years to current quarter';
- shallow downward trends for:

¹⁸³ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 17, 'All prisoners (crude rate)'.

¹⁸⁴ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 18, 'Age Standardised Imprisonment Rate, Aboriginal and Torres Strait Islander status, 2003–2013'.

¹⁸⁵ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 18, 'Age Standardised Imprisonment Rate, Aboriginal and Torres Strait Islander status, 2003–2013'.

¹⁸⁶ ACT Justice and Community Safety Directorate, *Criminal Justice Statistical Profile – June 2014*, 'Data Tables for June 2014', available at: <http://www.justice.act.gov.au/resources/uploads/june2014.xlsx> Other related documents are available from the *Criminal Justice Statistical Profile – June 2014* homepage at <http://www.justice.act.gov.au/page/view/387>

- 'Reported total incidents 5 years to current quarter'; and
- 'Assaults (Acts intended to cause injury) 5 years to current quarter';
- more pronounced downward trends for:
 - 'Person offences and Property offences 5 years to current quarter';
- steep downward trends for:
 - 'Robbery, extortion and related offences 5 years to current quarter'; and
 - 'Burglary, break and enter 5 years to current quarter';
 - 'Theft and related offences 5 years to current quarter';
 - 'Property damage and environmental pollution 5 years to current quarter'; and
 - 'Motor vehicle theft 5 years to current quarter'.¹⁸⁷

3.143 The tables also show:

- for 'Restorative justice referrals 5 years to current quarter', a more pronounced downward trend;
- for 'Admissions to the Bimberi Youth Justice Centre for Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander people 5 years to current quarter', a steep downward trend for 'All admissions' and 'Non-Indigenous young people' and a shallow downward trend for 'Aboriginal and Torres Strait Islander young people';
- for 'Admissions to the Alexander Maconochie Centre for Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander people 5 years to current quarter', shallow downward trends for 'Non-Aboriginal and Torres Strait Islander' and 'All Admissions', and a very shallow downward trend, close to steady-state, for 'Aboriginal and Torres Strait Islander';
- for 'Apprehensions Aboriginal and Torres Strait Islander people 5 years of data to current quarter', a shallow downward trend;
- for 'Apprehensions Non-Aboriginal and Torres Strait Islander people 5 years of data to current quarter', a very shallow downward trend;
- for 'Apprehensions Aboriginal and Torres Strait Islander people by gender 5 years to current quarter', a more pronounced downward trend for 'Male' and very shallow increase for 'Female';
- for 'Arrests and Cautions Aboriginal and Torres Strait Islander people 5 years to current quarter', a more pronounced downward trend for 'Arrests' and a very shallow upward trend or steady-state for 'Cautions'; and

¹⁸⁷ ACT Justice and Community Safety Directorate, *Criminal Justice Statistical Profile – June 2014*, 'Data Tables for June 2014', available at: <http://www.justice.act.gov.au/resources/uploads/june2014.xlsx>

- for 'Arrests and Cautions Non-Aboriginal and Torres Strait Islander people 5 years to current quarter', a shallow decrease for 'Arrests' and a very shallow downward trend for 'Cautions'.¹⁸⁸

SEVERITY OF CUSTODIAL SENTENCES

- 3.144 As noted, some contributors argued that the severity (that is, the duration) of custodial sentences in the ACT was increasing, in addition to rates of imprisonment.
- 3.145 Table 60 of *Criminal Courts, Australia 2012-2013* presents time-series data the mean and median custodial sentences for different categories of offence, for the years 2010-11, 2011-12, and 2012-13, for each jurisdiction, together with numbers of proven offences for each category.¹⁸⁹
- 3.146 Data for the ACT displays a number of features. It should be noted that total numbers for 'All principal proven offences' for the ACT, at 99, 293 and 320 for 2010-11, 2011-12 and 2012-13 respectively, are dramatically lower than other jurisdictions. Tasmania, with 347, 402, and 568 for those years has the next greatest figures for this indicator. For all other jurisdictions this indicator is measured in the thousands rather than hundreds. To give an indication of scale, NSW—the jurisdiction with the greatest numbers for this indicator—shows 9,286, 9,232, and 9,195 for these years, while Australia overall shows 26,960, 27,690, and 31,970 respectively.¹⁹⁰
- 3.147 This an important factor to take into account so that data on mean and median lengths of custodial sentence can be interpreted correctly. The ACT shows an increase from zero for 'Homicide and related offences' for 2010-11 and 2011-12, to 7.5 in 2012-13. Inspection of 'Number of defendants' shows that there were no defendants at all for this offence category in 2010-11 and 2011-12. Similarly, there are high figures for 'Robbery, extortion and related offences' (60.5 months, mean) and 'Fraud, deception and related offences' (70.3 months, mean) for the year 2010-11, but these reduce to means of 29.3 months and 6.0 months respectively in 2012-13. This results in a swing, for these indicators, from considerably higher

¹⁸⁸ ACT Justice and Community Safety Directorate, *Criminal Justice Statistical Profile – June 2014*, 'Data Tables for June 2014', available at: <http://www.justice.act.gov.au/resources/uploads/june2014.xlsx>

¹⁸⁹ *Criminal Courts, Australia 2012-2013*, Cat No.4513, table 60, available at: http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&45130do012_201213.xls&4513.0&Data%20Cubes&0EFD70A7F9340E61CA257CA7000DD9D8&0&2012-13&27.03.2014&Latest

¹⁹⁰ *Criminal Courts, Australia 2012-2013*, Cat No.4513, table 60, available at: http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&45130do012_201213.xls&4513.0&Data%20Cubes&0EFD70A7F9340E61CA257CA7000DD9D8&0&2012-13&27.03.2014&Latest

than for the same indicators for Australia overall in 2010-11, to considerably lower in the 2012-13 year.¹⁹¹

3.148 There are similar complexities in discerning trends in these indicators, as small sample size again results in a wide variation of values, not least in view of high values for length of custody for the first year in the table, 2010-11. For 'Sexual assault and related offences', for example, mean sentence length varies from 70.0 months in 2010-11 to 80.7 months in 2011-2012 and then down to 17.8 months in 2012-13.¹⁹²

3.149 Some offence categories, such as 'Acts intended to cause injury'; 'Robbery, extortion and related offences'; 'Unlawful entry with intent'; 'Theft and related offences'; 'Illicit drug offences'; 'Property damage and environmental pollution'; 'Traffic and vehicle regulatory offences'; and 'Offences against justice', show a succession of decreasing values for the three years 2010-11, 2011-12 and 2012-13 which may signal a downward trend.¹⁹³

3.150 For some categories, such as 'Prohibited and regulated weapons and explosives offences' and 'Traffic and vehicle regulatory offences' there is a series of increasing values which may, on the face of it, indicate an upward trend.¹⁹⁴

RECIDIVISM

3.151 Table 30 of the ABS publication *Prisoners in Australia* (2013) shows 'Proportion of Prisoners, sex and prior imprisonment by Aboriginal and Torres Strait Islander status'. This shows rates of recidivism for male and female prisoners under broader categories of Indigenous, Non-Indigenous and all prisoners.

3.152 The table shows that with a rate of 70.0% of male Indigenous prisoners with prior experience of imprisonment, the ACT is the second lowest of any jurisdiction for this indicator. The lowest is Victoria with 66.6%, the highest WA with 81.0%. The Australian rate is 77.9%. For female Indigenous prisoners the rate is 100.0%, the highest for any jurisdiction, but inspection of table 29 of *Prisoners in Australia* 2013 shows that this relates to a sample size of only 3 female

¹⁹¹ *Criminal Courts, Australia 2012-2013*, Cat No.4513, table 60, available at:
http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&45130do012_201213.xls&4513.0&Data%20Cubes%0EFD70A7F9340E61CA257CA7000DD9D8&0&2012-13&27.03.2014&Latest

¹⁹² *Criminal Courts, Australia 2012-2013*, Cat No.4513, table 60, available at:
http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&45130do012_201213.xls&4513.0&Data%20Cubes%0EFD70A7F9340E61CA257CA7000DD9D8&0&2012-13&27.03.2014&Latest

¹⁹³ *Criminal Courts, Australia 2012-2013*, Cat No.4513, table 60, available at:
http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&45130do012_201213.xls&4513.0&Data%20Cubes%0EFD70A7F9340E61CA257CA7000DD9D8&0&2012-13&27.03.2014&Latest

¹⁹⁴ *Criminal Courts, Australia 2012-2013*, Cat No.4513, table 60, available at:
http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&45130do012_201213.xls&4513.0&Data%20Cubes%0EFD70A7F9340E61CA257CA7000DD9D8&0&2012-13&27.03.2014&Latest

Indigenous prisoners in custody at the time of data collection, and hence cannot be considered a representative figure.¹⁹⁵

3.153 However, the same indicator for *Non-Indigenous* male prisoners in custody in the ACT shows the exact opposite. At 74.1%, the ACT registers the highest rate of prisoners with prior imprisonment of any jurisdiction: higher than the next highest, Tasmania, at 65.1% and significantly higher than the figure for Australia overall, at 51.9%. Female Non-Indigenous prisoners in the ACT also show a proportion of 74.1% with prior experience of imprisonment and are, again, the highest of any jurisdiction, including Australia overall at 51.9%. In aggregate, the ACT displays the highest overall proportion of prisoners with prior experience of imprisonment at 73.2%, compared with Australia at 57.8%, and at 20.0%, the lowest proportion of prisoners with no prior imprisonment at all.¹⁹⁶

TIMELINESS IN COURT CASES

3.154 The Productivity Commission's *Report on Government Services 2015* [ROGS 2015] displays data for indicators related to timeliness in court cases for all Australian jurisdictions.¹⁹⁷

3.155 Two indicators — 'backlog' and 'clearance' — are considered below.

BACKLOG

3.156 One such indicator is 'backlog', which ROGS 2015 describes as follows:

'Backlog' is defined as a measure of the age of a court's pending caseload against nominated time standards. The number of cases in the nominated age category is expressed as a percentage of the total pending caseload.¹⁹⁸

3.157 It notes that the 'following national standards have been set':

'For the Federal Circuit Court, magistrates' and children's courts:

- no more than 10 per cent of lodgments pending completion are to be more than 6 months old
- no lodgments pending completion are to be more than 12 months old.

¹⁹⁵ Australian Bureau of Statistics, *Prisoners in Australia 2013*, Cat No. 4517, table 30, 'Proportion of Prisoners, sex and prior imprisonment by Aboriginal and Torres Strait Islander status'.

¹⁹⁶ Australian Bureau of Statistics, *Prisoners in Australia 2013*, Cat No. 4517, table 30, 'Proportion of Prisoners, sex and prior imprisonment by Aboriginal and Torres Strait Islander status'.

¹⁹⁷ Productivity Commission, (2015), *Report on Government Services 2015*, Chapter 7: Courts, <http://www.pc.gov.au/research/recurring/report-on-government-services/2015/justice/courts/rogs-2015-volume-c-chapter7.pdf>, viewed 03/02/2015.

¹⁹⁸ Productivity Commission, (2015), *Report on Government Services 2015*, Box 7.9, p.7.29.

For Supreme courts, the Federal Court, district/county, family and coroners' courts and all appeals:

- no more than 10 per cent of lodgments pending completion are to be more than 12 months old
- no lodgments pending completion are to be more than 24 months old'.¹⁹⁹

3.158 Table 7.14, 'Backlog — all criminal matters, at 30 June 2014' displays data on court backlogs for all Australian jurisdictions: for appeal and non-appeal cases in the higher and District/County courts, and cases taking longer than 6 and longer than 12 months for Magistrates' and Children's courts, together with Pending caseload for each category of court in each jurisdiction.²⁰⁰

3.159 The table shows that the percentage of backlog criminal cases on appeal in the ACT Supreme Court is 3.7% for cases taking longer than 12 months (and less than 24 months). This is the second lowest figure for any jurisdiction: the NSW is the lowest at 3.3% and the NT the highest at 9.1%. The table displays no data for ACT Supreme Court cases taking longer than 24 months.²⁰¹

3.160 For non-appeal criminal cases, the table shows the ACT Supreme Court as having a backlog figure of 17.6%, which is in the middle-band of results: Tasmania has the highest at 26.4% and NT the lowest at 2.8%. However, for cases taking longer than 24 months the ACT Supreme Court shows the highest figure of any jurisdiction at 6.3%, with the next greatest as Tasmania with 6.0% and WA the lowest at 1.1%.²⁰²

3.161 For the ACT Magistrates Court figures for criminal cases taking longer than 6 months are in the middle band at 24.5%, with NT the highest at 29.1% and NSW the lowest at 11.7%. For criminal cases taking longer than 12 months the ACT Magistrates Court is again in the middle band with Queensland the highest at 12.2% and NSW the lowest at 1.7%.²⁰³

3.162 For the ACT Children's Court backlog figures for criminal cases taking more than 6 months were next to the highest for any jurisdiction, at 25.8% compared with 25.9% for the NT and with Victoria the lowest at 13.0%. The ACT Children's Court also showed the highest figure of any jurisdiction for cases taking longer than 12 months, at 12.1% compared with 10.5% in NT—the next highest figure—and with NSW showing the lowest figure of 1.6%.²⁰⁴

¹⁹⁹ Productivity Commission, (2015), *Report on Government Services 2015*, Box 7.9, p.7.29.

²⁰⁰ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.14, p.7.32.

²⁰¹ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.14, p.7.32.

²⁰² Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.14, p.7.32.

²⁰³ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.14, p.7.32.

²⁰⁴ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.14, p.7.32.

CLEARANCE

3.163 Regarding this indicator *ROGS 2015* states that:

‘Clearance’ indicates whether a court’s pending caseload would have increased or decreased over the measurement period. It shows whether the volume of case finalisations has matched the number of case lodgments during the reporting period. It is measured by dividing the number of finalisations in the reporting period by the number of lodgments in the same period. The result is multiplied by 100 to convert to a percentage.²⁰⁵

3.164 It also states that:

- a figure of 100 per cent indicates that, during the reporting period, the court finalised as many cases as were lodged, and the pending caseload should be similar to the pending caseload 12 months earlier
- a figure greater than 100 per cent indicates that, during the reporting period, the court finalised more cases than were lodged, and the pending caseload should have decreased
- a figure less than 100 per cent indicates that, during the reporting period, the court finalised fewer cases than were lodged, and the pending caseload should have increased.²⁰⁶

3.165 In connection with interpreting data for this indicator, *ROGS 2015* states that:

The clearance indicator should be interpreted alongside lodgment and finalisation data, and the backlog indicator reported earlier in this chapter. Trends over time should also be considered.

The clearance indicator can be affected by external factors (such as those causing changes in lodgment rates), as well as by changes in a court’s case management practices.²⁰⁷

3.166 Table 7.18, ‘Clearance — all criminal matters, 2013-14’, in *ROGS 2015* displays clearance indicators for all Australian jurisdictions for ‘Supreme — appeal’ and ‘Supreme — non-appeal’ criminal cases; District/County appeal and non-appeal ; and Magistrates’ and Children’s courts, together with Lodgements and Finalisations for each of these categories.²⁰⁸

²⁰⁵ Productivity Commission, (2015), *Report on Government Services 2015*, Box 7.13, p.7.38.

²⁰⁶ Productivity Commission, (2015), *Report on Government Services 2015*, Box 7.13, p.7.38.

²⁰⁷ Productivity Commission, (2015), *Report on Government Services 2015*, Box 7.13, p.7.38.

²⁰⁸ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.18, ‘Clearance — all criminal matters, 2013-14’, p.7.39

3.167 The table shows that the clearance rate for the ACT for ‘Supreme — appeal’, at 79.0% is the lowest of any jurisdiction, with NSW the next highest at 86.5% and the NT the highest at 147.4%.²⁰⁹

3.168 However for ‘Supreme — non-appeal’ the clearance rate for the ACT is the highest of any jurisdiction at 106.6%, compared with SA the next highest at 104.6% and NT the lowest at 79.7%.²¹⁰

3.169 Clearance rates for the ACT Magistrates’ Court are in the middle band at 97.5%, with Victoria the highest at 108.7% and NT the lowest at 95.1%.²¹¹

3.170 Clearance rates for the ACT Childrens’ Court are at the high end of the spectrum at 105.0%, with Victoria the highest at 106.7% and NT the lowest at 90.9%.²¹²

SENTENCING DATABASE

3.171 The Committee viewed the ACT Sentencing Database to consider what it may add to sentencing practice in the ACT.

3.172 The Committee considered the ACT Sentencing Database with a view to gaining an appreciation of statistical functionality and level of detail.

3.173 In one example, it saw that results for proven cases of ‘possession of knife in public place or school’ under s 382 of the *Crimes Act 1900* (ACT) were able to be displayed, optionally, to show:

- ‘Penalty Type, All Offenders’, showing both percentages and numbers of offenders sentenced to Prison; Fully Suspended Sentences; Good Behaviour Orders; Fines; or ‘Other Order’;
- How many of these (by percentage and count) involve multiple or single offences;
- In how many cases the defendant entered an initial plea of guilty, and / or a final plea of guilty;
- Offenders by type (Individual or Corporation); Gender; or Age;
- Or to display by:

²⁰⁹ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.18, ‘Clearance — all criminal matters, 2013-14’, p.7.39

²¹⁰ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.18, ‘Clearance — all criminal matters, 2013-14’, p.7.39

²¹¹ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.18, ‘Clearance — all criminal matters, 2013-14’, p.7.39

²¹² Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.18, ‘Clearance — all criminal matters, 2013-14’, p.7.39

- Penalty Type;
- Terms of Imprisonment;
- Terms of Periodic Detention;
- Partially Suspended Sentence;
- Fully Suspended Sentence;
- CSO (Community Service Order) Hours;
- GBO (Good Behaviour Order) Terms; or
- Fine Amounts (to show in how many cases, in percentage or by count, offenders were required to pay fines of differing amounts. The range is calibrated from \$25 through to more than \$5,000).²¹³

3.174 The Committee also saw how it was possible from within a database statistical view, in graph form, to proceed to view the de-identified individual cases summarised by the data, with the set viewed defined by the constraints set for the graph data originally displayed.

3.175 Another aspect of the database the Committee considered was sample size. In considering this, comparisons with the Commonwealth Sentencing Database proved useful, particular because the databases employ the same software platform, provided by the Judicial Commission of NSW.

3.176 Sample size for a number of offence categories in the ACT Sentencing Database is small. In some categories, there may be only one instance or case recorded. An example in the Database as it currently stands is murder under s 12 of the *Crimes Act 1900* (ACT), where only one offender has been sentenced and reflected in the Database for the period 01/07/2012 to 30/06/2014. This obviously makes it not possible to compare sentences for this offence or generalise other characteristics.

3.177 Even for more common offences there are small sample sizes. For example, the offence 'possession of a knife in public place or school' under s 382 of the *Crimes Act 1900*, the Database displays information on a total of 62 charges only, again for the period 01/07/2012 to 30/06/2014.

3.178 In its observations on features in the Justice Statistical Profile the Committee noted the significance of small sample sizes in producing sharp variations over time and making trends less easy to discern. This also applies to the ACT Sentencing Database, although the Committee notes representations made to it by the Attorney-General that this effect will modify over time as further cases are entered into the Database.²¹⁴

²¹³ ACT Sentencing Database, viewed 02/02/2015.

²¹⁴ ACT Government, Submission No.12, p.1.

- 3.179 In assessing this, the Committee considers that comparisons with the Commonwealth Sentencing Database should provide a way to assess this claim, since this database has been in operation for a longer time: the date range displayed for statistical information in the Commonwealth Sentencing Database is 01/10/2009 to 30/09/2014, representing five years' data compared with the ACT's two years.
- 3.180 Offences listed in the Commonwealth Sentencing Database are not always directly comparable: the demarcation between offences in the Commonwealth and those of the states and territories reflects the administrative and indeed, constitutional, demarcations between those jurisdictions. However, inspection of records from the Commonwealth Database shows that rather than necessarily displaying greater sample sizes, small sizes continue to be a feature for many offences. As example is 'Making infringing copy of a work w/i commercial profit' under s 132 AD (1) of the *Copyright Act 1968*, for which the count of total cases for 'All Offenders' amounts to only four over the five-year period covered. Even for 'Trafficking controlled drugs' under s 302.4 (1) of the *Criminal Code* (Cth) there is a total of 6 cases only over that five-year period.
- 3.181 Given the very small number of offenders reported for the ACT in ABS statistics considered above, this must raise some doubt over the efficacy of the ACT Database if it is not to be supplemented by some further capacity to make sense of the information it is to hold. It is the Committee's view that small sample sizes will require further processing and, possibly, investigation, if more reliable data is to be generated for the criminal justice domain in the ACT. This is considered in *Committee comment* below.

SENTENCING COUNCILS AND THEIR ROLE IN OTHER JURISDICTIONS

3.182 The Committee notes that there are currently four sentencing councils in Australia.²¹⁵

3.183 These are:

- the Sentencing Advisory Council in Victoria;²¹⁶
- the NSW Sentencing Council;²¹⁷

²¹⁵ There was, formerly, a Sentencing Council in Queensland, which was established in 2010 and abolished in 2012. The establishment of the Sentencing Council in Queensland was reported in Marissa Calligeros, 'Victims to have a say on jail time', *The Brisbane Times*, February 8, 2010, viewed 25 September 2014,

<http://www.brisbanetimes.com.au/queensland/victims-to-have-a-say-on-jail-time-20100208-nlab.html#ixzz3Elgmd0Dp>

The abolition of the Council was commented on by the Queensland Law Society, 'Society opposes abolition of Sentencing Advisory Council', Media release 22 May 2012, viewed 25 September 2014,

http://www.qls.com.au/About_QLS/News_media/Media_releases/Society_opposes_abolition_of_Sentencing_Advisory_Council

²¹⁶ Sentencing Advisory Council, Victoria, viewed 25 September 2014, <http://www.sentencingcouncil.vic.gov.au/>

- the Sentencing Advisory Council of South Australia;²¹⁸ and
- the Sentencing Advisory Council in Tasmania.²¹⁹

3.184 The Committee notes the Sentencing Advisory Council in Victoria's description of its role as being to 'bridge the gap between the community, the courts and government by informing, educating, and advising on sentencing issues'.²²⁰ In more detail, the Sentencing Advisory Council states that its functions are to:

- provide statistical information on sentencing, including information on current sentencing practices to members of the judiciary and other interested persons
- conduct research and disseminate information to members of the judiciary and other interested persons on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters with government departments and other interested persons and bodies as well as the general public
- advise the Attorney-General on sentencing issues
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.²²¹

SUMMARY

3.185 In view of differing representations on key indicators relevant to sentencing, the Committee considered information from other independent sources.

RATES OF IMPRISONMENT

3.186 The ABS sources considered by the Committee, comparing rates of imprisonment across jurisdictions, showed that crude (that is, not age-standardised) rates for males the ACT were in the middle band compared with other jurisdictions, for both Indigenous and non-Indigenous prisoners, and, for women prisoners, is the lowest of any jurisdiction.²²²

²¹⁷ The NSW Sentencing Council, viewed 25 September 2014, http://www.sentencingcouncil.justice.nsw.gov.au/sentencing/sent_council_index.html

²¹⁸ Sentencing Advisory Council of South Australia, viewed 24 October 2014 <http://www.agd.sa.gov.au/about-agd/what-we-do/services-government/sentencing-advisory-council-south-australia>

²¹⁹ Sentencing Advisory Council, Tasmania, viewed 25 September 2014, <http://www.sentencingcouncil.tas.gov.au/>

²²⁰ Sentencing Advisory Council, Victoria, 'Establishment and Functions', viewed 25 September 2014, <http://www.sentencingcouncil.vic.gov.au/about-us/establishment-functions>

²²¹ These functions are established by Section 108C of the *Sentencing Act 1991* (Vic). See Sentencing Advisory Council, Victoria, 'Establishment and Functions', viewed 25 September 2014, <http://www.sentencingcouncil.vic.gov.au/about-us/establishment-functions>

²²² Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 17, 'All prisoners (crude rate)'.

- 3.187 For age-standardised data, the ACT showed the lowest rate of any jurisdiction for Non-Indigenous people, and showed a rate in the middle band for Indigenous people, compared with other jurisdictions.²²³
- 3.188 Despite these indicators, however, the data demonstrated significant inequality between Indigenous and Non-Indigenous rates of imprisonment. It showed that the ratio between rates of imprisonment for Non-Indigenous and Indigenous people, in age-standardised rates, was 18.4 (that is, that Indigenous people are 18.4 times more likely to be imprisoned in the ACT). This is the second-highest rate in Australia for this indicator behind WA.²²⁴
- 3.189 Moreover, the ratio of Indigenous to Non-Indigenous people imprisoned rose dramatically in the ACT for the years 2003 to 2013, from a ratio of 7.2 in 2003 to one of 18.4 in 2013: the biggest proportional increase for this indicator of any jurisdiction.²²⁵

PREVALENCE OF CRIME

- 3.190 The ACT Justice and Community Safety Directorate's *Criminal Justice Statistical Profile – June 2014* shows different trends for different categories of crime, including an increase for one category of crimes against the person ('Dangerous or negligent acts endangering persons'); shallow increases for sexual offences and illicit drug offences; and either shallow or steep declines for a range of property offences.²²⁶

SEVERITY OF CUSTODIAL SENTENCES

- 3.191 In reviewing ABS data on custodial sentences across jurisdictions, the Committee considered that low sample sizes made it difficult to identify trends in the severity of these sentences. In brief, for some categories of crime a single incident in the ACT was enough to generate large variations in figures on the severity of sentence for that category.²²⁷

²²³ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 17, 'All prisoners (crude rate)'.

²²⁴ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 17, 'All prisoners (crude rate)'.

²²⁵ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 18, 'Age Standardised Imprisonment Rate, Aboriginal and Torres Strait Islander status, 2003–2013'.

²²⁶ ACT Justice and Community Safety Directorate, *Criminal Justice Statistical Profile – June 2014*, 'Data Tables for June 2014', available at: <http://www.justice.act.gov.au/resources/uploads/june2014.xlsx> Other related documents are available from the *Criminal Justice Statistical Profile – June 2014* homepage at <http://www.justice.act.gov.au/page/view/387>.

²²⁷ *Criminal Courts*, Australia 2012–2013, Cat No.4513, table 60, available at: http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&45130do012_201213.xls&4513.0&Data%20Cubes&0EFD70A7F9340E61CA257CA7000DD9D8&0&2012-13&27.03.2014&Latest

RECIDIVISM

- 3.192 In reviewing ABS data on recidivism, it was apparent to the Committee that the ACT displayed a rate of recidivism for Indigenous prisoners while substantial in itself was in the middle band for Australian jurisdictions. The exception to this was a high figure for female Indigenous prisoners, which appeared to be due to a small sample size leading to a statistical anomaly.²²⁸
- 3.193 For non-Indigenous prisoners, however, the ACT showed the highest rate of prisoners with prior imprisonment of any jurisdiction, for both male and female prisoners: considerably higher when compared with jurisdictions with next highest figure and with the figure for Australia overall.²²⁹

TIMELINESS IN COURT CASES

- 3.194 In reviewing *ROGS 2015* data on timeliness of court cases, the Committee notes that the backlog for appeal cases in the ACT Supreme Court lies in the lower end of the range, while for non-appeal cases it lies in the middle band. The same indicator for the ACT Magistrates also lies in the middle band, but the ACT Children's Court showed the highest figures of all jurisdictions for longevity of criminal cases, both greater than 6 months and greater than 12 months.²³⁰
- 3.195 Clearance rates for ACT Supreme Court cases on appeal were the lowest of any jurisdiction, but clearance rates for Supreme Court non-appeal cases was the highest. Clearance rates for both the ACT Magistrates' and Children's Courts lay in the middle band compared with other jurisdictions.²³¹

ACT SENTENCING DATABASE

- 3.196 In reviewing the ACT Sentencing Database the Committee found that the very small number of offenders reported for the ACT, as reflected in ABS statistics considered above, must raise some doubt over the efficacy of the Database unless it were supplemented by some further capacity to make sense of the information it holds. Small sample sizes make further processing and investigation necessary if more reliable data is to be generated for the criminal justice professional community in the ACT.

²²⁸ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 30, 'Proportion of Prisoners, sex and prior imprisonment by Aboriginal and Torres Strait Islander status'.

²²⁹ Australian Bureau of Statistics, *Prisoners in Australia* 2013, Cat No. 4517, table 30, 'Proportion of Prisoners, sex and prior imprisonment by Aboriginal and Torres Strait Islander status'.

²³⁰ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.14, p.7.32.

²³¹ Productivity Commission, (2015), *Report on Government Services 2015*, Table 7.14, p.7.32.

3.197 Moreover, taking into account comparisons with the Commonwealth Sentencing Database, where there the Committee found similar challenges with small sample size, despite the longer operation of this database, it is likely that more will be required than simply the passage of time if the ACT Sentencing Database is to fulfil the role for which it is envisaged.

SENTENCING COUNCILS IN OTHER JURISDICTIONS

3.198 The Committee notes the research, consultation, public education and advisory functions of sentencing councils in Australian jurisdictions, and considers these a useful model for a future ACT Sentencing Council.

COMMITTEE COMMENT

3.199 The Committee's consideration of all of the matters considered using other data sources, while revealing some important trends and features in the sentencing domain, did not convincingly resolve, one way or another, the many different views put to it by contributors.

3.200 This — again — strengthens arguments in favour of recommendations, made by the Committee elsewhere, which would create and define the role of a sentencing council for the ACT. It appears that without that the sentencing domain in the ACT will be unexplained; undocumented; will continue to be misunderstood by the general public; and will suffer from a policy debate of lower quality than should, in fact, be the case.

PUBLIC PERCEPTIONS OF SENTENCING

INTRODUCTION

3.201 In hearings of 19 May 2014 the Committee considered questions on the public perception of sentencing and the degree to which decisions by judicial officers may be seen as diverging from public opinion.

3.202 These questions arose in part due to a recent notorious case in the ACT where a child sex offender had sexually assaulted a child while on parole. In early 2014 the offender was sentenced by the ACT Supreme Court to a custodial sentence of 6 years which, with a penalty for another matter considered at the same time, amounted to a custodial sentence of seven years, six months.²³² This led to considerable concern in the community.²³³ On appeal, the

²³² The case is reported in the appeal decision, *The Queen v Williams* [2014] ACTCA 30, which refers to the original case as *R v Shane Williams*, SCC 158 of 2013; SCC 206 of 2013.

²³³ See Christophe Knaus, "Library child molester must serve extra three years minimum jail", *Canberra Times* 19 Aug. 2014: 3. *Australia/New Zealand Reference Centre*. Web. 11 Nov. 2014.

Court decided on a new penalty of eight years for the sex offence, amounting to a total sentence of nine years, six months, and a non-parole period of seven years six months.²³⁴

3.203 In particular the Committee considered:

- avenues available where a sentence is perceived to be inadequate;
- public awareness of the sentencing process; and
- current research on attitudes to sentencing in Australia.

3.204 Witnesses who commented in this area included:

- Legal Aid ACT;
- the Australia Lawyers Alliance;
- the ACT Law Society; and
- Dr Lorana Bartels.

3.205 Their contributions are considered below.

AVENUES WHERE SENTENCES ARE PERCEIVED INADEQUATE

3.206 Witnesses noted community concern which had arisen in relation to the first sentence given the offender in the case cited above. When asked, witnesses identified existing avenues through which community concerns can be addressed.

3.207 The Deputy Chief Executive Office, Legal Aid Commission ACT, told the Committee that ‘the way that public expectations are injected into the sentencing process is through the appeals process’, and that:

if you are speaking about a concern in relation to the inadequacy of sentencing, I think that you can be confident that the current DPP and indeed other DPPs have never been shy about coming forward in matters that they consider worthy of appeal.²³⁵

3.208 This avenue was also indicated by both the President and the Chair of Criminal Law Committee of the ACT Law Society.²³⁶

3.209 Appeals against sentences on grounds of manifest inadequacy are dealt with in further detail in the section on appeals in Chapter 4 of this report.

²³⁴ *The Queen v Williams* [2014] ACTCA 30.

²³⁵ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, pp.139

²³⁶ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84, and Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, pp.84-85..

3.210 Witnesses also referred to another other avenue through which public concerns could be addressed: change of statute law. In relation to this, however, witnesses placed a different emphasis on how this should be considered.

3.211 Representatives of the ACT Law Society cautioned against changing legislation in response to notorious individual cases. The Chair of the Society's Criminal Law Committee told the Committee that:

even if it is seen as a bad decision, before we say there is a need for change to the whole system, we have to be satisfied that there is more than one bad decision before we rewrite all the legislation around an issue.²³⁷

3.212 The question was, he said, 'is there systemic failure rather than one bad decision?', because:

The reality is that, throughout the entire law—all aspects, whether it be civil law or criminal law—over time and through history there have been individual cases which people would regard as miscarriages of justice. Not every one of those justifies a wholesale change to the law to which it relates. Some do; but not every one. It does not automatically follow. It may be the case that there are one or two dud decisions.²³⁸

3.213 He went on to cite the danger of responding to community concerns in this way when they are based on potentially inaccurate media reports of sentence proceedings:

The individual representation of cases that one reads in the *Canberra Times* is not necessarily the case that is going on before the court. They can be two radically different things, even though they are talking about the same event. A community expectation based on what is sometimes a caricature of the actual case that is going on is not a valid basis to conclude or suggest that sentencing is inadequate in some way. Certainly, there needs to be something more rigorous than that before one can jump to that conclusion.²³⁹

3.214 The President of the Society's Criminal Law Committee agreed, telling the Committee that '[o]ften ... you are talking about one or two cases that cause the public disquiet' and it is 'really difficult to mount an argument, in my reading of the situation, to change the whole law based on those one or two difficult cases'.²⁴⁰

3.215 On the other hand, Mr Steven Whybrow, representing the Australian Lawyers Alliance, emphasised what he saw as the positive results that could come when statute responded to

²³⁷ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.84.

²³⁸ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, pp.84-85.

²³⁹ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.82.

²⁴⁰ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84.

particular cases of note. He referred to the matter of Monfries,²⁴¹ where the offender, he told the Committee, had had ‘an appalling record of previous crazy driving through the streets of Canberra without having killed anyone, until his latest offence was taken into account’.²⁴²

3.216 In connection with this, he told the Committee, features of that the case had ‘determined sentencing practice’ in the ACT:

We did not have any [clear precedent in the ACT] because the Legislative Assembly had just changed the maximum penalty and brought it into line with New South Wales and Victoria. So we looked at all their cases to see what the practice was. The sentence imposed by the sentencing judge was the highest anyone had ever got. It was more akin to manslaughter than culpable driving.²⁴³

3.217 As a result, he told the Committee, ‘in terms of the seriousness of the offence and where it ranks, I do not believe we are now out of step [with other jurisdictions] in terms of objective sentencing’.²⁴⁴

3.218 As noted elsewhere, Mr Whybrow also put the view that ‘[i]ndividual cases make bad law’.²⁴⁵

3.219 In connection with this the Committee notes that the upshot of Mr Whybrow’s testimony was that the response to the particular case was positive because it resulted in increased consistency with an existing body of law: that is, the laws of other jurisdictions.

PUBLIC AWARENESS OF THE SENTENCING PROCESS

3.220 Witnesses appearing before the Committee in hearings noted the complexity of the sentencing process, and the resultant difficulties in informing the public about the process.

3.221 Mr Steven Whybrow, of the Australian Lawyers Alliance, told the Committee that:

Sentencing ... is the most contradictory process. You take into account something on the one hand that you cannot on the other. On one side you get a discount and on the other side it is an aggravating feature. Prior offending is, as I understand the law, not strictly that you do not take into account the prior offending; it is relevant. But the principle, effectively, is: if I have committed offence X, maximum penalty five years and

²⁴¹ *R v Monfries* (Unreported, Australian Capital Territory Supreme Court, Nield AJ, 18 June 2013). The case was reported in the media, for example: Elizabeth Byrne, ‘Justin Monfries jailed for Canberra Hospital hit and run’, ABC News Online, updated 19 Jun 2013, available at: <http://www.abc.net.au/news/2013-06-18/justin-monfries-sentenced-for-hit-and-run/4761946>

²⁴² Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, pp.110.

²⁴³ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.111.

²⁴⁴ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.111.

²⁴⁵ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.108.

objective seriousness is middle of the road—I do not say “middle of the road” like that, but a moderately serious offence of which 2½ to three years is appropriate—then you cannot turn that into four or five because you have done it 100 times before. Otherwise the punishment does not fit the crime. You need to be punished for the crime.²⁴⁶

3.222 In connection with this, Mr Whybrow noted that weighing-up prior offences and sentence discounts was particularly complex:

Where the prior record is relevant is that that 2½ to three does not go anywhere and, indeed, in some circumstances can go up slightly again. It has got to be not so much that the punishment does not fit the crime. If it is your 57th theft and finally you are done for shoplifting a packet of Lifesavers—you cannot give somebody 10 years for that because the punishment will not fit the crime. But you would be entitled to say, “Theft, breach of honesty et cetera.” Generally speaking, in all cases it is not out of the question to say, “You should go to jail.” But when you take into account youth, the value, the learning experience et cetera, all of a sudden those things come off the starting point without necessarily being said. So it looks like the starting point is a bond or a fine or things of that nature. But if you have got somebody with an extensive criminal history, you will see people go to jail for shoplifting because their previous history of shoplifting or other theft is such that that starting point does not drop down.²⁴⁷

3.223 Regarding the challenge of communication to this the public, witnesses spoke about the role of the media in communicating the rationale of sentencing.

3.224 The Deputy Chief Executive Officer, Legal Aid Commission ACT told the Committee that inaccuracies in media reporting regarding sentences in part reflected ‘the complexity of sentencing’ but she was, she told the Committee, ‘often frustrated, as are my colleagues ... that the reporting that accompanies sentencing is often reflective of the misunderstanding’ of the ‘balancing act’ entailed in formulating a sentence.²⁴⁸ Sentencing remarks were available to journalists in the ACT, but:

Whether they avail themselves of them is a different matter. And as you can imagine, the delay is often an issue. So I cannot tell you how quickly they go up online, but yes, they would be available to journalists, and the sentencing database has them more readily available.²⁴⁹

²⁴⁶ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.110.

²⁴⁷ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.110.

²⁴⁸ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.139

²⁴⁹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.152.

3.225 In connection with this, the Deputy Chief Executive Officer left it as an open question as to whether, for example, staff from the *Canberra Times* were ‘aware of [the sentencing database], have been trained on it, know how to use it and are checking the sentencing remarks’.²⁵⁰

3.226 The President, Criminal Law Committee, ACT Law Society, told the Committee that:

Often the situation is that perhaps we as a profession could do better at getting the message out to the public about there being a whole range of other reasons that the judge needed to take into account that perhaps have not been recorded in the *Canberra Times* or whatever.²⁵¹

3.227 He noted, however, that it was:

difficult always, particularly in a circumstance where it may well be the case that an individual matter is going on appeal, to comment in any great detail about that case. And certainly in my position as the president, if I get rung up by a journalist the day after a sentence has been handed down, the prospects of my knowing much about the actual facts to be able to put it into any other sort of context is pretty low really. So I tend to fall back on motherhood-type statements, which probably people just do not listen to. So it is something that the society and perhaps other professional bodies need to have another close look at.²⁵²

3.228 In view of this state of affairs, he told the Committee, ‘there needs to be more education in the community generally about what sentencing involves across the board and not just in particular issues’. A case in point was the reaction to the child sex offence cited above in which case, he said, ‘the reaction happened before the DPP had even considered their position in regard to an appeal’, and this had obscured the fact that ‘in our system there is the opportunity to appeal a bad decision, or what is perceived to be a bad decision’, which represents ‘an opportunity to correct anything that has miscarried’.²⁵³

3.229 He went on to tell the Committee that, in the absence of more accurate information, it was ‘often very easy for a journalist or somebody else to say, “Well, judges are out of touch.” However, he said:

if you look particularly in Canberra at the background of the people who are on our bench, you would certainly quickly realise that it is not the case that they have come from ivory towers and been parachuted in.²⁵⁴

²⁵⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.152.

²⁵¹ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84.

²⁵² Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.85.

²⁵³ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84.

²⁵⁴ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84.

3.230 In light of this, he told the Committee, it was ‘perhaps the case that there needs to be more education in the community generally about what sentencing involves across the board and not just in particular issues’.²⁵⁵

3.231 Dr Lorana Bartels made similar representations. She told the Committee that a way to address perceptions of a disjunction between sentencing practice and community perceptions was to educate ‘the public about what is involved in the sentencing process’:

I know that people might think that there is a process whereby there is a right sentence, and explaining that there are a whole host of factors that need to be taken into account, the list within section 33 of the sentencing act, and that there are common law factors and that there are principles and there are different purposes of sentencing, and that especially with young offenders we might like to focus on rehabilitation—all of those things go some way towards explaining to people what the sentencing process is.²⁵⁶

3.232 She also told the Committee that it was important for the public to know that there was an appellate process that could be initiated by the DPP on grounds of manifestly inadequate sentence.²⁵⁷

SUMMARY

3.233 The Committee notes contributions received regarding public perceptions of sentencing.

3.234 In relation to cases where sentences are perceived inadequate, arguments included:

- that in cases where there sentence may be perceived to be inadequate there are established avenues for response, including appeals by the DPP on grounds of manifestly inadequate sentence;²⁵⁸
- that a single event or decision is not likely to be reliable grounds for changes to legislation;²⁵⁹
- that responding to events or decisions in this way makes the law vulnerable to misperceptions of legal proceedings by the media and general public²⁶⁰ and

²⁵⁵ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84.

²⁵⁶ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.151.

²⁵⁷ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.151.

²⁵⁸ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, pp.139

²⁵⁹ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.84.

²⁶⁰ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.82, and Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84.

- that in some instances a response to an individual case may be beneficial where for example it brings the ACT's legal system into greater consistency with those of other jurisdictions.²⁶¹

3.235 In relation to public awareness of the sentencing process, arguments included:

- that the process of sentencing was inherently complex, including for example consideration of previous convictions while ensuring that the 'punishment fits the crime', and this makes informing the community about sentencing more challenging;²⁶²
- that sentencing entails a 'balancing act' which media do not reflect in their reports of sentencing outcomes;²⁶³
- that there may be greater scope for legal professionals and professional bodies to assist in disseminating higher quality information about sentencing;²⁶⁴
- that 'there needs to be more education in the community generally about what sentencing involves across the board and not just in particular issues';²⁶⁵
- that there appeared to be a general lack of awareness that there were avenues for appeal in cases where sentences were perceived to be 'manifestly inadequate'.²⁶⁶

COMMITTEE COMMENT

3.236 As for a number of other matters considered here, the Committee's considers that representations made to it regarding low levels of public awareness of sentencing strengthen the case for a sentencing council to be established in ACT.

RESEARCH ON ATTITUDES TO SENTENCING

3.237 Witnesses spoke to the Committee about systematic research that had been undertaken, or was in-progress, on public attitudes to sentencing. In particular they referenced studies by Professor Kate Warner into the attitudes of jury-members in Tasmania.²⁶⁷

3.238 The Chair, Criminal Law Committee, ACT Law Society told the Committee that in the study:

²⁶¹ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.111.

²⁶² Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.110.

²⁶³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.152.

²⁶⁴ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.85.

²⁶⁵ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84.

²⁶⁶ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.84, and Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.151.

²⁶⁷ See Warner, K., J. Davis, et al., (2011), 'Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study' (Trends & issues in crime and criminal justice no.407), Australian Institute of Criminology, <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi407.html> , viewed 12/11/2014.

jurors were extensively polled or interviewed about their expectations about cases, both in the abstract of hearing about a fact scenario and what they thought a sentence should be, and then actually in sitting through a trial and at the end of that trial, they having been the jurors who determined the person's guilt, being asked about what they thought the sentence ought to be.²⁶⁸

3.239 The results of the study, he told the Committee, showed that:

Nearly universally, in that study Kate Warner found that the jurors who heard the case and actually understood all the facts in the case would have imposed, had they had the power to impose a sentence, a lighter sentence than the judge sitting on the matter did impose.²⁶⁹

3.240 The Deputy Chief Executive Office, Legal Aid Commission ACT also spoke about the study, saying that it showed the importance of 'explaining to [to the public] how [a sentence] was arrived at':

what happened was: when jurors were provided with just the bald fact of the sentence, that was one thing. They were asked whether they thought that was appropriate or not appropriate. When they were provided with the judge's sentencing remarks and went through all of those things that we are familiar with, his terrible childhood, his attempts to overcome his substance abuse, all those things, their approval for the sentence went up. The sentence did not change one iota, but their understanding of it did.²⁷⁰

3.241 Dr Lorana Bartels spoke about another Australian research project which, she told the Committee, 'involved a national survey of 6,000 people', in order to investigate public attitudes towards sentencing. In connection with this, she told the Committee:

The fascinating thing about that was that, in spite of the fact that there are obviously, as we all know, very different sentencing policies and practices around the country, the level of satisfaction was the same. So our response of "people are dissatisfied" is perhaps uncoupled from what is actually going on.²⁷¹

3.242 At the time of her appearance before the Committee, Dr Bartels was herself involved in a 'national sex sentencing study', 'looking at not only jurors who sit on sex offence matters but also looking at grievous bodily harm and wounding'. 'So', she told the Committee, 'So we will be looking at offences of violence involving sex and those that are not', because 'there seems

²⁶⁸ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.82

²⁶⁹ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.82

²⁷⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, pp.151-152.

²⁷¹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.148.

to be something different about sex cases'.²⁷² The study will also survey 'a control group of 1,200 people across the country who are summonsed for jury duty but not ultimately empanelled; so they are not actually sitting on the trial'.²⁷³

3.243 In relation to this cohort, she told the Committee:

we are going to present them with one of 10 vignettes based on an actual case. We have selected these very carefully to ensure that we are looking at a range of sex-type cases. Then we have also got a couple of grievous bodily harm cases in there too. But with sex cases, we are talking about everything from an indecent assault to a sexual assault within the context of a relationship through to a date rape, colloquially termed, sort of situation. And we are going to look at the public attitudes to these different sorts of offences and the sentences imposed.²⁷⁴

3.244 Although she could not 'foreshadow what our findings will be', she told the Committee that she anticipated that:

attitudes will differ significantly, and ...that the response we have in particular to offences involving children will be different to how we approach offences involving adult victims ...²⁷⁵

3.245 She also anticipated, she told the Committee, that 'that once the circumstances of the case and the offender are brought to bear, there will be a greater understanding of the complexities of sentencing'.²⁷⁶

3.246 Commenting on earlier studies by Warner, Dr Bartels told the Committee that 'members of the public were least satisfied with sentences for sex offences and that there was little difference, as I say, across the country'.²⁷⁷

3.247 She noted that 'here in the ACT [we have] a government which is much less likely to say, "All right, I heard on talkback radio this morning that people are dissatisfied. We had better pass a law about that"'.²⁷⁸

²⁷² Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.152

²⁷³ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.148.

²⁷⁴ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.148.

²⁷⁵ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.153.

²⁷⁶ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.153.

²⁷⁷ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.150.

²⁷⁸ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.150.

3.248 In light of this, she told the Committee, the study:

demonstrates the wisdom of that, because if you are going to continually legislate in response to a perceived attitude towards sentences, it may not result in any increased satisfaction anyhow.²⁷⁹

3.249 She told the Committee that the policy implications of this were that:

if we take that study together with the other information—and it says that the more people understand that same sentencing, the more satisfied they become—I think we see it is a much more cost-effective thing to work on educating people than it is to just say, “All right.” We could hypothetically double and treble the number of people we send to prison. It would not make people satisfied and I do not think it would be a particularly smart use of our resources in the ACT.²⁸⁰

SUMMARY

3.250 The Committee notes contributions received regarding research on attitudes to sentencing.

3.251 Arguments included:

- that studies on jurors showed that left to their own devices jurors would tend to impose lighter rather than harsher sentences for a given offence compared with sentences imposed by judicial officers;²⁸¹
- that exposing jurors to details of the background of offenders, in these studies, did not change their calculations on an appropriate sentence, but increased their understanding of why particular sentences were imposed;²⁸²
- that levels of satisfaction with sentencing outcomes were consistent across Australia, despite there being ‘very different sentencing policies and practices’, and that the perception that ‘people are dissatisfied’ with sentencing may be ‘uncoupled from what is actually going on’;²⁸³
- that, as a result, legislating in response to ‘a perceived attitude towards sentences ... may not result in any increased satisfaction’;²⁸⁴
- that public opinion on sentencing varied considerably according to the kind of offence under consideration;²⁸⁵ and

²⁷⁹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.150.

²⁸⁰ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.150.

²⁸¹ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.82

²⁸² Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, pp.151-152.

²⁸³ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.148.

²⁸⁴ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.150.

²⁸⁵ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p153.

- that because the research suggests that ‘the more people understand that same sentencing, the more satisfied they become’, ‘it is a much more cost-effective thing to work on educating people’ rather than increasing ‘the number of people we send to prison’, which would ‘not make people satisfied’ and would not be ‘a particularly smart use of our resources in the ACT’.²⁸⁶

COMMITTEE COMMENT

3.252 Representations made to the Committee regarding research on attitudes to sentencing again serve to strengthen the case for a sentencing council in the ACT. This, it appears, would create a greater and more accurate awareness of sentencing and related matters in the criminal justice system; provide a better basis for policy; and generate high quality information that could be put to good use both in- and out-side of relevant professional communities. It appears that a significant benefit of this approach would be to increase community satisfaction with sentencing and the criminal justice system and, potentially, provide a better basis to address gaps in the criminal justice system’s response to challenging problems.

3.253 As noted in the comments attached to the previous sections of this chapter, it is the Committee’s view that the uncertainty relating to data and information on matters relevant to sentencing in the ACT all point to the need to establish a sentencing council in the ACT.

3.254 With this in mind the Committee makes the following recommendations.

Recommendation 1

3.255 The Committee recommends that the ACT Government propose legislation to the Legislative Assembly that, if passed, would create an ACT Sentencing Council.

Recommendation 2

3.256 The Committee recommends that this legislation would give an ACT Sentencing Council responsibility to: conduct research on sentencing, recidivism, and related matters in the ACT; draw on, analyse and produce publications using data from the ACT Sentencing Database; engage and educate the ACT community on matters relevant to sentencing and criminal justice; and provide policy advice to Government relevant to sentencing and criminal justice.

²⁸⁶ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.150.

Recommendation 3

3.257 The Committee recommends that the ACT Sentencing Council should be created as an independent statutory body on the model of the Victorian Sentencing Advisory Council.

4 AREAS OF CONCERN, COMPARISONS WITH OTHER JURISDICTIONS

INTRODUCTION

- 4.1 Submissions to the inquiry highlighted areas of concern which are discussed below in the context of comparisons between arrangements in the ACT and those of other jurisdictions.
- 4.2 These include the following matters considered in this chapter:
- mandatory sentencing;
 - suspended sentences;
 - corrections orders;
 - appeals;
 - forfeiture of property;
 - human rights; and
 - jurisprudence.

MANDATORY SENTENCING

- 4.3 A number of contributions to the inquiry noted the presence of mandatory sentences or mandatory minimum sentences in the statute books of other jurisdictions, and praised the ACT for not having introduced such measures.

AUSTRALIAN LAWYERS ALLIANCE

- 4.4 The submission by the Australian Lawyers Alliance suggested that it was a strength of ACT sentencing practice that it had:

generally resisted the knee-jerk “law and order” type auctions where heavier and heavier penalties are called for by ‘community spokespersons’ - usually in response to a particularly high profile case.²⁸⁷

- 4.5 In contrast, mandatory minimum sentences were employed in NSW in the form of a ‘standard non-parole period’ for particular offences. An example were provisions for the offence of
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²⁸⁷ Australian Lawyers Alliance, Submission No. 4, p.2.

“recklessly inflict grievous bodily harm” which ‘in NSW carries a standard non parole period of 4 years imprisonment’.²⁸⁸ However, the submission suggested, this was:

an offence which can be committed in a vast range of circumstances, some of which may not call out for a fulltime sentence of imprisonment let alone a minimum 4 years non-parole period.²⁸⁹

- 4.6 As a result, when ‘faced with what is effectively a mandatory and lengthy term of imprisonment’, an offender would ‘no longer have any incentive to plead guilty and will instead take their chances at trial’.²⁹⁰ This would result in a ‘cost to the community in both the time and expense of a trial’, but would also result in a cost to the victim:

who will need to give evidence at a trial that may not have been necessary if the offence did not lead to a mandatory sentence of imprisonment irrespective of the circumstances of the case.²⁹¹

- 4.7 The submission went on to say that it was ‘the experience of our members that such sentencing provisions do not achieve “justice”’.²⁹²

- 4.8 All in all, the submission argued, mandatory sentencing was ‘a blunt response to nuanced issues’, as it did not ‘allow for the exceptional case’,²⁹³ and:

invariably leads to persons involved in the system (defence, judges and prosecutors) trying to massage an inflexible and unfair system to provide an appropriate and just outcome.²⁹⁴

- 4.9 In brief, the view put forward in the submission was that where mandatory minimum sentences were imposed, ‘judicial discretion and individualised justice is replaced with a one size fits all approach which in practice leads to injustice and other unintended consequences’.²⁹⁵ Mandatory sentencing cut across doctrines of judicial discretion, which the Alliance wished strongly to support: ‘judges should retain a discretion to deal with each matter on its merits’.²⁹⁶

²⁸⁸ Australian Lawyers Alliance, Submission No. 4, p.4.

²⁸⁹ Australian Lawyers Alliance, Submission No. 4, p.4.

²⁹⁰ Australian Lawyers Alliance, Submission No. 4, p.4.

²⁹¹ Australian Lawyers Alliance, Submission No. 4, p.4.

²⁹² Australian Lawyers Alliance, Submission No. 4, p.4.

²⁹³ Australian Lawyers Alliance, Submission No. 4, p.4.

²⁹⁴ Australian Lawyers Alliance, Submission No. 4, p.4.

²⁹⁵ Australian Lawyers Alliance, Submission No. 4, p.2.

²⁹⁶ Australian Lawyers Alliance, Submission No. 4, p.4.

4.10 The Australian Lawyers Alliance expanded on these comments when it appeared before the Committee in public hearings. Mr Steven Whybrow, a barrister, appeared on behalf of the Alliance.

4.11 When asked to comment on mandatory sentencing and standard non-parole periods, Mr Whybrow told the Committee that:

Those types of concepts are, in my view, anathema to individualised sentencing and, indeed, to justice in every sense.²⁹⁷

4.12 He told the Committee that while a contribution to the inquiry had argued that mandatory sentencing would increase rates for guilty pleas:

It does not do that. In New South Wales there were mandatory non-parole periods for a range of sentences and the effect of it was that people would not plead guilty to those offences if they had ever been charged with them because, irrespective of their circumstances, they will go to jail for four years or seven years or whatever.

Prosecutors could not get pleas of guilty on even strong cases.

Offenders would be advised, “You might as well roll the dice. You’ve got a one in 10 chance of getting out of this, but you’re going to jail for seven years and your plea of guilty will count for nothing.”²⁹⁸

4.13 In view of this, he told the Committee:

prosecutors and defence would, in effect, try to find other offences of seriousness which reflect the criminality but did not have a mandatory non-parole period attached to it.²⁹⁹

4.14 This, he said, ‘really [was] bastardising the system’.³⁰⁰

4.15 Mr Whybrow went on to tell the Committee that these effects of mandatory sentencing flow ‘all the way through the system’. Removing judicial discretion prevented judicial officers from tailoring responses given the circumstances of particular offending:

Everyone on the jury knows that this 19-year-old kid, good family and all of this, is going to go to jail for eight years if they say guilty. The other guy was not as lily white as may have been written up on day one in the newspapers. There were circumstances in there. It does not quite get to self-defence, but the judge is going to have no discretion. “This kid will go to jail for eight years. We’re not going to do that. Not

²⁹⁷ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

²⁹⁸ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

²⁹⁹ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

³⁰⁰ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

guilty.” And that is what happens. The community takes it into their hands and you do not get a just result.³⁰¹

4.16 A better approach, Mr Whybrow told the Committee, would be:

“We reject self-defence. We have got confidence in the judicial process. We will take into account the extenuating circumstance and this kid’s rehabilitation and all the things that he has done since then.” He does not get eight years. He might get two years or he might get an intensive correctional order or he might get something that is relevant to his circumstances.³⁰²

4.17 He told the Committee that this showed that ‘[o]ne size fits all’ was ‘anathema to justice’. It also had the further effect in that it led ‘to people trying to get around it—from the lawyers to the judges to the community’. In light of this negative effect, he told the Committee, ‘you are better off dealing with the [individual] case’.³⁰³

4.18 Mr Whybrow went on to make more general comment about mandatory sentencing. He noted that when ‘three strikes and you are out’ mandatory sentencing had applied in the Northern Territory ‘it led to kids in their 20s, on their third shoplifting, getting 10 years or things of that nature’. He told the Committee that often such laws came into being ‘in the first place because of an extreme case’. However, this flew in the face of the accepted principle that ‘[i]ndividual cases make bad law’. This was, he said, a ‘well-respected saying’ in light of which the High Court ‘always tries to avoid the really bizarre cases because if they try to make principles on an unusual case, they generally will be taken out of context’.³⁰⁴

LEGAL AID ACT

4.19 When it appeared before the Committee in public hearings Legal Aid ACT was asked whether mandatory sentencing acted as a deterrent.

4.20 In response, the Deputy Chief Executive Officer told the Committee that it did not. Mandatory sentencing was ‘hugely problematic and usually impacts upon certain sectors of the community ... disproportionately’. In this ‘Aboriginal and Torres Strait Islander people [came] immediately to mind’.³⁰⁵

³⁰¹ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

³⁰² Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

³⁰³ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

³⁰⁴ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.108.

³⁰⁵ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.138.

4.21 In addition, she told the Committee, mandatory sentencing:

unnecessarily constrains the individual discretion of the sentencing judge or magistrate in a way that fetters their ability to take into account the subjective circumstances that bring a person before the court.³⁰⁶

4.22 The Head of the Criminal Law Practice at the Legal Aid Commission told the Committee that mandatory sentencing was similar to ‘the presumptions against bail in certain instances’ in that it targeted ‘the offence rather than the offender’. Mandatory sentencing flew ‘in the face of the concept of individualised justice’ because it sought to apply a uniform penalty to offending in a range of instances. In reality, he told the Committee, ‘each offender is an individual with their own background, their own circumstances, their own reasons for committing the offence’, and this was reflected in the fact that each ‘class of offence has a range of seriousness or aggravating circumstances’ which determine the penalties that are applied when an offender is convicted.³⁰⁷

4.23 The Head of the Criminal Law Practice and the Deputy Chief Executive Officer jointly told the Committee that if ‘somebody [were] the subject of an exclusion notice from a shopping centre and therefore rendered a trespasser, if they go into a shop and pinch something, that is burglary’ rather than ‘minor theft’, potentially raising custodial penalty from two to fourteen years.³⁰⁸

4.24 The Head of the Criminal Law Practice went on to tell the Committee that:

The way the law is, that is a burglary, just as a home invasion in the middle of the night with balaclavas and baseball bats is also a burglary. That is an aggravated burglary ... it is somebody breaking into a house in the middle of the night, committing another simple burglary, which has got to be at the far end of seriousness—occupants in the house, taking an heirloom et cetera ...³⁰⁹

4.25 Yet, he told the Committee ‘mandatory sentencing would say that the shoplifter and the home invader should be subject to the same mandatory sentence’.³¹⁰

4.26 Regarding this, the Deputy Chief Executive Officer told the Committee that in this sense mandatory sentencing ‘does not allow the balancing’:

Sentencing, in my experience, is the task of judicial officers that I have never envied, I must say. It is like moving deck chairs around on the Titanic in many respects. It is like

³⁰⁶ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.138.

³⁰⁷ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.138.

³⁰⁸ Mr Richard Davies and Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.138.

³⁰⁹ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.138.

³¹⁰ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.138.

playing chess. I have always thought of it that way. You move the queen, then you move the little guy and you move the king, and you are still left with a picture that you have got to untangle. And mandatory sentencing provides for no variances in that regime. So there is nothing to be balanced, because the formula is clear and there is no way for you to go outside that formula, no matter how compelling the circumstances.³¹¹

- 4.27 She told the Committee that this brought another problem in that ‘your judicial officers do not have to work particularly hard to reach an outcome’:

If you have got a formula, and the formula is in front of you as a judicial officer, and you do not have to consider anything outside that formula—A plus B equals C; you go out that door, not that door—not only are you constraining the options but nobody is having to turn their mind to what is in the best interests of the community and what is in the best interests of the offender.³¹²

- 4.28 Rather, she told the Committee, ‘we all benefit from a formula that takes those things into account and balances them in a fair way’.³¹³

- 4.29 In addition, the Head of the Criminal Law Practice told the Committee, as had the Australian Lawyers Alliance, that one of the consequences of mandatory sentencing was that it was ‘a major disincentive to anybody pleading guilty’. As a result, while ‘judges might not be so busy in sentencing people, they will be a lot busier presiding over trials’.³¹⁴

- 4.30 ‘A good example’, he told the Committee, were prosecutions of Indonesian fishermen charged with people smuggling. The aggravated form of the offence ‘carried a mandatory minimum sentence under the Commonwealth criminal code of 20 years, with a mandatory minimum non-parole period of three years’. This was ‘set way too high for really what judges around the country came to see as the criminality involved in the offence’.³¹⁵

- 4.31 It also ‘removed all incentive to plead guilty, until a former Attorney-General directed the Commonwealth DPP to charge the simple form of the offence, which carried a smaller maximum sentence’.³¹⁶ The result was that ‘[s]uddenly there were a lot of pleas of guilty’ because ‘a sentence could be imposed that adequately addressed the criminality’.³¹⁷

³¹¹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.139.

³¹² Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.139.

³¹³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.139.

³¹⁴ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.140.

³¹⁵ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.140.

³¹⁶ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.140.

³¹⁷ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.140.

4.32 The Head of the Criminal Law Practice and the Deputy Chief Executive Officer jointly told the Committee mandatory sentencing contrasted strongly with the regime currently in place in the ACT.

4.33 The Head of the Criminal Law Practice told the Committee that:

We have a fairly sophisticated system certainly enshrined in legislation, the system of rewarding or discounting sentences for pleas of guilty, which has operated for quite a number of years. In some jurisdictions it is set as a percentage, although it is always a percentage of what the particular judge thought was the appropriate sentence in the first place. All sentencing judges and magistrates here turn their mind to an appropriate discount, which is the term we use, for an early plea of guilty.³¹⁸

4.34 This was not only ‘Not only is it a demonstration of remorse and contrition for the offender’s behaviour, if there is, indeed, any evidence of that’:

it is perhaps more particularly for what they call the utilitarian value of the plea in saving the court’s hearing time and resources et cetera, and also facilitating the course of justice, in other words, not putting witnesses and victims through the trauma of giving evidence [and] getting an early result.³¹⁹

4.35 Regarding this, the Deputy Chief Executive Officer told the Committee that:

the current regime requires sentencing magistrates and judges to articulate that discount. They have to put a figure on the discount for it—the particular section escapes me—but there is now an administration of justice discount as well for people who may not have pleaded guilty but who have, for instance, run their trial in a manner that has meant, instead of it taking two weeks, it has only taken one. So there have been reasonable concessions made by defence lawyers—we do make them now and then—and those concessions have, for instance, resulted in four police officers having to give evidence, not 14.³²⁰

4.36 She went on to tell the Committee that this approach provided:

enough incentive for people to plead guilty when they should, when there is evidence against them that is compelling and there is little utility in them fighting the charge against them because of the impact of a discount.³²¹

³¹⁸ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, pp.140-141.

³¹⁹ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, pp.140-141.

³²⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.141.

³²¹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.141.

- 4.37 This was particularly so, she told the Committee ‘in relation to offenders that are looking at periods of imprisonment’:

Where people might be looking at periods of imprisonment for more serious offences, I think that the current regime provides enough incentive for us, for instance, to be able to give advice to our clients about the sort of discount that they might expect if they were to enter a plea of guilty early.³²²

- 4.38 She also told the Committee that It was more difficult to provide effective incentives for guilty pleas in cases of minor crime:

if you are talking about a first or second offender who has committed a more minor offence, like a minor theft or something like that, it is difficult to say, “If you plead guilty, you are going to get a good behaviour order. If you plead not guilty, you are going to get a good behaviour order.” Those are the areas where it is difficult to encourage early pleas, because in the result not a lot is going to hinge on that plea.³²³

DIRECTOR OF PUBLIC PROSECUTIONS

- 4.39 When the Director of Public Prosecutions appeared before the Committee in public hearings, he also made comment on mandatory sentencing. He told the Committee that it was ‘a very difficult issue’:

There are a number of jurisdictions in Australia where there is mandatory sentencing of one type or another in different areas. For example, in New South Wales there are standard non-parole periods. They may be departed from, but there has to be good cause shown. So there is effectively a starting point, which is a form of mandatory sentencing.

Another form of mandatory sentencing is, for example, in the Northern Territory where there is mandatory life imprisonment for murder.³²⁴

- 4.40 He went on to tell the Committee:

I have to say from a general principle point of view—and I may be bold to say the directors of public prosecutions around Australia would agree with this—generally mandatory sentencing is not a favoured outcome from a criminal law point of view, particularly sentences, for example, such as mandatory life for certain offences. The reason for that is very simple: it discourages people from pleading guilty because there is no benefit to be gained from a plea of guilty being entered.³²⁵

³²² Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.141.

³²³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.141.

³²⁴ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.56.

³²⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.56.

4.41 In addition, 'generally it ends up with most of the models having an out clause, so to speak, for the judicial officer to depart from a standard position in special circumstances'. As a result, 'all of the effort [for a judicial officer] comes when departing from the standard position'.³²⁶

4.42 The DPP made two further points about mandatory sentencing.

4.43 First, he stated that:

I can well understand why people advocate mandatory sentencing and really, if I might say so, the judiciary has to accept responsibility if they are imposing sentences which are not regarded in the community as appropriate. They have to expect that parliament may become involved in the process on behalf of the community. And that is really what is happening in a number of jurisdictions. I have to say that my experience and what my colleagues in other jurisdictions tell me disposes me against mandatory sentencing, for the reasons that I have indicated. But I can well understand the push for it.³²⁷

4.44 Second he suggested that while remedies were available, by way of appeal, in cases where manifestly inadequate sentence could be asserted, in some instances this also pointed to areas in which courts could have exercised discretion to more closely match community expectations:

There was a recent case, without going into details of the case, of a crime of fairly extreme violence and there was a fairly lengthy head sentence but a very low non-parole period was set. And we appealed against the inadequacy of the non-parole period, and we were successful in that appeal. And in running that appeal I did submit to the court that even though one could not expect percentages to be imposed and so on and so forth, the court did have to have in mind that the sentence that was imposed should have a transparency about it so that if a high head sentence is imposed, there has to be a good reason for the setting of the non-parole period, which is obviously the time the person actually serves in prison. We had a successful outcome in that matter in that the minimum term of the non-parole period was increased. So the courts have their role to play in this issue.³²⁸

³²⁶ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.63.

³²⁷ Mr Jon White, *Transcript of Evidence*, 19 May 2014, pp.63-64.

³²⁸ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.64.

OTHER CONTRIBUTORS

4.45 Other contributors also made brief comments in this area.

4.46 The Human Rights Commissioner, when she appeared in public hearings, told the Committee that she was not in favour of mandatory sentencing and that there had been:

international human rights criticism of the Northern Territory and WA governments for those mandatory sentences that have a [disproportionate] impact on Aboriginal and Torres Strait Islander young people.³²⁹

4.47 The Children and Young People Commissioner, when he appeared in public hearings, stated that ‘on principle’ he was not in favour of mandatory sentencing, but emphasised that ‘whatever we do in the system, it needs to be based on evidence’:

We need to look at the evidence that what we are trying to do actually works and makes a difference, and that it has a rehabilitative purpose. Just to say mandatory sentencing does or does not do something, strengthening bail does or does not do something or being tough on crime does or does not do something is not necessarily the answer. I think you need more of a sophisticated analysis of the evidence which guides this. That is not even going to the question.³³⁰

4.48 When Dr Lorana Bartels appeared in public hearings she told the Committee:

I would be uncomfortable with the notion of going down the path that some jurisdictions have of adopting a mandatory sentencing approach. I do not think that that does justice to anybody, quite frankly. It is not in the interests of our system that judicial officers are precluded from taking the circumstances of the case before them into account.³³¹

4.49 She went on to note that ‘some jurisdictions have gone down that path—most recently New South Wales with its one-punch laws’. In connection with this, she told the Committee that in recent discussion a judge in NSW had told her that:

“There’s going to be a case that crosses my path very soon and I’m going to have to send a young guy who is responding to some kind of provocation away for eight years, and the community that has been wanting tougher sentences is going to be breathing down my neck saying, ‘Here’s this poor fellow who was in the wrong place at the wrong time’.”³³²

³²⁹ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.118.

³³⁰ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, pp.118-119.

³³¹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.153.

³³² Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.153.

4.50 Regarding this, she told the Committee that she thought reflected ‘the concern that judicial officers have—that if they have their discretion removed, justice will not be served in some cases’.³³³

4.51 When the Attorney-General appeared in public hearings he stated that:

that this government does not support the introduction of mandatory minimum sentences. Mandatory minimum sentences can undermine judicial independence and removing from the judge or magistrate the capacity to properly impose a sentence that takes into account all of the relevant factors can lead to unjust, indiscriminate and potentially arbitrary outcomes for individuals.³³⁴

4.52 In relation to recent matters of community concern about the management of sex offenders, he told the Committee that there were other measures that would answer these concerns:

The action currently taken by the government by providing a strong framework for monitoring of child sex offenders and increasing information-sharing opportunities between the police and relevant agencies improves the ability of law enforcement to protect children in our community.³³⁵

SUMMARY

4.53 The Committee notes contributions received regarding mandatory sentencing.

4.54 Arguments included:

- that mandatory sentencing was not a feature of the ACT sentencing framework;³³⁶
- that mandatory sentencing in other jurisdictions tended to be the result of calls to respond to particular high profile cases;³³⁷
- that under mandatory sentencing regimes, including in the form of ‘standard non-parole periods’ as in NSW, imposed a uniform punishment on offences that could be committed in a wide range of circumstances, with differing degrees of culpability;³³⁸
- that mandatory sentencing removed incentives for offenders to plead guilty, resulting in more cases going to trial, resulting in greater expenditure of time and money in the courts;³³⁹

³³³ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.153.

³³⁴ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.3.

³³⁵ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.3.

³³⁶ Australian Lawyers Alliance, Submission No. 4, p.2.

³³⁷ Australian Lawyers Alliance, Submission No. 4, p.2.

³³⁸ Australian Lawyers Alliance, Submission No. 4, p.4.

- that mandatory sentencing does not ‘achieve “justice” ‘ and was ‘a blunt response to nuanced issues’, which did not ‘allow for the exceptional case’;³⁴⁰
- that mandatory sentencing perverts criminal justice systems because it ‘invariably leads to persons involved in the system (defence, judges and prosecutors) trying to massage an inflexible and unfair system to provide an appropriate and just outcome’;³⁴¹
- that mandatory sentencing regimes ‘judicial discretion and individualised justice is replaced with a one size fits all approach which in practice leads to injustice and other unintended consequences’;
- that, in contrast to the approach taken under mandatory sentencing, ‘judges should retain a discretion to deal with each matter on its merits’.³⁴²
- that mandatory sentencing is ‘anathema to individualised sentencing and, indeed, to justice in every sense’;³⁴³
- that ‘[r]emoving judicial discretion prevented judicial officers from tailoring responses given the circumstances of particular offending’;³⁴⁴
- that mandatory sentencing led to ‘to people trying to get around it—from the lawyers to the judges to the community’, and that it was better to deal with individual cases on their merits;³⁴⁵
- that the genesis of mandatory sentencing as a response high profile cases was contrary to ‘the accepted principle that ‘[i]ndividual cases make bad law’;³⁴⁶
- that mandatory sentencing was ‘hugely problematic’ due to its disproportionate impact on ‘certain sectors of the community’, particularly Indigenous people;³⁴⁷
- that mandatory sentencing regimes impose a similar penalty on crimes of different degrees of seriousness, and that arbitrary effects in this sense were particularly evident in connection with aggravated offences;³⁴⁸
- that mandatory sentencing ‘does not allow the balancing’ which is an integral part of the work of judicial officers;³⁴⁹

³³⁹ Australian Lawyers Alliance, Submission No. 4, p.4; see also Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.140.

³⁴⁰ Australian Lawyers Alliance, Submission No. 4, p.4.

³⁴¹ Australian Lawyers Alliance, Submission No. 4, p.4.

³⁴² Australian Lawyers Alliance, Submission No. 4, p.4.

³⁴³ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

³⁴⁴ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

³⁴⁵ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

³⁴⁶ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.108.

³⁴⁷ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.138.

³⁴⁸ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.138.

³⁴⁹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.139.

- that this also results in a reduction of scope for judicial officers to ‘turn their mind to what is in the best interests of the community and what is in the best interests of the offender’;³⁵⁰
- that the ACT has a ‘fairly sophisticated system ... enshrined in legislation ... of rewarding or discounting sentences for pleas of guilty’, and that this not only demonstrates the defendant’s ‘remorse and contrition’ but saves ‘the court’s hearing time and resources’ and avoids ‘putting witnesses and victims through the trauma of giving evidence’, as well as producing ‘an early result’;³⁵¹
- that ‘mandatory sentencing is not a favoured outcome from a criminal law point of view’ because ‘it discourages people from pleading guilty because there is no benefit to be gained from a plea of guilty being entered’;³⁵²
- that mandatory sentencing ‘generally ... ends up with most of the models having an out clause, so to speak, for the judicial officer to depart from a standard position in special circumstances’. As a result, ‘all of the effort [for a judicial officer] comes when departing from the standard position’;³⁵³
- that there are other measures, including appeals by the Crown on grounds of manifestly inadequate sentence³⁵⁴ and, in connection with sex offenders, monitoring and information-sharing among agencies,³⁵⁵ which answer the concerns which mandatory sentencing intended to address; and
- that the ACT Government ‘does not support the introduction of mandatory minimum sentences’.³⁵⁶

COMMITTEE COMMENT

4.55 The Committee notes that the overwhelming majority of contributions to the inquiry were not in favour of mandatory sentencing,³⁵⁷ on the grounds that: it compromised judicial balancing and discretion; made it difficult for courts to work according to the principle of individualised justice; reduced or removed incentives for guilty pleas; made court processes less efficient; and provided perverse incentives for courts to find ways to avoid dealing with offenders under charges to which mandatory sentencing provisions were attached.

³⁵⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.139.

³⁵¹ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, pp.140-141.

³⁵² Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.56.

³⁵³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.63.

³⁵⁴ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.64.

³⁵⁵ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.3.

³⁵⁶ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.3.

³⁵⁷ With the exception of Bravehearts, Submission No.17, pp.7, 8-9.

- 4.56 The Committee also notes that mandatory sentencing would appear to represent an entirely opposite direction to the representations it has heard on the advantages of Intensive Corrections Orders and other forms of enhanced supervision and, indeed, the measures most likely to deal effectively with the ACT's high rates of recidivism as are considered elsewhere in this report.
- 4.57 In light of these reflections, the Committee notes and endorses statements by the ACT Government, quoted in this report, attesting to the Government's opposition to mandatory sentencing.³⁵⁸

SUSPENDED SENTENCES

- 4.58 Concerns were expressed about the administration of suspended sentences in the ACT, including whether custodial sentences were imposed in those instances where offenders were found to be in breach of conditions set out in the initial sentencing. These concerns were raised in submissions by the Director of Public Prosecutions, the Victims of Crime Commissioner, and the Human Rights Commissioner, and are considered below.

DIRECTOR OF PUBLIC PROSECUTIONS

- 4.59 The submission to the inquiry by the Director of Public Prosecutions (the DPP) stated that the 'efficacy of suspended sentences is much discussed by criminal lawyers' and that recently Victoria had 'taken steps to abolish suspended sentences, initially for more serious matters'.³⁵⁹

- 4.60 The submission went on to say that:

In theory suspended sentences are high on the hierarchy of sentencing options, ranking just below sentences of actual imprisonment. This is because before a suspended sentence can be imposed a Court has to be satisfied that it is appropriate that the offender receive a custodial sentence.³⁶⁰

- 4.61 However, it suggested:

if the sentence of imprisonment which underlies the suspended sentence is not generally activated when the offender is dealt with for a breach of the suspended sentence, this has potential to weaken public confidence in the sentencing system.³⁶¹

³⁵⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.3.

³⁵⁹ Director of Public Prosecutions, Submission No.3, pp.1

³⁶⁰ Director of Public Prosecutions, Submission No.3, pp.1

³⁶¹ Director of Public Prosecutions, Submission No.3, p.2.

4.62 Other jurisdictions had made a legislative response to these risks:

Most Australian jurisdictions (including New South Wales and Victoria) embody in legislation a presumption that where a suspended sentence is breached, then the underlying sentence will be activated. For example in New South Wales it is provided that where a suspended sentence is breached, the Court must impose the underlying sentence of imprisonment unless it is positively satisfied that the offender's failure which led to the breach was trivial or there are good reasons for excusing the failure.³⁶²

4.63 In fact, the submission advised, the ACT was 'one of the few Australian jurisdictions where there is no presumption of activation of the sentence on breach'.³⁶³

HEARINGS

4.64 When he appeared before the Committee in public hearings of 19 May 2014, the DPP made further comment on suspended sentences.

4.65 The DPP noted the 2010 ACT Law Reform Advisory Council inquiry into suspended sentences and commented that this 'unfortunately did not really provide any firm recommendations to government and really left the issue to be further debated'.³⁶⁴

4.66 He told the Committee that he had found suspended sentences 'one of the most controversial and worrying aspects of the sentencing process', that is: 'worrying ... in terms of the result from the point of view of victims'.³⁶⁵

4.67 He went on to say that:

It is fair to say that in the ACT there has been a history of suspended sentences being imposed but when they have been breached the offender has not been sent to serve the sentence of imprisonment that was suspended.³⁶⁶

4.68 Moreover, he told the Committee, there had been 'many judicial pronouncements' stating that this brings suspended sentences 'into disrepute'.³⁶⁷

³⁶² Director of Public Prosecutions, Submission No.3, p.2.

³⁶³ Director of Public Prosecutions, Submission No.3, p.2.

³⁶⁴ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

³⁶⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

³⁶⁶ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

³⁶⁷ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

4.69 The DPP went on to tell the Committee that all other jurisdictions had provision for ‘activation on breach’ in the context of suspended sentences, meaning that:

if a suspended sentence is imposed and then a breach of that suspended sentence is shown, there will be effectively a presumption that the person will serve the term that was otherwise suspended. That is the way it operates in most other, if not all other, Australian jurisdictions now. So in other words, there is a presumption that once the breach is shown, then the original sentence will be carried out.³⁶⁸

4.70 He also told the Committee that ‘it may now be that the ACT is alone in not having activation on breach’.³⁶⁹

4.71 Previously, the DPP told the Committee, his office had conducted a project in which ‘tried to identify matters in the Supreme Court over a particular area as to what had happened to people who came before the court on a breach of a suspended sentence’. Findings were that ‘in over 50 per cent of those cases the person was simply resentenced to another suspended sentence’ and in ‘a number of cases, no action was taken’. Overall, this amounted to there being ‘in something like three-quarters of all of the cases’, outcomes in which the offender ‘was either resentenced with a suspended sentence or no action was taken’.³⁷⁰

4.72 There were two problems which arose from this situation, he told the Committee. First, in formal terms ‘in a hierarchy of sentences, suspended sentences rank just below the sentence of imprisonment’ and, as a result:

a judicial officer may not impose a suspended sentence on somebody, clearly, unless they have come to the view that that person should serve imprisonment as distinct from any other punishment.³⁷¹

4.73 In relation to this, the DPP told the Committee, there was a ‘truth-in-sentencing issue here’ in that he suspected that sometimes:

a suspended sentence is imposed when it is really an attempt to make the sentence appear more severe than it really is and there really is no intention other than to give a good behaviour bond but a suspended sentence sounds like a more severe sentence.³⁷²

4.74 A second cause for concern, he told the Committee, was that:

if a suspended sentence is wrongly imposed for that reason and breached, then it is possible that the person can fall into the net of having the term of imprisonment

³⁶⁸ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.58.

³⁶⁹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.58.

³⁷⁰ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.58.

³⁷¹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.58.

³⁷² Mr Jon White, *Transcript of Evidence*, 19 May 2014, pp.58-59.

imposed upon them when that term of imprisonment was not appropriate in the first place.³⁷³

4.75 There were instances, he told the Committee, in which:

there was not a properly considered decision in the first place to impose the suspended sentence, and then, when the judicial officer comes to consider what sentencing outcome they want, they pull back from the concept of imprisonment.³⁷⁴

4.76 'In that situation', he the Committee, 'a suspended sentence should not have been given', because:

a suspended sentence is a sentence of imprisonment where the judicial officer has determined that the person must go to jail. And obviously under our sentencing legislation, imprisonment is a last resort. So all alternatives to imprisonment should be explored before there is an easy resort to suspended sentence.³⁷⁵

4.77 He went on to say that 'in the study that we did we found' that:

most of the breaches were for people who reoffended. So this is not someone who does not comply with the bail condition or something like that or some minor breach; this is some form of reoffending. That is generally why the person is brought before the court. If it were appropriate to provide a suspended sentence in the first place, one would think that further offending would indicate that the time had come to move on to full-time imprisonment. But that has not tended to be the way that it has worked.³⁷⁶

4.78 In light of this he supported the introduction of intensive corrections orders. 'From the point of view of the aims of sentencing', he told the Committee, 'clearly rehabilitation will be an important one', and that a suspended sentence was usually:

an indication by the court that they want the offender to rehabilitate themselves and they are effectively on their last chance. That is ... routinely ... said by magistrates and judges when they impose suspended sentences.³⁷⁷

4.79 In relation to this, he told the Committee, 'the point is' that it may be 'better to move directly to rehabilitation in an intensive way', 'particularly in view of recidivism rates' rather than proceeding by way of suspended sentence.³⁷⁸

³⁷³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.59.

³⁷⁴ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.59.

³⁷⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.59.

³⁷⁶ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.59.

³⁷⁷ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.60.

³⁷⁸ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.60.

4.80 Consistent with this, he noted that Victoria was ‘in the process of abolishing suspended sentences’: it had already taken place in superior courts and it was being considered ‘in relation to summary courts’.³⁷⁹

4.81 This approach, he told the Committee, ‘has much to commend it’. Victoria had also recently introduced ‘a concept of community corrections orders’, which was: ‘an omnibus description of a whole series of orders , including ... something akin to the old intensive corrections order in Victoria’, which constituted ‘a suite of available measures ... to deal with matters’. In this context, he told the Committee, Victoria was ‘proceeding on the basis that they do not need ... suspended sentences at all’.³⁸⁰

VICTIMS OF CRIME COMMISSIONER

4.82 The submission to the inquiry by the Victims of Crime Commissioner raised a number of concerns about suspended sentences in the ACT.

4.83 These included:

- the need to continue with suspended sentences as a sentencing option;
- shortfalls in accessible information on how suspended sentences were administered in the ACT;
- concerns over contemporary practice where good behaviour orders associated with suspended sentences were breached;
- concerns over the range of offences for which suspended sentences could be applied in the ACT; and
- implications of suspended sentences for victims of crime, in particular consideration of the safety of victims, and whether adequate information was provided to victims about the character and reasoning behind suspended sentences where they had been applied.

4.84 These are considered below.

THE NEED TO CONTINUE WITH SUSPENDED SENTENCES

4.85 The submission supported the continuation of suspended sentences:

I support the usefulness of suspended sentences. For example I agree that suspended sentences can be effective as a deterrent against reoffending and that avoiding imprisonment can avoid the ‘notoriously corrupting influences of prison’.³⁸¹

³⁷⁹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

³⁸⁰ Mr Jon White, *Transcript of Evidence*, 19 May 2014, pp.57-58.

³⁸¹ Victims of Crime Commissioner, Submission No.10, p.13.

- 4.86 Moreover, suspended sentencing should be continued because abolishing this ‘sentencing option’ would be undesirable because it would be ‘inconsistent with the 1986 United Nations Standard Minimum Rules for Non-Custodial Measures, and could threaten the ACT Courts’ capacity to apply individualised justice’.³⁸²

SHORTFALLS IN DATA ON SUSPENDED SENTENCES

- 4.87 The Commissioner’s submission prefaced its remarks by highlighted shortcomings in available information on suspended sentences in the ACT, suggesting that there was:

little data available on the nature and number of breaches of Good Behaviour Orders (GBOs) in the ACT; and equally little data available on the consequences and outcomes of breaches that are confirmed by the courts.³⁸³

- 4.88 In relation to this, it noted that the 2010 ACT Law Reform Advisory Council (LRAC) report had ‘identified issues related to ACT data collection that causes difficulties in accurately determining suspended sentence rates and breach rates and outcomes’, and that until the sentencing database was accessible and had gathered information ‘for a number of years’, it made it more difficult to ‘to argue specific concerns relating to sentencing practices in the ACT, particularly as they relate to suspended sentences’.³⁸⁴

BREACHES OF CONDITIONS

- 4.89 The concerns raised by the submission were, then, to do how suspended sentences were applied and administered in the ACT. One concern was consistent with that raised by the DPP, regarding whether a custodial sentence is applied as a matter of course where conditional orders are breached.³⁸⁵
- 4.90 The submission noted that the ACT was ‘the only remaining jurisdiction in Australia ‘that did not have ‘a statutory presumption of activation of the original sentence of imprisonment on occurrence of a breach’. Tasmania had recently introduced ‘legislative amendments that brought it into line with the other states and territories’ in this regard.³⁸⁶
- 4.91 This, it advised, had significant implications for victims of crime. The submission stated that the Commissioner had been advised of ‘numerous instances’ where victims had felt dissatisfaction with suspended sentences.³⁸⁷ It also cited research that showed victims ranking suspended

³⁸² Victims of Crime Commissioner, Submission No.10, p.13.

³⁸³ Victims of Crime Commissioner, Submission No.10, p.13.

³⁸⁴ Victims of Crime Commissioner, Submission No.10, p.13.

³⁸⁵ Victims of Crime Commissioner, Submission No.10, p.3.

³⁸⁶ Victims of Crime Commissioner, Submission No.10, p.14.

³⁸⁷ Victims of Crime Commissioner, Submission No.10, p.13.

sentences ‘as the least severe community-based sentencing option’,³⁸⁸ (thus contrasting with the formal view, that suspended sentences are ‘high on the hierarchy of sentencing options, ranking just below sentences of actual imprisonment’).³⁸⁹

4.92 This, the submission suggested, illustrated a general principle that:

Lax enforcement [of suspended sentences] or repeated warnings will undermine the deterrent effect, and lead to a perception among offenders that such sentences are far from being equivalent to a true custodial sentence, which in turn undermine public and professional confidence.³⁹⁰

4.93 In relation to this the submission suggested that while the courts ‘must retain some flexibility and discretion in how they treat breaches’:³⁹¹

... consideration needs to be given to whether the ACT should introduce a statutory presumption of activation of the original sentence of imprisonment on occurrence of a breach of a good behaviour order that is attached to a suspended sentence.³⁹²

4.94 However, the submission suggested, better outcomes were possible, given a different approach. There was:

... evidence to suggest that victims are more likely to support suspended sentences that they perceive have adequately tough conditions associated and that will be appropriately enforced.³⁹³

4.95 In relation to this issue, the submission noted that the 2010 LRAC report on suspended sentences had posed the question: ‘what should be the consequences of the breach of a condition of the good behaviour order associated with a suspended sentence?’, and that in 2011 the ACT Government had undertaken to ‘consult with criminal justice stakeholders to consider whether the ACT should include a presumption’.³⁹⁴

4.96 The submission stated that the Commissioner did not believe that this consultation had taken place, and suggested that it should ‘as a matter of priority’.³⁹⁵ It called on the Government to

³⁸⁸ Victims of Crime Commissioner, Submission No.10, p.13.

³⁸⁹ Director of Public Prosecutions, Submission No.3, p.1.

³⁹⁰ Victims of Crime Commissioner, Submission No.10, p.14.

³⁹¹ Victims of Crime Commissioner, Submission No.10, p.14.

³⁹² Victims of Crime Commissioner, Submission No.10, p.14.

³⁹³ Victims of Crime Commissioner, Submission No.10, p.14.

³⁹⁴ Victims of Crime Commissioner, Submission No.10, p.14.

³⁹⁵ Victims of Crime Commissioner, Submission No.10, p.14.

‘keep its commitment’,³⁹⁶ and urged the Committee to assess ‘how breaches of such good behaviour orders are current being managed’.³⁹⁷

RANGE OF OFFENCES

- 4.97 The submission also expressed concern over a ‘lack of legislative restriction on offence type and the use of suspended sentences in the ACT’.³⁹⁸ He contrasted this with arrangements in other jurisdictions:

I understand that in the ACT suspended sentences are available for all offences; while New South Wales, Northern Territory, and Victoria do not allow suspended sentences for prescribed serious offences.³⁹⁹

- 4.98 Reflecting on this, it questioned ‘the appropriateness of fully and (at times) partially suspended sentences for some more serious offences’, such as ‘sexual assault and murder, especially when considered from the perspective of the victim/s, their friends and family’.⁴⁰⁰ This lack of restriction in the ACT was, it advised, ‘concerning to victims of serious crime’.⁴⁰¹

DUE CONSIDERATION TO VICTIMS

- 4.99 A further question raised by the submission was whether victims of crime were being kept adequately informed regarding ‘the reasoning, implications of, and conditions associated with the sentence’.⁴⁰²

- 4.100 Regarding this, it stated that:

when a suspended sentence (or any sentence for that matter) is imposed, it is important that the victim is provided with adequate information to understand the rationale behind the sentence, as well as the full conditions of the sentence.⁴⁰³

- 4.101 The submission also noted that:

s 4(k) of the *Victims of Crime Act 1994*, requires that victims should be given an explanation of the outcome of criminal proceedings and of any sentence and its implications.⁴⁰⁴

³⁹⁶ Victims of Crime Commissioner, Submission No.10, p.3.

³⁹⁷ Victims of Crime Commissioner, Submission No.10, p.15.

³⁹⁸ Victims of Crime Commissioner, Submission No.10, p.3.

³⁹⁹ Victims of Crime Commissioner, Submission No.10, p.13.

⁴⁰⁰ Victims of Crime Commissioner, Submission No.10, p.13.

⁴⁰¹ Victims of Crime Commissioner, Submission No.10, p.3.

⁴⁰² Victims of Crime Commissioner, Submission No.10, p.3.

⁴⁰³ Victims of Crime Commissioner, Submission No.10, p.14.

4.102 While the submission assumed that ‘this governing principle is complied with in the majority of matters that are before the Supreme Court’, it was ‘less certain ... for sentences handed down in the Magistrates Court’.⁴⁰⁵

HEARINGS

4.103 The Victims of Crime Commissioner made further comment on suspended sentences when he appeared before the Committee in hearings of 14 October 2014.

4.104 Asked to comment on the effect of suspended sentences, as they are currently managed in the ACT, on victims of crime, the Commissioner told the Committee they could have a negative effect, including for perceptions and confidence in the justice system:

People can accept the fact that a court will give someone a chance. If someone deserves a period of imprisonment and they are given a suspended sentence; that is the opportunity that people are given to turn their lives around. But when that same person comes back before the court and they are given another chance, that is when people lose trust, confidence and patience.⁴⁰⁶

4.105 The Commissioner went on to put say that this was what he saw ‘too often’. When applied in this way suspended sentences were ‘a cop-out’. Rather, it should be that:

If they were applied when someone breached their order, that had a suspended sentence associated with it, they should be made to face the consequences of what the suspended sentence was meant for, at all times allowing the court some discretion around that application.⁴⁰⁷

4.106 However in practice, he told the Committee, in instances of breach ‘it seems to me that I very often see a reapplication of a suspended sentence or a resentencing’.⁴⁰⁸

DR LORANA BARTELS

4.107 When she appeared before the Committee in a public hearing of 26 May 2014 Dr Lorana Bartels noted that the ACT was the only jurisdiction which did not have a legal presumption of activation on breach where a suspended sentence was in force.⁴⁰⁹

⁴⁰⁴ Victims of Crime Commissioner, Submission No.10, p.14.

⁴⁰⁵ Victims of Crime Commissioner, Submission No.10, p.14.

⁴⁰⁶ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.177.

⁴⁰⁷ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.177.

⁴⁰⁸ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.177.

⁴⁰⁹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.154.

4.108 Considering the regimes in place in other jurisdictions, she told the Committee:

it may be the case that we have now reached a point where we say, “If we want to have suspended sentences they do need to mean what they say.” That means that if an offender breaches it, at least the presumption should be that it would be activated unless there was some good reason, as we can see, for them to have committed this breach, and taking into account what the nature of the breach was.⁴¹⁰

4.109 She acknowledged that ‘changing that might make some judicial officers less likely to impose suspended sentences’, but told the Committee that she did not ‘necessarily think that would be a bad thing’:

Certainly, from my experience in Tasmania, where I interviewed all the judges and most of the magistrates, it emerged that although obviously it is formally a custodial sentence and that you are not to impose that sort of sentence until you have determined that no other sentence is appropriate, there were instances of judicial officers imposing them on first-time offenders and they really were not thinking, “This is a sentence of imprisonment.” Instead, they were thinking, “This is a beefed up good behaviour order,” or, “This is a strong message.” They were not necessarily anticipating that, if they breached, these people would be going to prison.⁴¹¹

4.110 Dr Bartels went on to observe that ‘that if we were to create a presumption of activation on breach ... that would change the use of them somewhat’. However there was ‘certainly ... a place for them and we need to retain them, including for serious offences’. She acknowledged that some other jurisdictions had removed them ‘as an option for serious offences’, but did not think this was ‘the right way to go’.⁴¹²

4.111 She told the Committee her support for the continuation of suspended sentences stemmed from research she had undertaken showing that suspended sentences had been applied, ‘across Australia’, in cases of euthanasia or ‘assisted suicide’. These were cases, she told the Committee:

where judges were recognising that what these people had done was very serious. Often the offenders were themselves quite elderly and obviously very distressed, and they were imposing suspended sentences.⁴¹³

⁴¹⁰ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, pp.154-155.

⁴¹¹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.155.

⁴¹² Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.155.

⁴¹³ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.155.

4.112 She told the Committee that if, however:

you were to create a blanket statement that says, “Any offence resulting in death shall not have a suspended sentence available,” you would be precluding their use in those sorts of cases.⁴¹⁴

4.113 While such cases were not common, a similar principle applied for other offences such as ‘culpable driving causing death’ which, she told the Committee, was ‘the sort of matter where there are often strong mitigating factors in the offender’s favour’:

You need to make a strong statement that says that a custodial sentence is warranted, but I think there are certainly circumstances where a suspended sentence is the appropriate outcome.⁴¹⁵

ACT HUMAN RIGHTS COMMISSIONER

4.114 The submission to the inquiry by the ACT Human Rights Commissioner referenced the 2010 LRAC review of suspended sentences, in which the Commissioner took part.

4.115 It noted that the review report concluded with policy questions which needed further consideration, including:

1. Should suspended sentences be a sentencing option in the ACT?
2. What should be the consequences of the breach of a condition of the good behaviour order associated with a suspended sentence?
3. What can be done to enhance consistency and predictability in the imposition of suspended sentences?
4. Does the terminology that is used adequately convey the nature of a suspended sentence?

4.116 The Commissioner’s submission noted that the Government response to the report had agreed that these questions would benefit from further consideration. These, the submission suggested, were ‘still relevant’ and warranted ‘further investigation’.⁴¹⁶

ACT LAW SOCIETY

4.117 The ACT Law Society made comment on suspended sentences in the ACT when it appeared in hearings of 19 May 2014.

4.118 In particular the Society made representations that the burden of conditions set for suspended sentences varied according to the socioeconomic status of the offender: that is, conditions

⁴¹⁴ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.155.

⁴¹⁵ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.155.

⁴¹⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.9.

were more onerous for offenders of lower socioeconomic status, and they were at greater risk of breaching conditions due to factors less in their control than might be assumed.

4.119 In his opening statement, the President of the Society's Criminal Law Committee told the Committee that:

With regard to a number of other submissions that have been made, I note that the DPP has made some recommendations with regard to suspended sentences. On the basis that the society really is of the view that the more options available, the better, we do not necessarily agree that suspended sentences should disappear. But I do take the point that the director makes from time to time that breaches do not automatically result in the activation of the sentence. In our view, there are a whole range of reasons for that, and it is really important that the discretion of the sentencing court be retained for decisions about whether or not it should be activated.⁴¹⁷

4.120 Later in the hearing the President of the Committee was asked to expand on these comments. He told the Committee that there were 'a range of things' that were affected, but 'the most important thing is reporting':

The circumstances are that often you will have people who live quite a long way away from where they are expected to report, so there is always difficulty around getting transport to, in fact, meet their obligations of reporting to their parole officer. Whether it is the case that they simply do not have a motor vehicle or whether it is the case that they cannot afford the bus fare at the time, it is those sorts of minor issues that I was particularly talking about.⁴¹⁸

4.121 The Chair of the Society's Criminal Law Committee added to this, telling the Committee that:

There is also, related to that, the issue that if you are in a lower socioeconomic group and you are confronted with a choice of meeting a reporting obligation, meeting with a parole officer or someone from Corrective Services, versus a day's employment, that decision is much harder than it is for someone who is employed in stable employment and can simply get a couple of hours off from their job and it does not affect their income; they can make up the time later. So there are impacts like that. Coming from a position of stable employment it would not be an issue, whereas coming from a position of very ad hoc, perhaps completely infrequent employment, that decision is a very confronting and very real dilemma. For others who have stable employment the dilemma would not arise because they would be able to either make up the hours with their employer or simply take leave from that stable employment.⁴¹⁹

⁴¹⁷ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.77.

⁴¹⁸ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.83.

⁴¹⁹ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.83.

4.122 The President of the Committee told the Committee that this was not only to do with conflicts between working hours and the obligation for the person to report to satisfy court orders:

It is not only that. It is the fact that they do not have very much money. Often they have mental health issues or other health issues that make it difficult for them to comply with particular orders. I am not wanting to raise the issue as being too big an issue, because I know that in respect of breach orders often it is because further offences have been committed, for example. But it is often the case that people find themselves on a downward spiral, mainly because they simply do not have the wherewithal within themselves to be able to comply with fairly simple directions as far as the rest of us are concerned. For somebody who has a mental health issue or a health issue or has not got any money or has no self-esteem, it is difficult to comply with even the very small things that they are asked to do.⁴²⁰

4.123 The Chair of the Committee added to this, telling the Committee that there was:

also an issue at the sentencing stage as to how much information is before a court as to that ability to comply. Although there is a lot of focus in pre-sentence reports on ability to complete, for example, community service and a specific assessment is made as to that fact, there is less focus, and therefore less information before a judge or magistrate, on those issues.⁴²¹

4.124 He went on to say that it may be the case that 'It may be the case that conditions are imposed which, with the benefit of hindsight, are unrealistic'. It was important to 'leave some discretion in the court', as this allowed 'the court to acknowledge that fact'. If there were 'not that discretion, there cannot be such an acknowledgement', and if 'there were to be no discretion', it would 'put more pressure on Corrective Services to make a more detailed assessment of those issues up-front to avoid that'.⁴²²

SUMMARY

4.125 The Committee notes the views put to it regarding suspended sentences.

4.126 Arguments included:

- that if the suspended sentence is 'not generally activated' where conditions are breached, it has the 'potential to weaken public confidence in the sentencing system';⁴²³

⁴²⁰ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.83.

⁴²¹ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, pp.83-84.

⁴²² Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.84.

⁴²³ Director of Public Prosecutions, Submission No.3, p.2.

- that the ACT was ‘one of the few Australian jurisdictions where there is no presumption of activation of the sentence on breach’ of conditions for a suspended sentence;⁴²⁴
- that suspended sentences were ‘one of the most controversial and worrying aspects of the sentencing process’, and were particularly ‘worrying ... in terms of the result from the point of view of victims’;⁴²⁵
- that there had been ‘many judicial pronouncements’ in the ACT stating that failure to activate custodial sentences brought suspended sentences ‘into disrepute’;⁴²⁶
- that ‘activation on breach’ was the norm in all other Australian jurisdictions;⁴²⁷
- that despite suspended sentences falling just below custodial sentences in the hierarchy of penalties, it may demonstrate a judicial officer’s intention to apply a good behaviour bond ‘but a suspended sentence sounds like a more severe sentence’;⁴²⁸
- that if a ‘if a suspended sentence is wrongly imposed for that reason and breached, then ... the person can fall into the net of having the term of imprisonment imposed upon them when that term of imprisonment was not appropriate in the first place’;⁴²⁹
- that ‘in view of recidivism rates’ it would be more effective ‘to move directly to rehabilitation in an intensive way’, rather than proceeding by way of suspended sentence’;⁴³⁰
- that Victoria had abolished suspended sentences in superior courts and this was being considered for summary courts (that is, Magistrates’ and Children’s courts);⁴³¹
- that suspended sentences should be maintained as a sentencing option in the ACT because they were an effective deterrent against offending while avoiding the ‘notoriously corrupting influences of prison’;⁴³²
- that abolishing suspended sentences would be ‘inconsistent with the 1986 United Nations Standard Minimum Rules for Non-Custodial Measures’, and ‘could threaten the ACT Courts’ capacity to apply individualised justice’;⁴³³

⁴²⁴ Director of Public Prosecutions, Submission No.3, p.2, and see Victims of Crime Commissioner, Submission No.10, p.14, Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.154.

⁴²⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

⁴²⁶ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

⁴²⁷ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.58.

⁴²⁸ Mr Jon White, *Transcript of Evidence*, 19 May 2014, pp.58-59.

⁴²⁹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.59.

⁴³⁰ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.60.

⁴³¹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

⁴³² Victims of Crime Commissioner, Submission No.10, p.13 and see Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.155, Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.77.

⁴³³ Victims of Crime Commissioner, Submission No.10, p.13.

- that there had historically been an absence of reliable data on breaches of suspended sentences in the ACT;⁴³⁴
- that community perceptions of suspended sentences saw them rated as ‘the least severe community-based sentencing option’ when, by formal convention, they were ranked ‘just below sentences of actual imprisonment’;⁴³⁵
- that ‘consideration needs to be given to whether the ACT should introduce a statutory presumption of activation of the original sentence of imprisonment on occurrence of a breach of a good behaviour order that is attached to a suspended sentence’;⁴³⁶
- that in 2011 the ACT Government had undertaken to ‘consult with criminal justice stakeholders to consider whether the ACT should include a presumption’;⁴³⁷
- that there was ‘lack of legislative restriction on offence type and the use of suspended sentences in the ACT’;⁴³⁸
- that it was uncertain as to whether victims of crime were being kept adequately informed regarding ‘the reasoning, implications of, and conditions associated with the sentence’, as provided for under s 4(k) of the Victims of Crime Act 1994;⁴³⁹
- that if sentences were not applied on breach it led to victims of crime losing ‘trust, confidence and patience’ with the criminal justice system;⁴⁴⁰
- that breaches often result in the ‘reapplication of a suspended sentence or a resentencing’;⁴⁴¹
- that there were particular offences and circumstances for which suspended sentences were a particularly useful sentencing option;⁴⁴²
- that it was important to maintain the discretion of the courts over whether activation of a suspended sentence due to the unequal effect of conditions on offenders of different socioeconomic backgrounds;⁴⁴³ and

⁴³⁴ Victims of Crime Commissioner, Submission No.10, p.13.

⁴³⁵ Director of Public Prosecutions, Submission No.3, p.1.

⁴³⁶ Victims of Crime Commissioner, Submission No.10, p.14 and see Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, pp.154-155..

⁴³⁷ Victims of Crime Commissioner, Submission No.10, p.14.

⁴³⁸ Victims of Crime Commissioner, Submission No.10, p.3.

⁴³⁹ Victims of Crime Commissioner, Submission No.10, pp.3, 14.

⁴⁴⁰ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.177.

⁴⁴¹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.177.

⁴⁴² Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.155.

⁴⁴³ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, pp.77, 83, and Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.83..

- that it would produce better and more just outcomes if courts were better informed on the capacity of offenders to comply with orders associated with suspended sentences, and that this would help the court to avoid imposing ‘unrealistic’ conditions on offenders.⁴⁴⁴

COMMITTEE COMMENT

- 4.127 The Committee notes the breadth of comment which the inquiry attracted regarding suspended sentences, embracing a range from suggestions that suspended sentences could be abolished, to support for statutory provision for activation on breach, to arguments in favour of a continued discretion by the courts as to whether sentences were activated on breach.
- 4.128 However, the Committee also notes a strand of agreement amongst contributors that in the ACT both the practice and community perceptions of suspended sentences were unclear and at times brought a risk of reducing public confidence in sentencing outcomes.
- 4.129 In the Committee’s view it is clear that something should be done, and there are a number of possible solutions.
- 4.130 In the Committee’s view relevant legislation should be amended to insert a presumption of activation on breach, but with a clause which allows courts to retain discretion while placing on record the reasons for departure from the presumption. This would mean that if, for example, conditions were breached in a number of cases due to the imposition of unrealistic conditions then courts would be obliged to make this explicit and could, on the basis of these remarks, refine orders made in connection with suspended sentences.
- 4.131 The Committee notes, however, that if Intensive Corrections Orders were to be introduced in the ACT, as discussed below, then the availability of a broader and more flexible range of orders, potentially, would be likely to result in a reduced reliance by ACT courts on suspended sentences.

INTENSIVE CORRECTIONS ORDERS

- 4.132 Contributions to the inquiry considered whether intensive corrections orders should be a sentencing option in the ACT.
- 4.133 These included contributions by:
- the Alcohol Tobacco and Other Drug Association ACT;
 - the ACT Council of Social Services (ACTCOSS);

⁴⁴⁴ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, pp.83-84.

- the ACT Bar Association;
- the ACT Law Society; and
- the Director of Public Prosecutions.

4.134 Some of these refer to Intensive Corrections Orders in NSW or Community Correction Orders in Victoria as possible models for a similar scheme in the ACT, and are considered below.⁴⁴⁵

4.135 A final part of this section notes the Minister for Correction's media release of 31 March 2014, which among other things indicated that the ACT government would end periodic detention and consider whether community correction orders would be its successor.⁴⁴⁶

ALCOHOL TOBACCO AND OTHER DRUG ASSOCIATION ACT

4.136 In its submission to the inquiry the Alcohol Tobacco and Other Drug Association ACT (ATODA) drew attention to research 'that demonstrates community service orders are more effective than bonds when it comes to reducing recidivism'.⁴⁴⁷ In particular it referenced a 2013 research paper by Snowball and Bartels, which 'demonstrated that adults given a community service order are less likely to reoffend than offenders given a bond, after controlling for other relevant and available characteristics'.⁴⁴⁸

4.137 In light of this, this submission suggested that the ACT 'streamline' processes for community orders by merging 'a variety of different community orders into a single order' so that 'courts have discretion to apply certain requirements'.⁴⁴⁹

4.138 This would, the submission suggested:

- 'permit the introduction of specific requirements needed to implement novel approaches';
- 'increase court discretion [which could] help to tailor orders to the specific characteristics and risks of each offender'; and
- 'reduce court costs and resources expended in managing offenders in the community'.⁴⁵⁰

4.139 The submission then went on to consider a similar scheme which had been introduced in Victoria, which provides for Community Correction Orders (CCOs). It quoted a Victorian

⁴⁴⁵ These are referenced in ACTCOSS, Submission No.6, p.7, and Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.11-12, respectively.

⁴⁴⁶ Shane Rattenbury MLA, 'Periodic detention to make way for alternate options', (media release), 31 March 2014.

⁴⁴⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.11.

⁴⁴⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.11.

⁴⁴⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.11.

⁴⁵⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.11-12.

Corrections webpage, which described CCOs as ‘a flexible order that can have different conditions applied based on the circumstances of the offence, the offender's needs and situation, and the direction of the court’,⁴⁵¹ and stated that that a CCO ‘must have at least one condition, based on the risk and needs of the offender and the severity of the offence, including:

- supervision
- unpaid community work
- treatment and rehabilitation
- curfews
- bans on entering specified areas or places
- bans on entering many licensed premises and bans on drinking alcohol in licensed premises
- bans on contacting or associating with specific people or groups
- residential restrictions or exclusions relating to the offender's accommodation.’⁴⁵²

4.140 In relation to this scheme, ATODA’s submission noted that no evaluation had yet been undertaken ‘into the implementation of effectiveness of CCOs in Victoria’, although ‘a number of issues [had] been identified’.⁴⁵³

ACT COUNCIL OF SOCIAL SERVICES (ACTCOSS)

4.141 In its submission to the inquiry, the ACT Council of Social Services described NSW’s Intensive Correction Orders (ICOs) scheme as follows:

ICOs are a custodial sentence of less than two years serviced in the community under supervision of that state or territory's Corrective Services, rather than in full-time custody in a correctional centre. People are eligible for an ICO when the court is considering a sentence of imprisonment of two years or less, and if the offence is not a sexual offence.⁴⁵⁴

⁴⁵¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.12, citing Department of Justice (Victoria), ‘Corrections, Prisons and Parole’, available at: <http://www.justice.vic.gov.au/home/sentencing/community+orders/>

⁴⁵² Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.12, citing Department of Justice (Victoria), ‘Corrections, Prisons and Parole’, available at: <http://www.justice.vic.gov.au/home/sentencing/community+orders/>

⁴⁵³ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.12, citing Kristina Kothrakis, Melbourne Criminal Lawyers Blog, 2013, ‘Community Corrections Order- impacts and issues’, available at: <http://melbournecriminallawyersblog.com/2012/01/25/community-corrections-order-impacts-and-issues/>

⁴⁵⁴ ACTCOSS, Submission No.6, p.7, citing NSW Corrective Services, available at: <http://www.correctiveservices.nsw.gov.au/information/legislation/intensive-correction-order>

4.142 The submission stated that conditions for ICOs included the offender being required to:

- complete a minimum number of community service hours per month;
- participate in programs to address the offending behaviour as directed by the court; and
- undertake drug testing.⁴⁵⁵

4.143 The submission also noted that:

- there was 'no minimum length for an ICO';
- the maximum length was two years;
- there was 'no parole period so offenders must serve the full term of the ICO'; and that
- offenders were 'progressed, or regressed, through four levels of supervision under the ICO based on their behaviour (such as attending programs or counselling as directed, or results of their drug tests) throughout the term of their sentence.'⁴⁵⁶

4.144 More broadly, the submission noted that '[f]lexibility in sentencing and having as many options "on the table" is vital, as it allows courts to take into account [an] individual's specific circumstances'.⁴⁵⁷ It was in this context, the submission suggested, that ICOs were important, because they filled 'the gap between community-based orders and custodial sentences for eligible offenders'.⁴⁵⁸

4.145 It stated that the strengths of ICOs were that:

As a sentencing option, they allow people to remain in the community, maintain employment, and maintain contact with family [and that] ICOs balance the need to have sentencing options that maximise rehabilitation and decrease social determinants of offending, while maintain a deterrent and punishment element.⁴⁵⁹

4.146 On the other hand, in another part of its submission ACTCOSS noted that 'with the abolition of periodic detention in NSW, there [had] been an increase in full-time custodial sentences', particularly in cases where offenders were 'not found to be suitable for Intensive Correction Orders'.⁴⁶⁰

4.147 In connection with this it noted that the Law Society of NSW had:

advocated that periodic detention be reconsidered as a sentencing option where ICOs aren't appropriate as they believe it is imperative that as many sentencing options as

⁴⁵⁵ ACTCOSS, Submission No.6, p.7.

⁴⁵⁶ ACTCOSS, Submission No.6, p.7.

⁴⁵⁷ ACTCOSS, Submission No.6, p.7.

⁴⁵⁸ ACTCOSS, Submission No.6, p.7.

⁴⁵⁹ ACTCOSS, Submission No.6, p.7.

⁴⁶⁰ ACTCOSS, Submission No.6, p.7.

possible are available to the courts, to allow them to make decisions that are in the best interest of the offender and the community.⁴⁶¹

ACT BAR ASSOCIATION

4.148 The submission to the inquiry by the ACT Bar Association proposed that ‘non-custodial sentencing options that are employed in other jurisdictions’ be employed in the ACT in order to ‘cut back on the number of shorter sentences that are being imposed and/or to reduce the time actually spent in custody’. It proposed Intensive Corrections Orders of the type applied in NSW under section 7 of the *NSW Crimes (Sentencing Procedure) Act 1999*, which ‘applies to persons who have been sentenced to a term of imprisonment for 2 years or less’.⁴⁶²

4.149 The submission went on to suggest that while ‘some elements of the intensive correction order regime are already present in the ACT’:

there are elements of that scheme that may provide the Courts here with greater sentencing options in respect of offenders liable to serve shorter periods of custody [and this] would tie in neatly with the comprehensive review of the case management framework for Community Corrections in the ACT that was undertaken in 2012.⁴⁶³

4.150 The submission noted that the review had recommended ‘the development of an integrated and dynamic case management model incorporating Throughcare principles and proactive supervision’, consistent with an Intensive Corrections Order regime, and suggested that the present Throughcare initiative ‘would ... fit comfortably within this ... model’.⁴⁶⁴

ACT LAW SOCIETY

4.151 The ACT Law Society made comment on corrections orders when it appeared in hearings of 19 May 2014.

4.152 The President of the Society’s Criminal Law Committee told the Committee that he thought it ‘critical’ that:

the effort is put in with respect to individual tailored orders for people upon their release from prison—and, indeed, whilst they are still in prison as much as possible—in order to address the underlying problems.⁴⁶⁵

⁴⁶¹ ACTCOSS, Submission No.6, p.7.

⁴⁶² ACT Bar Association, Submission No.11, p.4.

⁴⁶³ ACT Bar Association, Submission No.11, p.4.

⁴⁶⁴ ACT Bar Association, Submission No.11, p.4.

⁴⁶⁵ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.81.

4.153 This, he told the Committee, had important consequences for recidivism, because:

If you just release somebody into the community, if you make it perhaps a condition that they report to their parole officer once a month and the parole officer is overworked and does not have the opportunity to go into any depth with that particular person, the problems that have got the person into the trouble that resulted in their going to jail in the first place are still there, unaddressed. And given another couple of months or years, it is likely to bubble up again, with the result that further offending is going to be committed.⁴⁶⁶

4.154 He told the Committee that this pattern tended to be self-reinforcing, because:

once a person has been to jail on the first occasion, the sentencing principles say that they are going to be less and less entitled to any leniency the next time they come around. That is how you then create that vicious cycle. If there is no intervention aimed at helping the person to get over the problems that caused them to offend in the first place then they are just going to keep offending.⁴⁶⁷

4.155 As a consequence, he told the Committee:

In my submission, and in the submission of the society, it really is very important to have those tailored supervision orders as much as we possibly can. It is accepted that that involves a lot of resourcing. But in the long term, if you put the resources in at that stage, you might save quite a lot in terms of the recidivism rate and the cost of then locking people up later on.⁴⁶⁸

DIRECTOR OF PUBLIC PROSECUTIONS

4.156 The Director of Public Prosecutions (DPP) made comment on corrections orders when he appeared in hearings of 19 May 2014.

4.157 The DPP told the Committee that he had ‘have heard very positive reports about the intensive corrections orders that are in various forms in both Victoria and New South Wales, and probably in other jurisdictions’.⁴⁶⁹

4.158 The main benefit from these orders, he told the Committee, ‘is that there is much more direct supervision of an offender’:

A good behaviour order tends to be, “Sign a piece of paper, go away and sin no more, and if you keep out of trouble for a particular period of time, that will suffice.” For

⁴⁶⁶ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.81.

⁴⁶⁷ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.81.

⁴⁶⁸ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.81.

⁴⁶⁹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

many offenders, that is totally appropriate, but there are certainly offenders who require much more supervision to ensure their rehabilitation and that they have applied themselves as appropriate. That is where the intensive corrections orders can be useful, in meeting that need.⁴⁷⁰

4.159 The DPP told the Committee that Periodic Detention had not been successful in reducing recidivism and referred to the recidivism rate in the ACT as ‘worrying’ and that there was ‘general support in the legal community’ for correction orders as a replacement. However, he told the Committee, it was important to note that corrections orders were ‘resource intensive’, needing significant resources to be effective.⁴⁷¹

MINISTER FOR CORRECTIONS

4.160 In his media release announcing the end of periodic detention in the ACT, the Minister for Corrections stated that:

Corrective Services will move away from periodic detention to make way for future alternative options which may include intensive community correction orders, which will more effectively deliver on our goals of rehabilitation and reduced rates of incarceration.⁴⁷²

4.161 The media release went on to say that:

Community correction orders can include compulsory participation in programs and community services obligations. Other jurisdictions have found that this type of sentencing is not only more effective, but delivers enhanced outcomes for participants.⁴⁷³

SUMMARY

4.162 The Committee notes representations made to it regarding intensive corrections orders.

4.163 Arguments included:

- that offenders sentenced to community orders were less likely to reoffend than those given a bond;⁴⁷⁴
- that intensive corrections orders (or their equivalent) be adopted in the ACT as a way of aggregating and expanding the range of community orders available to the courts;⁴⁷⁵

⁴⁷⁰ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

⁴⁷¹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

⁴⁷² Shane Rattenbury MLA, ‘Periodic detention to make way for alternate options’, (media release), 31 March 2014.

⁴⁷³ Shane Rattenbury MLA, ‘Periodic detention to make way for alternate options’, (media release), 31 March 2014.

⁴⁷⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.11.

- that the introduction of intensive corrections orders would foster novel approaches, increase the discretion of courts and reduce court costs for managing offenders in the community;⁴⁷⁶
- that intensive corrections orders were a flexible mechanism which allowed courts to ‘take into account [an] individual's specific circumstances’,⁴⁷⁷ and filled ‘the gap between community-based orders and custodial sentences for eligible offenders’;⁴⁷⁸
- that, by report, in NSW the abolition of periodic detention had resulted in an increase in full-time custodial sentences, despite the presence of an intensive corrections orders regime;⁴⁷⁹
- that consideration be given to reinstating periodic detention as a sentencing option in the ACT;⁴⁸⁰
- that investing resources in ‘tailored supervision orders’ such as intensive corrections orders may ‘save quite a lot in terms of the recidivism rate and the cost of then locking people up later on’;⁴⁸¹
- that intensive corrections orders would significantly extend the scope of supervision currently provided for by good behaviour orders;⁴⁸² and
- that corrections orders were ‘resource intensive’ and needed significant resources to be effective.⁴⁸³

COMMITTEE COMMENT

4.164 The Committee welcomes the potential for intensive corrections orders to be introduced as a sentencing option in the ACT. In the Committee’s view, the potential aggregation and extension of the scope of supervision orders available to ACT courts is likely to be a positive step in responding to the ACT’s acknowledged high levels of recidivism, so long as sufficient resourcing is applied.

⁴⁷⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.11.

⁴⁷⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.11-12.

⁴⁷⁷ ACTCOSS, Submission No.6, p.7.

⁴⁷⁸ ACTCOSS, Submission No.6, p.7.

⁴⁷⁹ ACTCOSS, Submission No.6, p.7.

⁴⁸⁰ ACTCOSS, Submission No.6, p.7.

⁴⁸¹ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, p.81.

⁴⁸² Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

⁴⁸³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

4.165 With this in mind the Committee makes the following recommendations.

Recommendation 4

4.166 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly that would, if passed, see an intensive corrections orders regime established in the ACT.

Recommendation 5

4.167 The Committee recommends that the ACT Government accurately assess resource requirements for an intensive corrections orders regime in the ACT and ensure that adequate resources are applied to any future intensive orders regime.

4.168 The Committee views with concern advice that custodial sentences had increased in NSW when periodic detention was discontinued and an intensive corrections regime was in place. In the Committee's view it is important that the ACT Government investigate this feature of the NSW sentencing regime and, if necessary, apply lessons learned if intensive corrections orders are implemented in the ACT.

Recommendation 6

4.169 The Committee recommends that the ACT Government investigate reports that the number of custodial sentences had increased in NSW when periodic detention was abolished and with an intensive corrections orders regime in place, and apply any lessons learned to a future ACT intensive corrections orders regime.

APPEALS

4.170 Appeals processes, in connection with conviction or sentence, have significant implications for the outcomes of criminal cases.

4.171 Matters considered included:

- proposals for *de novo* appeals in the ACT;
- timelines for appeals in the wake of *R v Meyboom*; and
- prosecution appeals against sentences deemed 'manifestly inadequate'.

4.172 These are considered below.

DE NOVO APPEALS

4.173 Some contributions to the inquiry proposed that the ACT should move away from its current ‘error-of-law’ basis for sentence (and conviction) appeals so that Courts would consider appeals *de novo*.

4.174 The *Encyclopaedic Australian Legal Dictionary* states that ‘*de novo*’ is Latin for ‘anew’ and defines the term in a wider legal context as follows:

A matter heard *de novo* is heard over again from the beginning. The body conducting the hearing *de novo* is not confined to the evidence or materials that were presented in the original hearing. It ‘stands in the shoes’ of the original decision-maker, and makes the decision again.⁴⁸⁴

4.175 The *Dictionary* defines an ‘appeal *de novo*’ as an appeal ‘conducted by way of rehearing’.⁴⁸⁵

ACT LAW SOCIETY

4.176 The submission to the inquiry by the Law Society put the view that the ‘nature of the appeal process as it relates to superior court consideration of sentencing within the Magistrates Court’, was ‘a highly technical one’.⁴⁸⁶ This was due to the fact that, currently:

Sentence appeals in the Territory ... require the appellant to establish an error in the sentence imposed in the Court below.⁴⁸⁷

4.177 The present approach in the ACT had the effect, the submission suggested, of diverting ‘concentration from the substantive merits of a case’, but also ‘to cause the court to engage in a resource intensive and time consuming analysis of the lower court decision on the basis of its technical merits’.⁴⁸⁸

4.178 This was ‘in sharp contrast to the mechanism utilised in the NSW District Court’,⁴⁸⁹ where sentence appeals were ‘conducted on a *de novo* basis’.⁴⁹⁰

That is the appeal judge is placed in the position of the sentencing Magistrate and determines the appropriate sentence based on the same evidence. There is no

⁴⁸⁴ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 7 November 2014), ‘*de novo*’.

⁴⁸⁵ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 7 November 2014), ‘*appeal de novo*’.

⁴⁸⁶ ACT Law Society, Submission No.13, p.3.

⁴⁸⁷ ACT Law Society, Submission No.13, p.3.

⁴⁸⁸ ACT Law Society, Submission No.13, p.3.

⁴⁸⁹ ACT Law Society, Submission No.13, p.3.

⁴⁹⁰ ACT Law Society, Submission No.13, p.3.

requirement for the appellant to show an error in the original sentence, thus removing the requirement for the appellant judge to dissect the original proceedings.⁴⁹¹

4.179 This, it suggested, tended 'to function far more efficiently than the current process in the Territory'.⁴⁹²

4.180 Current ACT procedure was 'a complex and resource intensive process', in contrast to 'the relatively simple *de novo* sentencing process' used in 'appeals from the NSW Local Court to the NSW District Court, in accordance with Part 3 of the *Crimes (Appeal and Review) Act 2001* (NSW)'.⁴⁹³

4.181 Moreover, in NSW appeals were 'initiated ... by completing a very simple Notice of Appeal'.⁴⁹⁴ If this approach were adopted in the ACT, the submission suggested:

Self represented parties would have little difficulty in completing and lodging a Notice of Appeal themselves. The Territory equivalent requires the appellant to enunciate the grounds of the appeal in far more detail.⁴⁹⁵

4.182 'While it could be argued', the submission suggested, 'that a change in the Territory approach would lead to more sentence appeals being lodged', the time required 'to consider an appeal on a *de novo* basis should be substantially less'. Moreover, the NSW District Court, using this approach, 'sets an impressive example for efficiently determining a relatively large number of appeals in a short time frame', 'particularly on regional circuits'.⁴⁹⁶

4.183 The submission noted, however, that ACT procedure had 'recently ... improved with the abolition of the need for the appellant to prepare the Appeal Book in sentence appeals'. As in NSW, 'the lower Court provides the appellant Court with the relevant documents considered by the sentencing Magistrate'.⁴⁹⁷

4.184 Nevertheless, appellants in the Territory were 'still required to obtain and file a transcript of the proceedings from the Court below'. In the view of the Law Society, it would be 'preferable if these were provided by the Court'.⁴⁹⁸

⁴⁹¹ ACT Law Society, Submission No.13, p.3.

⁴⁹² ACT Law Society, Submission No.13, p.3.

⁴⁹³ ACT Law Society, Submission No.13, p.3.

⁴⁹⁴ ACT Law Society, Submission No.13, p.3.

⁴⁹⁵ ACT Law Society, Submission No.13, p.3.

⁴⁹⁶ ACT Law Society, Submission No.13, pp.3-4.

⁴⁹⁷ ACT Law Society, Submission No.13, p.4.

⁴⁹⁸ ACT Law Society, Submission No.13, p.4.

4.185 A further concern raised by the Law Society was that the ACT's 'current docket system does not encompass efficient case management principles. in relation to sentence appeals', with 'multiple court appearances before the appeal is considered'. This usually resulted in 'increased costs to the appellant'. In contrast, in NSW, 'sentence appeals are often determined on the first or second date the matter is before the Court'.⁴⁹⁹

4.186 In light of these comments, the submission proposed that the ACT 'should give due consideration to adopting the NSW approach to sentence appeals in their entirety'.⁵⁰⁰

HEARINGS

4.187 The ACT Law Society added to these comments when it appeared before the Committee in hearings of 19 May 2014.

4.188 The Chair of the Society's Criminal Law Committee, when asked to elaborate on proposals to institute *de novo* appeals in the ACT, told the Committee that, currently:

In respect of sentence appeals in the ACT, we are first of all required to demonstrate to the Supreme Court an error of law. So we are talking here of appeals from the Magistrates Court to the Supreme Court. We have to demonstrate error of law before the Supreme Court is actually seized of jurisdiction and can intervene in the sentence. When one reads the sentencing appeal decisions of the Supreme Court, invariably 70, 80 per cent of the judgements are taken up with the issue of what the error actually was by the magistrate before they get to the issue, which is often only a few paragraphs at the end as to what the result ought to have been.⁵⁰¹

4.189 By contrast, he told the Committee:

The New South Wales approach has been to put appeal as a right, that is, it is an entitlement of any accused sentenced in the Local Court to have that sentence reviewed by the District Court. Therefore, you do not need to show error. It is true that means there are more appeals that are probably taking place as a number, but for each individual appeal, 70 per cent, as I have indicated—and that is an estimation on my part—of the work that the Supreme Court is doing on those appeals does not exist because they simply have the right to intervene with the sentence and impose the sentence which they think appropriate.⁵⁰²

⁴⁹⁹ ACT Law Society, Submission No.13, p.4.

⁵⁰⁰ ACT Law Society, Submission No.13, p.4.

⁵⁰¹ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.86.

⁵⁰² Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.86.

4.190 There was, he told the Committee, the prospect of significant efficiencies arising from instituting such an approach in the ACT:

If that is administered in the same way it is in New South Wales, that means that instead of a typical sentencing appeal being a half day of court hearing time and then resulting in a 30 or 40-paragraph judgement some time thereafter, which must be taking significant judicial resources to draft, most District Court sentencing appeals take between 15 and 30 minutes, certainly no more than 30 minutes. They would routinely, for example, in the Queanbeyan sittings of the District Court hear a sentencing appeal at 9 am, 9.30, start a trial at 10, run their trial till 4 and do another sentence appeal between 4 and 4.30 at the end of the day.⁵⁰³

4.191 And, he added:

the efficiency benefits of that over the current system are great and would, in the society's opinion, actually reduce the overall workload on a Supreme Court in relation to those appeals ...⁵⁰⁴

4.192 Moreover, he told the Committee, such an approach would allow ACT courts to focus on getting 'to the nuts and bolts of the question': that is, to consider 'whether the right sentence has been imposed by the magistrate or not', rather than 'actually jumping through a series of hoops to demonstrate legal error and debating all the law behind those conclusions before getting to that end question'.⁵⁰⁵

4.193 When asked by the Committee whether it were likely judicial officers were likely to object to a change from 'error-of-law' to *de novo* appeals in the ACT, the Chair of the Society's Criminal Law Committee told the Committee that this was unlikely because:

At the moment, in order for a judge to overturn a magistrate, they have to find the magistrate got it wrong as a matter of law and therefore inherently the judgements are critical. A system of *de novo* review does not actually require any specific finding that the magistrate did not apply certain law or did not apply certain rules [and so it is in] many ways it is less critical of the previous judicial officer.⁵⁰⁶

⁵⁰³ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.86.

⁵⁰⁴ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.86.

⁵⁰⁵ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.86.

⁵⁰⁶ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.87.

ACT BAR ASSOCIATION

4.194 The ACT Bar Association's submission to the inquiry put forward similar views to those advanced in ACT Law Society's submission:

Sentence appeals from the Magistrates Court are too technical in their nature and are expensive and time consuming to prepare. At the moment, and at the risk of oversimplifying the matter somewhat, legal error must be shown for an appeal to succeed.⁵⁰⁷

4.195 'This', the submission suggested:

results in a process that is highly technical requiring the ... production of often lengthy submissions. Given their technical nature decisions are often reserved meaning that the resolution of appeals is delayed.⁵⁰⁸

4.196 In response to this the submission proposed 'a shift to a process of Magistrates Court appeals more in keeping with the model adopted in NSW under the *Crimes (Appeal and Review) Act 2001*', where:

sentence appeals are instituted by the filing of a notice of Appeal that defendants often file themselves. On appeal judges place themselves in the shoes of the original Magistrate. Although the opinion of the Magistrate is taken into account the justification for a different approach (whether to increase or decrease the sentence) is not predicated on there being a finding of error.⁵⁰⁹

4.197 As a result, the submission suggested:

The system is more conducive to *extempore* decisions. Justice is delivered more quickly and in a much more cost effective manner.⁵¹⁰

4.198 If introduced in the ACT, this system 'could apply to both defence and prosecution appeals',⁵¹¹ and:

Whilst this reform may simplify the appeal process and make the avenue of appeal more accessible to the convicted, there is no indication that it would result in a net increase in the workload of the Supreme Court.⁵¹²

⁵⁰⁷ ACT Bar Association, Submission No.11, p.5.

⁵⁰⁸ ACT Bar Association, Submission No.11, p.5.

⁵⁰⁹ ACT Bar Association, Submission No.11, pp.5-6.

⁵¹⁰ ACT Bar Association, Submission No.11, p.6. The *Oxford English Dictionary* defines *extempore* as 'At the moment, without premeditation or preparation; at first sight; off-hand'; "extempore, adv., adj., and n." *OED Online*, Oxford University Press, September 2014. Web. 9 November 2014.

⁵¹¹ ACT Bar Association, Submission No.11, p.6.

⁵¹² ACT Bar Association, Submission No.11, p.6.

4.199 This reform, the submission suggested, ‘would improve accessibility to justice and improve judicial accountability’.⁵¹³

LEGAL AID ACT

4.200 The submission to the inquiry by Legal Aid ACT put forward a view similar to those put forward by the ACT Bar Association and the ACT Law Society, considered above.

4.201 The submission characterised the current system for appeals in the ACT as ‘cumbersome, time consuming and costly for the courts and appellant’, although it had been somewhat ‘simplified by the Supreme Court in recent years’.⁵¹⁴

4.202 The submission went on to propose *de novo* appeals, which it described as an ‘approach [which] has successfully operated in appeals from Local Courts to the District Court of New South Wales for many years’.⁵¹⁵

A *de novo* appeal, certainly an appeal against sentence, essentially would require the Supreme Court to decide whether the decision in the Magistrates Court was the appropriate one and whether another decision would be more appropriate. It would in effect be a rehearing. Unlike the current process, in a *de novo* appeal the appropriateness of the decision is determined at the time of the hearing of the appeal.⁵¹⁶

4.203 The benefits of such an approach, ‘[a]part from the benefit of having an experienced Supreme Court judge look at a sentence afresh’, were that:

they are quick (much quicker than the average duration of appeals under the current system) and do not involve the amount of work and preparation required of the prosecution, the appellant's legal representatives, and the judge, by the present system.⁵¹⁷

4.204 In practice, *de novo* appeals against conviction:

could be undertaken on the transcript of the proceedings in the lower court with limited provision for applications for leave to either the appellant or the prosecution to recall witnesses or call further evidence on the hearing of the appeal.⁵¹⁸

⁵¹³ ACT Bar Association, Submission No.11, p.6.

⁵¹⁴ Legal Aid ACT, Submission No.14, p.23.

⁵¹⁵ Legal Aid ACT, Submission No.14, p.23.

⁵¹⁶ Legal Aid ACT, Submission No.14, p.23.

⁵¹⁷ Legal Aid ACT, Submission No.14, p.23.

⁵¹⁸ Legal Aid ACT, Submission No.14, p.23

4.205 Currently, in ‘the present [ACT] system’, the submission suggested:

Magistrates and representatives, even on minor and mundane matters, spend additional and considerable court time ensuring that the matter is not exposed to appealable error; this, in our view, has led to a false economy and congestion within the courts.⁵¹⁹

4.206 The submission also noted the prevalence of this mechanism for appeals in certain Australian jurisdictions:

As we understand it, appeals from magistrates are by way of *de novo* hearing, or a variation of it, not only in New South Wales but also in Victoria, Queensland and the Northern Territory.⁵²⁰

4.207 Other jurisdictions, ‘South Australia, Western Australia and we believe Tasmania have *House v The King* type appeals’, that is: where grounds for appeal hinge on an assertion of judicial error.⁵²¹

DIRECTOR OF PUBLIC PROSECUTIONS

4.208 When the Director of Public Prosecutions appeared in hearings of 19 May 2014, he told the Committee he agreed with other contributions which had proposed that the ACT contemplate a change to *de novo* appeals:

At the moment sentencing appeals from the Magistrates Court to the Supreme Court are done on an error-of-law basis. So it is necessary for an error to be found in what the magistrate has done before the appeal can be taken.

That has the effect that a great deal of time is taken up in the Supreme Court by judges learnedly going through Magistrates Court decisions, finding an error of law and then producing learned judgements, which are very learned—and when I say that I am not attempting to express sarcasm. But they are obviously very time consuming in terms of the writing of the judgements and the researching of the judgements. There is also an effect in the Magistrates Court because the magistrates tend to try to appeal-proof

⁵¹⁹ Legal Aid ACT, Submission No.14, p.23

⁵²⁰ Legal Aid ACT, Submission No.14, p.23

⁵²¹ Legal Aid ACT, Submission No.14, p.23. *House v The King* appeals are defined in *Markarian v the Queen* [2005] HCA 25 at [25]:

‘As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* [23], itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".’

their decisions by taking extra time over them. So that adds to the time in the Magistrates Court as well.⁵²²

4.209 The DPP noted other ‘submissions to the committee to the effect that the situation in New South Wales of *de novo* appeals would be a model that is well worth looking at’ and that he would ‘endorse that’.⁵²³ He went on to tell the Committee that:

A *de novo* appeal is simply a right of appeal without establishing a legal error. If this is done properly—and I will not go into great detail; the detail is with you—the magistrates can simply deal quickly, efficiently and justly with matters in their court and the Supreme Court can then deal expeditiously with matters which in New South Wales are generally done on the papers. So there is no necessity for further evidence to be called; the Supreme Court judge simply looks at the material and then decides whether or not to allow the appeal—and, in most instances, can come to pretty much an instant decision. That has much to commend it, and there are many people in the legal community in the ACT who would support that movement.⁵²⁴

TIMELINES FOR APPEALS

ACT BAR ASSOCIATION

4.210 In addition, the submission to the inquiry by the ACT Bar Association raised concerns about timeframes for appeals.

4.211 It advised the Committee that:

Following the decision of His Honour Justice Refshauge in *R v Meyboom* ... the 28 day time frame for the instituting of appeals against conviction runs from the finding of guilt by a judge in a trial by judge alone (and by implication a jury in a jury trial). The implication for accused persons is that appeals must be lodged (with all the expense for litigants and the Courts that is involved) when the ultimate result normally would be only a sentence appeal. It had hitherto been assumed that the time frame for both sentence and conviction appeals ran from the date of sentence.⁵²⁵

4.212 The submission summarised the consequences of the decision as follows:

The practical consequences of the pre *Meyboom* position is that accused persons could take into account the sentence outcome in their case before deciding whether it was

⁵²² Mr Jon White, *Transcript of Evidence*, 19 May 2014, pp.55-56.

⁵²³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.56.

⁵²⁴ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.56.

⁵²⁵ ACT Bar Association, Submission No.11, p.9.

worth while trying to overturn a finding of guilt. As a result of His Honour's ruling a conviction appeal must be instituted usually even before the sentence has taken place. Not only is this position wasteful of resources it may involve an accused impugning the judge's conduct of a trial before the sentence takes place. That is a difficult proposition for accused persons who may by their appeal feel they may invoke the ire of the presiding judge.⁵²⁶

ACT LAW SOCIETY

4.213 The submission by the ACT Law Society also expressed concerns about timelines for appeals.

4.214 The submission also advised the Committee, as had that of the ACT Bar Association, that this hinged on the judgement made in the 2012 ACT Court of Criminal Appeals case *R v Meyboom*, and that this had significantly changed timelines within which appeals could be lodged in ACT courts.⁵²⁷

4.215 The result of the relevant finding in the judgement was 'that many defendants [were] forced to lodge conviction appeals before their sentence'. This was 'a significant problem related to sentencing' because 'contrition is a matter to be taken into account' and 'appealing shows very little'.⁵²⁸

4.216 'However', the submission continued, if defendants 'do not appeal before sentence the opportunity will be lost in circumstances when the appeal window is 28 days'.⁵²⁹

4.217 Moreover, 'most sentences involving pre-sentence reports do not occur for 6-8 weeks [so as] to allow those reports to be completed'. The result of these arrangements was that 'appeals are lodged for conviction when, if the matter had finalised to sentence before the appeal period expired, there may have been no appeal lodged at all'.⁵³⁰

4.218 These difficulties were 'compounded', the submission suggested, because 'the increased ... sentence that becomes likely may in fact solidify an appeal'. If, on the other hand, 'a lesser penalty had been imposed (without reference to lack of contrition) an appeal may have been avoided'.⁵³¹

⁵²⁶ ACT Bar Association, Submission No.11, p.9.

⁵²⁷ 'It seems to me that the finding of guilt by a judge in a trial by judge alone must entail not only the verdict but also the acceptance of the verdict by the Court and thus the conviction. This is reinforced by the fact that on 4 February 2011, the Court adjourned the proceedings for the purpose of hearing submissions on sentence.' Refshauge J at [30], *The Queen v Craig Paul Meyboom* [2012] ACTCA 2

⁵²⁸ ACT Law Society, Submission No.13, p.4.

⁵²⁹ ACT Law Society, Submission No.13, p.4.

⁵³⁰ ACT Law Society, Submission No.13, p.4.

⁵³¹ ACT Law Society, Submission No.13, p.4.

4.219 In response to this predicament, the submission proposed that ‘legislation be enacted specifying that appeals ... be lodged within 28 days of the date of sentence’.⁵³²

HEARINGS

4.220 The ACT Law Society added to these comments when it appeared before the Committee in hearings of 19 May 2014.

4.221 The Chair of the Society’s Criminal Law Committee told the Committee that, at present:

If a person is found guilty and then later sentenced, as it stands following the decision in *Meyboom*, if you are acting for an accused, you really need to file the appeal even before you know what the sentence is. That is the appeal about conviction as well.⁵³³

4.222 This, he told the Committee, had ‘a number of consequences for the justice system’:

One is that there are probably appeals by people who are appealing because they are concerned the worst case is going to eventuate. It may in fact be, once they know what the sentence is, that has not eventuated, but by then they have lodged an appeal which, inevitably, has prejudiced the sentence that was imposed because the lodging of that appeal will be referred to no doubt by the judicial officer as a demonstration of a lack of remorse.⁵³⁴

APPEALS ON GROUNDS OF ‘MANIFESTLY INADEQUATE’ SENTENCE

4.223 Contributors to hearings for the inquiry noted that it was open to the Director of Public Prosecutions (DPP) to lodge appeals on grounds that a sentence was considered ‘manifestly inadequate’. These included contributions by the DPP himself, the Australian Lawyers Alliance, and the Attorney-General, and are considered below.

DIRECTOR OF PUBLIC PROSECUTIONS

4.224 When the DPP appeared before the Committee in hearings of 19 May 2014 he told the Committee that his office had ‘appealed quite frequently against what we claim to be the inadequacy of sentences handed down in both the Magistrates Court and the Supreme Court’.⁵³⁵

⁵³² ACT Law Society, Submission No.13, p.4.

⁵³³ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.87.

⁵³⁴ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.87.

⁵³⁵ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.56.

AUSTRALIAN LAWYERS ALLIANCE

4.225 Mr Steven Whybrow, representing the Australian Lawyers Alliance in public hearings of the same day, noted that the DPP had lodged an appeal on such grounds in relation to a recent notable case of sexual assault in which a child was the victim. In such cases, he told the Committee:

one would hope and expect that the court of appeal is going to rebalance the ledger. You may have had a particularly persuasive advocate indicating that in the context of this person these features should be taken into account. That is what the appeal process is for.⁵³⁶

4.226 Mr Whybrow went on to describe further avenues:

If it is a bad case and serious offending, then if the sentence is inadequate, there are appeal mechanisms in place to deal with that. And if the appeal mechanism does not solve anything, then the attorney has got the capacity to say, "We'll have to look into this," and potentially raise the penalty ...⁵³⁷

4.227 A recent instance of this occurring, he told the Committee, was in connection with culpable driving offences, which had been 'increased to bring them in line with other states', which resulted in penalties being increased from 'seven years ... for culpable driving causing death' to the current tariff of 14 years.⁵³⁸

4.228 He went on to say that he had been 'personally involved in that Monfries matter' which, he told the Committee 'was an extraordinarily serious offending' to which the offender 'was sentenced to effectively 12 years' on appeal.⁵³⁹

ATTORNEY-GENERAL

4.229 When the Attorney-General appeared before the Committee in hearings of 2 May 2014, he was asked to clarify his powers in relation to matters where manifestly inadequate sentence was asserted.

4.230 He told the Committee while it was in the power of Attorneys-General in some jurisdictions, it was not in his power to launch an appeal in such circumstances; had he no power to direct the

⁵³⁶ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.109.

⁵³⁷ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

⁵³⁸ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

⁵³⁹ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.107.

DPP to do so, nor was the DPP 'subject to my direction in any way'. Appeals on grounds of manifestly inadequate sentence were entirely 'a matter for the DPP to determine'.⁵⁴⁰

4.231 He told the Committee that there were 'very good reasons for that' as it was:

very easy for these matters to become highly politicised and political pressure brought to bear on elected public officials to act in a certain way. Often that political pressure is the result of quite uninformed or sensationalist reporting about particular offences that is not necessarily grounded in a thorough understanding of the particular circumstances in that case.

I think we have to do everything possible to maintain the justice system as one that operates in a dispassionate manner. I do not think that is helped if there is the capacity for an elected official to decide that because a matter is politically contentious or sensationalised they feel they have to intervene.⁵⁴¹

4.232 However, the Attorney told the Committee, concerns about penalties could be raised with him and he respond address this by proposing changes to statute which, if supported by the Assembly, would pass into law:

From time to time the DPP will draw to my attention their concerns about the adequacy of a sentence that has been imposed for the purposes not of reviewing that sentence—because I have no powers to seek review of a sentence—but, instead, to draw my attention to the desirability of amending the law for future recurrences.⁵⁴²

4.233 This, he told the Committee was 'certainly the case' in relation to reforms proposed to the Assembly in relation to dangerous driving, a process which, he said, was:

driven very much by the experience of a number of high profile cases where people have been charged with dangerous driving offences where they have committed those crimes before but they previously were not aggravating factors in relation to penalties should they be caught again.⁵⁴³

4.234 In other words, this was a response to community concern about repeat instances of that offence. The Attorney also referred to responses by government to community concern about child sex offences. He told the Committee that he was 'aware that there has been concern from parts of the community in recent times about the adequacy of laws dealing with child sex offences'⁵⁴⁴ and that:

⁵⁴⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, pp.15-16.

⁵⁴¹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.15.

⁵⁴² Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.14.

⁵⁴³ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.14.

⁵⁴⁴ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.3

The government is strongly committed to ensuring that our children are protected from sexual assault and violence in all of its forms. ACT legislation provides measures to monitor child sex offenders in the territory. For example, registered offenders must report to police about where they live and work, their travel plans and a range of other personal matters.⁵⁴⁵

4.235 Moreover, he told the Committee:

In 2012 the government introduced amendments to the law to create a new scheme for child sex offender prohibition orders. Police can apply to a magistrate for an order prohibiting an offender from engaging in specific activities or attending specific locations. The 2012 amendments also increased existing penalties for 21 offences in the *Crimes (Child Sex Offenders) Act*.⁵⁴⁶

SUMMARY

4.236 The Committee notes contributions made to the inquiry regarding appeals.

4.237 Arguments regarding *de novo* appeals included:

- that would be considerable benefit if the ACT were to adopt *de novo* appeals similar to those allowed in the NSW District Court;⁵⁴⁷
- that, under the current regime for appeals, the lower court should provide a transcript of proceedings to the superior court rather than this obligation falling to the appellant;⁵⁴⁸
- that sentence appeals are not effectively managed under the current docket system in the courts and hence require multiple appearances which result in higher costs for appellants, in contrast to NSW where ‘sentence appeals are often determined on the first or second date the matter is before the Court’;⁵⁴⁹
- that NSW has established appeals from lower to a higher courts ‘as a right’, and while numbers of appeals have increased, the work falling to the superior court has decreased because superior courts ‘simply have the right to intervene with the sentence and impose the sentence which they think appropriate’;⁵⁵⁰
- that in the ACT, where ‘typical sentencing appeal [takes] a half day of court hearing time and [the drafting of] a 30 or 40-paragraph judgement some time thereafter, which must be taking significant judicial resources to draft’, whereas ‘most [NSW] District Court

⁵⁴⁵ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.3

⁵⁴⁶ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.3

⁵⁴⁷ ACT Law Society, Submission No.13, p.3.

⁵⁴⁸ ACT Law Society, Submission No.13, p.4.

⁵⁴⁹ ACT Law Society, Submission No.13, p.4.

⁵⁵⁰ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.86.

sentencing appeals take between 15 and 30 minutes, certainly no more than 30 minutes’;⁵⁵¹

- that this approach could be adopted for ‘both defence and prosecution appeals’;⁵⁵² and
- that adopting this model would represent a significant saving in time and resources for both courts and appellants, and be a means to enhance the efficiency of courts.⁵⁵³

4.238 Arguments regarding timelines for appeals included:

- that, in consequence of the judgement in *R v Meyboom* ‘a conviction appeal must be instituted usually even before the sentence has taken place’, which is ‘wasteful of resources’, and ‘may involve [the risk of] an accused impugning the judge’s conduct of a trial before the sentence takes place’, which is ‘a difficult proposition for accused persons who may by their appeal feel they may invoke the ire of the presiding judge’;⁵⁵⁴
- that, following *R v Meyboom* there was a ‘significant problem’ because ‘contrition is a matter to be taken into account’ in sentencing and ‘appealing shows very little’;⁵⁵⁵
- that, however, if defendants ‘do not appeal before sentence the opportunity will be lost in circumstances when the appeal window is 28 days’;⁵⁵⁶
- that ‘most sentences involving pre-sentence reports do not occur for 6-8 weeks [so as] to allow those reports to be completed’, and that as a result ‘appeals are lodged for conviction when, if the matter had finalised to sentence before the appeal period expired, there may have been no appeal lodged at all’;⁵⁵⁷
- that ‘the increased ... sentence that becomes likely may in fact solidify an appeal’ while if, on the other hand, ‘a lesser penalty had been imposed (without reference to lack of contrition) an appeal may have been avoided’;⁵⁵⁸ and
- that ‘legislation be enacted specifying that appeals ... be lodged within 28 days of the date of sentence’.⁵⁵⁹

⁵⁵¹ Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.86.

⁵⁵² ACT Bar Association, Submission No.11, p.6.

⁵⁵³ ACT Law Society, Submission No.13, p.3. See also Mr Michael Kukulies-Smith, *Transcript of Evidence*, 19 May 2014, p.86, ACT Bar Association, Submission No.11, pp.5-6, Legal Aid ACT, Submission No.14, p.23, and Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.56..

⁵⁵⁴ ACT Bar Association, Submission No.11, p.9.

⁵⁵⁵ ACT Law Society, Submission No.13, p.4.

⁵⁵⁶ ACT Law Society, Submission No.13, p.4.

⁵⁵⁷ ACT Law Society, Submission No.13, p.4.

⁵⁵⁸ ACT Law Society, Submission No.13, p.4.

⁵⁵⁹ ACT Law Society, Submission No.13, p.4.

COMMITTEE COMMENT

4.239 Regarding proposals that there be *de novo* appeals in the ACT, the Committee is persuaded that *de novo* appeals as employed in NSW, specifically on the pattern of appeals to the NSW District Court regarding cases initially heard by the NSW Local Court, should be adopted in the ACT. This would represent a significant step forward in access to, the administration and the efficiency of justice in the ACT, entailing a lower resource requirement for both courts and appellants.

4.240 With this in mind, the Committee makes the following recommendation.

Recommendation 7

4.241 The Committee recommends that the ACT Government propose legislative amendments to the Legislative Assembly that would, if passed, see the ACT adopt *de novo* appeals as employed in NSW, specifically on the pattern of appeals to the NSW District Court regarding cases initially heard by the NSW Local Court.

4.242 Regarding timelines for appeals in the ACT, the Committee is persuaded that the judgement in *R v Meyboom* has created significant anomalies in timelines and other requirements for appeals on both sentence and conviction, and that these should be resolved as soon as possible.

4.243 With this in mind, the Committee makes the following recommendation.

Recommendation 8

4.244 The Committee recommends that the ACT Government propose legislative amendments to the Legislative Assembly that would, if passed, see the ACT adopt legislative provisions requiring that appeals be lodged with courts within 28 days of sentence decisions being brought down.

4.245 Regarding representations made to it on the appeals by the DPP on grounds of manifestly inadequate sentence, the Committee is persuaded of the importance of this as one of the balancing mechanisms available under the criminal justice system. Representations to the inquiry suggest that there is less awareness of this mechanism in the community than would ideally be the case. In view of this the Committee sees an important role for a future ACT sentencing council, the creation of which is recommended elsewhere in this report, in raising community awareness of these appeals.

FORFEITURE OF PROPERTY

4.246 In its submission, the ACT Bar Association raised concerns about how the forfeiture of property was dealt with in connection with sentencing in the ACT. In other jurisdictions, and in common law, forfeiture of property was taken into account when sentencing decisions were made.

4.247 The submission stated that this was not the case in the ACT:

currently, section 34(2) of the *Crimes (Sentencing) Act 2005* (ACT) places what is apparently an absolute prohibition on a sentencing court from having regard to the forfeiture of any property under the *Confiscation of Criminal Assets Act 2003* (ACT) or the making of a penalty order under that Act.⁵⁶⁰

4.248 The prohibition applied:

regardless of whether the property in question has been identified as “proceeds” of the relevant offence (i.e. derived from the offence), or alternatively merely as an “instrument” of the offence (i.e. used in or in connection with the commission of an offence but otherwise lawfully acquired).⁵⁶¹

4.249 This was ‘in contrast to the position at common law, where forfeiture of lawfully acquired property generally has been regarded as a mitigating factor in sentencing’.⁵⁶²

4.250 The submission stated that the approach taken in the ACT contrasted with ‘legislative positions at federal level and in Victoria’.⁵⁶³

4.251 In the federal jurisdiction, section 320 of the *Proceeds of Crime Act 2002* (Cth), allowed ‘a sentencing court to have regard to cooperation of an offender in resolving forfeiture proceedings’.⁵⁶⁴

4.252 In Victoria, ‘subsection 5(2A) of the *Sentencing Act 1991* (Vic) provides in effect that a sentencing court’:

- Must not have regard to the forfeiture of the proceeds of an offence; but
- May have regard to the forfeiture of an instrument of an offence; and
- May have regard to pecuniary penalty order to the extent to which it relates to benefits in excess of profits derived from the commission of the offence.⁵⁶⁵

⁵⁶⁰ ACT Bar Association, Submission No.11, p.11.

⁵⁶¹ ACT Bar Association, Submission No.11, p.11.

⁵⁶² ACT Bar Association, Submission No.11, p.11.

⁵⁶³ ACT Bar Association, Submission No.11, p.11.

⁵⁶⁴ ACT Bar Association, Submission No.11, p.11.

4.253 Regarding this, the Bar Association said that in its view ‘legislatures in Victoria and at federal level have adopted a considered and fair approach to sentencing in this context’, and urged the ACT Government to ‘replace the current “blunt instrument” approach reflected by section 24(2) of the *Sentencing Act* with a similar legislative scheme’.⁵⁶⁶

HEARINGS

4.254 The Bar Association made further comment on forfeiture of property when it appeared before the Committee in hearings of 19 May 2014.

4.255 The Chair of the ACT Bar Association Criminal Committee told the Committee that:

At the moment there are provisions that allow confiscation of property in the context of prosecution action or even independent of prosecution action. It may be, for example, that somebody has stolen from an employer over a period. The consequence of their offending behaviour might be that the house that they own is taken from them, notwithstanding that it might belong jointly to their husband or wife and their children. But that at the moment cannot be taken into account as a matter that would be factored into the overall disposition of the criminal offence.⁵⁶⁷

4.256 He went on to say that:

So the fact that they lose their house, notwithstanding they may not have in a one-to-one sense derived the benefit to the house, cannot be taken into account. We say that that seems to be a counterintuitive outcome, that the sentencing as a whole, the consequence of offending behaviour, should be taken into account in determining what the appropriate outcome is.⁵⁶⁸

SUMMARY

4.257 The Committee notes representations made to it regarding forfeiture of property and the current legislative prohibition in the ACT on these being taken into account at sentencing.

4.258 Arguments included:

- that ‘currently, section 34(2) of the *Crimes (Sentencing) Act 2005* (ACT) places what is apparently an absolute prohibition on a sentencing court from having regard to the

⁵⁶⁵ ACT Bar Association, Submission No.11, p.11.

⁵⁶⁶ ACT Bar Association, Submission No.11, p.12.

⁵⁶⁷ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.74.

⁵⁶⁸ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, pp.74-75.

forfeiture of any property under the Confiscation of Criminal Assets Act 2003 (ACT) or the making of a penalty order under that Act';⁵⁶⁹

- that this applied 'regardless of whether the property in question has been identified as "proceeds" of the relevant offence (i.e. derived from the offence), or alternatively merely as an "instrument" of the offence' (i.e. used in or in connection with the commission of an offence but otherwise lawfully acquired);⁵⁷⁰
- that this contrasted with 'the position at common law, where forfeiture of lawfully acquired property generally has been regarded as a mitigating factor in sentencing';⁵⁷¹ and
- that these legislative provisions were out of step with other jurisdictions, including those of Victoria and the Commonwealth, and were 'a blunt instrument' that should be amended.⁵⁷²

COMMITTEE COMMENT

4.259 The Committee is persuaded that the current section 34(2) of the *Crimes (Sentencing) Act 2005* (ACT) is not conducive to ability of judicial officers in ACT courts to deliver individualised justice or to balance sentencing imperatives, and that as a result the ACT is out of step with other jurisdictions.

4.260 With this in mind the Committee makes the following recommendation.

Recommendation 9

4.261 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would allow greater judicial discretion over sentencing in cases which include forfeiture of property by an offender.

HUMAN RIGHTS

4.262 The Human Rights Commissioner's submission to the inquiry noted that 'sentencing options in the ACT ... engage many rights protected in the [*Human Rights Act 2004*], and noted that s 30 of the Act required that 'all ACT law be interpreted consistently with human rights'.⁵⁷³

⁵⁶⁹ ACT Bar Association, Submission No.11, p.11.

⁵⁷⁰ ACT Bar Association, Submission No.11, p.11.

⁵⁷¹ ACT Bar Association, Submission No.11, p.11.

⁵⁷² ACT Bar Association, Submission No.11, p.11.

⁵⁷³ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

4.263 The submission raised number of concerns about sentencing and human rights including concerns over:

- aggravated offences;
- irreducible life sentences; and
- costs to an accused due to court delays.

4.264 These are considered below.

AGGRAVATED OFFENCES

4.265 The Commissioner's submission noted the presence in the ACT statute book of aggravated offences. An example was s 48A of the *Crimes Act 1900*, which 'provides for an aggravated offence where the victim is a pregnant woman, and the commission of the offence caused death or serious harm to the child'.⁵⁷⁴ She also noted that there had been proposals for the creation of other similar aggravated offences, such as in 2012, when aggravating factors were proposed for assaults on police officers.⁵⁷⁵

4.266 The submission also noted that 'such aggravated offence engage the right to liberty of s 18' [of the *Human Rights Act 2004*] and that, as a result, care must be taken to consider such offences 'in light of the proportionality analysis under s28 of the *Human Rights Act 2004*'.⁵⁷⁶

IRREDUCIBLE LIFE SENTENCES

4.267 With regard to irreducible life sentences, the submission noted the outcome of a 2013 case in which the European Court of Human Rights held that:

⁵⁷⁴ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.7.

⁵⁷⁵ See the Standing Committee on Justice and Community Safety, *Crimes Legislation Amendment Bill 2011 and the Crimes (Offences against Police) Amendment Bill 2012*, June 2012, http://www.parliament.act.gov.au/_data/assets/pdf_file/0011/371486/JACS12_Crimes_Bill_2011.doc.pdf

⁵⁷⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.7. s 28 of the *Human Rights Act 2004* (ACT) reads:

28 Human rights may be limited

(1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose;

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

a prisoner must have some possibility of being released, and that it was incompatible with human dignity to deprive a person of liberty without offering them some chance of regaining their freedom.⁵⁷⁷

4.268 In light of this the Court found that ‘the imposition of an irreducible life sentence is a breach of article 3 of the European Convention, which prohibits torture, inhumane or degrading treatment’.⁵⁷⁸

4.269 The submission cited an ‘equivalent protection’ in s 10 (1) of the *Human Rights Act 2004* and noted that s 31 of the Act ‘states that judgements of foreign and international courts and tribunals may be considered in interpreting human rights’.⁵⁷⁹

4.270 The focus of the submission’s concern were perceived similarities between the process by which a prisoner serving a life sentence could apply to the Attorney-General for release on licence under Chapter 13 of the *Crimes (Sentence Administration) Act 2005*, and the United Kingdom process which the European Court of Human Rights had found invalid.⁵⁸⁰

4.271 In the case in the UK however the Secretary of State (to whom applications were to be made) had applied further qualifications on the process by way of ‘written policy suggesting such a discretion would only be exercised where the prisoner was terminally ill or seriously incapacitated’. It was this that had contravened the imperative, indicated above, that ‘a prisoner must have some possibility of being released’.⁵⁸¹

4.272 The submission noted that another case heard by the European Court of Human Rights had found in favour of a similar regime (that is, the provision of avenue for release by appeal to the senior law officer) in Cyprus. She suggested that arrangements in the ACT were arguably closer to those, but expressed concern that this remained ‘untested by the ACT Supreme Court’.⁵⁸²

HEARINGS

4.273 The Human Rights Commissioner made further comment on indefinite life sentences when she appeared before the Committee in hearings of 26 May 2014.

⁵⁷⁷ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.7, citing *Vinter v United Kingdom* [2013] ECHR.

⁵⁷⁸ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.7.

⁵⁷⁹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.7.

⁵⁸⁰ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.7.

⁵⁸¹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.7.

⁵⁸² ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

4.274 In her opening statement, the Commissioner told the Committee that:

In relation to indefinite life sentences, the European court, in *Vintner v UK*, in 2014 found that having a sentence without the possibility of parole is inhumane and degrading treatment, which is a provision in the ACT, section 10(1). There has been some litigation on this issue by Mr Eastman requesting a licence, and the Supreme Court cases there seem to show that the licensing system is reasonable and is an executive and not a judicial function. So there are a number of cases by Mr Eastman that actually have some information about that system in the ACT.

There was one case before Justice Refshauge, *R v Lewis*, in 2013 saying that it is not a judicial power to issue a licence; it really is an executive power. There was the UK case of the home secretary v Anderson in 2003, but that looked at the tariff of what a person's sentence was rather than the question of release, which is what the focus has been in the Eastman case. And it is quite distinguishable.⁵⁸³

4.275 Later in the public hearing she told the Committee that:

At the time we wrote this submission I had a concern, but there have been several cases involving Mr Eastman since where it seems like the licence system means that it would be human rights compatible and that he is not detained indefinitely for the rest of his life. There are several decisions now saying that the licence system is reasonable because there is hope for rehabilitation and release into the community, as opposed to some earlier European cases that I mentioned where it was found there was absolutely no chance of regaining freedom by the exercise of a discretion such as compassion by a prison or governor of another state.

That is not the situation here. "Indefinite" does not mean indefinite. It means after 10 years of serving a sentence you have the right to apply to the Attorney-General for release.⁵⁸⁴

ACCUSED'S COSTS DUE TO COURT DELAYS

4.276 The Commissioner's submission noted that in a recent case in the ACT where the court had considered the issue of:

an acquitted person receiving a costs order and the impact on the rights to liberty, fair trial and to be tried without unreasonable delay under the *Human Rights Act*.⁵⁸⁵

4.277 The submission showed that the Court had considered that it was 'unjust that delays causing loss to an accused through no fault of that accused are currently without remedy', and had

⁵⁸³ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.115.

⁵⁸⁴ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.121.

⁵⁸⁵ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

noted legislation in New South Wales which provide such a remedy. In view of this, the submission proposed, ‘legislation like these Acts should be considered’, to create outcomes ‘consistent with the human rights of an accused in the ACT’.⁵⁸⁶

HEARINGS

4.278 The Human Rights Commissioner and the Children and Young People Commissioner represented the Human Rights Commission when they appeared before the Committee in hearings of 26 May 2014.

4.279 The Children and Young People Commissioner spoke on two matters.

4.280 First, he told the Committee that in his view it was important that sentencing decisions in the sphere of youth justice be made on the basis of evidence. Currently, he told the Committee:

I would say a lot of the decisions are not evidence based. Human services and services for children and young people are frequently made by all stakeholders on what a particular individual thinks is a good idea at the time. It can be done for economic reasons, political reasons or community reasons—many reasons. There is a stack of reasons why we do things.⁵⁸⁷

4.281 Rather than this approach, he told the Committee, it was ‘really important to step back a bit and look at what is the data, both nationally and internationally, that says, “Will this idea actually work?”’.⁵⁸⁸

4.282 Second, he told the Committee, there was an option to employ ‘broader outcome-based sentences’, ‘not so much about a specific program being undertaken; it is more about the outcome that a judicial officer might be wanting to achieve’, and allowing Corrective Services ‘some discretion as to what program the person might do’.⁵⁸⁹

4.283 The Human Rights Commissioner, when she appeared before the Committee:

- expressed concern at the human rights implications of aggravated offences;⁵⁹⁰
- noted courts in other jurisdictions taking ‘into account the cultural background of people before you before sentencing them’ consistent with precedents in the High Court;⁵⁹¹

⁵⁸⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

⁵⁸⁷ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.121.

⁵⁸⁸ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.121.

⁵⁸⁹ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.125.

⁵⁹⁰ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, pp.120-121.

⁵⁹¹ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.115.

- emphasised the importance of ss 18(5) and 22(2)(c) of the *Human Rights Act 2004*, providing that ‘people awaiting trial usually should not be detained as a general rule’ and ‘not being subject to unreasonable delay before trial’, respectively;⁵⁹² and
- a related matter: that the ‘presumption against bail [had] been a problem in the ACT’ and that this had been highlighted ‘in the *Islam* case by Justice Penfold back in 2010’ where she found that ‘that some presumptions were incompatible’ [with the *Human Rights Act 2004*].⁵⁹³

SUMMARY

4.284 The Committee notes representations made to it regarding sentencing and human rights.

4.285 Arguments included:

- that there were potential conflicts between the existence of aggravated offences in the ACT legislation and human rights principles set out in s 18 and s 28 of the *Human Rights Act 2004*;⁵⁹⁴ and
- that it was ‘unjust that delays causing loss to an accused through no fault of that accused are currently without remedy’, and that a remedy be provided by way of legislation, as it is in NSW, so as to create outcomes ‘consistent with the human rights of an accused in the ACT’.⁵⁹⁵

COMMITTEE COMMENT

4.286 In reflecting on these arguments, the Committee considers that overall the ACT has not shown itself inclined toward creating aggravated forms of offences, notwithstanding s 48A of the *Crimes Act 1900*.

⁵⁹² Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.114.

⁵⁹³ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.114.

⁵⁹⁴ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.7. s 28 of the *Human Rights Act 2004* (ACT) reads:

28 Human rights may be limited

(1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose;

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

⁵⁹⁵ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

4.287 In connection with ‘delays causing loss to an accused through no fault of that accused’, the Committee that it is desirable that a remedy be provided in law, not only to protect the rights of the accused but also to add, in a healthy way, to the framework of checks and balances already present in the criminal justice system.

4.288 With this in mind, the Committee makes the following recommendation.

Recommendation 10

4.289 The Committee recommends that the ACT Government introduce legislation in the Legislative Assembly which, if passed, would provide a remedy in statute for delays causing loss to an accused through no fault of that accused.

5 SENTENCING AND THE CRIMINAL JUSTICE SYSTEM

INTRODUCTION

- 5.1 Contributions to the inquiry have noted a number of ways in which sentencing influences other parts of the justice system.
- 5.2 This relationship between sentencing and other elements was proposed in the submission by ACTCOSS, which argued that:
- none of the elements of current sentencing options in the ACT (bail, remand, custodial and non-custodial options etc.) can be changed in isolation. There are complex relationships between all of these elements, and changes to one can impact the others. For example, changes to eligibility criteria to make it harder to get bail may have a flow on to the number of remandees who are housed in gaol, which in turn lead to unsustainable cost increases related to growth in the number of detainees.⁵⁹⁶
- 5.3 Another submission, by Dr Lorana Bartels, noted difficulties in establishing links between ‘contemporary sentencing practice’ and other parts of the justice system ‘given the paucity of available sentencing data’.⁵⁹⁷
- 5.4 Other contributions to the inquiry considered in this report suggested links between:
- timeliness of court decisions on conviction or sentencing for defendants, offenders, and victims of crime and their families;⁵⁹⁸
 - requests for pre-sentencing reports and timeliness of decisions;⁵⁹⁹
 - timeliness of court decisions and the proportion of prisoners held on remand to sentenced prisoners at the AMC;⁶⁰⁰
 - the application, perception and administration of suspended sentences on victims of crime;⁶⁰¹

⁵⁹⁶ ACTCOSS, Submission No.6, p.5.

⁵⁹⁷ Dr Lorana Bartels, Submission No.1, p.4.

⁵⁹⁸ Australian Lawyers Alliance, Submission No. 4, p.4.

⁵⁹⁹ ACT Bar Association, Submission No.11, p.6.

⁶⁰⁰ ACTCOSS, Submission No.6, p.5.

⁶⁰¹ Victims of Crime Commissioner, Submission No.10, p.13.

- the availability or otherwise of data and information on sentencing and the public's acceptance, understanding, and engagement with contemporary sentencing.⁶⁰²

5.5 The present chapter identifies further links between sentencing practice and the various parts of the justice system, and people who come into contact with it. It deals with all items under part 2 of the Terms of Reference for the inquiry except for Term 2 (f), Offenders, which is dealt with in the following chapter, Chapter 3.

THE COURTS

CONTEMPORARY SENTENCING PRACTICE

5.6 The Committee invited the ACT Magistrates and Supreme Courts to submit to the inquiry and appear before the Committee. In both cases the Courts declined.

5.7 However a number of other contributors made comment about contemporary sentencing practice in ACT courts.

5.8 This included the submission by the Australian Lawyers Alliance, which argued in favour of current settings on sentencing, and those lodged by other contributors—the ACT Bar Association, the Director of Public Prosecutions, and ACTCOSS—who suggested avenues for change. These are considered below.

AUSTRALIAN LAWYERS ALLIANCE

5.9 The Australian Lawyers Alliance, in its submission, put the view that 'the sentencing regime in the Territory [did] not need any major overhaul' and that sentences handed down by ACT courts were 'generally about right, in accordance with community expectations' and that there was 'no need to seek to change the sentencing culture of the courts'.⁶⁰³

5.10 The submission put the view that the *Crimes (Sentencing) Act*:

in our view provides appropriate direction for judicial officers in sentencing as well as providing a range of sentencing options such that sentences in the ACT, perhaps more than any other jurisdiction in Australia, can be tailored to properly meet the

⁶⁰² Victims of Crime Commissioner, Submission No.10, p.12, and Dr Lorana Bartels, Submission No. 1, p.4, citing Lorana Bartels, 'Sentencing Statistics, Sentencing Councils and the Quest for Data in the Australian Capital Territory', in Patricia Easteal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 60

⁶⁰³ Australian Lawyers Alliance, Submission No. 4, p.1.

circumstances of the case and expectations of the community in terms of punishment, deterrence and retribution as well as rehabilitation and personal accountability.⁶⁰⁴

- 5.11 The submission stated that the objects set out in section 6 of the *Crimes Sentencing Act* 'are in our view an appropriate statement of what a sentencing law should seek to achieve'.⁶⁰⁵
- 5.12 Describing changes over time in the perception and complexion of sentencing in the ACT, the submission suggested that the ACT had in the past enjoyed a reputation as a 'lenient jurisdiction', but that this had been an artefact of the absence of a local prison. With the establishment of the AMC there had been 'a steady increase in the number of persons sentenced to imprisonment in the Territory'. This was the reflection of 'the fact the ACT now [had] its own correctional facility'.⁶⁰⁶ With the AMC in place as the ACT's correctional facility, it was 'no longer appropriate to regard the ACT as a lenient jurisdiction'.⁶⁰⁷

Rather it should be regarded as a just and non-reactionary jurisdiction in which the Courts administer justice fairly with appropriate judicial discretion and oversight cognisant of community expectations.⁶⁰⁸

- 5.13 The submission put the view that any correctives that were needed to the principle of judicial discretion already existed in the appeal system, which provided 'sufficient oversight to correct inadequate or excessive sentences'.⁶⁰⁹ Moreover:

The existence or preponderance of sentencing appeals either to or from the Supreme Court is not indicative of a broken system - rather it demonstrates the reality that sentencing is an inexact science where judicial discretion in sentencing is balanced with judicial oversight and a capacity to review sentencing decisions when and where necessary.⁶¹⁰

- 5.14 Contemporary sentencing practice in the ACT, the submission suggested, required no significant adjustment because the 'current system works'.⁶¹¹

ACT BAR ASSOCIATION

- 5.15 In its submission to the inquiry, the ACT Bar Association made recommendations for change in the legislative framework for sentencing in the ACT.

⁶⁰⁴ Australian Lawyers Alliance, Submission No. 4, p.2.

⁶⁰⁵ Australian Lawyers Alliance, Submission No. 4, p.2.

⁶⁰⁶ Australian Lawyers Alliance, Submission No. 4, pp.1-2.

⁶⁰⁷ Australian Lawyers Alliance, Submission No. 4, p.2.

⁶⁰⁸ Australian Lawyers Alliance, Submission No. 4, p.2.

⁶⁰⁹ Australian Lawyers Alliance, Submission No. 4, p.4.

⁶¹⁰ Australian Lawyers Alliance, Submission No. 4, p.4.

⁶¹¹ Australian Lawyers Alliance, Submission No. 4, p.4.

5.16 First, the submission noted that it supported:

an approach to sentencing that ensures that sentencing Courts have a wide range of sentencing options available so that the requirement under section 10 of the *Crimes (Sentencing) Act 2005* that imprisonment be used as sentence of last resort is given full effect.⁶¹²

5.17 The submission went on to say that the Bar was ‘conscious of the need for arrangements to be put in place to ensure that Judges and Magistrates are given a greater range of options other than remand in custody in respect of bail issues’.⁶¹³

5.18 It also favoured ‘a form of sentence administration’ which ensured that ‘rates of recidivism are reduced from their present high levels’.⁶¹⁴

ACT COUNCIL OF SOCIAL SERVICES

5.19 In its submission to the inquiry, ACTCOSS, the ACT Council of Social Services, took a different approach to contemporary sentencing practice.

5.20 The submission put forward a number of questions against which the ‘adequacy and effectiveness of current sentencing options should be assessed’:

- Do sentencing options allow for community safety concerns to be taken into account in determining whether a custodial or non-custodial sentence is most appropriate?
- Do sentencing options allow for diverse and tailored approaches that maximise opportunities to reduce the social determinants of offending and re-offending - such as alcohol and other drug issues, mental health issues, lack of economic opportunities?
- Do sentencing options take into account both the costs and benefits for the community and for people involved in the criminal justice system, minimising unnecessary costs and maximising social and economic benefits?⁶¹⁵

5.21 The submission went on to state that it was ACTCOSS ‘main interest’ that:

judicial officers in the ACT have the right range of sentencing options available so that the social determinants of crime are addressed, offenders are given the opportunity to rehabilitate, and the risks of reoffending are reduced whilst community safety is maximised.⁶¹⁶

⁶¹² ACT Bar Association, Submission No.11, p.1.

⁶¹³ ACT Bar Association, Submission No.11, p.2.

⁶¹⁴ ACT Bar Association, Submission No.11, p.2.

⁶¹⁵ ACTCOSS, Submission No.6, p.4.

⁶¹⁶ ACTCOSS, Submission No.6, p.4.

- 5.22 The submission noted the purposes of sentencing set out in section 7 (1) of the *Crimes (Sentencing) Act 2005* and described these as ‘valid’, however it took issue with the approach taken in section 7 (2), where the Act states ‘all purposes are provided equal weight’. The submission went on to recommend that ‘the provisions be changed to give the courts power to give priority to rehabilitation with the aim of reducing recidivism’.⁶¹⁷
- 5.23 This would, it suggested, be consistent with arrangements in section 133C of the Act for juvenile offenders, which provides that ‘a court must consider the purpose of promoting the rehabilitation of the young offender and may give more weight to that purpose than it gives to any of the other purposes’.⁶¹⁸

TIMELINESS IN HANDING DOWN DECISIONS

- 5.24 Submissions to the inquiry expressed concern over delays in handing down decisions in ACT criminal courts, a matter which has also been discussed in public hearings held by the Committee over a number of years.⁶¹⁹
- 5.25 For this inquiry, contributors made a variety of interpretations as to the cause of delay in ACT courts, its effects, and the best way to respond. These were set out in submissions by the ACT Bar Association; the Australian Lawyers Alliance; Dr Lorana Bartels; ACTCOSS; the ACT Human Rights Commissioner; and the ACT Victims of Crime Commissioner, and are considered below.

ACT BAR ASSOCIATION

- 5.26 The Bar Association’s submission to the inquiry noted that ‘in recent times’ concerns had been raised ‘about the delay in the delivery of judgments in the Supreme Court’. It suggested that an ‘unusually high proportion of sentences in the Supreme Court are the subject of reserved decisions’, and that the ‘time taken to deliver those reserved decisions is also in some instances unusually long’.⁶²⁰
- 5.27 The submission suggested that this was related to other trends, that ‘[c]onsistent with the move toward more punitive outcomes being imposed in the Magistrates Court there is a tendency to obtain more and more pre-sentence reports (PSRs)’.⁶²¹ Although it was ‘difficult to quantify’, there was ‘anecdotal evidence’ that ‘this process of obtaining a PSR [was] delaying

⁶¹⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.7.

⁶¹⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.7-8.

⁶¹⁹ See Standing Committee on Justice and Community Safety, *Annual And Financial Reports 2011-2012*, p.93 ff; Standing Committee on Justice and Community Safety, *Annual And Financial Reports 2012-2013*, p.8 ff.

⁶²⁰ ACT Bar Association, Submission No.11, p.6.

⁶²¹ ACT Bar Association, Submission No.11, p.6.

proceedings in the Magistrates Court’ and ‘placing unreasonable burdens on ACT Corrective Services’.⁶²²

- 5.28 Although it expressed uncertainty as to whether this was a matter that could be ‘resolved by a recommendation of the Committee’, the submission suggested a legislative resolution to the matter, by amending ‘section 41 of the *Crimes (Sentencing) Act 2005* to guide the exercise of the Court’s discretion as to the ordering of a pre-sentence report may be necessary’. This, it suggested, ‘would require the Court to consider in a timely and more systematic way whether a full time custodial sentence is *prima face* indicated on the material before it’.⁶²³

AUSTRALIAN LAWYERS ALLIANCE

- 5.29 The submission by the Australian Lawyers Alliance focused on another aspect of the question of timeliness, ‘the appointment of a fifth judge to the ACT Supreme Court’.⁶²⁴

- 5.30 The submission suggested that:

In the last 18 months there has effectively been a *de-facto* additional judge in the ACT in the form of Acting Justice Nield. It is clear that without this additional judicial capacity, timeliness in completing criminal matters In the Territory would have been significantly adversely affected.⁶²⁵

- 5.31 Further, it suggested:

To return to a situation of only having four full-time judges will have the effect of increasing the time accused persons wait for trial and victims of crime wait in ‘limbo’ for matters to be completed. Consequential issues as to bail and delay will inevitably arise.⁶²⁶

- 5.32 As had the submission by the ACT Bar Association, the submission by the Lawyers Alliance suggested that reserved decisions by the courts had been ‘ongoing ... in the Territory for some time’ although ‘it appears in recent times this has slowly begun to improve’. Regarding this, however, the submission suggested that one thing that could be said with certainty was ‘that if the number of judges is reduced the timeliness in the delivery of decisions will not increase’.⁶²⁷

⁶²² ACT Bar Association, Submission No.11, p.6.

⁶²³ ACT Bar Association, Submission No.11, p.6.

⁶²⁴ Australian Lawyers Alliance, Submission No. 4, p.4.

⁶²⁵ Australian Lawyers Alliance, Submission No. 4, p.4.

⁶²⁶ Australian Lawyers Alliance, Submission No. 4, p.4.

⁶²⁷ Australian Lawyers Alliance, Submission No. 4, p.4.

ACT COUNCIL OF SOCIAL SERVICES (ACTCOSS)

5.33 The submission to the inquiry by the ACT Council of Social Services (ACTCOSS) focused on the implications of delayed decisions on defendants.

5.34 The submission stated that while ACTCOSS was ‘aware’ of efforts to clear the courts backlog, there remained ‘a concern about the delays in handing down decisions and sentences’ and ‘the impact this has on people who are waiting for a judicial decision, especially when it is in relation to a criminal matter’.⁶²⁸

From speaking to people with lived experience of the justice system, a lack of timeliness of decisions and sentences impacts on their employment, rehabilitation chances and families. As an example, one person spoke of their dilemma about starting a new job while they were waiting for their sentence, as they were unsure if they would then have to tell their new boss they would be imprisoned for a time, or not.⁶²⁹

5.35 Prisoners held in remand could be, ‘in particular’, ‘negatively impacted on by delays in handing down of sentences’.⁶³⁰

5.36 Court delays also had important consequences on service providers:

A lack of timeliness in handing-down decisions also has an impact on organisations who work with people in the justice system, such as alcohol and other drug (AOD) treatment service providers. Delays in handing-down sentences can have an effect on the development and implementation of treatment and care plans, and on the time it takes to establish a relationship with care providers.⁶³¹

5.37 Regarding this, the submission provided an example of an AOD (alcohol and other drug) organisation which had ‘noted that they sometimes have to “hold beds” for people in their rehabilitation centre while they wait to hear their sentence’, and that this had an ‘impact’ by reducing ‘the availability of spaces for other clients’.⁶³²

ACT HUMAN RIGHTS COMMISSIONER

5.38 In her submission to the inquiry, the ACT Human Rights Commissioner also focused on the effect of delays on defendants. The submission noted that section 22 (c) of the *Human Rights Act 2004* required that ‘a defendant be tried without unreasonable delay’. This had been ‘a contentious issue in the ACT’ leading, in one case, to an accused being released on Bail due to

⁶²⁸ ACTCOSS, Submission No.6, p.5.

⁶²⁹ ACTCOSS, Submission No.6, p.5.

⁶³⁰ ACTCOSS, Submission No.6, p.5.

⁶³¹ ACTCOSS, Submission No.6, p.5.

⁶³² ACTCOSS, Submission No.6, p.5.

delay, and other defendants had also argued that their human rights had been ‘unreasonably limited by trial delay’.⁶³³

DR LORANA BARTELS

5.39 Dr Lorana Bartels’ submission to the inquiry noted ‘well publicised ... lengthy delays within the ACT court system’. The submission noted the impact of delays on victims and proposed that it was in the interests of ‘victims, defendants and the broader community for justice to be dispensed swiftly’.⁶³⁴

5.40 As had other contributions, Dr Bartels’ submission suggested that a way to reduce timelines for court decisions was to appoint a fifth judge to the Supreme Court.⁶³⁵ However, it advised the Committee, moves to reduce the backlog should not be at the expense of transparency and sentencing jurisprudence:

To the extent possible, any measures should take into account the desirability of judges providing comprehensive reasons for their sentencing outcomes, including statements of policy and principle ...⁶³⁶

ACT VICTIMS OF CRIME COMMISSIONER

5.41 As noted, the submissions considered above focused, for the most part, on the consequences of court delays on defendants. The submission by the Victims of Crime Commissioner focused on consequences for victims as crime as well as defendants.

5.42 With regard to the extent of the backlog that had at times been experienced in the ACT court system, the Commissioner’s submission noted that:

State and territory governments have set a standard for the time taken to progress criminal matters through the courts. The national standard for a Supreme Court is no more than 10% per cent of cases still pending after a year. In 2012 the ACT backlog was 47.3% of non-appeal cases still running after a year. At the time that was the biggest backlog of any Supreme Court in Australia.⁶³⁷

5.43 The submission noted that ‘on 13 September 2013 the Attorney-General announced that significant decreases in waiting times and backlogs had been achieved following the introduction of the docket system in 2012’. ‘Nevertheless’, he stated, ‘on 29 July 2013 *The*

⁶³³ ACT Human Rights and Discrimination Commissioner, Submission No.8, pp.5-6.

⁶³⁴ Dr Lorana Bartels, Submission No.1, p.4.

⁶³⁵ Dr Lorana Bartels, Submission No.1, p.4.

⁶³⁶ Dr Lorana Bartels, Submission No.1, p.4.

⁶³⁷ Victims of Crime Commissioner, Submission No.10, p.4.

Canberra Times reported that there were 46 unresolved cases waiting six months or more for a Judge to hand down a decision in the ACT Supreme Court'.⁶³⁸

5.44 The submission then went on to discuss the effects of court delays, initially for defendants:

Criminal trials that fail to proceed as scheduled contribute to backlog and delay, which consume significant resources and impacts negatively on the accused, especially if they are remanded into custody, and their families.⁶³⁹

5.45 It then considered the effects of delays on victims of crime:

Less understood and acknowledged is the fact that trial delays have serious adverse effects, both emotionally and materially, on victims of crime and their families. Delays create additional trauma for them and can influence their decision to leave the criminal justice system.

Delays for trials and the handing down of decisions following trials have adverse effects on victims of crime and their families. I receive numerous complaints from victims about the effect of delays in our criminal justice system. Victims of sexual offences are particularly vulnerable when awaiting the trial, decision or sentence of the case. Each event in the progress of the case recalls for them the trauma associated with the offence. Their recovery is delayed due to these repeated experiences of being victimised. The longer it takes to finalise cases against the accused the longer they are prone to developing longer term anxiety related illnesses.⁶⁴⁰

5.46 In one case, the submission advised:

An alleged assault occurred in June one year and the accused was committed to trial in October that year. The trial was held two years later, during which the verdict was reserved. Two not guilty verdicts were handed down 21 months after the trial was held. The victim was upset at the not guilty verdicts, but even more so at the length of time it took for the verdicts to be announced.⁶⁴¹

5.47 While the submission acknowledged 'the joint efforts of the ACT Government and ACT Supreme Court to manage the issue of trial delays by introducing a docket system', it expressed continuing concern about 'the timeliness of handing down decisions, noting that during the 2012-13 financial year, 124 cases across all courts that were finalised had taken over 2 years to complete'.⁶⁴² It went on to suggest that if:

⁶³⁸ Victims of Crime Commissioner, Submission No.10, p.2.

⁶³⁹ Victims of Crime Commissioner, Submission No.10, p.2.

⁶⁴⁰ Victims of Crime Commissioner, Submission No.10, p.2.

⁶⁴¹ Victims of Crime Commissioner, Submission No.10, p.2.

⁶⁴² Victims of Crime Commissioner, Submission No.10, p.2.

the recent initiatives to improve timeliness across all areas of court proceedings do not result in long-term, significant improvements in efficiency and therefore outcomes for victims, then other initiatives should be considered.⁶⁴³

- 5.48 One possible measure, the submission suggested, was to ‘make provisions for time limits or time frames for verdicts’.⁶⁴⁴ In addition, having:

legislative provisions similar to those included in the *Federal Court of Australia Act 1976* (Cth) would provide a Chief Justice or Magistrate with the authority to temporarily restrict a Judge or Magistrate to non-sitting duties to manage court business.⁶⁴⁵

- 5.49 ‘In the case of outstanding judgments’, the submission suggested, ‘this would allow the Head of Jurisdiction to take measures early to ensure these judgments are expedited’.⁶⁴⁶

- 5.50 In brief form, the submission suggested that as [l]engthy delays in handing down decisions and sentences in the criminal court are harmful to victims’,⁶⁴⁷ it was recommended that:

the Committee investigates legislative reform that can address this issue, including legislating time limits and/or legislative provisions that provide the Head of Jurisdiction to take specific measures to ensure judgements are expedited.⁶⁴⁸

HEARINGS

- 5.51 The Victims of Crime Commissioner added to these comments when he appeared before the Committee in public hearings of 14 October 2014.

- 5.52 When asked about court delays, the Commissioner told the Committee that:

Since the appointment of Chief Justice Helen Murrell, I have noticed a distinct improvement in the time lines around bringing cases forward, holding people to their dates of trial and not shifting them at the last minute, and prioritising sexual assault matters. That is welcome. The Chief Justice is very active in administering the business of the court. That was needed, and we are seeing the positive influence of the Chief Justice.⁶⁴⁹

⁶⁴³ Victims of Crime Commissioner, Submission No.10, p.2.

⁶⁴⁴ Victims of Crime Commissioner, Submission No.10, p.5.

⁶⁴⁵ Victims of Crime Commissioner, Submission No.10, p.5.

⁶⁴⁶ Victims of Crime Commissioner, Submission No.10, p.5.

⁶⁴⁷ Victims of Crime Commissioner, Submission No.10, p.3.

⁶⁴⁸ Victims of Crime Commissioner, Submission No.10, p.3.

⁶⁴⁹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

5.53 In relation to the effect of delays on victims, the Commissioner told the Committee that:

With delays at court, victims can get their heads around dates. They understand that the courts are busy and they can accept that trials will take some months, years, to bring on.⁶⁵⁰

5.54 He told the Committee that, rather, it was the 'late change of arrangements—the late vacation of trial dates, the unnecessary attendance at court without prior arrangements being made—that distresses victims'.⁶⁵¹ He was 'seeing a decrease in that':

Prosecutors and defence are becoming aware that a trial date, when set, is going to occur unless there is a very good reason, whereas in past years you would see very late applications to vacate trial dates.⁶⁵²

5.55 The Commissioner also noted that in his submission to the inquiry he had recommended 'legislative mechanisms to enforce the courts to hear matters of sexual assault within a certain time frame'. In view of the changes he identified he thought 'the administration ... would not now require that to occur':

In honouring the independence of the court, we either allow the court to administer itself or we introduce law and place time restrictions or time limits on the processing of sexual assault matters. I would not say that now; I do not hold that position as strongly as I did, because of the way the courts are being administered. With the Chief Justice taking such an active role in that, she is doing her best to address the delays, and we are seeing a reduction in time.⁶⁵³

DIRECTOR OF PUBLIC PROSECUTIONS

5.56 The DPP made comment on delays in ACT courts in his Annual Report 2013-2014, in which he stated that new listing practices in the ACT Supreme Court had been successful, but that listing practices in the ACT Magistrates Court required similar attention. As a result, 'delays are increasing in the Magistrates Court, just as they are decreasing in the Supreme Court'.⁶⁵⁴

5.57 The DPP made further comment when he appeared in public hearings, where he told the Committee that:

business in the Supreme Court is very busy and the new listing arrangements that have been brought in with the new Chief Justice are operating very successfully. I think

⁶⁵⁰ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

⁶⁵¹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

⁶⁵² Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

⁶⁵³ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

⁶⁵⁴ Director of Public Prosecutions, Annual Report 2013-2014, p.1,
http://www.dpp.act.gov.au/data/assets/pdf_file/0010/644194/2013-2014-Annual-Report.pdf

members of the committee will be able to see, in terms of numbers of trials completed, that great advances have been made. In fact I think it is fair to say that the backlog, which was fairly substantial a couple of years ago, has now pretty much been wound back in the Supreme Court.⁶⁵⁵

5.58 He also told the Committee that the new listing arrangements included sexual offences. These were ‘often difficult cases to run, for various reasons’, including that:

- they ‘often have additional material that has to be put before juries’;
- they ‘are all jury matters, because of the nature of the matters’; and
- ‘there is a lot of technology that needs to be employed’.⁶⁵⁶

5.59 As a result, he told the Committee, ‘they are not as straightforward as some other matters’, but:

they are being included in the listing arrangements; as a consequence, again, the waiting times for the victims to have their matters brought on for trial have been greatly reduced.⁶⁵⁷

5.60 However, as in the forward to his annual report, he went on to note difficulties in the ACT Magistrates Court:

unfortunately we do seem to have some problems in the Magistrates Court in terms of throughput of work. As I have said in my report—and it is not just me—I think that I and the profession generally have been waiting for some time for some advances in the listing arrangements to be put into effect in the Magistrates Court. Unfortunately, that has not happened to date, although I know that the Chief Magistrate and the court are very aware of the issues and are actively considering the concerns of me and the profession in terms of listing procedures.⁶⁵⁸

GOVERNMENT RESPONSE

5.61 In its submission to the inquiry the ACT Government made only passing reference to timeliness in the courts. A more complete response was made by the Attorney-General in public hearings into JACS annual and financial reports for 2012-2013, where he indicated that the focus of the

⁶⁵⁵ Mr Jon White SC, *Transcript of Evidence*, 13 October 2014, p.89.

⁶⁵⁶ Mr Jon White SC, *Transcript of Evidence*, 13 October 2014, p.89.

⁶⁵⁷ Mr Jon White SC, *Transcript of Evidence*, 13 October 2014, p.89.

⁶⁵⁸ Mr Jon White SC, *Transcript of Evidence*, 13 October 2014, p.89.

Government's response to a backlog in the courts had been to conduct a 'blitz' to reduce the courts backlog before instituting a docket system for managing court cases.⁶⁵⁹

- 5.62 The Government placed its reliance on these measures, in combination with the development of a new ICT case management system for the courts, referenced in its submission to the inquiry. Its submission also suggested that the advent of the ACT Sentencing Database would have a positive impact on timelines for court decisions because it would 'lead to a ... reduction in the number of appeals against sentence as trends emerge in the sentences awarded'.⁶⁶⁰
- 5.63 [Note further comment by Attorney in Annual Reports hearings 3 November 2014 – criteria for appointment of fifth judge rather than 'never'].

COMMITTEE REVIEW OF DATA: TIMELINESS IN COURT CASES

- 5.64 In relation to questions of timeliness in court cases, the Committee considered the most recent edition of the Productivity Commission's *Report on Government Services* (ROGS) (2013).
- 5.65 Data in ROGS for 'Higher' courts merges data from Supreme and County or District Courts for those jurisdictions which have a three-tier court system. These 'higher courts' correspond to the jurisdiction of the ACT Supreme Court. In this data the ACT shows a rate of 23.8% of appeal cases outstanding after 12 months, higher than any other jurisdiction except Queensland, which shows a rate of 52.9% for this indicator. Not all jurisdictions report for the category 'cases outstanding after 24 months', making comparison difficult.⁶⁶¹
- 5.66 For non-appeal cases in higher courts, the ACT registers the highest proportion of cases outstanding after 12 months: at 42.6% it is close to double that of the next nearest figure, 23.4% in Victoria. A similar result is displayed for non-appeal cases in excess of 24 months, where the ACT shows the highest figure of any jurisdiction: 16.5% compared with the next highest figure of 5.7% for Queensland and Tasmania.⁶⁶²
- 5.67 For comparisons of 'Supreme' courts, figures for the ACT remain the same as for 'higher courts' but change for other jurisdictions with the inclusion of County or District Courts. Comparison on this basis results in the ACT having the highest figures of any jurisdiction for

⁶⁵⁹ Standing Committee on Justice and Community Safety, *Transcript of Evidence*, 20 November 2013, p.146, and ACT Government, Submission No.12, p.2.

⁶⁶⁰ ACT Government, Submission No.12, p.2.

⁶⁶¹ Productivity Commission, Report on Government Services 2013, Chapter 7, 'Courts', http://www.pc.gov.au/_data/assets/pdf_file/0007/121768/10-government-services-2013-chapter7.pdf, table 7.12, p.7.34.

⁶⁶² Productivity Commission, Report on Government Services 2013, Chapter 7, 'Courts', http://www.pc.gov.au/_data/assets/pdf_file/0007/121768/10-government-services-2013-chapter7.pdf, table 7.12, p.7.34.

appeal cases taking over 12 months to resolve: 23.8% compared to the next highest, Victoria, at 19.3%). Again, not all jurisdictions report on cases outstanding for more than 24 months. For non-appeal cases the ACT displays the highest rate of cases taking more than 12 months (42.6%, as against Victoria at 33.3%) and is second-highest for cases extending over more than 24 months: 16.5% compared with Victoria at 17.2%.⁶⁶³

5.68 Comparisons for Magistrates and Children's Courts across jurisdictions show the ACT as average for the number of cases extending beyond 6 and 12 months.⁶⁶⁴

SUMMARY

5.69 The Committee notes the representations made to it regarding the ACT courts.

5.70 Arguments included:

- that the ACT 'should be regarded as a just and non-reactionary jurisdiction in which the Courts administer justice fairly with appropriate judicial discretion and oversight cognisant of community expectations, and that the 'current system works';⁶⁶⁵
- that it was important to 'to ensure that Judges and Magistrates are given a greater range of options other than remand in custody in respect of bail issues';⁶⁶⁶
- that provisions set out in section 7 (2) of the *Crimes (Sentencing) Act 2005* should 'be changed to give the courts power to give priority to rehabilitation with the aim of reducing recidivism';⁶⁶⁷

5.71 The Committee notes the representations made to it regarding timeliness in handing down decisions in the ACT courts.

5.72 Arguments included:

- that concerns had been raised 'about the delay in the delivery of judgments in the Supreme Court', an 'unusually high' proportion of sentences in the Supreme Court being

⁶⁶³ Productivity Commission, Report on Government Services 2013, Chapter 7, 'Courts', http://www.pc.gov.au/_data/assets/pdf_file/0007/121768/10-government-services-2013-chapter7.pdf, table 7.12, p.7.34.

⁶⁶⁴ Productivity Commission, Report on Government Services 2013, Chapter 7, 'Courts', http://www.pc.gov.au/_data/assets/pdf_file/0007/121768/10-government-services-2013-chapter7.pdf, table 7.12, p.7.34. See also data presented in JACS Annual Report which may represent a different view from ROGS data: see JACS Annual Report 2013-2014, p.88, Graph 9.

⁶⁶⁵ Australian Lawyers Alliance, Submission No. 4, pp.2, 4.

⁶⁶⁶ ACT Bar Association, Submission No.11, p.2 and see Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.7.

⁶⁶⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.7.

the subject of reserved decisions, and the 'unusually long' times 'taken to deliver those reserved decisions ... in some instances';⁶⁶⁸

- that '[c]onsistent with the move toward more punitive outcomes being imposed in the Magistrates Court there is a tendency to obtain more and more pre-sentence reports (PSRs)', and that this was 'delaying proceedings in the Magistrates Court';⁶⁶⁹
- that a legislative resolution would be to amend 'section 41 of the *Crimes (Sentencing) Act 2005* to guide the exercise of the Court's discretion as to the ordering of a pre-sentence report may be necessary', which would also 'require the Court to consider in a timely and more systematic way whether a full time custodial sentence is *prima facie* indicated on the material before it'.⁶⁷⁰
- that a fifth judge should be appointed to the ACT Supreme Court;⁶⁷¹
- that there was concern about 'delays in handing down decisions and sentences' and 'the impact this has on people who are waiting for a judicial decision, especially when it is in relation to a criminal matter';⁶⁷²
- that section 22 (c) of the *Human Rights Act 2004* required that 'a defendant be tried without unreasonable delay';⁶⁷³
- that it was in the interests of 'victims, defendants and the broader community for justice to be dispensed swiftly';⁶⁷⁴
- that the 'national standard for a Supreme Court is no more than 10% per cent of cases still pending after a year' and in 2012 the ACT backlog was 47.3% of non-appeal cases still running after a year', 'the biggest backlog of any Supreme Court in Australia';⁶⁷⁵
- that 'on 13 September 2013 the Attorney-General announced that significant decreases in waiting times and backlogs had been achieved following the introduction of the docket system in 2012', yet 'on 29 July 2013 *The Canberra Times* reported that there were 46 unresolved cases waiting six months or more for a Judge to hand down a decision in the ACT Supreme Court';⁶⁷⁶
- that 'during the 2012-13 financial year, 124 cases across all courts that were finalised had taken over 2 years to complete';⁶⁷⁷

⁶⁶⁸ ACT Bar Association, Submission No.11, p.6.

⁶⁶⁹ ACT Bar Association, Submission No.11, p.6.

⁶⁷⁰ ACT Bar Association, Submission No.11, p.6.

⁶⁷¹ Australian Lawyers Alliance, Submission No. 4, p.4. See also Dr Lorana Bartels, Submission No.1, p.4.

⁶⁷² ACTCOSS, Submission No.6, p.5.

⁶⁷³ ACT Human Rights and Discrimination Commissioner, Submission No.8, pp.5-6.

⁶⁷⁴ Dr Lorana Bartels, Submission No.1, p.4. See also Victims of Crime Commissioner, Submission No.10, p.2.

⁶⁷⁵ Victims of Crime Commissioner, Submission No.10, p.4.

⁶⁷⁶ Victims of Crime Commissioner, Submission No.10, p.2.

⁶⁷⁷ Victims of Crime Commissioner, Submission No.10, p.2.

- that one possible response was to make provision for ‘time limits or time frames for verdicts’;⁶⁷⁸
- that a further possible response was to make ‘legislative provisions similar to those included in the Federal Court of Australia Act 1976 (Cth) would provide a Chief Justice or Magistrate with the authority to temporarily restrict a Judge or Magistrate to non-sitting duties to manage court business’;⁶⁷⁹
- that timeliness in the ACT Supreme Court had improved following the appointment of a new Chief Justice in 2013;⁶⁸⁰
- that new listing practices in the ACT Supreme Court had been successful, but that listing practices in the ACT Magistrates Court required similar attention because ‘delays are increasing in the Magistrates Court, just as they are decreasing in the Supreme Court’;⁶⁸¹ and
- that the legal profession generally has been ‘waiting for some time for some advances in the listing arrangements to be put into effect in the Magistrates Court’.⁶⁸²

COMMITTEE COMMENT

5.73 The Committee notes arguments made regarding the ACT courts.

5.74 Reflecting on these arguments, it considers that in general ACT courts appear to be held in high esteem, and are regarded as moderate and fair, by the legal profession.

5.75 In the Committee’s view, representations to broaden the discretion of judicial officers over bail dispositions has merit and would be consistent with the spirit of more flexible arrangements presaged as the ACT considers introducing intensive corrections orders. In connection with this, the Committee notes the high proportion of prisoners on remand within the prison population at the AMC and the desirability of reducing this if the negative, inadvertent, consequences of incarceration are to be minimised.

5.76 With this in mind the Committee makes the following recommendation.

⁶⁷⁸ Victims of Crime Commissioner, Submission No.10, p.5.

⁶⁷⁹ Victims of Crime Commissioner, Submission No.10, p.5.

⁶⁸⁰ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

⁶⁸¹ Director of Public Prosecutions, Annual Report 2013-2014, p.1,
http://www.dpp.act.gov.au/_data/assets/pdf_file/0010/644194/2013-2014-Annual-Report.pdf

⁶⁸² Mr Jon White SC, *Transcript of Evidence*, 13 October 2014, p.89.

Recommendation 11

- 5.77 The Committee recommends that the ACT Government propose legislative changes to the Legislative Assembly which, if passed, would increase options available to judicial officers so as to provide alternatives to placing accused persons on remand.**
- 5.78 With regard to emphasis on sentencing imperatives in the 7 (2) of the *Crimes (Sentencing) Act 2005*, the Committee considers that the current framing of the section maximises and protects judicial discretion—and that this is a good thing—and that a greater emphasis on rehabilitation will, in any case, be the result of the anticipated introduction of intensive corrections orders in the ACT.
- 5.79 The Committee also notes arguments made regarding timeliness in the courts.
- 5.80 Reflecting on these arguments, the Committee notes that listing practices are a matter for the courts to consider, although in the case of the ACT Supreme Court policy settings introduced by the ACT Government seem to have played a part in reducing timelines for the completion of cases.
- 5.81 In the Committee’s view it is a compelling argument that the reform of listing practices which took place in the Supreme Court should be matched by reforms in the Magistrates Court, and that the ACT Government should do what lies in its power to assist the court in this matter.
- 5.82 With this in mind the Committee makes the following recommendation.

Recommendation 12

- 5.83 The Committee recommends that the ACT Government advocate for, encourage and support reform of listing practices in the ACT Magistrates court with the anticipated outcome that cases be resolved in shorter, and more predictable, timeframes.**

CORRECTIONS

INTRODUCTION

- 5.84 A number of contributors made comment on the relationship between sentencing and corrections. In particular they made comment on:
- responses to the AMC being at capacity;
 - management of prisoners with mental health problems;
 - the effectiveness of rehabilitation programs and services;

5.85 Contributors included:

- the Minister for Corrections and his officers;
- the ACT Council of Social Services (ACTCOSS);
- the Alcohol Tobacco and Other Drug Association ACT (ATODA);
- Dr Lorana Bartels;
- the ACT Human Rights Commissioner;
- the ACT Bar Association; and
- the Australian Lawyers Alliance.

5.86 Their comments are considered below.

RESPONSES TO THE AMC BEING AT CAPACITY

CORRECTIVE SERVICES

5.87 The Minister for Corrections appeared before the Committee, with his officers, in hearings of 2 May 2014.

5.88 In a previous a hearing, of 13 November 2013, the Committee had heard testimony suggesting that overcrowding at the AMC had:

- reduced a sense of security for some prisoners;
- resulted in reduced access to privileges and programs;
- brought greater challenges in preventing mixing between incompatible prisoners and categories of prisoners; and
- increased rates of prison lockdowns.⁶⁸³

5.89 In hearings of 2 May 2014 the Minister for Corrections confirmed that ‘the general issue of mix of remand and sentenced prisoners’ continued to be ‘an issue ... across the board’ at the AMC,⁶⁸⁴ and told the Committee that ‘population pressures’ at the AMC were a significant contributor to this problem.⁶⁸⁵

5.90 He also told the Committee that ‘greater levels of separation and segregation’ would be a ‘key focus’ of designs for the proposed expansion of the AMC:

⁶⁸³ See: Standing Committee on Justice and Community Safety, *Annual and Financial Reports 2012-2013*, pp.34-35, available at: http://www.parliament.act.gov.au/_data/assets/pdf_file/0011/567470/Standing-Committee-on-Justice-and-Community-Safety-Annual-Reports-2012-13-Final-March-2014.pdf

⁶⁸⁴ *Transcript of Evidence*, 2 May 2014, pp.33

⁶⁸⁵ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.34.

The intent and the learnings that are contained in the new design are that there [will be] much higher levels of separation. They are done on a hub and spoke design so that individual wings can be isolated. It might be that a certain cohort of offenders that can go together can go together in smaller groups. That will give the operational team at the AMC much greater flexibility and scope to manage the population both for the safety of the prisoners and for the safety of staff. So that is a key benefit.⁶⁸⁶

5.91 The Minister went on to tell the Committee that:

flexibility will be determined by the overall population numbers as well. If there are lower numbers, there is obviously more space and more flexibility. We see a considerable ebb and flow in the population. Those things will all shift on a daily basis.⁶⁸⁷

5.92 He told the Committee that:

A key part of the work done by the corrections team at the AMC is to each day manage where best to put people and who to put them with. There is a constant assessment process going on in that regard.⁶⁸⁸

5.93 The Committee questioned witnesses as to numbers of prisoners in each category—sentenced and un-sentenced. In response, the Executive Director, ACT Corrective Services, told the Committee that it was at that time ‘around one-third remand, two-thirds sentenced’, but ‘that can change’. Moreover, there were also groups within the Indigenous population at the AMC, amounting to 52 prisoners at the time, who could not ‘mix together’, so ‘even within that [smaller] group, there is a cohort that cannot mix with others. This was ‘generally because of the nature of their offences’.⁶⁸⁹

5.94 On the other hand, the Minister told the Committee, there could in some circumstances be ‘an advantage in mixing remand and sentenced, particularly for Indigenous detainees’, as:

Often there is a cultural benefit in Indigenous detainees sharing a cell. There is a sense of support, for want of a better word. So it may actually be better to mix people, even if they are remand and sentenced, for some of those cultural reasons.⁶⁹⁰

5.95 In response to a question about prisoner lockdowns, the Executive Director, ACT Corrective Services, told the Committee that:

⁶⁸⁶ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.34.

⁶⁸⁷ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, pp.34-35.

⁶⁸⁸ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.35.

⁶⁸⁹ Mrs Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.34.

⁶⁹⁰ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.34.

All jails have them and no-one likes them. But we are very clear that we do everything we can to not stop a program for lockdowns. So people will still be escorted to a program, to education or medical. Mr Taylor and the team make a great effort to minimise the impact on visits and programs in relation to lockdowns. They are generally not full-day; they are generally for a couple of hours until we can sort staffing out.⁶⁹¹

ACTCOSS

- 5.96 ACTCOSS' submission to the inquiry noted that the AMC was operating 'at capacity', and noted that the 2013-14 ACT Budget had seen \$3 million 'directed towards funding for a design for extra accommodation at the AMC'. This expansion could, it suggested, 'potentially lead to the incarceration of more detainees'. In view of this, ACTCOSS suggested that there was a 'sense of urgency in identifying and implementing alternative sentencing options'.⁶⁹²

ATODA

- 5.97 ATODA's submission to the inquiry also proposed a link between the AMC being 'at capacity' and 'the need for innovative justice responses':

The ACT is in a situation where the Territory's only adult prison, the Alexander Maconochie Centre (AMC), is over-capacity with approximately 317 detainees, and decisions need to be made to either reduce the growth of the prison population or to invest in the building of new facilities to cater for an increase in the prison population. ATODA understands that there are both short term and longer term plans to expand the bed numbers at the AMC.⁶⁹³

- 5.98 ATODA suggested that through recourse to alternative sentencing options '[s]ome of this expansion could potentially be prevented and save the ACT millions of dollars'. The \$3M earmarked for plans for 'planning work' related to the expansion of the AMC, in its view, indicated something of the savings achievable through this approach.⁶⁹⁴

- 5.99 'Consequently', the submission proposed, the ACT should:

engage with and benefit from initiatives that have been proven to reduce prison populations, and people involved in the justice system more broadly, and to promote more novel, evidence-based approaches to justice. Such initiatives may provide an

⁶⁹¹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.34.

⁶⁹² ACTCOSS, Submission No.6, pp.4-5.

⁶⁹³ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.3-4.

⁶⁹⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.4.

opportunity to reduce future growth in prison expenditure by removing the need to build new facilities and reduce people's contact with the justice system.⁶⁹⁵

DR LORANA BARTELS

5.100 Dr Lorana Bartels made comment on these matters when she appeared before the Committee in hearings of 26 May 2014.

5.101 With regard to separating sentenced and unsentenced prisoners she noted 'the challenge of separating prisoners who simply do not get on', and that 'in a different jurisdiction you could have them in different facilities'.⁶⁹⁶

5.102 With regard to the proposed extension of the AMC, Dr Bartels told the Committee that while this would 'obviously ease immediate pressures', it was 'not a long-term solution, as the minister duly acknowledged'.⁶⁹⁷ Regarding this, she told the Committee that the ACT 'simply cannot keep building new prison beds':

So we need to ensure we are thinking intelligently and creatively about justice and sentencing. We need to make sure our focus is and remains on things that research shows us really do help to cut involvement in crime: drug and alcohol treatment, counselling and mental health, housing, education, employment and transport.⁶⁹⁸

5.103 In light of this she welcomed the Attorney-General's Justice Reform Strategy and put the view that in this 'context a therapeutic jurisprudential approach is, in addition to restorative justice, a good way to go'.⁶⁹⁹

MANAGEMENT OF PRISONERS WITH MENTAL HEALTH PROBLEMS

CORRECTIVE SERVICES

5.104 In hearings of 2 May 2014 the Minister for Corrections and his officers were asked about the management of prisoners at the AMC who experienced mental health problems.

5.105 In response, the Executive Director, ACT Corrective Services, told the Committee that:

In terms of managing someone in custody who has a mental health issue, when people are first admitted into custody we have an induction process. If someone is seen at that

⁶⁹⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.4.

⁶⁹⁶ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

⁶⁹⁷ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

⁶⁹⁸ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

⁶⁹⁹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, pp.146-147.

point to have a mental health issue, they are automatically assessed by the forensic health team, which is part of Health. Sometimes their mental health issue may not be forensic; then it will come back to us. People get admitted and sometimes it might be hard to work out. So someone might be behaving in a psychotic way but they might be coming down from ice. If someone is really floridly unwell, it is pretty clear that it is a mental health issue. With some people it is not always so clear, and sometimes it might not become apparent. So we have a good process in terms of alerting to that.⁷⁰⁰

5.106 Providing more detail on how this was managed, she told the Committee that:

We have set up a high-risk assessment team, which meets every day. That team is chaired by the senior manager, corrections psychologist support services. It is chaired by her and it is attended by custodial staff, which is really important, because custody staff are making observations all the time about how someone is going, and their observations are really important for clinical staff. It is attended by the senior case manager and also forensic health and primary health. So there is a daily discussion on everyone who is in the crisis support unit. There might be people who are not in the crisis support unit but who are being managed in the AMC proper and who may not be forensically unwell but still may need to be managed. So there is a process in terms of that. Some of those clients would not go to a secure mental health centre, anyway. They would be managed. Sometimes it is just a matter of stabilising medication and they are okay.⁷⁰¹

5.107 Questions were also asked about the Crisis Support Unit (CSU) at the prison, which is described as 'unit for detainees assessed as being at high risk of self-harm, or of harm to others or from others as the result of a mental illness or other mental condition'.⁷⁰² When asked about numbers in the CSU the Executive Director, ACT Corrective Services, told the Committee that:

We have 10 beds—nine cells, one double. I had a look yesterday and we had seven, but sometimes we are full. Quite often we are full. That can change every day, because we do not know who is coming into custody, or someone might become unwell whilst they are in custody.⁷⁰³

5.108 Responding to a question about length of stay in the CSU the Executive Director told the Committee that:

the last time I looked the average stay was around 42 days. Someone could be in for the whole period if they are really unwell and not stable. Some people might just need

⁷⁰⁰ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.38.

⁷⁰¹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.38.

⁷⁰² ACT Corrective Services, 'Crisis Support Unit', viewed 12 November 2014, available at: <http://www.cs.act.gov.au/page/view/873/title/crisis-support-unit>

⁷⁰³ Mrs Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.38.

to become stable and have short periods in and then are managed back out into the centre. So it can vary greatly depending on the presentation of the client.⁷⁰⁴

5.109 In relation to this the Minister for Corrections told the Committee, in relation to the proposed expansion of the AMC, that:

One of the features of the new design with the special care facility is to try to provide a step-down point between the crisis support unit and mainstream, so that people who are perhaps getting better but are not quite ready for the challenging environment of mainstream will be able to have a step-through process as well, which we believe will improve the situation for some of the clients.⁷⁰⁵

EFFECTIVENESS OF REHABILITATION PROGRAMS

CORRECTIVE SERVICES

5.110 When the Minister for Corrections appeared in hearings of 2 May 2014, he told the Committee that ‘corrections [was] really the tailpipe of the justice system’, but ‘where corrections [was] trying to make a difference’ was through its attempts to rehabilitate offenders and reduce recidivism.⁷⁰⁶

5.111 Regarding the work of Corrective Services in this area, the Minister told the Committee that there was ‘undoubtedly scope for improvement in the way we seek to treat people’:⁷⁰⁷

There are a whole lot of challenges there but it is about constant learning. Through-care, for example, is one of the innovations we have put in place to try to tackle that; the [proposed] intensive correction community orders are another.⁷⁰⁸

5.112 These were important, he told the Committee, because ‘for some of the detainees ... are simply not in jail long enough for corrections to substantively engage with them’.⁷⁰⁹ This was also a benefit of the Through-care program in that:

If someone is only in jail for, say, five months but we then have 12 months of contact with them, that becomes a 17-month period in which you can work with somebody rather than just five months.⁷¹⁰

⁷⁰⁴ Mrs Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.39.

⁷⁰⁵ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, pp.38-39.

⁷⁰⁶ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.39.

⁷⁰⁷ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.39.

⁷⁰⁸ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.39.

⁷⁰⁹ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.39.

⁷¹⁰ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.39.

5.113 The Minister told the Committee that access to a broad range of sentencing options was also important:

We have a broad range of people that come into the system. We want to have the most appropriate sentencing option. Some people simply have to go to jail. They are violent or they are dangerous; the community needs protection from them. When they come to corrections there is a particular approach to that sort of detainee. Others perhaps are in for more minor offences and have come as a result of their social or demographic background.⁷¹¹

5.114 These last, he told the Committee, were in ‘a different category’ and were people for whom ‘the rehabilitative programs are probably so much more important regarding whether we see them back again or not’.⁷¹²

5.115 When asked about the progress of clients through the Throughcare program, the Executive Director told the Committee that at the time of hearings no clients had as yet exited the program.⁷¹³ Asked for further detail about the level of support and engagement with clients in the program, she told the Committee that:

There is a continuum. So you start much more intensively and work through it. In the first six weeks, we would probably have some sort of daily contact with the ones that are in that red light area. We work very closely, and that work is improving all the time, with Health and Housing, particularly in terms of the contact. The most important thing is to get the housing stable and get income support stable. If you can get a few of those right, they are more likely to engage in some other things.⁷¹⁴

5.116 However, in formal terms, she told the Committee:

The program allows for 12 months, so theoretically, if someone has been there for 12 months, we should push them off. We are not at 12 months yet. But if someone is doing well, it will happen gradually. It will just be a natural thing. Some go back into custody and come out and we start again, with another 12 months.⁷¹⁵

5.117 As a result, she told the Committee, the program ‘grows a bit exponentially as well’.⁷¹⁶

⁷¹¹ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.40.

⁷¹² Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.40.

⁷¹³ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.37.

⁷¹⁴ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.40.

⁷¹⁵ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.40.

⁷¹⁶ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.40.

5.118 She went on to tell the Committee, regarding support and engagement with clients in the program, that:

We have a system whereby some are at the red light stage, some are at amber and we have a few in the green. Some need to be contacted every day. Some are tapering off. A couple that started early still need support and they are doing quite well. But I do not want to speak with rose-coloured glasses here because they are a very complex, difficult group. The staff are very passionate. It is a very exciting program to be part of. We think that it will pay dividends, but you need to have a lot of resilience and not take disappointments personally, because they do fall over.⁷¹⁷

5.119 Some clients, she told the Committee, were very limited in terms of life skills:

They do not even know how to catch a bus. They have the clothes that they are wearing. If you have not worked in the business, it is very hard to convey to stakeholders and people who are interested, in terms of social skills, how low the level of functioning is.⁷¹⁸

5.120 In this context, she told the Committee it was important to maintain realistic expectations:

I think the key is about how we measure success. That is important for staff, too. If someone has only spent three weeks out of custody at a time and we have got them out for three months or six months, that is a win. Next time we might get them out for nine months. It is important that we have those sorts of milestones; otherwise the staff would be overwhelmed.⁷¹⁹

PAID WORK RELEASE PROGRAM

5.121 When asked about a paid work release program that had been introduced at the AMC, the Executive Director, Corrective Services, told the Committee that this had been introduced ‘just over 12 months ago’, and went on to describe the program as follows:

It is a paid work release program which allows eligible detainees who have jumped through quite a significant number of hoops to work in the community, which means they go to work every day and they come back. There are restrictions on time—they have to go straight there and straight back. It is compulsory that a certain amount of their money is saved, so that by the time they come out of custody they will have some money saved to assist them. It is still in the early stages but we are going okay with that.⁷²⁰

⁷¹⁷ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.36.

⁷¹⁸ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.36.

⁷¹⁹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.37.

⁷²⁰ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

5.122 In addition, she told the Committee, there was also ‘a pilot program that DEEWR supported with Habitat, a jobs provider for Aboriginal clients’:

They work with all Aboriginal clients in custody—on remand as well—in terms of pre-exiting. Sometimes if they get backdated sentences it can be difficult, but it is about working with them, pre-existing and throughout the through-care process, in terms of supporting them in jobs in the community.⁷²¹

5.123 She told the Committee that this was a pilot program but that it is going ‘very well’. It was ‘an important pilot’ because:

with the existing job network processes, the different cut-off points and incentives for the NGOs that have this contract are not really conducive for our clients. So the standards have been changed slightly ... to see whether it copes better with a prisoner client. This could have policy implications for the whole of the country in terms of how job network providers are able to manage prisoners exiting generally.⁷²²

5.124 The significance of these programs, she told the Committee was due to the fact that ‘[m]any of our clients have never, ever held a job; nor have they had a significant adult in their life who has held a job’.⁷²³ As a result:

with respect to all the opportunities we had when we were young, when we got our first job and we were excited and our parents took us and drove us, they have not had that. It is really scary for them. Sometimes you have to try a few things. They fail quite a few times because they have not had the kind of structure that we all got when we were growing up in an environment with a work ethic and people around us.⁷²⁴

5.125 In light of this, she told the Committee, it was incumbent on Corrective Services to apply realistic expectations:

With some of our clients, if we can get them stable, on an allowance and doing some other things, that will be the most that they will ever be able to do.⁷²⁵

5.126 However Corrective Services were also ‘confident that some might remain in the workforce’, as there were

There are certainly some who do come with job skills, a small number, that we are able to place and work through with them.⁷²⁶

⁷²¹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

⁷²² Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

⁷²³ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

⁷²⁴ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

⁷²⁵ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

⁷²⁶ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, pp.35-36.

OTHER COMMENT ON REHABILITATION PROGRAMS

5.127 Other contributors to the inquiry also made comment on rehabilitation programs offered by Corrective Services.

5.128 These are considered below.

DR LORANA BARTELS

5.129 Dr Lorana Bartels' submission to the inquiry Dr Bartels cited 'repeated reports' that 'services provided at the AMC [were] inadequate'.⁷²⁷

especially for special groups, such as offenders with a mental illness and female offenders, with criticisms that women are being denied the opportunities male prisoners receive. There has also been concern expressed about the use of lockdowns at the AMC and the extent to which this is a breach of prisoners' human rights. There is also anecdotal evidence of violence and intimidation between inmates.⁷²⁸

5.130 These matters, it considered, were issues which possibly pertained 'more to correctional management than sentencing *per se*', but were 'clearly of relevance to the circumstances in which offenders serve their sentences'.⁷²⁹

HUMAN RIGHTS COMMISSIONER

5.131 When the ACT Human Rights Commissioner appeared in hearings of 26 May 2014, she told the Committee that she was concerned that rehabilitation programs at the AMC were not subject to sufficient evaluation:

When we did the human rights audit of the women's area, certainly one recommendation was to evaluate any programs that were there. Even with the most recent one on through-care for all women, whether they are on remand or sentenced, they have 12 months support post-release. That seems to be working very well, but we still said we wanted an evaluation included in that, for that evidence base. It seems to be working incredibly well, but without an evaluation.⁷³⁰

⁷²⁷ Dr Lorana Bartels, Submission No.1, p.5.

⁷²⁸ Dr Lorana Bartels, Submission No.1, p.5.

⁷²⁹ Dr Lorana Bartels, Submission No.1, p.5.

⁷³⁰ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.123.

ACT BAR ASSOCIATION

5.132 When he appeared in public hearings of 19 May 2014, the Chair, ACT Bar Association Criminal Committee told the Committee that the Bar Association was concerned about the effectiveness of rehabilitation programs at the AMC, saying that ‘In relation to rehabilitation, the evidence, so far as it relates to recidivism, is not necessarily a pretty picture’.⁷³¹ This, he told the Committee said ‘something about post-release programs, but it also may say something about the capacity of the prison to deliver programs within it that will make a difference’.⁷³²

5.133 In particular, he referred to the Solaris program, ‘a drug therapeutic community within the prison’.⁷³³

The bar has no problems with that program. It is a worthwhile attempt at addressing what is obviously a central issue to offending, and that is, drug taking. But unless it is effectively integrated to pre-incarceration services and post-incarceration services, it is not going to have its best effect. Unofficially, we have been informed that it has been assessed and the effectiveness of the Solaris program has batted at an almost 100 per cent failure rate.⁷³⁴

5.134 He told the Committee that the Bar Association believed that this was due to the program not having been ‘effectively integrated into post-release programs’.⁷³⁵

5.135 This contrasted, he told the Committee, with anecdotal information, which had come to him from ‘some of the people I talk to who have experienced both sides of the equation’,⁷³⁶ comparing ACT programs with similar programs in NSW:

ACT prisoners going to New South Wales and those who have now been sentenced to the ACT—they say that the programs in New South Wales jails are better. We do not advocate for going back to the old system by any means, but the reality is that the economies of scale that are available to the New South Wales authorities in the sorts of programs they can offer to New South Wales prisoners are not available locally. Therefore, the types of programs and the intensiveness of the programs that are offered here may not match what is available in New South Wales.⁷³⁷

⁷³¹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.70.

⁷³² Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.70.

⁷³³ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.70.

⁷³⁴ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.70.

⁷³⁵ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.70.

⁷³⁶ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.71.

⁷³⁷ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, pp.70-71.

 AUSTRALIAN LAWYERS ALLIANCE

5.136 When Mr Steven Wybrow appeared in hearings of 19 May 2014 on behalf of the Australian Lawyers Alliance, he told the Committee that reductions in recidivism ‘does come down to resourcing of Corrective Services’. If adequately funded, he told the Committee:

it really does improve, for a number of people, their chances of avoiding having to go back, feeling that it is an easy option or just committing crimes when they have been given some skills and some capacity to make different choices, which generally does not happen in the jail setting, certainly as much in New South Wales and other jurisdictions as it does here. We have made a good start. I know it costs a fortune but it does everywhere. I believe Corrective Services funding is one of those where you put \$2 in and save \$3 later.⁷³⁸

PRISONERS AID ACT

5.137 When the Prisoners Aid ACT appeared in hearings of 14 October 2014, its Secretary told the Committee that the success of any intensive corrections orders proposed for ACT would hinge on ‘the resources that would be needed to institute an intensive program’, including for staff training, as this kind of regime ‘is very intensive in terms of staff in particular, to provide the constant monitoring, supporting and counselling of offenders’.⁷³⁹

SUMMARY

5.138 The Committee notes arguments put by contributors regarding Corrective Services.

5.139 Arguments regarding the AMC operating at full capacity included:

- that problems arising from the mixing of sentenced and un-sentenced prisoners were in large part due to the AMC operating at capacity;⁷⁴⁰
- that the effects of a higher population of prisoners would be moderated by additional capacity planned for the AMC, and by the design of the additional facilities;⁷⁴¹
- that a ‘key part of the work done by the corrections team at the AMC is to each day manage where best to put people and who to put them with’;⁷⁴²
- that in some circumstances there were benefits in mixing sentenced and unsentenced prisoners;⁷⁴³

⁷³⁸ Mr Steven Wybrow, *Transcript of Evidence*, 19 May 2014, p.103.

⁷³⁹ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.181.

⁷⁴⁰ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.34.

⁷⁴¹ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.34.

⁷⁴² Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.35.

- that staff at the AMC ‘make a great effort to minimise the impact on visits and programs in relation to lockdowns’;⁷⁴⁴
- that lockdowns ‘are generally not full-day; they are generally for a couple of hours until [Corrective Services] can sort staffing out’;⁷⁴⁵
- that the expansion of the AMC could ‘lead to the incarceration of more detainees’ and in light of this there was a ‘sense of urgency in identifying and implementing alternative sentencing options’;⁷⁴⁶
- that in light of this the ACT should ‘engage with and benefit from initiatives that have been proven to reduce prison populations, and people involved in the justice system more broadly, and to promote more novel, evidence-based approaches to justice’;⁷⁴⁷
- that such ‘initiatives may provide an opportunity to reduce future growth in prison expenditure by removing the need to build new facilities and reduce people’s contact with the justice system’;⁷⁴⁸ and
- that the ACT needed ‘to make sure our focus is and remains on things that research shows us really do help to cut involvement in crime: drug and alcohol treatment, counselling and mental health, housing, education, employment and transport’.⁷⁴⁹

5.140 Arguments made in relation to management of prisoners with mental health problems included:

- that there are daily meetings of the ‘high-risk assessment team’ which determines whether prisoners should be held at the AMC, and under what conditions, or a ‘secure mental health centre’;⁷⁵⁰
- that there are 10 beds in the Crisis Support Unit (CSU) at the AMC and length of stay ‘can vary greatly depending on the presentation of the client’ but averaged ‘around 42 days’;⁷⁵¹ and
- that plans for expanded facilities at the AMC aimed to provide a ‘step-down point between the crisis support unit and mainstream prison population’.⁷⁵²

⁷⁴³ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.34.

⁷⁴⁴ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.34.

⁷⁴⁵ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.34.

⁷⁴⁶ ACTCOSS, Submission No.6, pp.4-5.

⁷⁴⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.4.

⁷⁴⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.4.

⁷⁴⁹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

⁷⁵⁰ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.38.

⁷⁵¹ Mrs Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.39.

⁷⁵² Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, pp.38-39.

5.141 Arguments made in relation to the effectiveness of rehabilitation programs included:

- that there was ‘undoubtedly scope for improvement in the way we seek to treat people’;⁷⁵³
- that the proposed intensive corrections orders were important in this regard because ‘some of the detainees ... are simply not in jail long enough for corrections to substantively engage with them’;⁷⁵⁴
- that the Throughcare program also offered the potential to engage offenders for periods of time greater than the duration of custody;⁷⁵⁵
- that rehabilitation programs were ‘so much more important’ for prisoners who ‘are in for more minor offences and have come as a result of their social or demographic background’, in determining whether they would be subject to further custodial sentences;⁷⁵⁶
- that at the time of hearings no clients had as yet exited the Throughcare program;⁷⁵⁷
- that the nominal duration of the Throughcare program is 12 months;⁷⁵⁸
- that the Throughcare program manages different categories of client, and arranges different frequencies of contact between officers and clients according to need and risk;⁷⁵⁹
- that in managing the program setting realistic expectations was important due to modest levels of life skills for some clients;⁷⁶⁰
- that the paid work release program, in which ‘eligible detainees’ ‘go to work every day and they come back’ at the end of the working day to the AMC, had been operating for about 12 months, with a reasonable level of success;⁷⁶¹
- that a similar program was in operation specifically for Indigenous prisoners and was going ‘very well’;⁷⁶²
- that these programs were important because ‘[m]any of our clients have never, ever held a job; nor have they had a significant adult in their life who has held a job’;⁷⁶³ and

⁷⁵³ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.39.

⁷⁵⁴ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.39.

⁷⁵⁵ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.39.

⁷⁵⁶ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.40.

⁷⁵⁷ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.37.

⁷⁵⁸ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.40.

⁷⁵⁹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.36.

⁷⁶⁰ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.36.

⁷⁶¹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

⁷⁶² Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

⁷⁶³ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.35.

- that for some clients 'if [they can be] stable, on an allowance and doing some other things, that will be the most that they will ever be able to do', however there are also 'some who do come with job skills, a small number, that [Corrective Services] are able to place and work through with them' toward stable employment.⁷⁶⁴

5.142 Other arguments made in relation to rehabilitation programs included:

- that observations of women prisoners in the Throughcare program suggested that 'working incredibly well', but 'without an evaluation';⁷⁶⁵
- that Throughcare and similar programs should be subject to evaluation to create an 'evidence base' on their operation;⁷⁶⁶
- that in 'relation to rehabilitation, the evidence, so far as it relates to recidivism, is not necessarily a pretty picture', and that this 'may say something about the capacity of the prison to deliver programs within it that will make a difference';⁷⁶⁷
- that according to unofficial advice the Solaris drug therapeutic community at the AMC 'has been assessed and the effectiveness of the Solaris program has batted at an almost 100 per cent failure rate';⁷⁶⁸
- that it was important that drug therapeutic programs are 'effectively integrated to pre-incarceration services and post-incarceration services' if they are to achieve their 'best effect';⁷⁶⁹ and
- that the success of any intensive corrections orders proposed for ACT would hinge on 'the resources that would be needed to institute an intensive program', including for staff training, as this kind of regime 'is very intensive in terms of staff in particular, to provide the constant monitoring, supporting and counselling of offenders'.⁷⁷⁰

COMMITTEE COMMENT

AMC AT CAPACITY

5.143 With these arguments in mind, the Committee takes the view that although the proposed expansion of the AMC offers the prospect of better conditions for prisoners, including greater security and separation, the increase in prisoner numbers should also encourage efforts to moderate and reduce numbers of prisoners.

⁷⁶⁴ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, pp.35-36.

⁷⁶⁵ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.123.

⁷⁶⁶ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.123.

⁷⁶⁷ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.70.

⁷⁶⁸ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.70.

⁷⁶⁹ Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, p.70.

⁷⁷⁰ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.181.

5.144 Elsewhere in this report the Committee has recommended that the ACT Government implement an intensive corrections orders regime that is sufficiently well-funded to provide the significant resource requirements that are likely to be needed to make such a regime effective.

5.145 The Committee also recommends, later in the report, that the current restorative justice regime be expanded, so that it extends to adult offenders, starting with less serious offences and progressing into limited use for more serious offences subject to certain conditions being met. In connection with this, the Committee also recommends that articulations between restorative justice, and the more the conventional processes of the criminal justice system, be stated explicitly in statute, both for the Galambany Court and other restorative justice fora.

PRISONERS WITH MENTAL HEALTH PROBLEMS

5.146 In considering prisoners with mental health problems, the Committee was concerned by reports which suggest high rates of mental illness among detainees in prison.

5.147 This included a 2012 Australian Institute of Health and Welfare report which suggested that:

Almost 2 in 5 prison entrants (38%) reported having been told that they have a mental health disorder. Further, more than 1 in 5 (21%) prison entrants reported currently being on medication for a mental health disorder: this represents more than half (55%) of those who reported ever having been told they have a mental illness.⁷⁷¹

5.148 Moreover, in relation to experience of psychological distress, the report stated that:

- almost 2 in 5 (38%) prison entrants reported high or very high levels of distress, compared with about 1 in 10 (11%) persons in the general population
- more than 3 times the proportion of prison entrants reported high or very high psychological distress compared with the general population (males 39% compared with 9% and females 51% compared with 13%)
- about 4 times the proportion of prison entrants aged 25-44 reported high or very high levels of distress compared with the general population (44-45% compared with 11%).⁷⁷²

5.149 On the other hand, the report also stated that:

- Almost 1 in 5 (19%) prison discharges, or 64% of those ever diagnosed with mental health condition, were offered treatment for a mental health condition while in prison.

⁷⁷¹ Australian Institute of Health and Welfare, (2012), 'Mental health of prison entrants', Australian Government, <<http://www.aihw.gov.au/prisoner-health/mental-health/>>, viewed 06/02/2015.

⁷⁷² Australian Institute of Health and Welfare, (2012), 'Mental health of prison entrants', Australian Government, <<http://www.aihw.gov.au/prisoner-health/mental-health/>>, viewed 06/02/2015.

- More than 1 in 4 (27%) dischargees said their mental health became a lot better while in prison, and a further 19% said it got a little better. Only 1 in 10 (9%) dischargees reported that their mental health got a little or a lot worse.⁷⁷³

5.150 In the Committee's view, this material poses a question on whether some Australian prisoners are, in effect, serving custodial sentences due to problems with mental health. In the Committee's view, if this were to occur in the ACT it would be unconscionable.

5.151 The Committee also notes that problems with mental health amongst offenders should be effectively addressed if the ACT is to moderate its currently high levels of recidivism.

5.152 The Committee notes and welcomes plans for the creation of a new 25-bed secure mental health facility at Symonston, planning arrangements for which were provided in legislation passed in the Assembly in 2014.⁷⁷⁴

5.153 The Committee also notes the advent of the *Mental Health (Treatment and Care) Amendment Bill 2014*, which amended the *Mental Health (Treatment and Care) Act 1994*, which as a result contains a number of amended provisions regarding forensic psychiatric treatment orders administered by ACAT.

5.154 In view of these recent and coming developments the Committee has determined to maintain an interest in this aspect of the administration of criminal justice after the tabling of this report.

REHABILITATION PROGRAMS

5.155 In reflecting on arguments made to it regarding rehabilitation programs, the Committee considers that evaluation should be an integral part of rehabilitation programs, and should be designed and implemented at the same time as programs are designed and implemented. In the Committee's view this is standard contemporary practice.

5.156 Questions which have been raised over the effectiveness of the Solaris therapeutic community in achieving drug and alcohol rehabilitation, in the Committee's view, highlight the importance of these evaluation processes, and the importance of evaluation reports being public documents which can aid accountability and public debate in connection with these programs.

⁷⁷³ Australian Institute of Health and Welfare, (2012), 'Mental health of prison entrants', Australian Government, <<http://www.aihw.gov.au/prisoner-health/mental-health/>>, viewed 06/02/2015.

⁷⁷⁴ See the *Planning and Development (Symonston Mental Health Facility) Amendment Act 2014*, <http://www.legislation.act.gov.au/a/2014-26/default.asp> and the Bill's Explanatory Statement at http://www.legislation.act.gov.au/es/db_49559/20140515-57806/pdf/db_49559.pdf viewed 06/02/2015.

5.157 With this in mind, the Committee makes the following recommendations.

Recommendation 13

5.158 The Committee recommends that the ACT Government evaluate all prisoner rehabilitation programs offered by or under the auspices of Corrective Services, and that evaluation is made an integral part of planning and implementation for all future prisoner rehabilitation programs.

Recommendation 14

5.159 The Committee recommends that evaluations of prisoner rehabilitation programs be tabled in the Legislative Assembly within 90 days of the due date for completion of the evaluation report.

ACT POLICE

5.160 ACT Policing did not provide a submission to the inquiry, but it appeared before the Committee in hearings of 2 May 2014.

5.161 The Deputy Chief Police Officer (Crime) told the Committee of two areas of particular concern to ACT Policing regarding sentencing: one was ‘around deterrence and crime prevention—the ability to prevent further crime’, the other was ‘around recidivism—those people who have gone through the sentencing process but still commit crime’.⁷⁷⁵

5.162 He went on to tell the Committee that:

From our perspective, unfortunately people do continue to commit crime upon the sentencing. It is a matter of having an analysis of whether or not, for each case, the sentencing was a sufficient deterrent and whether those controls were sufficient in their entirety to protect the community.⁷⁷⁶

5.163 When asked about restorative justice, the Deputy Chief Police Officer told the Committee that:

ACT Policing is very supportive of the restorative justice process. We are still in phase 1. There is certainly further potential. From our point of view, we try and divert as often as possible and utilise those processes. We work very closely with the Justice and

⁷⁷⁵ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.18.

⁷⁷⁶ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.19.

Community Safety Directorate as well as the restorative justice unit in particular. We have a very good operating arrangement and see very good success in the results from those cases that go through restorative justice.⁷⁷⁷

5.164 He went on to describe the restorative justice process as ‘a very confronting experience’ which was ‘certainly not an easy way out’.⁷⁷⁸ ACT Policing was in favour of restorative justice because ‘we do not want to put people in jail, because that exposes them to other risks and can also lead to further recidivism just because of that exposure’. In light of this risks, police only wanted ‘to put the people in jail that are the people that really need to go to jail for community safety’, and ‘perhaps their own rehabilitation’.⁷⁷⁹

5.165 Following this, further questions were asked regarding the role of ACT Policing in sentencing and bail.

5.166 With regard to sentencing, the Deputy Chief Police Officer told the Committee, ACT Policing provided advice to the DPP ‘around the criminality associated’, but ‘[a]t the end of the day, the sentencing decision is really a matter for DPP and not one for ACT Policing’.⁷⁸⁰

5.167 With regard to bail, he told the Committee that:

In the first instance the police are part of the bail consideration process, and if it is in the watch house, they directly do that themselves. If the matter is subsequently before the courts, it is represented by DPP and we certainly work very closely, often as the informant, by providing advice. Whether it is directly just a police investigation matter or whether on behalf of a victim about bail, views on bail and certain considerations, we do that.⁷⁸¹

5.168 ‘We certainly put forward our case to the DPP, and that is obviously put forward to the courts’ however, he told the Committee, ‘ultimately, the DPP makes those representations and the final decision’.⁷⁸²

ACT CHILDREN AND YOUNG PEOPLE COMMISSIONER

5.169 The submission to the inquiry by the ACT Children and Young People Commissioner (CYPC) made a number of proposals regarding discretionary actions of police in dealing with young

⁷⁷⁷ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.19.

⁷⁷⁸ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.19.

⁷⁷⁹ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.19.

⁷⁸⁰ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.22.

⁷⁸¹ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.22.

⁷⁸² Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.22.

people, which did not address the formal sentencing jurisdiction of the courts but nevertheless relate to issues engaged by sentencing in a broader sense. These are considered below.

5.170 These proposals arose from a Bail & Remand Roundtable hosted by the CYPC on 11 April 2013. Those which referred to police action included:

- 'Greater police discretion to not arrest young people who they find in breach of their bail';
- 'Greater police discretion to 'un-arrest' if they have arrested a young person';
- 'Greater capacity for the police to 're-bail' a young person with the same bail conditions'; and
- 'Place community youth workers and/or Police Youth Liaison Officers at court to engage and work with young people as soon as possible after their arrest'.⁷⁸³

5.171 The CYPC's submission also referenced recommendations made in the CYPC's report on the ACT Youth Justice System in the ACT. Those which envisaged a change in the current practices of police included a number of proposals consistent with those giving police greater discretion over youth bail described above.⁷⁸⁴

SUMMARY

5.172 The Committee notes arguments put to it regarding the role of ACT Policing in matters related to sentencing.

5.173 Arguments included:

- that ACT Policing puts a view to the DPP regarding the criminality of an offence in a particular instance, but this is not determinative and responsibility lies with the DPP as to the representations made to the court;⁷⁸⁵
- that ACT Policing has a direct role in 'police bail' and may put a view to the DPP regarding bail matters heard by the courts;⁷⁸⁶
- that police should be accorded greater discretion over bail for young people, including the discretion not to arrest young people where bail is breached, and to 'un-arrest' and 're-bail' young people;⁷⁸⁷ and
- that community youth workers and / or Police Youth Liaison Officers should be accessible to 'work with young people as soon as possible after their arrest'.⁷⁸⁸

⁷⁸³ ACT Children and Young People Commissioner, Submission No.7, p.2.

⁷⁸⁴ ACT Children and Young People Commissioner, Submission No.7, [pp.6-7, un-paginated]

⁷⁸⁵ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.22.

⁷⁸⁶ Commander David Pryce, *Transcript of Evidence*, 2 May 2014, p.22.

⁷⁸⁷ ACT Children and Young People Commissioner, Submission No.7, p.2.

⁷⁸⁸ ACT Children and Young People Commissioner, Submission No.7, p.2.

COMMITTEE COMMENT

- 5.174 Reflecting on the arguments put to it in the course of the inquiry, the Committee considers that while it appreciates that extending further discretion to police over bail and related matters may have a desirable effect in reducing the exposure of young people to the experience of custody, there would need to be considerable further work done on these proposals to provide a framework of accountability and acceptable practice. In the absence of such this proposals would introduce further elements of risk into the working environment of police officers, and reduce certainty for all concerned.
- 5.175 The Committee welcomes further representations, in the future, which provide greater levels of detail on how greater discretion would be balanced with the need for certainty and accountability.

LEGAL PROFESSION

- 5.176 While the Committee received submissions from organisations representing different parts of the legal profession, the chief focus of these were the effect of sentencing practices in the ACT on defendants—and to a certain degree victims—rather than on lawyers.
- 5.177 Three submissions from the legal community addressed questions of procedure for appeals on sentence, with implications for the practice of lawyers representing defendants and for the fate of defendants. These comments regarding appeals are considered in the section on appeals in Chapter 4, above.

VICTIMS OF CRIME

- 5.178 The submission to the inquiry by the ACT Victims of Crime Commissioner advised the Committee of:
- the impact of crime on victims;
 - their experience of the justice system; and
 - the role and fate of Victim Impact Statements in the judicial process.

- 5.179 These matters are considered below.

IMPACT OF CRIME ON VICTIMS

- 5.180 The Commissioner's submission advised of the impacts of crime on victims:

People who suffer traumatic criminal events often have problems weeks, months or even years later, as they may re-experience the trauma, both mentally and emotionally. Often times, their sense of safety and well-being are so damaged that

they cannot use their normal, daily coping skills because they are not sufficient to deal with trauma.⁷⁸⁹

VICTIMS' EXPERIENCE OF THE JUSTICE SYSTEM

5.181 The submission advised that there was potential for victims to be assisted by participation in the justice system:

The effect of litigation, or legal exposure, on victims can be therapeutic by assisting them to make sense of what happened and to put things into perspective. Restorative justice is particularly good at this because it gives victims answers to questions about what happened to them and what should be done to help repair the harm they have suffered.⁷⁹⁰

5.182 However these positive outcomes did not always eventuate:

US victim advocate Susan Merman says that if you set out to design a system for provoking intrusive post-traumatic symptoms one could not do better than a court of law.⁷⁹¹

5.183 Research had suggested that procedural justice for victims was a critical factor in making their experience of the criminal justice system a positive one:

Dr Jo-Anne Wemmers from the University of Montreal has established the relevance of procedural justice for victims of crime and found that victims' fairness judgements affected their faith in the criminal justice system. In particular, when victims felt that police and public prosecutors had shown an interest in them, had given them an opportunity to express their wishes and had taken their wishes into consideration, victims were more likely to feel that they had been treated fairly ... fair procedures impact victims' healing or recovery.⁷⁹²

5.184 The traditional framework of the justice system, the Commissioner suggested, has presented a significant challenge to achieving due justice for victims because the 'concept of a fair trial has always been an exclusive two-sided affair':

Reflecting the adversarial nature of our system of justice, the fair trial principle served to remedy structural disadvantages facing the accused, imposing on courts an

⁷⁸⁹ Victims of Crime Commissioner, Submission No.10, p.1.

⁷⁹⁰ Victims of Crime Commissioner, Submission No.10, p.1.

⁷⁹¹ Victims of Crime Commissioner, Submission No.10, p.1.

⁷⁹² Victims of Crime Commissioner, Submission No.10, p.1.

obligation on ensuring a fair balance between the interests of the prosecution and the defence.⁷⁹³

5.185 The submission went on to suggest that:

The problem with this conceptualisation of fairness is that victims are not part of this picture: victims appear to have no special status beyond their position as potential witnesses for the prosecution.⁷⁹⁴

PARTICULAR DIFFICULTIES FOR VICTIMS OF SEXUAL ASSAULT

5.186 The submission noted that these difficulties, affecting all victims, were particularly problematic for victims of sexual assault:

The criminal justice system is particularly difficult for victims of sexual assault. They are more prone to value laden judgements about their legitimacy as a victim. There is the belief/disbelief dynamic that occurs within sexual assault that is not present within other dynamics of serious violent crime. There are “why” questions asked of victims of sexual assault, either directly or implied, that are not asked of other victims. “Why did you decide to walk home at that late hour”? “Why did you get into that car”? “Why were you wearing what you were wearing”?⁷⁹⁵

5.187 This was reflected in research data on cases of sexual offences against children, which had ‘one of the highest rates of attrition of any offence’. He cited a 2006 study by Eastwood et al which had ‘identified ... three key areas of concern for child complainants’ as being ‘waiting for trial, seeing the accused and the cross examination process’. Effects on the complainants were that:

Children found the waiting time from reporting to trial (the average time was 18.2 months) prevented them from moving on with their lives, and that it ‘seemed like it took forever’. There were serious psychological problems associated with waiting such a long time, including nightmares, suicide attempts, self-mutilation, self-hatred, fear of the offender, depression, inability to concentrate on school and fears about the trial.⁷⁹⁶

VICTIM IMPACT STATEMENTS

5.188 The submission identified Victim Impact Statements, provided to courts, as an important way in which victims could have a greater role in cases. To some extent this addressed the invisibility of victims within the traditional ‘two-sided’ procedure of criminal trials.

⁷⁹³ Victims of Crime Commissioner, Submission No.10, pp.1-2.

⁷⁹⁴ Victims of Crime Commissioner, Submission No.10, pp.1-2.

⁷⁹⁵ Victims of Crime Commissioner, Submission No.10, p.2.

⁷⁹⁶ Victims of Crime Commissioner, Submission No.10, p.2.

5.189 The submission underscored the importance of Victim Impact Statements ('VIS') which, it noted, courts were obliged to consider 'in deciding how the offender should be sentenced' were provided for under the *Crimes (Sentencing) Act 2005*,⁷⁹⁷ and were 'an important part of the sentencing process':⁷⁹⁸

Giving victims the opportunity to prepare a VIS can enhance their satisfaction within the criminal justice system; it also indicates to the Judge, in considering a sentence, the impact on the victim and in some circumstances the community as a whole.⁷⁹⁹

5.190 The submission suggested that benefits of victim impacts statements included:

- providing a useful aid to the sentencing court to make an informed decision in relation to the impact on the victim, especially in circumstances where an offender has pleaded guilty and the court has not had an opportunity to hear the complainants evidence;
- reducing the alienation that a victim may feel in the criminal justice system -without this input, the victim has no real role in the formal process with the exception of being a witness;
- providing a cathartic and psychological benefit to the victim as they can express themselves in their own words with less formality than police statements;
- assisting in making the sentencing process more reflective of the community's response to crime; and
- promoting responsibility and rehabilitation for the accused as they are confronted with the harm caused as a result of their offending.⁸⁰⁰

PROBLEMS WITH TIMING FOR VICTIM IMPACT STATEMENTS

5.191 The submission put the view that there were problems with timing for Victim Impact Statements in the ACT Magistrates Court:

As a victim impact statement can only be used if and when an offence is proven, the timing of when a VIS is sought is critical to its preparation. In most Supreme Court trials, where there is a finding of guilt, there is usually sufficient time post-decision and pre-sentence for a victim to prepare a victim impact statement. However in the Magistrates Court sentencing can often commence at the first mention, immediately after a finding of guilty, allowing no time for a VIS to be prepared.⁸⁰¹

⁷⁹⁷ Victims of Crime Commissioner, Submission No.10, p.5. See *Crimes (Sentencing) Act 2005*, s 53 (1) (a).

⁷⁹⁸ Victims of Crime Commissioner, Submission No.10, p.5.

⁷⁹⁹ Victims of Crime Commissioner, Submission No.10, p.5.

⁸⁰⁰ Victims of Crime Commissioner, Submission No.10, p.5. See *Crimes (Sentencing) Act 2005*, s 53 (1) (a).

⁸⁰¹ Victims of Crime Commissioner, Submission No.10, p.5.

5.192 The submission went on to provide further detail on this problem:

A victim may prepare a VIS before a finding of guilt; however there is the possibility that there will be a finding of not guilty, in which case the VIS will not be used. This can leave the victim distressed at having prepared the VIS (many victims find the process distressing and/or painful) for no purpose or recognition. Victims will tend to assume that in being asked to prepare a VIS it will be likely that it will be used.⁸⁰²

5.193 'Furthermore', the submission suggested:

if a VIS is prepared and provided to the prosecution too early in proceedings, it may have to be disclosed to defence before a finding of guilt. This knowledge may discourage a victim from preparing a VIS.⁸⁰³

5.194 This was important because:

Ultimately, as a VIS is the only real chance a victim has to let the court and the offender know exactly how the crime has impacted on their life, it is extremely important that every victim who is eligible to make a VIS is given an opportunity to do so, without the potential for further trauma.⁸⁰⁴

REMEDIES

5.195 The Commissioner's submission proposed remedies for this problem. They included alterations to court process and amendments to legislation.

5.196 In relation to changes of practice, the submission proposed that:

Ideally, where a defendant has been found guilty, but a victim has not yet been invited to prepare a VIS, a period of time should be provided for this to occur. It is acknowledged that a further delay in court proceedings to allow for this to occur is undesirable; however, such delays should be balanced against a victim's right to have their voice heard. Court proceedings are often delayed on an application by the offender or their defence team and victims find it difficult to accept that no such consideration is given to them to allow them to put forward a VIS, particularly for more serious offences.⁸⁰⁵

⁸⁰² Victims of Crime Commissioner, Submission No.10, p.6.

⁸⁰³ Victims of Crime Commissioner, Submission No.10, p.6.

⁸⁰⁴ Victims of Crime Commissioner, Submission No.10, p.6.

⁸⁰⁵ Victims of Crime Commissioner, Submission No.10, p.6.

5.197 Legislation in Western Australia provided a framework for courts to alter timelines so that Victim Impact Statements could be factored into their process:

While Courts retain the power to adjourn any matter as they see fit, the Western Australian *Sentencing Act 1995* explicitly provides for a court to adjourn the sentence of an offender to enable a victim impact statement to be given to the court. This provision makes it clear that a Court can rely upon this reason to adjourn a matter and provides some legitimacy to requests from prosecutors to seek an adjournment for that purpose.⁸⁰⁶

REDACTION OF VICTIM IMPACT STATEMENTS

5.198 The Commissioner's submission noted another problem with Victim Impact Statements in that there could be 'redaction of information contained in a VIS with little or no consultation with the maker of the VIS'.⁸⁰⁷ It went on to say that:

This occurs where a VIS is provided to the court, the defence lawyer objects to part of the statement, and the court rules that part of the statement be removed. This may occur when the victim is not present in court and/or without consulting the victim. While this is not a frequent practice, when it does occur it can cause victims considerable distress. A practice direction could be developed similar to Victoria that gives guidelines to practitioners and victims of crime regarding the timeliness of preparing a VIS and set out processes that would support early resolution of points of contention.⁸⁰⁸

5.199 Overall, taking in account both of these issues, the submission proposed that:

Legislative reform and/or practice directions should be considered in order to allow for a Victim Impact Statement to be prepared following a finding of guilt, allowing enough time in which to prepare one with consultation as to any objections or redactions, while still allowing for matters to proceed expeditiously.⁸⁰⁹

HEARINGS

5.200 The Victims of Crime Commissioner added to these comments when he appeared before the Committee in hearings of 14 October 2014.

⁸⁰⁶ Victims of Crime Commissioner, Submission No.10, p.6.

⁸⁰⁷ Victims of Crime Commissioner, Submission No.10, p.6.

⁸⁰⁸ Victims of Crime Commissioner, Submission No.10, p.6.

⁸⁰⁹ Victims of Crime Commissioner, Submission No.10, p.3.

5.201 He told the Committee that ‘what causes victims some harm is late changes to their victim impact statements’. The context to this was, he told the Committee, that:

Victim impact statements are prepared prior to a sentencing hearing and there are no time lines around when that should be agreed. What happens now in practice is that the Crown and the defence will reach agreement on the content of a victim impact statement; when that is done, it is ready to go and it is put before the court, the victim impact statements are read out and delivered to the court adequately and satisfactorily.⁸¹⁰

5.202 However, he told the Committee:

When those practices are not ...followed—that does not happen often, but when it does—it can be traumatic. If a victim impact statement comes to the attention of the defence on the day of sentencing or a day or two days before and changes are being made or recommended to be made to the victim impact statement, that causes the victim some stress and confusion.⁸¹¹

5.203 In response, he told the Committee, he had sought ‘a practice direction around the timing of that’, as was the case in Victoria. He had written to the Supreme Court ‘some time ago, before this Chief Justice came to this jurisdiction, but it was not supported. He told the Committee this was still ‘something that I would like to see, so that everyone knows where they stand with the timing of delivery of victim impact statements’.⁸¹²

SUMMARY

5.204 The Committee notes arguments put to it regarding victims of crime.

5.205 Arguments included:

- that ‘[p]eople who suffer traumatic criminal events often have problems weeks, months or even years later’, and may be ‘so damaged that they cannot use their normal, daily coping skills because they are not sufficient to deal with trauma’;⁸¹³
- that the ‘effect of litigation, or legal exposure, on victims can be therapeutic by assisting them to make sense of what happened and to put things into perspective, and restorative justice ‘is particularly good at this’;⁸¹⁴

⁸¹⁰ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

⁸¹¹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, pp.173-174.

⁸¹² Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.174.

⁸¹³ Victims of Crime Commissioner, Submission No.10, p.1.

⁸¹⁴ Victims of Crime Commissioner, Submission No.10, p.1.

- however a victim's participation in conventional court settings could also provoke 'intrusive post-traumatic symptoms';⁸¹⁵
- that victims being accorded due levels of procedural justice was an important contributor to 'victims' healing or recovery';⁸¹⁶
- that traditional court settings exclude victims because they focus on a contest between the prosecution and the defence;⁸¹⁷
- that giving victims 'the opportunity to prepare a VIS [Victim Impact Statement] can enhance their satisfaction within the criminal justice system';⁸¹⁸
- that there were challenges in submitting a VIS in the ACT Magistrates' Court because 'sentencing can often commence at the first mention, immediately after a finding of guilty, allowing no time for a VIS to be prepared';⁸¹⁹
- that 'where a defendant has been found guilty, but a victim has not yet been invited to prepare a VIS, a period of time should be provided for this to occur';⁸²⁰
- that 'the Western Australian *Sentencing Act 1995* explicitly provides for a court to adjourn the sentence of an offender to enable a victim impact statement to be given to the court', and, as a result, the 'Court can rely upon this reason to adjourn a matter' and there is a basis of 'legitimacy [for] requests from prosecutors to seek an adjournment for that purpose';⁸²¹ and
- that if uncertainty about the timing and procedure for having Victim Impact Statements considered by the ACT Magistrates Court it would reduce 'stress and confusion' for victims following departures from procedures currently determined by convention.⁸²²

COMMITTEE COMMENT

5.206 The Committee notes arguments put to it regarding sentencing and victims of crime.

5.207 The Committee notes the importance of procedural fairness for victims of crime, including the importance of having Victim Impact Statements, accurately reflecting their experience, factored into the process of courts.

⁸¹⁵ Victims of Crime Commissioner, Submission No.10, p.1.

⁸¹⁶ Victims of Crime Commissioner, Submission No.10, p.1.

⁸¹⁷ Victims of Crime Commissioner, Submission No.10, pp.1-2.

⁸¹⁸ Victims of Crime Commissioner, Submission No.10, p.5.

⁸¹⁹ Victims of Crime Commissioner, Submission No.10, p.5.

⁸²⁰ Victims of Crime Commissioner, Submission No.10, p.6.

⁸²¹ Victims of Crime Commissioner, Submission No.10, p.6.

⁸²² Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, pp.173-174.

5.208 With this in mind the Committee makes the following recommendation.

Recommendation 15

5.209 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly that, if passed, would make ACT legislation consistent with the *Sentencing Act 1995 (WA)* in explicitly providing that courts were able to adjourn the sentencing of an offender to enable a Victim Impact Statement to be given to the court.

5.210 The Committee also notes the arguments put to it suggesting that restorative justice represented a further avenue through which to more effectively address the experience of victims of crime within the criminal justice system. The Committee makes recommendations regarding the expansion of the ACT's restorative justice scheme below in this report.

COMMUNITY ORGANISATIONS

INTRODUCTION

5.211 ATCOSS and ATODA were among the community-based organisations which contributed to the inquiry, however Prisoners Aid ACT was the only contributing community-based organisation which had direct and specific involvement in supporting prisoners and ex-prisoners from the ACT justice system. Its contribution, on the basis of a submission and an appearance before the Committee in hearings, is considered below.

PRISONERS AID ACT

DESCRIPTION OF THE ORGANISATION

5.212 The submission to the inquiry by Prisoner's Aid ACT advised the Committee that Prisoners Aid (PA) was 'created in 1963' to:

help ACT-sentenced prisoners released from NSW jails to find accommodation, employment, make social contacts, obtain financial assistance and so on – at the time when any ex-prisoner is most vulnerable and most likely to reoffend.⁸²³

5.213 The remained 'a key activity of PA', especially 'now that Canberra has had its own jail since 2009'.⁸²⁴ With regard to other aspects of its present work, the submission stated that:

⁸²³ Prisoners Aid ACT, Submission No.18, p.1.

⁸²⁴ Prisoners Aid ACT, Submission No.18, p.1.

PA gets to know most prisoners before their release with a view to working out what they need, including such apparently simple things as driving licences and birth certificates. We also meet prisoners at the time of release if they do not have family or friends to assist. We support and participate in the ACT government's Throughcare program.⁸²⁵

5.214 The submission stated that the organisation's principal functions were:

- assisting prisoners on their release;⁸²⁶
- supporting prisoners while they are in jail;⁸²⁷
- helping the families of those in jail;⁸²⁸ and
- Court Assistance and Referral Service (CARS).⁸²⁹

5.215 In relation to the CARS service, the submission stated that:

In 1989 PA set up a service in the ACT courts building to assist all those involved in the court system - particularly those charged with offences but also victims of crime, witnesses, and the families of these people. Our office is open every weekday morning when the courts are functioning - which is most days of the year. The office is also a convenient point of contact for released prisoners.⁸³⁰

5.216 In addition:

CARS also assists people ordered by the court to undertake drug rehabilitation within or outside the ACT to travel to the institution concerned... CARS will provide bus tickets and in some cases ensure clients get on the bus.⁸³¹

PROPOSITIONS AND RECOMMENDATIONS

5.217 In its submission Prisoners Aid ACT put two broad propositions. The first was that:

Courts should have range of sentencing options that is as wide as possible to best 'make the punishment fit the crime' and to maximise the prospects of rehabilitation.⁸³²

⁸²⁵ Prisoners Aid ACT, Submission No.18, p.1.

⁸²⁶ Prisoners Aid ACT, Submission No.18, p.1.

⁸²⁷ Prisoners Aid ACT, Submission No.18, p.1.

⁸²⁸ Prisoners Aid ACT, Submission No.18, p.1.

⁸²⁹ Prisoners Aid ACT, Submission No.18, p.2.

⁸³⁰ Prisoners Aid ACT, Submission No.18, p.2.

⁸³¹ Prisoners Aid ACT, Submission No.18, p.2.

⁸³² Prisoners Aid ACT, Submission No.18, p.2.

5.218 In connection with this the submission stated that it supported ‘any move to give weight to the prospects for rehabilitation in determining sentences’.⁸³³

5.219 In connection with this it stated that Prisoners Aid:

- supported ‘any move to give weight to the prospects for rehabilitation in determining sentences’;⁸³⁴
- supported ‘the use of non-custodial sentences such as Community Service Orders to the maximum extent possible’;⁸³⁵
- opposed ‘the introduction of mandatory sentencing which removes from the court's discretion what could be viable alternative sentences that might improve prospects of rehabilitation’;⁸³⁶ and
- opposed ‘any reduction in sentencing options unless they can be justified in detail’, including the abolition of periodic sentencing.⁸³⁷

5.220 The second proposition put by the submission was that:

The Throughcare program should be adequately funded to fully prepare prisoners for their release and to assist them in the 6 -12 months after their release.⁸³⁸

5.221 In relation to this proposition the submission made a number of points.

5.222 First, the submission noted that ‘the ACT has the lowest rate of imprisonment per 100,000 population in Australia’ and put the view that ‘the courts by and large make sound and fair decisions in relation to sentencing’. As a result, ‘[i]f the number of prisoners in AMC is to be reduced’, it suggested, ‘this is likely to come not from fewer first offenders going to jail but from a reduction in the number re-offending after release’.⁸³⁹

5.223 Second, the submission noted that the ACT had ‘the highest rate of return to corrective services in Australia at 56%’. In view of this it suggested that ‘it may be particularly worthwhile to target Throughcare assistance at first-time offenders’, and noted that that ‘the most likely to re-offend appear to be women ... and those with longer sentences’.⁸⁴⁰

⁸³³ Prisoners Aid ACT, Submission No.18, p.3.

⁸³⁴ Prisoners Aid ACT, Submission No.18, p.2.

⁸³⁵ Prisoners Aid ACT, Submission No.18, p.3.

⁸³⁶ Prisoners Aid ACT, Submission No.18, p.3.

⁸³⁷ Prisoners Aid ACT, Submission No.18, p.3.

⁸³⁸ Prisoners Aid ACT, Submission No.18, p.3.

⁸³⁹ Prisoners Aid ACT, Submission No.18, pp.3-4.

⁸⁴⁰ Prisoners Aid ACT, Submission No.18, p.4.

5.224 Third, the submission proposed that '[c]onsideration should be given to extending the Throughcare program to male remandees as soon as possible', and suggested that the 'fact that remandees in the ACT spend almost as much time in detention as sentenced prisoners ... indicates the importance of paying equal attention to this group'.⁸⁴¹

5.225 Fourth, the submission suggested that 'given that the ACT has the lowest imprisonment rate in Australia', those 'actually incarcerated are more likely to be hard-core, habitual or institutionalised offenders' and 'such prisoners are inherently more likely to re-offend after release'. In light of this, the submission proposed, the 'chief measure for the ACT should be a reduction in recidivism over time rather than comparison with other states and territories'.⁸⁴²

5.226 Fifth, the submission proposed that 'recidivism rates need to be measured for both those on the ACT's Throughcare program and those not participating', as it 'is possible that those who choose to go on the program are inherently less likely to re-offend'. Consistent with this, it stated that rates should also be measured 'for different types of offender e.g. males and females, remand and sentenced, and first sentence and multiple sentences'.⁸⁴³

HEARINGS

5.227 Prisoners Aid ACT added to these comments when it appeared before the Committee in hearings of 14 October 2014.

5.228 With regard to the work undertaken by Prisoners Aid, the Secretary told the Committee that:

We are a small grassroots organisation working at the practical level. We assist prisoners when they first get out. That is why we were created back in 1963, to do exactly that. We support prisoners while they are in jail. We help the families of those in jail, noting that family support and maintaining family connections after release are very important in reducing recidivism. That is the one point that criminologists agree on. To be in contact with families, we maintain a roster of volunteers in the visitor entry area at the Alexander Maconochie Centre.⁸⁴⁴

5.229 He also provided further description of the Court assistance and referral service (CARS):

The other principal thing that we do is to run an office in the Magistrates Court, which is there to assist all people in need in the criminal justice system—not just those charged with offences but witnesses, victims of crime, families of these people and so on. We work very much with the system, for all its faults, weaknesses and deficiencies.

⁸⁴¹ Prisoners Aid ACT, Submission No.18, p.4.

⁸⁴² Prisoners Aid ACT, Submission No.18, p.4.

⁸⁴³ Prisoners Aid ACT, Submission No.18, p.4.

⁸⁴⁴ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.179.

From time to time we do think about the bigger picture, and that is why we do have some views on sentencing.⁸⁴⁵

5.230 Providing further detail, he told the Committee that:

We identify four programs, really four areas, in which we operate. One full-time staff member and our half-time staff member really work across those four things. They go regularly to the prison and talk to prisoners. They help prisoners on their release. Quite often, released prisoners, some time after release, come into the court office because they are having problems—they have run out of money or whatever. We can help or refer them to other agencies. Our staff help with families and all the other matters that arise in the court. And it is the same with our volunteers, particularly the more experienced ones, who do things across the board.⁸⁴⁶

5.231 In connection with this part of the organisation's work, he told the Committee that 'for years' CARS had been assisting people to attend to court-ordered rehabilitation:

The magistrates will order someone to attend a rehabilitation centre, which might be anywhere in New South Wales. There is absolutely no provision to get the offender from the Magistrates Court to the centre. Somehow they are supposed to make their own way.⁸⁴⁷

5.232 In response, he told the Committee CARS has:

for some years provided funds; we have usually bought bus tickets for them, taken them to the bus station, put them on the bus and hoped they got off at the other end and headed straight for the rehabilitation centre.⁸⁴⁸

5.233 When asked to comment on rates for recidivism in the ACT, the Secretary told the Committee that the critical factor was to provide sufficient support for prisoners on release:

The problem is essentially that a term of imprisonment often lasts much longer, or the adverse effects of a term of imprisonment often last much longer, than the term inside. It creates difficulties subsequently post release with employment and with getting accommodation. Often family relations are disrupted; families may even break up. Prisoners' self-esteem may be damaged. They may come to see themselves as criminals. All of this encourages a return to crime.⁸⁴⁹

⁸⁴⁵ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.179.

⁸⁴⁶ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.185.

⁸⁴⁷ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.184.

⁸⁴⁸ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.184.

⁸⁴⁹ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.180.

5.234 When asked to comment on intensive corrections orders, the Secretary saw two key benefits:

One is keeping them out of full-time imprisonment. The other is an opportunity to work with them, get them to complete programs, to get counselling, to deal with alcohol problems, drugs or family relationships. There are a whole lot of things that can be done.⁸⁵⁰

5.235 He noted, however, that success relied not only on ‘the willingness of the offender to cooperate’, which was ‘very important’, but also on ‘the resources that would be needed to institute an intensive program’, noting that the kinds of programs needed would be ‘very intensive in terms of staff in particular, to provide the constant monitoring, supporting and counselling of offenders’.⁸⁵¹

5.236 When asked about the proposed Needle and Syringe Program at the AMC, the Secretary told the Committee that internal discussions had highlighted important questions about the proposed which, if answered, could assist the broader decision-making process :

a number of questions have been raised in our discussions in which both streams [for and against the program] would like to know the answer. For example, is it a needle exchange program only in that you have to produce a dirty needle to get a clean one? If you do not have a dirty needle, how do you get a clean one? What will be the position of custodial staff? Will they know who is collecting a clean needle in exchange for a dirty needle and how does that square with their duty to find any contraband, drugs, whatever in the prison? On these sorts of practical implementation questions, I think it would help very much to have some clear answers. It would help both sides of the debate.⁸⁵²

SUMMARY

5.237 The Committee notes views put to it from the perspective of community organisations.

5.238 Arguments included:

- that courts have access to a ‘range of sentencing options that is as wide as possible to best “make the punishment fit the crime” and to maximise the prospects of rehabilitation’;⁸⁵³
- that, in determining sentences, more weight be given to ‘prospects for rehabilitation’;⁸⁵⁴

⁸⁵⁰ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.181.

⁸⁵¹ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.181.

⁸⁵² Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.183.

⁸⁵³ Prisoners Aid ACT, Submission No.18, p.2.

⁸⁵⁴ Prisoners Aid ACT, Submission No.18, p.3.

- that non-custodial sentences such as Community Service Orders [be used] to the maximum extent possible’;⁸⁵⁵
- that there should be no moves in the ACT toward mandatory sentencing;⁸⁵⁶
- that there be no ‘reduction in sentencing options unless they can be justified in detail’, including the abolition of periodic sentencing;⁸⁵⁷
- that the ‘Throughcare program should be adequately funded to fully prepare prisoners for their release and to assist them in the 6-12 months after their release’;⁸⁵⁸
- that, given the ACT’s low rate of imprisonment and high rates of recidivism, a lower number of prisoners at the AMC is ‘likely to come not from fewer first offenders going to jail but from a reduction in the number re-offending after release’;⁸⁵⁹
- that in view of the ACT’s high rate of recidivism ‘it may be particularly worthwhile to target Throughcare assistance at first-time offenders’;⁸⁶⁰
- that ‘[c]onsideration should be given to extending the Throughcare program to male remandees as soon as possible’, in view of the ‘fact that remandees in the ACT spend almost as much time in detention as sentenced prisoners’;⁸⁶¹
- that ‘given that the ACT has the lowest imprisonment rate in Australia’, those ‘actually incarcerated are more likely to be hard-core, habitual or institutionalised offenders’ and ‘such prisoners are inherently more likely to re-offend after release’ and, in light of this, the ‘chief measure for the ACT should be a reduction in recidivism over time rather than comparison with other states and territories’;⁸⁶²
- that ‘recidivism rates need to be measured for both those on the ACT’s Throughcare program and those not participating’, as it ‘is possible that those who choose to go on the program are inherently less likely to re-offend’, and that rates should also be measured ‘for different types of offender e.g. males and females, remand and sentenced, and first sentence and multiple sentences’;⁸⁶³
- that a critical factor in addressing recidivism was providing sufficient support for prisoners on release;⁸⁶⁴

⁸⁵⁵ Prisoners Aid ACT, Submission No.18, p.3.

⁸⁵⁶ Prisoners Aid ACT, Submission No.18, p.3.

⁸⁵⁷ Prisoners Aid ACT, Submission No.18, p.3.

⁸⁵⁸ Prisoners Aid ACT, Submission No.18, p.3.

⁸⁵⁹ Prisoners Aid ACT, Submission No.18, pp.3-4.

⁸⁶⁰ Prisoners Aid ACT, Submission No.18, p.4.

⁸⁶¹ Prisoners Aid ACT, Submission No.18, p.4.

⁸⁶² Prisoners Aid ACT, Submission No.18, p.4.

⁸⁶³ Prisoners Aid ACT, Submission No.18, p.4.

⁸⁶⁴ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.180.

- that the benefits of intensive corrections orders would include keeping offenders ‘out of full-time imprisonment’ and the ‘opportunity to work with them, get them to complete programs, to get counselling, to deal with alcohol problems, drugs or family relationships’;⁸⁶⁵
- that the kinds of programs needed would be ‘very intensive in terms of staff in particular, to provide the constant monitoring, supporting and counselling of offenders’;⁸⁶⁶ and
- that, in relation to the Needle and Syringe Program proposed for the AMC there were ‘important questions’ about the specifics of the program which, if answered, could assist the broader decision-making process.⁸⁶⁷

COMMITTEE COMMENT

5.239 In reflecting on arguments put to it from the perspective of a community organisation, the Committee notes its recommendation, made elsewhere in this report, that the ACT introduce an intensive corrections orders regime.

5.240 The Committee notes arguments put to it that Throughcare should be adequately funded and that the ACT assess progress on reducing custodial sentences against enhanced reporting on recidivism.

5.241 The Committee also makes the following recommendations.

Recommendation 16

5.242 The Committee recommends that the ACT Government assess the resources required to adequately fund the Throughcare program and apply that level of resourcing to the program.

Recommendation 17

5.243 The Committee recommends that the ACT Government institute enhanced reporting on recidivism in the ACT, and focus on measuring performance against those figures.

⁸⁶⁵ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.181.

⁸⁶⁶ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.181.

⁸⁶⁷ Dr Hugh Smith, *Transcript of Evidence*, 14 October 2014, p.183.

6 SENTENCING AND OFFENDERS

INTRODUCTION

- 6.1 Of those involved in the justice system offenders are among those most directly affected by sentencing practice.
- 6.2 Submissions to the inquiry distinguished between different categories of offender, and expressed concern at their interactions with the justice system. This included:
- Indigenous offenders;
 - offenders with addictions to alcohol and / or other drugs (AOD);
 - offenders with a disability, including those affected by mental illness;
 - youth offenders; and
 - female offenders.
- 6.3 These are considered below.

GROUPS OVER-REPRESENTED IN THE JUSTICE SYSTEM

ACTCOSS

- 6.4 The following groups were described by ACTCOSS' submission to the inquiry as groups which were 'over-represented' in the justice system in the ACT, meaning that numbers were disproportionate to their numbers in the ACT population as a whole.⁸⁶⁸
- 6.5 They included:
- 'Aboriginal and/or Torres Strait Islander peoples: Nationally Aboriginal and Torres Strait Islander peoples are over 14 times more likely to be imprisoned than the rest of the population, and have higher rates of prior imprisonment experience than other detainees. In 2012, the Aboriginal and Torres Strait Islander population in the AMC was 14.7 per cent. The ACT also has the third highest incarceration rate of Aboriginal and Torres Strait Islander young people.'
 - 'People with alcohol and other drug problems: in Australia illicit drug use and alcohol issues is strongly linked with crime. In the 2010 AIHW report on the health of

⁸⁶⁸ ACTCOSS, Submission No.6, p.10.

Australia's prisoners, the ACT had the highest proportion of prison entrants who reported illicit drug use in the previous 12 months (at 92 per cent).'

- 'People with mental health issues: Research suggests that there is a higher incidence of mental health issues in the Australian prison population than in the general population. In the ACT, 70 per cent of participants in the 2010 ACT Inmate Health Survey reported having had a formal psychiatric assessment at some point in their life, and 40 per cent had suicidal thoughts.'
- 'People with disability (neurocognitive disorders): people with Acquired Brain Injuries (ABI) are over-represented in the prison system in Australia - research puts figures at 65 per cent of people in Australian gaols reporting a traumatic brain injury. In the 2010 ACT Inmate Health Survey, 62 per cent of participants reported experiencing a head injury which resulted in unconsciousness.'⁸⁶⁹

6.6 These groups are considered below.

INDIGENOUS OFFENDERS

INTRODUCTION

6.7 Contributors to the inquiry expressed concern at the position of Indigenous offenders within the ACT justice system. These included contributions by:

- the Alcohol Tobacco and Other Drug Association ACT (ATODA);
- Mr Anthony Hopkins;
- the Aboriginal Legal Service NSW/ACT; and
- the ACT Bar Association.

6.8 Specifically, these contributions expressed concern about

- national rates of imprisonment for Indigenous people;
- rates of imprisonment for Indigenous people in the ACT; and
- proposed responses for overrepresentation of Indigenous people in the ACT justice system.

6.9 This last entailed proposals to support a greater degree of recognition of cultural background when courts move toward determining a sentence for Indigenous offenders, including proposals for:

⁸⁶⁹ ACTCOSS, Submission No.6, p.10.

- formal processes through cultural background would be consistently documented in pre-sentencing reports;
- legislation to be amended so that cultural background would be given greater weight in sentencing; and
- specific arrangements to ensure that rehabilitation for Indigenous offenders is as effective as possible.

6.10 These are considered below.

NATIONAL RATES OF IMPRISONMENT FOR INDIGENOUS OFFENDERS

6.11 Contributors expressed strong concern at high national rates of imprisonment for Indigenous offenders.

ABORIGINAL LEGAL SERVICE NSW/ACT

6.12 The Aboriginal Legal Service NSW/ACT advised the Committee that nationally there was:

a disproportionate rate of imprisonment of Aboriginal and Torres Strait Islander people relative to non-Indigenous prisoners and relative to the share of Aboriginal and Torres Strait Islander people in the Australian population.⁸⁷⁰

6.13 The submission advised that the most recent figures from the Australian Bureau of Statistics showed that the rate of imprisonment for Indigenous offenders was '15 times higher than the rate for non-indigenous prisoners'.⁸⁷¹

6.14 In addition, this rate had in recent years increased:

This was itself an increase over the previous 12-month period, when the rate of imprisonment was 14 times higher. At 30 June 2012, Aboriginal and Torres Strait Islander prisoners made up 27% of the adult prison population.³ This had become 28% overall by the June quarter 2013, following a 7% increase, over the 12-month period, in the number of male and 8% increase in the number of female Aboriginal and Torres Strait Islander persons in custody.⁸⁷²

⁸⁷⁰ Aboriginal Legal Service NSW/ACT, Submission No.15, p.1.

⁸⁷¹ Aboriginal Legal Service NSW/ACT, Submission No.15, p.1.

⁸⁷² Aboriginal Legal Service NSW/ACT, Submission No.15, p.1.

6.15 This resulted in a situation where:

Aboriginal and Torres Strait Islander prisoners constitute 28% of the prison population [but] make up only 2% of the Australian population.⁸⁷³

ATODA

6.16 These figures were broadly consistent with those put forward by the Alcohol Tobacco and Other Drug Association ACT (ATODA) in its submission to the inquiry.⁸⁷⁴

6.17 ATODA's submission noted that across Australia:

proportionally more Aboriginal and Torres Strait Islander sentenced prisoners have prior imprisonment experience (at 76%) than other detainees (at 48%).⁸⁷⁵

6.18 The submission noted observed that the Indigenous 'incarceration rate at the Alexander Maconochie Centre is unfortunately consistent with this'.⁸⁷⁶

6.19 Regarding drivers for this, the submission cited the work of the National Indigenous Drug and Alcohol Committee (NIDAC) which identified 'major contributors to Aboriginal and Torres Strait Islander over-representation in prisons'⁸⁷⁷ as:

- overcrowded housing;
- family members from the Stolen Generations; and
- alcohol and other drug misuse.⁸⁷⁸

MR ANTHONY HOPKINS

6.20 Mr Hopkins' submission compared the situation in Australia to that in Canada. From this, it stated, 'comparisons can fruitfully be drawn with respect to the experience of its Indigenous people', and in relation to 'legislative and judicial efforts to address custodial overrepresentation'.⁸⁷⁹

6.21 Mr Hopkins noted comments by Canadian courts on Indigenous overrepresentation in the justice system:

⁸⁷³ Aboriginal Legal Service NSW/ACT, Submission No.15, p.1.

⁸⁷⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

⁸⁷⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

⁸⁷⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

⁸⁷⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

⁸⁷⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

⁸⁷⁹ Mr Anthony Hopkins, Submission No.9, p.2.

The Supreme Court of Canada in *R v Gladue* [1999] 1 SCR 688 at 722 [64] described the overrepresentation of Aboriginal offenders in the Canadian prison population as a “crisis in the Canadian criminal justice system” and as “a sad and pressing social problem”. In the subsequent decision of *R v Ipeelee* [2012] 1 SCR 433 at 466-7 [57] the Supreme Court of Canada described ongoing custodial overrepresentation as “a crushing failure of the Canadian criminal justice system vis-a-vis Aboriginal peoples” (478-9 [74]).⁸⁸⁰

6.22 The submission noted that ‘this later conclusion was drawn by reference to statistics that disclosed that 17% of federal prisoners were Aboriginal, despite Aboriginal people making up only 3 % of the population’. Given that ‘statistics for Australia and the ACT disclose an even more serious overrepresentation of Indigenous Australians’, he suggested, ‘the conclusions of the Supreme Court of Canada are equally applicable here’.⁸⁸¹

6.23 Regarding causal factors for Indigenous overrepresentation in the justice system, Mr Hopkins’ submission referred to the findings over the 1991 report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) which, he noted, had devoted ‘a whole volume to exploring the underlying issues which explain these disproportionate rates of imprisonment’.⁸⁸²

In summary, the Commissioners found an answer in the history of colonial and post-colonial relations between Indigenous and non-Indigenous Australians and their institutions. They also found an answer in the legacy of discrimination, disadvantage and socio-economic inequality borne of this history.⁸⁸³

6.24 With reference to this, Mr Hopkins’ submission drew out implications for the sentencing of Indigenous offenders:

What the statistics and conclusions of the RCIADIC show is that Indigenous custodial overrepresentation is a consequence of complicated systemic and background factors playing out in the lives of Indigenous offenders coming before the courts; systemic and background factors which are unique to Indigenous Australians. That means that for many Indigenous offenders, their experience as Indigenous Australians is an essential part of the explanation for their offending, and it is an essential part of the identification of their rehabilitative needs.⁸⁸⁴

⁸⁸⁰ Mr Anthony Hopkins, Submission No.9, p.2.

⁸⁸¹ Mr Anthony Hopkins, Submission No.9, p.2.

⁸⁸² Mr Anthony Hopkins, Submission No.9, p.3, citing the 1991 report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>

⁸⁸³ Mr Anthony Hopkins, Submission No.9, p.3.

⁸⁸⁴ Mr Anthony Hopkins, Submission No.9, p.3.

- 6.25 As a result, it suggested, sentencing which responded to this experience necessarily became ‘an essential part of reducing recidivism’,⁸⁸⁵ and this, he suggested, was:

precisely what the Supreme Court of Canada has concluded with respect to its Indigenous population. And it accords with the conclusions reached by many courts across Australia.⁸⁸⁶

RATES OF INDIGENOUS IMPRISONMENT IN THE ACT

ABORIGINAL LEGAL SERVICE NSW/ACT

- 6.26 As had other contributors, the submission by the Aboriginal Legal Service NSW/ACT noted higher rates of imprisonment for Indigenous people in the ACT:

At 30 June 2012, the rate of imprisonment of Aboriginal and Torres Strait Islander people at 15 times the rate of imprisonment of non-Indigenous prisoners coincided exactly with the national average rate. However, the ACT rate was higher than in New South Wales, Victoria, Queensland, Tasmania and the Northern Territory. Only Western Australia (20 times) and South Australia had higher rates of imprisonment of Indigenous prisoners compared to non-Indigenous prisoners.⁸⁸⁷

- 6.27 Moreover, the submission noted:

Rates of imprisonment of Indigenous people remain at substantially disproportionate levels when compared to the non-Indigenous population.⁸⁸⁸

- 6.28 The submission went on to advise that:

recent figures released from the Australian Bureau of Statistics and ACT Justice and Community Safety suggest that an increase in the general population of Aboriginal and Torres Strait Islander people in the ACT, accompanied by the introduction of adult prison and expanded juvenile detention facilities in the ACT, has translated to an increase in prisoner population.⁸⁸⁹

- 6.29 The Aboriginal Legal Service also noted that:

- According to the 2011 census, the resident population of Aboriginal and Torres Strait Islander people in the ACT was 5183, up from 3872 in 2006- an increase of 33.9%. The

⁸⁸⁵ Mr Anthony Hopkins, Submission No.9, p.3.

⁸⁸⁶ Mr Anthony Hopkins, Submission No.9, p.3.

⁸⁸⁷ Aboriginal Legal Service NSW/ACT, Submission No.15, p.3.

⁸⁸⁸ Aboriginal Legal Service NSW/ACT, Submission No.15, p.3.

⁸⁸⁹ Aboriginal Legal Service NSW/ACT, Submission No.15, p.2.

local population represented 0.9% of the then total Aboriginal and Torres Strait Islander population in Australia of 548,370.

- According to ACT Government figures, the total sentenced Indigenous prisoner population held at 1 June 2013 was 31 in a prison population of 184. The total average of Indigenous prisoners held on remand for the month of June 2013 was 20.4 in a prison population of 86.53.
- In addition, for the June 2013 quarter, a total of 14 Indigenous young people were held in Bimberi on remand or following committal, in a detention centre population of 40.⁸⁹⁰

MR ANTHONY HOPKINS

6.30 Mr Anthony Hopkins' submission noted that:

As is the case elsewhere in Australia, Indigenous Australians are grossly overrepresented in prison and juvenile detention in the ACT. Though the Indigenous population accounts for less than three percent of the Australian population, on 30 June 2012, Indigenous Australians made up 27% of the adult prison population. Expressed another way, on 30 June 2012 the rate of imprisonment of Indigenous Australians was 15 times higher than the general population.⁸⁹¹

6.31 It also noted that rates were 'higher for female prisoners (> 30% of custodial population nationally) and higher again for Indigenous juveniles (>50% of custodial population nationally).⁸⁹²

6.32 'Tragically', he observed, this rate of overrepresentation was 'trending steadily up rather than down'.⁸⁹³

RECOGNITION OF INDIGENOUS STATUS IN SENTENCING

INTRODUCTION

6.33 Contributors to the inquiry put views that paying due regard to the Indigenous status of offenders during the sentencing process would be an important way of responding to the overrepresentation of Indigenous people amongst the prison population. These views are considered below.

⁸⁹⁰ Aboriginal Legal Service NSW/ACT, Submission No.15, p.2.

⁸⁹¹ Mr Anthony Hopkins, Submission No.9, p.2.

⁸⁹² Mr Anthony Hopkins, Submission No.9, p.2.

⁸⁹³ Mr Anthony Hopkins, Submission No.9, p.2.

ABORIGINAL LEGAL SERVICE NSW/ACT

6.34 The submission to the inquiry by the Aboriginal Legal Service NSW/ACT considered the implications of *Fernando* and *Bugmy* for the sentencing of Indigenous offenders in the ACT.

6.35 Regarding this, the submission noted that:

Recently, the High Court of Australia had occasion to consider the line of jurisprudence concerning sentencing of Aboriginal offenders. This jurisprudence has commonly been encapsulated broadly under the heading the 'Fernando principles'.⁸⁹⁴

6.36 The submission then went on to elaborate on the *Fernando* principles and their subsequent interpretation by the courts.

6.37 In *Bugmy*, the submission noted, the High Court had noted the view expressed in the judgement on *Neal*, that:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material/acts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter/or the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.⁸⁹⁵

6.38 The *Bugmy* judgement then went on to say that:

Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol fuelled violence. However, Wood J [author of the Fernando principles] was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.⁸⁹⁶

⁸⁹⁴ Aboriginal Legal Service NSW/ACT, Submission No.15, p.3, referencing *Bugmy v The Queen* [2013] HCA 37.

⁸⁹⁵ Aboriginal Legal Service NSW/ACT, Submission No.15, pp.3-4.

⁸⁹⁶ Aboriginal Legal Service NSW/ACT, Submission No.15, p.4.

6.39 The submission also noted the view, expressed in the judgement in *Fernando*, that the:

grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.⁸⁹⁷

6.40 In light of this, the submission suggested, the court expressed the view that:

It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within aboriginal communities are very real ones and their cure requires *more subtle remedies* than the criminal law can provide by way of imprisonment.⁸⁹⁸ (emphasis added)

6.41 In relation to this last, the submission advised that although ‘the line of authority commenced by the decision in *Fernando* has been approved by the High Court (and had been considered and approved by the Supreme Court of the ACT in 2011)’, the ‘subtle remedies’ called for in the judgement ‘remain the subject of controversy within and without the judicial system’, and needed clarification.⁸⁹⁹

6.42 The submission noted, however, that in the two cases, *Fernando* and *Bugmy*, determinations had been made in relation to the application of NSW laws. These were different from ACT law ‘in material respects’.⁹⁰⁰

6.43 Notably, the submission suggested, ACT legislation in s 33(1)(m) of the *Crimes (Sentencing) Act 2005* (ACT) already required courts to consider the ‘cultural background, character, antecedents, age and physical or mental condition of the offender’.⁹⁰¹

6.44 In addition, s 42 of the *Crimes (Sentencing) Act 2005* made provision for pre-sentence reports; required that such reports ‘must address’ each ‘pre-sentence report matter’; and s 40A of the *Crimes (Sentencing) Act 2005* provided that ‘the offender’s social history and background (including cultural background)’ was indeed ‘a pre-sentence report matter’.⁹⁰²

⁸⁹⁷ Aboriginal Legal Service NSW/ACT, Submission No.15, p.4.

⁸⁹⁸ Aboriginal Legal Service NSW/ACT, Submission No.15, p.4.

⁸⁹⁹ Aboriginal Legal Service NSW/ACT, Submission No.15, p.4.

⁹⁰⁰ Aboriginal Legal Service NSW/ACT, Submission No.15, p.4.

⁹⁰¹ Aboriginal Legal Service NSW/ACT, Submission No.15, p.5, referencing s 33(1)(m) of the *Crimes (Sentencing) Act 2005* (ACT). The submission also noted that a similar clause had been recommended as an amendment to relevant NSW legislation.

⁹⁰² Aboriginal Legal Service NSW/ACT, Submission No.15, p.9.

6.45 The submission proposed that this be strengthened by amending 40B such that it would require that:

the offender's social history and background (including cultural background with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders) ... be taken into account in the context of sentencing.⁹⁰³

6.46 The submission later returned to consider the form of words used in *Fernando*: that, in view of their collective history, Indigenous offenders required 'more subtle remedies than the criminal law can provide by way of imprisonment'.⁹⁰⁴

6.47 Regarding this, the submission went on to observe that:

While there is controversy as to what these subtle remedies may incorporate, they are the responsibility of the courts, which have, over time, built up a significant number of empirical studies related to restorative justice sentencing for Aboriginal offenders.⁹⁰⁵

6.48 In the light of this, the submission went on to quote recommendations put forward by the National Justice Chief Executive Officers Group with *Fernando* in mind. These included recommendations to:

- 'Begin efforts to assist offenders to successfully rehabilitate promptly upon imprisonment, and continue after release until reintegration is completed (throughcare).
- Ensure that programs are designed, developed and delivered in a culturally appropriate manner. (Evidence suggests that participants in programs that are delivered in a culturally appropriate manner are more likely to complete the program and less likely to re-offend.)
- Address substance abuse. (Drug and alcohol abuse are risk factors for offending.)
- Invest in lengthy and intensive programs. (Evidence indicates that programs of at least 100 hours are necessary to gain significant reductions in recidivism.)⁹⁰⁶

HEARINGS

6.49 The Aboriginal Legal Service added to these comments when it appeared before the Committee in hearings of 19 May 2014. In the hearing the Aboriginal Legal Service (ALS) spoke about:

- current conditions;

⁹⁰³ Aboriginal Legal Service NSW/ACT, Submission No.15, p.9.

⁹⁰⁴ Aboriginal Legal Service NSW/ACT, Submission No.15, p.6.

⁹⁰⁵ Aboriginal Legal Service NSW/ACT, Submission No.15, p.6.

⁹⁰⁶ Aboriginal Legal Service NSW/ACT, Submission No.15, pp.6-7, quoting Australia: National Justice Chief Executive Officers Group, *Staying Strong on the Outside: Indigenous Young Adults*: Final Report, September 2009, <http://www.indigenousjustice.gov.au/stayingstrong.pdf>, p3.

- proposed responses; and
- throughcare for Indigenous offenders.

6.50 These are considered below.

CURRENT CONDITIONS

6.51 Regarding current conditions Mr Raymond Brazil, a lawyer at the ALS, told the Committee that Indigenous deaths in custody had ‘actually decreased’. However, he told the Committee, the Service was concerned at ‘near deaths in custody’, which did not get reported:

In a nutshell, deaths in custody are still a vital issue and are always going to be a pressing issue, but there is not the same statistical pressure that there may have been 10 or 20 years ago. But it is the concern for Aboriginal people who are in custody and may be exposed to the near deaths, which, sadly, do not get reported, at least officially.⁹⁰⁷

6.52 Mr Michael Lalor, a solicitor at the ALS, referred in his opening statement to the “the underlying social, cultural and legal issues behind Aboriginal deaths in custody” referred to by the 1991 the Royal Commission into Aboriginal Deaths in Custody.⁹⁰⁸

6.53 He went on to note that:

In the wake of the commission releasing its findings, a commitment was given by representatives of all Australian states and territories to address and ultimately reduce the overrepresentation of Indigenous people within the prison system.⁹⁰⁹

6.54 Regarding this issue, he told the Committee that:

Recent studies into this overrepresentation establish that the problem must be viewed in a holistic fashion with consideration being given to a range of social and environmental factors concerning Indigenous defendants. The sentencing of Indigenous offenders does not and cannot occur in a vacuum.⁹¹⁰

6.55 He then went on to state that the ALS recognised:

the real, practical and innovative steps taken by ACT law makers in developing social policy aimed at reversing recognised Indigenous disadvantage in areas such as housing, education and health, amongst others. The ALS also recognises that ACT lawmakers

⁹⁰⁷ Mr Raymond Brazil, *Transcript of Evidence*, 19 May 2014, p.-91.

⁹⁰⁸ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

⁹⁰⁹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

⁹¹⁰ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

have frequently formulated these policies in consultation with representatives of the Indigenous community within the ACT.⁹¹¹

6.56 The ALS also acknowledged, in terms of legislative arrangements, that:

ACT sentencing law differs in important respects from corresponding law in other jurisdictions. For example, section 33(1)(m) of the *Crimes (Sentencing) Act* is an important legislative acknowledgement that the sentencing of all offenders must take account of the unique cultural background applicable to those offenders.⁹¹²

6.57 Regarding this, Mr Lalor went on to tell the Committee that:

In that regard, we think that the ACT really leads Australia. I note that the New South Wales Law Reform Commission have recommended adopting a similar provision as the ACT provision as it stands as a means of furthering their own sentencing regime⁹¹³

6.58 He went on to say that the ACT was ‘lucky enough that that is an entrenched principle in law here’, but that it was the view of the ALS that that ‘the position could be advanced by further amendment’.⁹¹⁴

6.59 In particular, Mr Lalor told the Committee, ‘as the law stands in the ACT’:

where a defendant seeks to rely on matters in his or her background that tend to mitigate culpability for an offence, the connection between those matters must be proven by evidence.⁹¹⁵

6.60 It was the view of the ALS, Mr Lalor told the Committee, that ‘a lot of times, unless the defendant is able to or unless there is funding for specialised reports, it is the role of pre-sentence reports to address that’.⁹¹⁶ However, he told the Committee, it was:

common—and I want to be careful that I am not rubbishing Corrective Services, because I understand that they have funding constraints—to have a pre-sentence report where, in the opening sentence, there will be a heading “Subjective features” or something of that nature, and then it will say, “The offender is a 32-year-old Aboriginal man.” And that is it.⁹¹⁷

⁹¹¹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

⁹¹² Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

⁹¹³ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.93.

⁹¹⁴ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.93.

⁹¹⁵ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.97.

⁹¹⁶ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.97.

⁹¹⁷ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.97.

6.61 As a result, he told the Committee, ‘in the absence of better information to the courts under pre-sentence reports and in the absence of perhaps legislative guidance’, sentencing often took place without the benefit of ‘an accurate representation of an Aboriginal offender’s cultural background’. In these conditions, he told the Committee, ‘[u]nfortunately, Aboriginal offenders fall to be sentenced on their record’—that is, based on the defendant’s record of prior contacts with the criminal justice system.⁹¹⁸

RESPONSES TO CURRENT CONDITIONS

6.62 Regarding responses to current conditions, Mr Lalor told the Committee that:

Recent studies and recent literature available suggest that there are four main indicators, or four main triggers, to Aboriginal offending. These are, broadly speaking: family factors, employment and education factors, drug and alcohol abuse and overrepresentation before the courts.⁹¹⁹

6.63 He went on to say that:

The ALS position is that, while the solution to this problem requires systemic change and broad-ranging social policies to address these four broad planks ... what we are suggesting in our sentencing submission is that the courts, by sentencing, have a role to play in addressing one of these indicators, or planks, if you like.⁹²⁰

6.64 This ‘one plank’ which Courts could address was overrepresentation before the courts—essentially by way of diversion programs. Hence, Mr Lalor told the Committee, the ALS was ‘asking the legislature to arm the courts, or give an indication of legislative intent to the courts, to enable them to deal as they can with that problem’.⁹²¹

6.65 In line with this, Mr Lalor told the Committee, the ALS proposed changes regarding the Galambany Circle Sentencing Court.

6.66 The first proposal was that there be ‘legislative recognition’ of the Court.⁹²² At present, the Court, which Mr Lalor described as:

an important and innovative reform to sentencing practice in the ACT, fostering not only appropriate sentencing outcomes for Indigenous defendants but also inclusion within the justice system for Indigenous people and ... for victims of crime.⁹²³

⁹¹⁸ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, pp.97-98.

⁹¹⁹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.90.

⁹²⁰ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.90.

⁹²¹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.90.

⁹²² Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

⁹²³ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

6.67 —was formalised under a practice direction of the ACT Magistrates Court rather than being explicitly recognised in statute.⁹²⁴

6.68 Mr Lalor went on to say, regarding this, that currently the Galambany Court:

is recognised legislatively in the Magistrates Court Act of the ACT, which gives it some measure of permanence, if you like. What we are seeking to do by our submission, again, is to give the court the power to reverse and arrest the over-incarceration which I referred to in my opening statement by effectively enshrining the principles behind the circle sentencing court in legislation.⁹²⁵

6.69 Speaking further to this proposal, Mr Lalor put the view that:

The circle sentencing court is itself an exercise in restorative justice. What we believe is necessary is legislative recognition of those restorative justice principles, similarly, as is the case with restorative justice itself, to allow that court to not only continue in the work that it is doing but also develop its own unique jurisprudence, if you like.⁹²⁶

6.70 Speaking to the second proposal regarding the Galambany Circle Sentencing Court, Mr Lalor cited the ‘more subtle remedies’ indicated in the judgement of Justice Wood in *Fernando*:

It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand with Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.⁹²⁷

6.71 Mr Lalor went on to say that:

It is these subtle remedies that essentially we are asking the legislature to arm the courts with, again, in order to tackle the real and practical problems being faced by a lot of members of the Aboriginal community. While measures such as the Galambany Circle Sentencing Court are essential, we say, in tackling the problem, the range of sentencing options available to a court are quite narrow within the terms of a good behaviour bond and other supervision available to offenders through Corrective Services.⁹²⁸

⁹²⁴ The relevant Practice Direction is the *Magistrates Court of the Australian Capital Territory Galambany Court Practice Direction No. 1 of 2012*, <http://www.courts.act.gov.au/magistrates/page/view/3308/title/galambany-court-practice-direction-no>

⁹²⁵ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.92.

⁹²⁶ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.92.

⁹²⁷ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.91, quoting *R v Fernando* (1992) 76 ACR 58.

⁹²⁸ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.91.

6.72 Moreover, ‘in order to formulate more effective sentencing options’, the ‘Aboriginal community itself should be consulted in formulating those options’, and that:

more effective casework, which itself would be facilitated by involvement of the Aboriginal community, is essential to diversionary sentencing options from imprisonment.⁹²⁹

6.73 More broadly, Mr Lalor told the Committee:

if the steadily climbing rates of Indigenous over-incarceration are finally to be arrested and reversed then it is this demonstrated willingness to trial and adopt new practical and innovative approaches to sentencing that will ultimately achieve that aim.⁹³⁰

6.74 In particular, there was a need to enhance formal recognition of Indigenous status and experience in pre-sentence reports. Regarding this, Mr Lalor told the Committee that:

we do not say is that an offender should get a break in sentencing because he or she is Aboriginal. We say that these triggers to offending, which are recognised by current literature on sentencing, are now present to such high degrees within some sections of the Aboriginal community as to be endemic.⁹³¹

6.75 He went on to say that:

We are not asking the parliament to incorporate a different sentencing regime for people of different ethnic backgrounds. We are simply asking the legislature to build on this notion of cultural background, which is already contained in the sentencing act, to give some further acknowledgement to that principle, if you like, but with particular regard to Aboriginal offenders.⁹³²

6.76 Mr Lalor also told the Committee that under s 33(1)(m) of the *Crimes (Sentencing) Act* ‘the court ... must take into account cultural background matters as are known’. It was the view of the ALS that ‘the court could be better informed by pre-sentence report writers’ and that ‘that information could be best served by Aboriginal or Torres Strait Islander people having input into the pre-sentence report-writing process themselves’, similar to *Gladue* reports in Canada.⁹³³

⁹²⁹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.91.

⁹³⁰ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.90.

⁹³¹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.93.

⁹³² Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.93.

⁹³³ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.98.

6.77 In regard to this, he told the Committee, the ALS recommended:

that the legislation concerning the writing of pre-sentence reports also be amended to have pre-sentence reports take into account the offender's social history and background, including cultural background. Our proposed amendment, again, is with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders⁹³⁴

6.78 This proposal, he told the Committee, was:

focused on addressing those matters which have been recognised as triggers to offending and which are unfortunately so prevalent within some sections of the Aboriginal community.⁹³⁵

6.79 Regarding this, Mr Raymond Brazil of ALS told the Committee that this was a way of formalising something that was already inherent in the *Crimes (Sentencing) Act*:

In terms of the pre-sentence reports, what we are proposing in essence is that, with what appears to be, with respect, the spirit of the legislation—that the courts are informed of these matters, of an individual offender's background—there needs to be a little bit more detail and clarity about how the court is informed and, in the case of Aboriginal offenders, to make sure that they are sufficiently informed of that background, and in a way that is effective, that adequately and culturally appropriately takes into account that offender's background.⁹³⁶

CARE AND RELEASE

6.80 The ALS spoke about throughcare and post-release care for Indigenous offenders.

6.81 Mr Lalor stated that ALS supported 'more intensive casework within the corrective services portfolio' with Indigenous clients, and commented that this intensive casework:

really ties in with our submission that the sentencing act itself could be amended to take into account a range of social and environmental factors in the crafting of the sentences themselves.⁹³⁷

6.82 Mr Lalor told the Committee that an ongoing concern from the ALS's point of view was with continuity in relationships between caseworkers and Indigenous clients in the justice system. This was particularly a concern where clients had problems with mental health.⁹³⁸

⁹³⁴ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.98.

⁹³⁵ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.98.

⁹³⁶ Mr Raymond Brazil, *Transcript of Evidence*, 19 May 2014, pp.97-98.

⁹³⁷ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.92.

⁹³⁸ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.99.

- 6.83 The Manager, Prisoner Throughcare, detailed the work of the ALS in supporting Indigenous prisoners during and after custodial sentences. He noted particular difficulties in securing appropriate housing for offenders after release:

One of the main things we find difficulty with is trying to find housing for our clients. They are relying on family and friends. Then they end up going back into the same routine and getting mixed up with the same crowd; whereas we are trying to divert them away. That is probably the main part that really blocks a lot of people. It is just making the change and having a little bit of independence with their own house.⁹³⁹

ACT BAR ASSOCIATION

- 6.84 The submission to the inquiry by the ACT Bar Association made comment on the significance of taking Aboriginality into account in sentencing:

It is established law that an Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence [in light of] *Fernando*.⁹⁴⁰

- 6.85 It further noted that:

In *Bugmy v R* [2013] HCA 37 (2 October 2013) the High Court has recently affirmed that the deprived background of an aboriginal offender remains relevant to sentence even with the passage of time.⁹⁴¹

- 6.86 Regarding this, the submission observed that:

The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.⁹⁴²

⁹³⁹ Mr Peter Rose, *Transcript of Evidence*, 19 May 2014, p.92.

⁹⁴⁰ ACT Bar Association, Submission No.11, p.9.

⁹⁴¹ ACT Bar Association, Submission No.11, p.9.

⁹⁴² ACT Bar Association, Submission No.11, p.10.

- 6.87 At this point the submission commented on the implications of this for the weighing-up of sentencing imperatives by judicial officers:

Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving “full weight” to an offender's deprived background in every sentencing decision...⁹⁴³

- 6.88 In light of these reflections, the submission put that view that ‘the significance of Aboriginality to the process of sentencing should be made the subject of explicit legislative provision’.⁹⁴⁴ The value of such an approach would, the submission suggested, that it would ensure ‘that the *Bugmy* and *Fernando* principles are not the subject of derogation over time’.⁹⁴⁵

- 6.89 It would also:

send a powerful message to the community at large and to the indigenous community in particular of the Assembly's mindfulness of the extent to which indigenous people are over represented in the ACT's prison population.⁹⁴⁶

ATODA

- 6.90 ATODA's submission put the view that the ACT's *Crimes (Sentencing) Act 2005* was ‘silent’ as regards the Indigenous status of offenders. In response, the submission suggested that the Act should be amended so that it contained: ‘separate provisions relating to Indigenous offenders be included, paralleling those relating specifically to juvenile offenders’. This would ‘provide guidance, if not directions, to judicial officers when they are dealing with Indigenous offenders’.⁹⁴⁷

- 6.91 ‘Such an approach’, the submission suggested:

would give due weight not just to the individual life circumstances of the offender but also to key features of Australian history and culture that helped to explain, and underpin, much Indigenous offending.⁹⁴⁸

⁹⁴³ ACT Bar Association, Submission No.11, p.10.

⁹⁴⁴ ACT Bar Association, Submission No.11, p.10.

⁹⁴⁵ ACT Bar Association, Submission No.11, p.10.

⁹⁴⁶ ACT Bar Association, Submission No.11, p.10.

⁹⁴⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.8.

⁹⁴⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.8.

MR ANTHONY HOPKINS

- 6.92 Regarding the recognition of Indigenous status in sentencing, the submission to the inquiry by Mr Anthony Hopkins submission put the view that:

Generally it is well accepted that the application of the principle of equality before the law requires sentencing courts to take into account material facts that exist in the lives of individual offenders because of their Aboriginality or experience as Indigenous Australians.⁹⁴⁹

- 6.93 In support of this the submission quoted a judgement from *Neal v The Queen* (1982) which stated that:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.⁹⁵⁰

- 6.94 The submission noted that this was indicated 'in general terms' as a consideration in s 33(1)(m) of the *Crimes (Sentencing) Act 2005* (ACT).⁹⁵¹ This section of the Act indicates that the 'the cultural background, character, antecedents, age and physical or mental condition of the offender' are among the relevant 'matters' which a court 'must consider' in 'deciding how an offender should be sentenced ... for an offence'.⁹⁵²

- 6.95 The submission stated that there were 'continuing lines of authority' which made it clear that it would 'often be necessary to direct specific attention to the aboriginality of offenders in the exercise of the sentencing discretion'.⁹⁵³

- 6.96 However, the upshot of this was not entirely clear, as there had been 'an ongoing tension evident in case law as to when aboriginality should be considered and what facts that exist by reason of an offender's aboriginality may be relevant'.⁹⁵⁴

- 6.97 These 'tensions' were between lines of authority that limited the degree to which aboriginality could be taken into account and those taking a more expansive view. These are considered below.

⁹⁴⁹ Mr Anthony Hopkins, Submission No.9, p.3.

⁹⁵⁰ Mr Anthony Hopkins, Submission No.9, p.3, quoting *Neal v The Queen* (1982) 149 CLR 305 at 326 (Brennan J).

⁹⁵¹ Mr Anthony Hopkins, Submission No.9, p.4.

⁹⁵² *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(m).

⁹⁵³ Mr Anthony Hopkins, Submission No.9, p.4.

⁹⁵⁴ Mr Anthony Hopkins, Submission No.9, p.4.

MORE LIMITED VIEWS OF THE RELEVANCE OF ABORIGINALITY IN SENTENCING

- 6.98 Considering decisions taking a more conservative or limiting view, Mr Hopkins' submission noted that:

Following on from the NSW decision of *R v Fernando* (1992) 76 A Crim R 58 there have been decision[s] of the NSW Supreme Court and the ACT Supreme Court that apparently restrict consideration of Aboriginality to cases involving an offender whose experience as an Aboriginal person falls within a particular category.⁹⁵⁵

- 6.99 An example, the submission Hopkins advised, was an ACT decision in which Penfold J stated that it was:

apparent that the Fernando principles are of primary relevance to offences committed by Aboriginal offenders within Aboriginal Communities, and in particular where the offences are associated with alcohol abuse and resulting violence within those communities.⁹⁵⁶

- 6.100 This appeared to suggest that the Fernando principles were more relevant to a particular subset of situations involving Indigenous offenders.

BROADER VIEWS OF THE RELEVANCE OF ABORIGINALITY IN SENTENCING

- 6.101 In indicating current judicial views which supported a broader interpretation of the significance of Aboriginality in sentencing, Mr Hopkins' submission referenced a recent decision in *Bugmy v The Queen* (2013), in which judgement 'the plurality of the High Court confirmed the general principle in Neal and did not countenance its restriction to a particular class of Indigenous offender', stating that:

Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity and they, too, may be subject to the grave social difficulties discussed in Fernando.⁹⁵⁷

- 6.102 The submission went on to note that the plurality of the High Court 'also made clear that sentencing courts are not permitted to take judicial notice of the systemic background of deprivation of many Aboriginal offenders'.⁹⁵⁸

⁹⁵⁵ Mr Anthony Hopkins, Submission No.9, p.4.

⁹⁵⁶ Mr Anthony Hopkins, Submission No.9, p.4, quoting Penfold J, *Crawford v Laverty* [2008] ACTSC 107 at [32].

⁹⁵⁷ Mr Anthony Hopkins, Submission No.9, p.5.

⁹⁵⁸ Mr Anthony Hopkins, Submission No.9, p.5.

6.103 Speaking to this, the submission noted, the Court stated that:

Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indicies, but to recognise this is to say nothing about a particular Aboriginal offender.⁹⁵⁹

CURRENT STATUS OF ABORIGINALITY IN SENTENCING

6.104 In considering the upshot of these different tendencies — narrower and broader judicial views on the relevance of aboriginality to sentencing — Mr Hopkins' submission suggested that, taken together, they established 'two propositions', which were that:

1. An Indigenous offender's experience of disadvantage because of their Aboriginality may be critically relevant to the exercise of the sentencing discretion no matter what environment they live in; [and that]
2. This experience of disadvantage must be established by evidence presented to the sentencing court rather than by a process of taking judicial notice of the general experience of Indigenous Australians as a group.⁹⁶⁰

6.105 The submission went on to observe that in view of these propositions 'the critical issues in terms of ensuring that an Indigenous offender has his or her experience as an Indigenous person taken into account' were 'twofold':

Firstly, it is necessary to ensure that sentencing courts are focused on the importance of taking Indigenous experience into account in sentencing in pursuit of the goal of equality before the law. And secondly, it is necessary to consider ways in which to obtain and present evidence of that experience to the court.⁹⁶¹

6.106 In views put forward in the submission, this led to a state of affairs in which:

whilst overrepresentation may be explained through an understanding of complicated systemic and background factors playing out in the lives of Indigenous offenders, these factors cannot be assumed to exist in the life of any particular offender.⁹⁶²

6.107 As a result, the submission advised that the 'link between the experience of the group and the experience of the individual must be [made] explicit' to a court about to sentence an offender.⁹⁶³

⁹⁵⁹ Mr Anthony Hopkins, Submission No.9, p.5.

⁹⁶⁰ Mr Anthony Hopkins, Submission No.9, p.5.

⁹⁶¹ Mr Anthony Hopkins, Submission No.9, p.5.

⁹⁶² Mr Anthony Hopkins, Submission No.9, p.5.

⁹⁶³ Mr Anthony Hopkins, Submission No.9, p.5.

6.108 In views put forward in the submission, the effect of this was that:

The High Court [had] endorsed an approach to sentencing that facilitates the taking into account of Indigenous experience of disadvantage in the interests of ensuring equality before the law.⁹⁶⁴

6.109 ‘However’, the submission advised, there were such ‘differences of approach evident in lower courts’ as to warrant introducing legislative amendments that would require courts to take Aboriginality into account. This was the case ‘not least in the ACT’, where it was in these terms desirable to enact ‘a legislative amendment to the *Crimes (Sentencing) Act 2005* which specifically directs the attention of sentencing courts to the circumstances of Indigenous offenders’.⁹⁶⁵

6.110 With regard to this last proposition the submission observed that ‘[n]o such provision exists in any jurisdiction in Australia’, but noted however that the ‘the Canadian experience’ was different in this regard and as such was ‘instructive’.⁹⁶⁶

6.111 This is considered below.

TAKING ABORIGINALITY INTO ACCOUNT IN CANADIAN COURTS

6.112 Mr Hopkins’ submission to the inquiry noted present practice in Canadian courts, where a formal mechanism had developed to provide advice to courts on the aboriginal status of offenders, and to require courts to take this into account when sentencing.

6.113 The submission noted the importance of *R v Gladue* in the Supreme Court of Canada.⁹⁶⁷ This case to an extent turned on the interpretation of a relatively recent amendment to the Canadian *Criminal Code*, section 7.8.2(e), which requires that:

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.⁹⁶⁸

6.114 Regarding this, the Court stated that this section of the *Code* did not ‘alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the

⁹⁶⁴ Mr Anthony Hopkins, Submission No.9, p.6.

⁹⁶⁵ Mr Anthony Hopkins, Submission No.9, p.6.

⁹⁶⁶ Mr Anthony Hopkins, Submission No.9, p.6.

⁹⁶⁷ *R. v. Gladue*, [1999] 1 S.C.R. 688, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1695/index.do>. Gladue was an aboriginal woman who stabbed her common-law husband, killing him, while they were both drunk. She was sentenced to three years imprisonment for manslaughter and lodged an appeal. The appeal case was the occasion for the court to consider the implications of section 718.2(e) of the Canadian Criminal Code, the implications of which are considered in this section.

⁹⁶⁸ *Criminal Code*, RSC 1985, c C-46, section 7.8.2(e).

offender’.⁹⁶⁹ Mr Hopkins observed that, rather, the subsection was “a legislative direction ‘that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders’ “.⁹⁷⁰

6.115 Moreover, Mr Hopkins’s submission noted that ‘the direction to pay particular attention is applicable in sentencing “all aboriginal offenders” ‘, irrespective of whether they lived in a specific community or circumstances.⁹⁷¹

6.116 Regarding this, the submission noted that in *Gladue*:

The Court held that section 718.2(e) requires sentencing courts to adopt a different ‘process’ for the sentencing of Aboriginal offenders in order to achieve a ‘truly fit and proper sentence in the particular case’. The sentencing process remains individualised, but the individual offender before the court is understood to exist within the context of the collective experience of Aboriginal Canadians. This requires explicit recognition of ‘unique background and systemic factors which may have played a part in bringing the particular offender before the courts’. These include dislocation, discrimination, child removal, socioeconomic disadvantage, substance abuse and community fragmentation that all too often lead to incarceration at grossly disproportionate rates. The Court recognised that collective experience may provide an explanation for the individual’s offending behaviour.⁹⁷²

6.117 Moreover, ‘critically’, the submission observed:

the Court also recognised that the same collective experience offers the potential for innovation in sentencing process and uniquely Aboriginal pathways for punishment, healing and reform.⁹⁷³

⁹⁶⁹ Mr Anthony Hopkins, Submission No.9, p.6.

⁹⁷⁰ Mr Anthony Hopkins, Submission No.9, p.6.

⁹⁷¹ Mr Anthony Hopkins, Submission No.9, p.6. In *Gladue* ‘all aboriginal offenders’ refers to all aboriginal people whether resident on aboriginal reservations or not. This parallels matters raised in Australian courts such as *Crawford v Lavery* [2008] ACTSC 107 at [32] where Penfold J stated that :’ It is apparent that the Fernando principles are of primary relevance to offences committed by Aboriginal offenders within Aboriginal Communities, and in particular where the offences are associated with alcohol abuse and resulting violence within those communities’, quoted by Mr Anthony Hopkins, Submission No.9, p.4.

⁹⁷² Mr Anthony Hopkins, Submission No.9, pp.6-7.

⁹⁷³ Mr Anthony Hopkins, Submission No.9, p7. A review of the *Gladue* appeal judgement shows that the court was not only concerned with extenuating circumstances, but also with restorative justice as a response to aboriginal offending.

RESPONSE IN CANADA TO *GLADUE*

6.118 Mr Hopkins' submission noted the response in Canada in the wake of the Gladue decision.

6.119 Initially, it advised, there was little change:

According to Jonathan Rudin, Program Director of the Aboriginal Legal Services of Toronto Legal Clinic, 'in the weeks, months and years that passed following the Gladue decision, little changed in the Canadian legal landscape'. Material facts which existed by reason only of the Aboriginality of offenders remained unidentified and were not acted upon.⁹⁷⁴

6.120 However, what followed was important:

To remedy this, Gladue courts were established, specifically charged with the task of giving full effect to the decision. Aboriginal caseworkers were appointed to provide Gladue reports to these courts, setting out the systemic and background issues affecting the lives of Aboriginal offenders, together with available culturally relevant sentencing options. The reports explain offending behaviour within the collective history of Aboriginal Canadians, highlighting the link between individual and collective experience. And further, they explore options for healing and reform from the vantage point of this collective experience.⁹⁷⁵

6.121 These 'Gladue reports', observed Mr Hopkins' submission, were 'distinct from pre-sentence reports in that their fundamental purpose is to identify material facts which exist only by reason of the offender's Aboriginality'.⁹⁷⁶

6.122 'Critically', it observed:

Gladue reports are written by Aboriginal Canadians employed by Aboriginal organisations. Accordingly, the authors of the reports exist within the same collective experience as the offender before the court. But like presentence reports, Gladue reports provide an independent source of evidence from which facts material to sentencing can be established and acted upon.⁹⁷⁷

⁹⁷⁴ Mr Anthony Hopkins, Submission No.9, p.7.

⁹⁷⁵ Mr Anthony Hopkins, Submission No.9, p.7.

⁹⁷⁶ Mr Anthony Hopkins, Submission No.9, p.8.

⁹⁷⁷ Mr Anthony Hopkins, Submission No.9, p.8.

6.123 'As a consequence', the submission noted:

identification of the relevance and importance of an offender's Aboriginality is not left solely to the defence lawyer. Nor does it depend on the resources that lawyer has available to them.⁹⁷⁸

6.124 Moreover, in a 'mark of the extent to which the Canadian judiciary values these reports', they were 'now accepted in, and sought by, Gladue and non-Gladue courts alike, faced with the task of sentencing Aboriginal Canadians'.⁹⁷⁹

6.125 The submission noted that the value placed on Gladue reports was reflected in another judgement of the Supreme Court of Canada (*R v Ipeelee*), which stated that:

In current practice, it appears that case-specific information is often brought before the court by way of a Gladue report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.⁹⁸⁰

APPLYING THE CANADIAN MODEL TO THE ACT

6.126 Returning to current conditions in the ACT, it has been noted that Mr Hopkins' submission observed that the application of *Fernando* principles had been interpreted in such a way as to restrict considerations of aboriginality at sentencing to 'offences committed by Aboriginal offenders within Aboriginal Communities'. In relation to this, the submission observed that:

[Whilst] this restrictive approach has not been followed by other judges on the ACT Supreme Court, there is a concern *that without legislative guidance* the tendency to consider some experiences of Aboriginality as relevant and not others fails to appreciate the complexity of Indigenous post colonial experience and disadvantage.⁹⁸¹
[emphasis added]

6.127 In saying this, the submission suggested that ACT legislation should be amended to provide a stronger requirement for ACT courts to take aboriginality into account when sentencing, and that this could give rise to instruments in the ACT similar to Gladue reports in Canada.

⁹⁷⁸ Mr Anthony Hopkins, Submission No.9, p.8.

⁹⁷⁹ Mr Anthony Hopkins, Submission No.9, p.8.

⁹⁸⁰ Mr Anthony Hopkins, Submission No.9, p.8, quoting *R v Ipeelee* [2012] 1 SCR 433 [60].

⁹⁸¹ Mr Anthony Hopkins, Submission No.9, p.4.

6.128 Alternatively, Mr Hopkins' submission suggested, changes could be made to the current regime of pre-sentence reports so that some of these reports would serve a similar purpose.⁹⁸²

6.129 Regarding current arrangements the submission observed that:

At present in the ACT, pre-sentence reports give very limited attention to the Aboriginality of offenders. This is made clear in research findings drawn from interviews with lawyers working for the Aboriginal Legal Service in the ACT. There appears to be little if any consideration given in pre-sentence reports to the systemic and background factors that may be playing out in the lives of Indigenous offenders, nor to how the offenders experience as and Indigenous person may be material to the sentencing discretion.⁹⁸³

6.130 This, the submission suggested, could be 'remedied to an extent through training to ensure that report writers are alive to these issues and better able to provide this evidence to courts', and noted that 'following the Canadian experience', 'such education and report writing is better delivered or at least directly informed by Indigenous people who fully comprehend the complexities of post-colonial Indigenous experience'.⁹⁸⁴

6.131 The submission advised, however, that the 'identification of background and systemic factors playing out in the lives of Indigenous Australians and presenting this experience in court [was] only part of the challenge'.⁹⁸⁵

6.132 A 'more critical part of the challenge' was to 'develop Indigenous specific pathways to healing and reform that address these disadvantages and offer offenders a way forward'. In this, it was 'critical to recognise that Indigenous Australians themselves must be involved in the design and delivery of such programs to ensure their relevance and efficacy'.⁹⁸⁶

6.133 The submission noted that two programs proposed for the ACT—the Ngunnawal Healing Farm and Circuit Breaker—had 'yet to come to fruition', although it was 'not aware of the reasons for this or the precise nature of either proposal'.⁹⁸⁷

⁹⁸² Mr Anthony Hopkins, Submission No.9, p.8.

⁹⁸³ Mr Anthony Hopkins, Submission No.9, p.8.

⁹⁸⁴ Mr Anthony Hopkins, Submission No.9, pp.8-9.

⁹⁸⁵ Mr Anthony Hopkins, Submission No.9, p.9.

⁹⁸⁶ Mr Anthony Hopkins, Submission No.9, p.9.

⁹⁸⁷ Mr Anthony Hopkins, Submission No.9, p.9.

6.134 Mr Hopkins' submission summarised its proposals, considered above, in the following recommendations:

- '1. That s 33 [of the] *Crimes (Sentencing) Act 2005* be amended to include a requirement that sentencing courts pay particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders.
2. That a pilot project be implemented to enable the provision of Indigenous specific presentence reports to sentencing courts where offenders consent to the production of such reports.
3. That immediate steps be taken to investigate and implement Indigenous specific pathways for rehabilitation and reform following best practice programs available in other Australian jurisdictions.'⁹⁸⁸

HEARINGS

6.135 Mr Hopkins added to these comments when he appeared before Committee in hearings of 26 May 2014.

IMPORTANCE OF THE CANADIAN APPROACH

6.136 In his opening statement Mr Hopkins noted that 'in the ACT, not unlike other jurisdictions, we have serious over-representation when it comes to Indigenous populations in prison, and particularly in juvenile detention'.⁹⁸⁹

6.137 In his statement, Mr Hopkins emphasised the importance of taking into account the 'Canadian approach' when thinking about how the justice system ACT could be improved as regards its handling of Indigenous offenders.⁹⁹⁰

6.138 The first aspect of this involved:

informing the courts about reasons why Indigenous people come in greater numbers—not just generally but in the context of a specific individual, because it has to be acknowledged that sentencing must remain an individual process.⁹⁹¹

⁹⁸⁸ Mr Anthony Hopkins, Submission No.9, p.10.

⁹⁸⁹ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.158.

⁹⁹⁰ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.158.

⁹⁹¹ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.158.

6.139 Mr Hopkins stated that this should not be seen as an attempt to seek ‘some sort of race-based discount.’⁹⁹² Rather, there needed to be:

a real focus on why it is that this Aboriginal and Torres Strait Islander person finds themselves in this situation. What is it about their experience that relates to their identity and experiences as an Indigenous person?⁹⁹³

6.140 This was ‘most important’, he told the Committee, because it would allow the courts to identify ‘what rehabilitation pathways are open for Aboriginal and Torres Strait Islander offenders that will address their particular issues that have been identified’, ‘ideally through that court process’.⁹⁹⁴

POSSIBLE MODELS FOR REPORTS IN THE ACT

6.141 Mr Hopkins noted that under present conditions there were pre-sentence report writers attached to the Galambany Circle Sentencing Court, but they did not ‘seem to be available’ for cases being heard in other ACT courts. As a result, he told the Committee:

When I have Aboriginal clients coming up for sentencing, by and large, it is just not considered. It is a matter of, “This person identifies as Aboriginal or has Aboriginal heritage,” and that is about it.⁹⁹⁵

6.142 Mr Hopkins went on to outline potential models for pre-sentence reports in the ACT that would service a similar function to *Gladue* reports in Canada and thus improve on the situation he described.

6.143 He told the Committee that the ‘cheapest’ and ‘simplest’ model would be to ‘to put a bit of investment into the current pre-sentence report writing process’. To be effective, he suggested, it would be ‘important to have Indigenous involvement and, to some extent, control in the writing process’ for such reports.⁹⁹⁶

6.144 However, he noted that the Canadian model went ‘a step beyond that’:

It creates its own set of reports—the Gladue reports. As I understand it, it is not done through correctional services. It is controlled, or at least to some extent organised, through the aboriginal legal services there. It has aboriginal Canadian report writers. It has a set of specifics looking at the background and systemic factors that are present in an offender’s life—again, looking at the group experience and seeing if the group

⁹⁹² Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.158.

⁹⁹³ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.158.

⁹⁹⁴ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.158.

⁹⁹⁵ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.159.

⁹⁹⁶ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.159.

experience is reflected in the individual experience, and then looking at possible pathways. There has been some evaluation done of those reports, and it is considered important that aboriginal Canadians are involved and in control to a significant extent in the writing of those.⁹⁹⁷

6.145 Reflecting on these two possible approaches, Mr Hopkins told the Committee that either of these options ‘would create some significant value’, particularly in contrast with the ‘general experience in the ACT’, where:

even though we all acknowledge these statistics, looking through the juvenile statistics it seems to hover at about 30 per cent of the juvenile detention population, despite being 1.7 per cent of the population. We all acknowledge that we want to do something about it, but we then do not get the information that shows us how an individual relates to that group experience. We accept the group experience; we do not see the link between group and individual.⁹⁹⁸

6.146 At this point Mr Hopkins again emphasised the importance of linking this extension of information to practical approaches to reduce offending:

The biggest issue in Canada and everywhere is the next step: what can be done? Are there pathways?⁹⁹⁹

6.147 Regarding this, he went on to say that:

With respect to the tangible benefit of informing the court of the reasons why a person has come there and how those reasons might relate to their experience as Aboriginal people, it is in the outcome. So unless you tie this in with potential outcomes and rehabilitation pathways, I think it is very limited.¹⁰⁰⁰

6.148 While there was ‘some mitigation in explaining to the court, “[t]his person has got to where they are because of all these levels of disadvantage”’,¹⁰⁰¹ this was ‘really just half of the picture’, and was ‘not the half that we want to see’.¹⁰⁰²

6.149 Rather, he told the Committee:

we need to say, “Okay, how are we going to help this person change? How are we going to stop this person, this young child, going through detention again and again, then just going off to the AMC afterwards and being one of the statistics?”¹⁰⁰³

⁹⁹⁷ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.159.

⁹⁹⁸ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.159.

⁹⁹⁹ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.159.

¹⁰⁰⁰ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.160.

¹⁰⁰¹ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.160.

¹⁰⁰² Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.160.

PATHWAYS

6.150 In light of this, Mr Hopkins spoke about rehabilitation programs, in connection with which he made four main points.

6.151 First, he noted in the ACT such ‘initiatives’, ‘like the Ngunnawal healing farm’ had ‘not quite come to fruition yet but may’.¹⁰⁰⁴

6.152 Second, he told the Committee that it was important to establish rehabilitation programs specifically suitable for Indigenous offenders, saying that:

The issue with not providing specific Indigenous rehabilitation pathways is that you effectively get a model that is not designed to deal with those issues that may be specific to Aboriginal and Torres Strait Islander people and their path to offending.¹⁰⁰⁵

6.153 Third, he told the Committee that it was essential, in designing and implementing such programs, to engage the wider Indigenous community if such programs were to be successful:

it is pretty well accepted that one of the benefits of programs run by Indigenous people or where they have really clear involvement in and control over the program is that you have people who know the experience.¹⁰⁰⁶

...

There has to be a partnership. A partnership with the ACT Indigenous community would be an essential element of some kind of specific pathway for rehabilitation of Indigenous people.¹⁰⁰⁷

6.154 Fourth, Mr Hopkins recommended that the ACT, in seeking to frame effective programs of this kind, consider the experience in other jurisdictions:

I think it is not necessarily an inordinately difficult task to learn the lessons from those other jurisdictions, with some targeted research there, and say what does and what does not work—and there are academics that focus on this—and then say, “We want to do something that works in the ACT, but we do not just want to throw money at something where we do not have a real belief in the outcome”.¹⁰⁰⁸

...

¹⁰⁰³ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.160.

¹⁰⁰⁴ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.159.

¹⁰⁰⁵ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.161.

¹⁰⁰⁶ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.161.

¹⁰⁰⁷ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.162.

¹⁰⁰⁸ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p. 164.

I think the other potential is to work it out, for example with juveniles, and say, “Is there a program that is working? If there is a program that is working, we will put some money into sending kids to that program.” We are only talking about a number of children or a number of young people. Let us see if we can be innovative and draw off resources. It is not necessarily that the ACT would have to create the program ...¹⁰⁰⁹

6.155 [This, he said, tied into ‘initiatives that have not quite come to fruition yet but may, like the Ngunnawal healing farm’ in the ACT.¹⁰¹⁰]

OTHER RELATED MATTERS

ATODA

6.156 ATODA’s submission to the inquiry considered the following additional matters:

- weight given to prior offences for Indigenous offenders;
- the importance of consultation with the Indigenous community; and
- Indigenous offenders’ susceptibility to self-harm.

6.157 These are considered below.

SIGNIFICANCE ACCORDED TO PRIOR OFFENCES

6.158 The submission went on to say that part of ‘such a reconsideration’ would be: ‘a review of the appropriateness or otherwise of the current practice of placing much emphasis on Indigenous peoples prior offences’.¹⁰¹¹

6.159 In such circumstances, the submission continued, Indigenous offenders:

are not sentenced on the offence for which they appearing before the court but, instead, the courts are taking into account prior offences without sufficient understanding that many of these relate to societal problems rather than to deficiencies in the individual offender.¹⁰¹²

6.160 A further problem, the submission suggested, was of ‘many Indigenous offenders receiving heavy penalties simply because they have had a significant number of minor offences in the

¹⁰⁰⁹ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.165.

¹⁰¹⁰ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.159.

¹⁰¹¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.8.

¹⁰¹² Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.8.

past'. In relation to this, which ATODA considered 'totally unjust', it urged that the 'approach be reviewed'.¹⁰¹³

- 6.161 The submission stated that these patterns were highly problematic because they resulted in higher rates of incarceration for Indigenous offenders, and it was known that incarceration had deleterious effects of its own:

Evidence exists that it is the cumulative amount of time imprisoned that has the deleterious effect upon people. Offenders given longer sentences are more likely to return to crime. And for many people, short prison sentences ... have become a regular life activity, and the constant coming and going between community and prison interrupts the ability to deal with drug and alcohol issues, strengthen family relationships, and participate in community, education, training and employment.¹⁰¹⁴

IMPORTANCE OF CONSULTATION WITH INDIGENOUS COMMUNITY

- 6.162 ATODA's submission also put forward—as had other witnesses above—the view that consultation with the Indigenous community was critically important in addressing Indigenous overrepresentation in the ACT justice system:

Given the complexity of the social issues sometimes underlying the over representation of Aboriginal and Torres Strait Islander people in the justice system, any response needs to be done in conjunction with meaningful consultation with the individuals and communities involved, including front-line Aboriginal and Torres Strait Islander services, families, individuals and Elders. Any programs which have an Aboriginal and Torres Strait Islander focus need to include community leaders in their development, implementation, governance and evaluation, with adequate resources including access to the evidence-base, as they are the experts in what their communities need.¹⁰¹⁵

- 6.163 The submission expressed concerns that 'several' recommendations were outstanding from the *Working Together* report, developed in association between 'AOD Aboriginal and Torres Strait Islander workers and ACT Corrective Services', and recommended that 'the Committee considers identifying the status of these recommendations from ACT Corrective Services'.¹⁰¹⁶

¹⁰¹³ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.8.

¹⁰¹⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.8.

¹⁰¹⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

¹⁰¹⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.6-7. The report referenced by ATODA is: Working Group (2010), *Working Together. A Report Prepared by the ACT Corrective Services Aboriginal and Torres Strait Islander Working Group to Identify Gaps in Service Delivery*, December 2010.

SELF-HARM

6.164 ATODA's submission also put the view that self-harm was 'a significant problem for Aboriginal and Torres Strait Islander people detained in the AMC' and that, in view of this, 'culturally secure comorbid and mental health services should be strengthened' to provide better support for Indigenous offenders.¹⁰¹⁷

CORRECTIONS

6.165 The Minister for Corrections and his officers described current approaches to Indigenous offenders when they appeared before the Committee in hearings of 2 May 2014.

6.166 In the hearing, the Minister for Corrections told the Committee that:

I think we have an intolerable situation with the over-representation of Aboriginal people in our corrections system. The numbers this week are in the low 50s for Indigenous detainees at the AMC. Out of a population of 340-ish, you can see that it is a very high proportion.¹⁰¹⁸

6.167 The Executive Director, Corrective Services, went on to describe specific features of Corrective Services' current approach to managing Indigenous offenders, 'both in community corrections and in custody':

- 'In custody we have a couple of identified positions, both a caseworker as well as an Indigenous liaison officer. We also have an Indigenous official visitor. We also run some particular programs. We do not exclude anyone on remand from doing programs or education. The uptake is high. That is peculiar to the ACT. Most jurisdictions restrict remandees from working or being part of education programs. The only restriction on a program would be that it might require a guilty plea in relation to a serious offence.'¹⁰¹⁹
- 'In terms of particular programs, we have a contract with Relationships Australia. They have Indigenous and non-Indigenous counsellors. We have both for one-on-one counselling. We also run, with Indigenous counsellors, for Aboriginal men, a yarning program. We find that men particularly, more than women, relate better to a group situation rather than one-on-one counselling in terms of having a discussion. That has been going for a couple of years now.'¹⁰²⁰
- 'We work with Winnunga and the social wellbeing program. We have staff from Winnunga coming out every week and they will work with remand and non-remand clients. We have also started a certificate II in conservation and land management which is for Aboriginal

¹⁰¹⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

¹⁰¹⁸ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.32.

¹⁰¹⁹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.32.

¹⁰²⁰ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, pp.32-33.

men and women. We involve TAMS in that as well. The rangers will come out and talk about work opportunities that are related to that.’¹⁰²¹

- ‘We have just started an elders and community leaders visitation program, which is about community leaders and elders who have some presence in the community, men and women. They come out and meet with them to provide a mentoring role and encourage them to participate in programs and those kinds of things.’¹⁰²²
- ‘In community corrections we obviously have identified positions. I am really pleased to announce that, notwithstanding identified positions, we have Aboriginal staff in general positions. We also have two Aboriginal staff in our current custodial recruitment group that is going through. We have three Aboriginal trainees at the moment. We also have an Aboriginal liaison officer in community corrections because all of our clients work with Aboriginal staff. That worker will go out and do the home visits and do the liaison with the family.’¹⁰²³

6.168 The Executive Director went on to tell the Committee that it was:

very important to engage family when you are working with offenders, particularly if a family are behaving in pro-social ways and working. They can be a really important part of bringing their child or partner through an order.’¹⁰²⁴

6.169 In relation to this, she told the Committee, ‘[w]e do a number of things’, including working ‘closely with circle sentencing’, in connection with which:

Our Indigenous liaison officer goes to every circle sentence so we can get involved there and be part of that process.’¹⁰²⁵

SUMMARY

6.170 The Committee notes views put to it regarding Indigenous offenders.

6.171 Arguments included:

- that Indigenous people were overrepresented in criminal justice systems and imprisonment in all Australian jurisdictions;¹⁰²⁶
- that this was ‘trending steadily up rather than down’;¹⁰²⁷

¹⁰²¹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.33.

¹⁰²² Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.33.

¹⁰²³ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.33.

¹⁰²⁴ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.33.

¹⁰²⁵ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.33.

¹⁰²⁶ Aboriginal Legal Service NSW/ACT, Submission No.15, p.1.

¹⁰²⁷ Mr Anthony Hopkins, Submission No.9, p.2.

- that rates of Indigenous incarceration were higher in Australia than in Canada, where similar trends could be seen for Indigenous people and the criminal justice system;¹⁰²⁸
- that these patterns had been attributed, in Australia, to 'the history of colonial and post-colonial relations between Indigenous and non-Indigenous Australians', and the 'legacy of discrimination, disadvantage and socio-economic inequality borne of this history';¹⁰²⁹
- that Indigenous people were overrepresented in the ACT criminal justice system and the AMC;, and that this was a matter of significant concern;¹⁰³⁰
- that differences in rates of imprisonment in the ACT for Indigenous and non-indigenous people were greater than in a number of other Australian jurisdictions;¹⁰³¹
- that High Court decisions in *Fernando* and *Bugmy* had supported the principle that Aboriginality should be taken into account by courts when sentencing offenders;¹⁰³²
- that s 33(1)(m) of the *Crimes (Sentencing) Act 2005* (ACT) already required courts to consider the 'cultural background, character, antecedents, age and physical or mental condition of the offender';¹⁰³³
- that, in addition, s 42 of the *Crimes (Sentencing) Act 2005* made provision for pre-sentence reports; required that such reports 'must address' each 'pre-sentence report matter'; and s 40A of the *Crimes (Sentencing) Act 2005* provided that 'the offender's social history and background (including cultural background)' was indeed 'a pre-sentence report matter';¹⁰³⁴
- that s 40B of the *Crimes (Sentencing) Act 2005* should be amended so that it would require that 'the offender's social history and background (including cultural background with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders) ... be taken into account in the context of sentencing';¹⁰³⁵
- that while the prevalence of Indigenous deaths in custody had decreased, 'near deaths' continued to be a feature of the custodial system, were not reported, and had significant harmful effects on Indigenous prisoners;¹⁰³⁶
- that there had been 'real, practical and innovative steps taken by ACT law makers in developing social policy aimed at reversing recognised Indigenous disadvantage in areas

¹⁰²⁸ Mr Anthony Hopkins, Submission No.9, p.2.

¹⁰²⁹ Mr Anthony Hopkins, Submission No.9, p.3.

¹⁰³⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

¹⁰³¹ Aboriginal Legal Service NSW/ACT, Submission No.15, p.3.

¹⁰³² Aboriginal Legal Service NSW/ACT, Submission No.15, p.4 ff.

¹⁰³³ Aboriginal Legal Service NSW/ACT, Submission No.15, p.5, referencing s 33(1)(m) of the *Crimes (Sentencing) Act 2005* (ACT). The submission also noted that a similar clause had been recommended as an amendment to relevant NSW legislation. See also Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

¹⁰³⁴ Aboriginal Legal Service NSW/ACT, Submission No.15, p.9.

¹⁰³⁵ Aboriginal Legal Service NSW/ACT, Submission No.15, p.9.

¹⁰³⁶ Mr Raymond Brazil, *Transcript of Evidence*, 19 May 2014, p.-91.

such as housing, education and health, amongst others' and that 'ACT lawmakers have frequently formulated these policies in consultation with representatives of the Indigenous community within the ACT'.¹⁰³⁷

- that 'as the law stands in the ACT', 'where a defendant seeks to rely on matters in his or her background that tend to mitigate culpability for an offence, the connection between those matters must be proven by evidence';¹⁰³⁸
- that in many cases 'unless the defendant is able to or unless there is funding for specialised reports, it is the role of pre-sentence reports to address that';¹⁰³⁹
- that it was 'common', however, ... 'to have a pre-sentence report where, in the opening sentence, there will be a heading "Subjective features" or something of that nature, and then it will say, "The offender is a 32-year-old Aboriginal man." And that is it';¹⁰⁴⁰
- that sentencing often took place without the benefit of 'an accurate representation of an Aboriginal offender's cultural background', and that, as a result, often 'Aboriginal offenders fall to be sentenced on their record'—that is, based on the defendant's record of prior contacts with the criminal justice system;¹⁰⁴¹
- that 'there are ... four main triggers, to Aboriginal offending', which are 'family factors, employment and education factors, drug and alcohol abuse and overrepresentation before the courts';¹⁰⁴²
- that the courts could be given greater power to influence one of these factors — overrepresentation before the courts — by way of legislative amendments which would provide 'legislative recognition' of the Galambany Circle Sentencing Court, currently provided for under a practice direction of the ACT Magistrates' Court;¹⁰⁴³
- that this would allow the Galambany Circle Sentencing Court to 'develop its own jurisprudence';¹⁰⁴⁴
- that 'if the steadily climbing rates of Indigenous over-incarceration are finally to be arrested and reversed then it is this demonstrated willingness to trial and adopt new practical and innovative approaches to sentencing that will ultimately achieve that aim';¹⁰⁴⁵

¹⁰³⁷ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

¹⁰³⁸ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.97.

¹⁰³⁹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.97.

¹⁰⁴⁰ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.97.

¹⁰⁴¹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, pp.97-98.

¹⁰⁴² Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.90.

¹⁰⁴³ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.89.

¹⁰⁴⁴ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.92.

¹⁰⁴⁵ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.90.

- that ‘the court could be better informed by pre-sentence report writers’ and that ‘that information could be best served by Aboriginal or Torres Strait Islander people having input into the pre-sentence report-writing process themselves’, similar to *Gladue* reports in Canada;¹⁰⁴⁶
- that ‘the legislation concerning the writing of pre-sentence reports also be amended to have pre-sentence reports take into account the offender’s social history and background, including cultural background. Our proposed amendment, again, is with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders’;¹⁰⁴⁷
- that this would expand a principle already inherent in the *Crimes (Sentencing) Act* [in s 40];¹⁰⁴⁸
- that finding appropriate housing for Indigenous offenders after release was a particular challenge;¹⁰⁴⁹
- that if ‘the significance of Aboriginality to the process of sentencing [were] made the subject of explicit legislative provision’,¹⁰⁵⁰ this would ensure ‘that the *Bugmy* and *Fernando* principles are not the subject of derogation over time’;¹⁰⁵¹
- that judicial interpretations of *Fernando* and related lines of authority amount to principles, in practice, that in Australian courts:
 - ‘An Indigenous offender’s experience of disadvantage because of their Aboriginality may be critically relevant to the exercise of the sentencing discretion no matter what environment they live in’; [and that]
 - ‘This experience of disadvantage must be established by evidence presented to the sentencing court rather than by a process of taking judicial notice of the general experience of Indigenous Australians as a group’.¹⁰⁵²
- that Canadian courts are explicitly required by legislation to consider aboriginality when sentencing offenders;¹⁰⁵³
- that recognition of this ‘collective experience’ by Canadian courts offers ‘the potential for innovation in sentencing process and uniquely Aboriginal pathways for punishment, healing and reform’;¹⁰⁵⁴

¹⁰⁴⁶ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.98.

¹⁰⁴⁷ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.98.

¹⁰⁴⁸ Mr Raymond Brazil, *Transcript of Evidence*, 19 May 2014, pp.97-98.

¹⁰⁴⁹ Mr Peter Rose, *Transcript of Evidence*, 19 May 2014, p.92.

¹⁰⁵⁰ ACT Bar Association, Submission No.11, p.10.

¹⁰⁵¹ ACT Bar Association, Submission No.11, p.10.

¹⁰⁵² Mr Anthony Hopkins, Submission No.9, p.5.

¹⁰⁵³ Mr Anthony Hopkins, Submission No.9, pp.6-7.

¹⁰⁵⁴ Mr Anthony Hopkins, Submission No.9, p7. A review of the *Gladue* appeal judgement shows that the court was not only concerned with extenuating circumstances, but also with restorative justice as a response to aboriginal offending.

- that courts in Canada are provided with explicit advice on the Aboriginality of offenders and its consequences by way of *Gladue* reports written by Aboriginal caseworkers;¹⁰⁵⁵
- that at present in the ACT, 'pre-sentence reports give very limited attention to the Aboriginality of offenders';¹⁰⁵⁶
- that this could be remedied either by creating an avenue similar to Canadian *Gladue* reports or by extending the present pre-sentence report regime;
- that this could be done by way of training and/or changes in policy which recognise that 'such education and report writing is better delivered or at least directly informed by Indigenous people who fully comprehend the complexities of post-colonial Indigenous experience';¹⁰⁵⁷
- that a 'more critical part of the challenge' was to 'develop Indigenous specific pathways to healing and reform that address these disadvantages and offer offenders a way forward' and that it was 'critical to recognise that Indigenous Australians themselves must be involved in the design and delivery of such programs to ensure their relevance and efficacy';¹⁰⁵⁸
- that, in connection with the design of rehabilitation programs for Indigenous offenders, the ACT could consider approaches taken in other jurisdictions and apply lessons learned to formulate and put in place effective programs;
- that at present Indigenous offenders in the ACT are attracting undue lengths of custodial sentence due to prior offences;¹⁰⁵⁹ and
- that 'culturally secure comorbid and mental health services should be strengthened' to provide better support for Indigenous offenders at risk of self-harm.¹⁰⁶⁰

COMMITTEE COMMENT

6.172 The Committee thanks contributors for the views put to it in the course of the inquiry.

6.173 After deliberating, the Committee wishes first of all to express its concern at the predicament of Indigenous offenders in the ACT. It was notable that all contributors who touched on this topic expressed strong concern at the rates of imprisonment for Indigenous people, and the dramatic differences in likelihood of imprisonment between Indigenous and non-Indigenous people in the ACT.

¹⁰⁵⁵ Mr Anthony Hopkins, Submission No.9, p.7.

¹⁰⁵⁶ Mr Anthony Hopkins, Submission No.9, p.8.

¹⁰⁵⁷ Mr Anthony Hopkins, Submission No.9, pp.8-9.

¹⁰⁵⁸ Mr Anthony Hopkins, Submission No.9, p.9.

¹⁰⁵⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.8.

¹⁰⁶⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

6.174 It is the Committee's view that some very significant proposals have been put forward on how to respond, suggesting ways to formalise and expand on productive directions already underway.

6.175 In light its deliberations on these proposals, the Committee makes the following recommendations.

Recommendation 18

6.176 The Committee recommends that the ACT Government introduce changes to legislation in the Legislative Assembly which, if passed, would explicitly require courts to consider the Indigenous status of offenders at sentencing.

Recommendation 19

6.177 The Committee recommends that the ACT Government introduce changes to legislation in the Legislative Assembly which, if passed, would formally recognise the Galambany Circle Sentencing court under statute.

Recommendation 20

6.178 The Committee recommends that the ACT Government create a specific mechanism for the creation of reports similar to *Gladue* reports in Canada, informing courts of any relationship between an accused's offending and his or her Indigenous status.

Recommendation 21

6.179 The Committee recommends that the ACT Government ensure that Indigenous case-workers make a significant contribution to the creation of reports informing courts of any relationship between an accused's offending and his or her Indigenous status.

Recommendation 22

6.180 The Committee recommends that the ACT Government ensure that it engages the ACT Indigenous community, and provides a diversity of sentencing options, so as to foster appropriate pathways for the punishment and rehabilitation of Indigenous offenders and reduce rates of Indigenous imprisonment in the ACT.

OFFENDERS WITH ALCOHOL AND OTHER DRUG PROBLEMS

INTRODUCTION

6.181 Contributors to the inquiry highlighted the significance of alcohol and other drugs in offending behaviour, and the importance of courts being able to refer offenders to alcohol and other drug rehabilitation programs as a sentencing option.

6.182 The Alcohol Tobacco and Other Drug Association ACT (ATODA) and Legal Aid ACT made particular comment in this area, which is considered below.

CONDITIONS IN AUSTRALIA

6.183 The submission to the inquiry by ATODA advised the Committee that '[a]lcohol and other drug use is a major contributor to offending and re-offending, including amongst prisoners' in Australia. It also suggested more should be done to address this problem.¹⁰⁶¹

6.184 Some shortfalls arose from a prioritising of supply reduction over other dimensions in the corrections system:

A recent report by the National Drug and Alcohol Research Centre, undertaken for the Australian National Council on Drugs (ANCD), has emphasised Australia's corrections system's overemphasis on supply reduction measures at the expense of demand and harm reduction measures.¹⁰⁶²

6.185 'This', the submission suggested, meant that 'many prisoners may not be receiving evidence based treatments they need for their alcohol and other drug problems'.¹⁰⁶³ This was important because such treatments 'can be effective at addressing AOD problems, reducing offending behaviour, and diverting offenders from the justice system'.¹⁰⁶⁴

6.186 In addition, AOD treatment had also 'been shown to be less expensive than incarceration for some populations', including 'Aboriginal and Torres Strait Islander people'.¹⁰⁶⁵

6.187 The submission went on to say that:

A 2006 meta-analysis of 28 evaluations of AOD treatment programs found that offending following treatment was significantly lower among people who had

¹⁰⁶¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹⁰⁶² Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹⁰⁶³ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹⁰⁶⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

¹⁰⁶⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

participated in treatment programs than among the comparison groups. Treatment programs included opioid maintenance therapy (e.g. methadone), therapeutic communities (e.g. residential rehabilitation), post-release supervision for offenders with AOD problems, and drug courts.¹⁰⁶⁶

6.188 Of these, the submission noted, ‘only an adult alcohol and drug court is not available in the ACT’.¹⁰⁶⁷

CONDITIONS IN THE ACT

6.189 The submission by ATODA commented on connections between the use of alcohol and other drugs and offending in the ACT, noting that ‘approximately two-thirds (67%) of prisoners in the Alexander Maconochie Centre have a history of injecting drug use’, while ‘79% reported being under the influence of drugs at the time of committing their most recent offence’.¹⁰⁶⁸

6.190 The submission noted ‘significant developments’ in the ACT, including:

- the Strategic Framework for the Management of Blood-Borne Viruses in the Alexander Maconochie Centre (AMC) 2013 - 2017;
- the Drug Polices and Services Framework for the AMC 2013-2015; and
- implementing the findings from the Burnet Report.¹⁰⁶⁹

DRUG DIVERSION PROGRAMS

6.191 The submission to the inquiry by ATODA discussed alcohol and drug diversion programs. It defined diversion programs as ‘alternatives to imprisonment as effective as demand reduction (e.g. drug treatment) strategies that promote public health and public safety’. The submission advised the Committee that these were ‘the most widely used drug related offending intervention in Australia’.¹⁰⁷⁰

6.192 The submission advised the Committee that there was strong evidence for the effectiveness of these programs.

¹⁰⁶⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

¹⁰⁶⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

¹⁰⁶⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹⁰⁶⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹⁰⁷⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.10.

6.193 With regard to reoffending, the submission advised that ‘a national review of 12 police diversion programs in Australia’ had found that ‘the majority of offenders did not reoffend following diversion’.¹⁰⁷¹

6.194 With regard to drug use, the submission advised that:

the proportion of offenders who self reported as regular cannabis users decreased from 95% to 74% pre and post undertaking the Queensland Police Drug Diversion Program and participants in the Western Australian Pre-sentence Opportunity Program also reported significant reductions in self-reported drug use and self reported frequency of desire to use.¹⁰⁷²

6.195 With regard to the ‘cost-effectiveness of responses’, the submission advised that:

studies of the NSW Magistrates Early Referral Into Treatment court diversion program revealed that drug diversion offered savings equivalent to \$2.98 for every \$1 invested. This was attributed to reductions in the costs of police investigation, hospitalisation, criminal activity and prison and probation supervision costs.¹⁰⁷³

DRUG DIVERSION PROGRAMS IN THE ACT

6.196 Commenting on the state of diversion programs in the ACT, the submission by ATODA suggested that the ‘ACT can be proud of its leadership in its alcohol and drug diversion programs’.¹⁰⁷⁴

6.197 There were five such programs, comprising:

- the Court Alcohol and Drug Assessment Service (CADAS);
- Simple Cannabis Offence Notice (SCON),
- Police Early Intervention and Diversion (PED),
- the Early Intervention Program (EIP, formerly the Early Intervention Pilot Program) and
- the Youth Drug and Alcohol Court (YDAC).¹⁰⁷⁵

6.198 ATODA’s submission noted that ACT drug diversion programs had two objectives: to divert offenders ‘into AOD assessment, education and treatment (e.g. CADAS)’ and to divert offenders ‘away from the justice system (e.g. SCON)’.¹⁰⁷⁶ It advised the Committee that ATODA

¹⁰⁷¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.10.

¹⁰⁷² Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.10.

¹⁰⁷³ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.11.

¹⁰⁷⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.11.

¹⁰⁷⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.11.

¹⁰⁷⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.11.

had participated in ‘evaluation roundtables’ in 2012 for ACT Drug Diversion Programs, and that a ‘key issue’ that had been raised was ‘the need to develop a comprehensive AOD Diversion Strategy’ and asked the Committee to give this particular consideration.¹⁰⁷⁷

EVALUATION OF ACT DRUG DIVERSION PROGRAMS

6.199 ATODA’s submission advised the Committee that ACT drug diversion programs had been evaluated in 2012.¹⁰⁷⁸

6.200 The Committee later found that the evaluation, which was conducted by Hughes *et al* of the National Drug and Alcohol Research Centre (NDARC), was completed in February 2013,¹⁰⁷⁹ and was subsequently published by the ACT Justice and Community Safety Directorate on 1 October 2014.¹⁰⁸⁰

FINDINGS OF THE EVALUATION

6.201 The report listed what it regarded as the ‘strengths’ and ‘challenges’ of the ACT drug diversion system.

6.202 As ‘strengths’ the report listed:

- ‘Breadth of diversionary options’;¹⁰⁸¹
- ‘Adaptability of the system/system players to perceived gaps/need’;¹⁰⁸²
- ‘Good will and enthusiasm of key stakeholders’;¹⁰⁸³
- ‘Streamlined referral process between police and health’;¹⁰⁸⁴
- ‘A centralised assessment and treatment agency’ in the form of Alcohol and Drug Services (ADS);¹⁰⁸⁵ and
- ‘High rates of treatment assessment and completion’.¹⁰⁸⁶

¹⁰⁷⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.11.

¹⁰⁷⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.11..

¹⁰⁷⁹ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs, Justice and Community Safety Directorate, ACT*, < http://cdn.justice.act.gov.au/resources/uploads/JACS/Drug_Diversion_Evaluation_Report.pdf >, viewed 24/10/2014.

¹⁰⁸⁰ Justice and Community Safety Directorate, ‘Evaluation of the ACT Drug Diversion Programs’ <http://www.justice.act.gov.au/news/view/1612/title/evaluation-of-the-act-drug> viewed 02/12/2014.

¹⁰⁸¹ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.78.

¹⁰⁸² Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.78.

¹⁰⁸³ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.78.

¹⁰⁸⁴ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.78.

¹⁰⁸⁵ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, pp.78-79.

¹⁰⁸⁶ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.79.

6.203 As ‘challenges’ the report listed:

- ‘Gaps in system knowledge and siloed knowledge’;¹⁰⁸⁷
- ‘Gaps in working as a system’;¹⁰⁸⁸
- ‘Increasing use of diversion programs for ‘non diversionary’ activities (program creep)’;¹⁰⁸⁹
- ‘Lack of adequate data collection/skills in analysis’;¹⁰⁹⁰
- ‘Lack of adequate goals and direction for the ACT drug diversion system’;¹⁰⁹¹
- ‘Confusion in communication about some programs’;¹⁰⁹² and
- ‘Disconnect between drug diversion and broader system changes’.¹⁰⁹³

6.204 The report listed ‘[a]dditional , more specific problems’ with particular programs as:

- ‘SCON [Simple Cannabis Offence Notice]: Low police support/Low compliance with SCON scheme’;¹⁰⁹⁴
- ‘PED [Police Early Diversion]: Low referrals for possession of drugs other than cannabis e.g. ecstasy’;¹⁰⁹⁵
- ‘EIPP [Early Intervention Pilot Program]: Most expensive and resource intensive’;¹⁰⁹⁶
- ‘CADAS [Court Alcohol and Drug Assessment Scheme]: Lack of awareness in the courts, DPP and Legal Aid, geographical barriers to using assessors and lack of clarity over what is and is not CADAS’;¹⁰⁹⁷ and
- ‘YDAC [Youth Drug and Alcohol Court]: Lack of performance indicators and comprehensive data collection’.¹⁰⁹⁸

RECOMMENDATIONS

6.205 In light of these findings, the report made the following recommendations at ‘system level’:

1. Document a comprehensive ACT AOD diversion strategy;
 2. Establish a facilitator position for the whole ACT AOD diversion system;
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¹⁰⁸⁷ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.80.

¹⁰⁸⁸ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.80.

¹⁰⁸⁹ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, pp.81-82.

¹⁰⁹⁰ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, pp.82-83.

¹⁰⁹¹ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.83.

¹⁰⁹² Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.84.

¹⁰⁹³ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.84.

¹⁰⁹⁴ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, pp.84-85.

¹⁰⁹⁵ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.85.

¹⁰⁹⁶ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.86.

¹⁰⁹⁷ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, pp.86-88.

¹⁰⁹⁸ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.88.

3. Refocus all programs on drug diversion; and
4. Establish an improved capacity for data management and evaluation of the AOD diversion system in the ACT.¹⁰⁹⁹

6.206 The report made the following recommendations at ‘program level’:

5. Reform the Simple Cannabis Offence Notice (SCON) payment system to bring it in line with other infringement schemes in the ACT;
6. Increase Police Early Diversion (PED) thresholds for maximum quantity of heroin, methamphetamine, ecstasy and cocaine that can be possessed;¹¹⁰⁰
7. Build a less resource intensive and more sustainable Early Intervention Pilot Program (EIPP);
8. Re-define and re-launch the Court Alcohol and Drug Assessment Scheme (CADAS);
9. Adopt short and long term solutions to get Court Alcohol and Drug Assessment Scheme (CADAS) assessors into the ACT courts; and
10. Establish by the end of 2012 performance indicators and data systems for the Youth Drug and Alcohol Court (YDAC), and initiate work on developing an evaluation strategy for implementation in the second half of 2013.¹¹⁰¹

DRUG COURTS

6.207 The submission to the inquiry by Legal Aid ACT made comment on drug courts, which it described as follows:

Drug Courts are based on US models, characterised by integrated community-based treatment program. The aim of drug courts is to help the offenders to develop life skills and to stop or decrease harmful drug-use, and decrease recidivism.¹¹⁰²

6.208 It also noted the prevalence of drug courts, which were in place in all jurisdictions ‘except Tasmania and the two Territories’.¹¹⁰³

6.209 The submission noted evaluations of drug court programs which had shown positive indicators:

Evaluations of the NSW Drug Court have found that those who remain engaged with the program, or complete the program, have reduced rates of drug-related offending.

¹⁰⁹⁹ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.13.

¹¹⁰⁰ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.13.

¹¹⁰¹ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.14.

¹¹⁰² Legal Aid ACT, Submission No.14, p.12.

¹¹⁰³ Legal Aid ACT, Submission No.14, p.12.

However, those who were discharged or terminated had a higher recidivism rate than the control group.

Other evaluations, including those of the NSW Youth Drug Court (2004), the Victorian Drug Court, the South East Queensland Drug Court and the North Queensland Drug Court show similar results.¹¹⁰⁴

THE NSW DRUG COURT

6.210 Speaking about the NSW Drug Court, the submission by Legal Aid ACT noted that it had been the first such court in Australia.

6.211 The submission described the work of the Court:

In addition to the community based program, the Drug Court also administers compulsory drug treatment orders made by a sentencing court in relation to an offender sentenced to a non-parole period of 18 months or more.¹¹⁰⁵

6.212 The submission quoted the Court's description of the programs in which offenders take part:

'Each participant's program comprises three phases. Each phase has distinct goals that must be achieved before the participant graduates to the next phase of their program.

- Phase 1 is the 'initiation' phase where participants are expected to reduce drug use, stabilise their physical health and cease criminal activity. In this phase, participants are required to undergo drug testing at least three times a week and to report back to the Drug Court once a week.
- Phase 2 is the 'consolidation' phase where participants are expected to remain drugfree and crime-free, and develop life and job skills. In this phase, testing for drug use is conducted twice weekly and report back court appearances occur fortnightly.
- Phase 3 is the 're-integration' phase where participants are expected to gain or be ready to gain employment, and to be financially responsible. In Phase 3, drug testing is conducted twice weekly and report back court appearances are conducted monthly.

Participants are closely monitored by the court. The Drug Court team meets before court each day to receive reports from treatment providers and Probation Officers, and to discuss those participants who will be appearing that day. In the light of this discussion the Judge then speaks to each participant about his or her progress.'¹¹⁰⁶

¹¹⁰⁴ Legal Aid ACT, Submission No.14, p.14.

¹¹⁰⁵ Legal Aid ACT, Submission No.14, p.12.

¹¹⁰⁶ Legal Aid ACT, Submission No.14, p.13, quoting NSW Drug Court, 'For participants', http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_participants.html

EVALUATION

6.213 Legal Aid’s submission quoted the results of a 2008 evaluation of the NSW Drug Court by the NSW Bureau of Crime Statistics and Research (BOCSAR), which found that participants ‘who completed the program (compared to a Control Group)’ were:

- 37% less likely to be reconvicted of any offence at any point during the follow-up period;
- 65% less likely to be reconvicted of an offence against the person; and
- 35% less likely to be reconvicted of a property offence.¹¹⁰⁷

6.214 Other ‘positive outcomes’ were considered to be:

- Reduced levels of drug use and re-offending throughout and following program completion;
- Improved health and well-being for participants;
- Cost savings related to prosecution, law enforcement, courts and prisons;
- Social benefits, such as reduced, long-term drug use, increased employment, education, and family reunification.¹¹⁰⁸

DRUG COURT DIVISION OF THE MAGISTRATES COURT IN VICTORIA

6.215 Legal Aid ACT’s submission noted that:

the Drug Court Division of the Magistrates Court is established under the *Magistrates’ Court Act 1989* (Vic) (s 4A) with power to make drug treatment orders under the provisions of the *Sentencing Act 1991* (Vic).¹¹⁰⁹

6.216 The submission described the features of drug treatment orders as follows:

- ‘A drug treatment order can be ordered for defendants with a drug or alcohol problem, if it contributed to the offence.
- The defendant must also plead guilty to the offence and the offence is one within the jurisdiction of the Magistrates’ Court and punishable by a term of imprisonment. (s 18Z *Sentencing Act*).
- The Drug Court must be satisfied on the balance of probabilities that the offender is drug or alcohol dependent and their dependency contributed to the commission of the offence. They must also consider that a sentence of imprisonment would otherwise be appropriate and it must not have suspended the sentence in whole or in part.

¹¹⁰⁷ Legal Aid ACT, Submission No.14, pp.14-15.

¹¹⁰⁸ Legal Aid ACT, Submission No.14, p.15.

¹¹⁰⁹ Legal Aid ACT, Submission No.14, p.15.

- The purpose of a drug treatment order is to facilitate the rehabilitation of the offender by providing judicially-supervised, therapeutically-oriented, integrated drug or alcohol treatment and supervision regime. It is also intended to reduce the level of criminal activity associated with drug or alcohol dependency and reduce the offender's health risks associated with drug or alcohol dependency (s 18X Sentencing Act)
- A drug treatment order has two parts identified in s 18ZC of the *Sentencing Act*): the treatment and supervision part, and the custodial part. The 'treatment and supervision' part consists of 'core conditions' and 'program conditions' attached to the order and operates for 2 years, or until that part of the order is cancelled. The 'custodial' part consists of the sentence of imprisonment that the Drug Court must impose on the offender under s 18ZD
- The court still has to impose the sentence of imprisonment that it would have, had it not made the drug treatment order (s 18ZD(2)). Consequently if the drug treatment order is cancelled or breached, the custodial part will usually have to be served by the defendant in prison (s 18ZE Sentencing Act)
- The 'core conditions' are outlined in s 18ZF and include requirements such as undergoing treatment for drug and alcohol dependency as specified in the order, or from time to time, by either the Drug Court, or a specified community corrections officer etc. The 'program conditions' are outlined in s 18ZG and include requirement such as submitting to alcohol/drug testing, attending vocational, educational, employment programs as specified in the order, also, not associating with specified persons and a requirement to reside at a specified place for a specified period.
- Under s 18ZJ there can be rewards for complying with the conditions, such as varying the treatment and supervision part of the order, or varying or cancelling the order under s 18ZL (l)(c), (d) or (e). Such variations can include adding or removing program conditions, or altering the frequency of treatment, the degree of supervision or the frequency of drug or alcohol testing.¹¹¹⁰

A DRUG COURT FOR THE ACT

6.217 Legal Aid ACT's submission suggested that in the ACT:

A very significant proportion of the defendants appearing before the criminal courts ... suffer from an alcohol or drug addiction that has invariably either directly or indirectly contributed to the commission of the offence.¹¹¹¹

6.218 It also suggested that 'the programs and sentencing options currently available may not be adequate to address this underlying cause of criminal behaviour'. In light of this, the

¹¹¹⁰ Legal Aid ACT, Submission No.14, pp.15-16.

¹¹¹¹ Legal Aid ACT, Submission No.14, p.16.

submission proposed that ‘consideration be given to establishing a “Drug Court” as either a standalone court or a division of the existing courts’.¹¹¹²

6.219 ‘Alternatively’, the submission continued:

the same objectives could be achieved by introducing new sentencing options (such as drug treatment orders or intensive corrections or supervision orders) into the *Crimes (Sentencing) Act* (ACT) to be available to the existing courts and designed to achieve the same ends as a separate drug court.¹¹¹³

INTENSIVE CORRECTION ORDERS

6.220 One of the ‘sentencing options’ which Legal Aid ACT’s submission proposed for further consideration was the intensive correction order schemes which operated ‘in varying forms in New South Wales, Victoria, Queensland and Western Australia’.¹¹¹⁴

6.221 The submission provided further detail about Intensive Correct Orders in New South Wales, where they had been introduced ‘to replace periodic detention orders’, and were ‘an option available to a sentencing court which has sentenced an offender to a term of up to 2 years imprisonment’.¹¹¹⁵

6.222 It went on to say that:

In New South Wales intensive corrections orders (ICO) are a “custodial sentence” referred to in Pt 2 Div 2 *Crimes (Sentencing Procedure) Act* and a direct alternative to a custodial sentence. Corrective Services NSW manages ICOs according to four levels of supervision and conditions. Offenders are progressed, or regressed, through these levels based on their conduct throughout the term of the ICO. A wide range of discretionary conditions may be imposed under an ICO including curfews, electronic monitoring and various levels of contact with Corrective Services. Compulsory conditions include community service work and drug and alcohol testing. Breaches are dealt with in a way similar to how breached of periodic detention are currently dealt with in the ACT.¹¹¹⁶

¹¹¹² Legal Aid ACT, Submission No.14, p.16.

¹¹¹³ Legal Aid ACT, Submission No.14, p.16.

¹¹¹⁴ Legal Aid ACT, Submission No.14, p.16.

¹¹¹⁵ Legal Aid ACT, Submission No.14, p.16.

¹¹¹⁶ Legal Aid ACT, Submission No.14, pp.16-17.

RESOURCE IMPLICATIONS

6.223 Legal Aid ACT's submission discussed resource implications if the ACT were to adopt drug courts and / or Intensive Corrections Orders. On one hand it highlighted the greater resources needed for these more 'intensive' programs:

drug courts and intensive corrections/supervision orders require a significantly greater allocation of resources than existing community based orders and would require a commitment and involvement by a wide range of government and private agencies to treat the risk factors and causes of the criminal behaviour for each individual offender.¹¹¹⁷

6.224 However, the submission suggested, this would be off-set by reductions in costs in other parts of the corrections system, as it anticipated that 'such programs would be less costly in the long term than the cost of full time custody with better prospects of success in reducing recidivism'.¹¹¹⁸

6.225 In light of this, the submission suggested, 'such an investment' was 'well worth making'.¹¹¹⁹

6.226 The submission also noted, of current drug court programs, that they were selectively employed, usually targeting 'offenders who have a high risk of re-offending' and were typically used as 'a last resort before incarceration'.¹¹²⁰

AN AREA OF CONCERN: DRINK DRIVING

6.227 ATODA's submission voiced particular concern about what it said was the '[d]iminishing deterrence effect of drink driving countermeasures':

Drink driving countermeasures have been one of the major public health success stories of the twentieth century, but it appears their deterrence effect is diminishing. With over 100 people caught drink driving on Canberra roads most months, we need to look critically at the ACT's approach.¹¹²¹

6.228 Drink driving, the submission suggested, remained 'common':

Unfortunately Australian studies indicate that drink driving is common. Drink driving is most common among men, who are middle aged, and who are employed. However, there are some indications of increasing prevalence among young women. More than

¹¹¹⁷ Legal Aid ACT, Submission No.14, p.17.

¹¹¹⁸ Legal Aid ACT, Submission No.14, p.17.

¹¹¹⁹ Legal Aid ACT, Submission No.14, p.17.

¹¹²⁰ Legal Aid ACT, Submission No.14, p.14.

¹¹²¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

half of respondents to one national survey indicated that they drink drive and even more reported that they might or are likely to do so in the future.¹¹²²

6.229 The submission noted efforts by the ACT government to respond to this:

Addressing impaired driving is a road safety priority for the ACT Government, law enforcement, public health and alcohol and drug treatment services. Current responses include driver licence disqualification, fines, detention and imprisonment, and a soon to begin alcohol ignition interlock program which includes a therapeutic component to seek to address any underlying alcohol problems of the offender.¹¹²³

6.230 It noted that the ACT Government had:

made significant drink driving reforms including the introduction of mandatory alcohol awareness courses for all drink drivers, zero alcohol concentration limits for a wider range of licence categories, immediate licence suspension for drivers exceeding the prescribed concentration and narrowing the availability of restricted licences to first time low range drink driving offenders.¹¹²⁴

6.231 However, despite ‘these important initiatives the problem remains and the data is particularly concerning for some drink drivers’:

In 2010-2011, 33% of drink drivers in the ACT had been previously caught for drink driving, and more than 890 drivers were caught with a mid to high range blood alcohol concentration of 0.08 or more. Importantly, 53% of those caught with a blood alcohol concentration of 0.15 (3 times the prescribed legal limit) had been caught drink driving previously and 10% were unlicensed.¹¹²⁵

6.232 ‘This’, the submission suggested, indicated that ‘the current approaches are not preventing drink driving among a portion of the ACT population’.¹¹²⁶

6.233 Commenting on this, and possible avenues for a more effective response, ATODA’s submission advised that there were ‘tried and tested overseas initiatives that could complement the ACT’s current approach, particularly for those caught breaking the law’,¹¹²⁷ and suggested that:

the Committee consider a specific recommendation related to drink driving including expanding evidence-based sentencing options and related reforms.¹¹²⁸

¹¹²² Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹²³ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹²⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹²⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹²⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹²⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14.

¹¹²⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14.

A POSSIBLE RESPONSE: AN ACT COMMUNITY AND WORK ORDER PROGRAM

6.234 One of the options on which ATODA's submission focused was an ACT Community and Work Order Program. This, it advised the Committee, had been introduced in connection with 'recent reforms to the ACT infringement system', but was 'limited to traffic infringements'.¹¹²⁹

6.235 The submission went on to say that ATODA believed that 'this reform should be expanded to encompass all infringements, including the following infringements made for ATOD-related behaviours' including, among other things:

- drink driving offences;
- drug driving offences; and the
- Simple Cannabis Offence Notice Scheme (SCON).¹¹³⁰

6.236 The submission described the rationale for this proposal as follows:

People who receive such infringements or fines are likely to have ATOD problems. Many are also likely to be disadvantaged. Providing means whereby these infringements and fines can be paid without placing relatively excessive financial difficulties on those individuals while promoting access to treatment may help to prevent the deterioration in financial, social, and health, which are known to contribute to crime and offending behaviour.¹¹³¹

6.237 Moreover, the submission advised, such a scheme would be a:

potential point of contact whereby assessment and treatment can be provided to populations who may otherwise not receive attention until after serious offending occurs.¹¹³²

HEARINGS

6.238 Legal Aid ACT appeared before the Committee in hearings of 26 May 2014 and made comment on offenders with alcohol and other drug problems, in particular the advantages of drug courts over the present system in place in the ACT for dealing with offenders with drug and alcohol problems.

¹¹²⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14. Changes to the ACT infringement system were put in place with the enactment of the *Road Transport (General) Amendment Act 2012*, <http://www.legislation.act.gov.au/a/2012-7/default.asp>

¹¹³⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14.

¹¹³¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14.

¹¹³² Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14.

6.239 The Deputy Chief Executive Officer told the Committee that:

prior to beginning at Legal Aid, at the beginning of this year, I was a senior prosecutor with the DPP for about 13 years. It is my experience—and it will come as no surprise to any of you—that many of the people that we see come before the court, both sadly in the Children’s Court jurisdiction and with adult offenders, have substance abuse issues. When it comes to sentencing those people, it is certainly our experience that the sentencing magistrate or judge tries very hard to tailor an outcome that is going to address the causes that bring a person before the court.¹¹³³

6.240 She told the Committee that:

the investment and resourcing of a drug court could mean that there is the development of specialisation, from a prosecuting perspective, from a defence perspective and from a judicial perspective, in terms of exploring more broadly what a substance abuse problem brings to the table in terms of the need for sentencing options that cater to that ...¹¹³⁴

6.241 ‘At the moment’, however, she told the Committee:

the situation, as we see it, is that it is very much dependent on the sentencing magistrate or judge in terms of how much that problem features in the sentencing outcome as a target for rehabilitation.¹¹³⁵

6.242 This was important, she told the Committee, because:

as a person returns to court again and again, that problem can become less of a target in sentencing because from their criminal history it can be seen, for instance, that they have been given a number of opportunities for rehabilitation and have not been successful or, in the eyes of the court, perhaps have not taken full advantage of those opportunities for residential rehabilitation, for instance. So the significance of that drug problem can diminish as a person racks up more and more appearances before a court.¹¹³⁶

6.243 The Head, Criminal Law Practice, at Legal Aid agreed:

The more appearances in court, the greater the degree of recidivism, if you like, the less significance the drug problem achieves in the sentencing process, because it gets to the point where the court says, as Louise said, “You have had your chances, you have been to rehab, you have failed, you do not want to deal with your drug problem.

¹¹³³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.130.

¹¹³⁴ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.130.

¹¹³⁵ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.130.

¹¹³⁶ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.130.

We are not going to help you. You are a menace to society. The only outcome for you is full-time custody.”¹¹³⁷

6.244 He went on to tell the Committee that:

Certainly there is the solaris program within the jail, but that is not necessarily the best way to deal with longstanding drug problems. If somebody gets to that stage, then it is a good opportunity to attempt to address the problem, but really the problem needs to be addressed before it gets to that stage where somebody is basically jailbait, an institutionalised offender.¹¹³⁸

6.245 This was, in fact, a common occurrence:

we see so many people—and not necessarily very old people—but after a while you really get the sense that they are institutionalised. They cannot really function on the outside ...¹¹³⁹

6.246 The witnesses went on to describe drug courts in greater detail.

6.247 The Head, Criminal Law Practice, told the Committee that in NSW drug courts were presided over by a judge of ‘same standing as a District Court judge’.¹¹⁴⁰

6.248 He told the Committee that relationships and resources were central to the operation of drug courts:

It does not work unless you have all the agencies and the resources there to address all the problems, the holistic approach to the problem, because it is not just the drug use. Something may have been a catalyst for the person getting the drugs or having got into drugs. There are consequences in the way they live their lives, at least a chaotic lifestyle which also needs to be addressed. So unless you are addressing everything at the same time, then they will go back onto the street ...¹¹⁴¹

6.249 To this the Deputy Chief Executive Officer added that:

having all those services at the table means there is less wriggle room for an offender to say, “I could not do that because Housing did not answer my call.” Housing say, “Yes, we did. You did not ring.”¹¹⁴²

¹¹³⁷ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.130.

¹¹³⁸ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.130.

¹¹³⁹ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.130.

¹¹⁴⁰ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.132

¹¹⁴¹ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.133

¹¹⁴² Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.133.

6.250 She told the Committee that this contrasted with present arrangements in the ACT:

[in] our system, when someone is in breach of a supervision order or a good behaviour order that has a component of supervision, that does not provide that holistic sort of information. So it is really much more about the offender's engagement with Corrections, as opposed to the offender's engagement with Housing or with Health or with the rehabilitation program that they were directed to go and attend.

So a lot of the information that we get around breach action is second-hand. It is Corrections saying, "We spoke to Joe Blow at Housing and they said X," and then the offender says, "No, that did not happen." So there is a lot lost, in our experience, I would suggest, in translation ... ¹¹⁴³

6.251 In contrast, she told the Committee, 'the drug court has people at the table who are directly attempting to engage with the offender' and, as a result, 'the accountability is high'. ¹¹⁴⁴

6.252 She told the Committee that there was a 'real appetite from the judiciary' in the ACT to adopt a similar approach, but there was 'just not the regime or the structures in place to do it'. ¹¹⁴⁵

6.253 Rather, current arrangements represented the 'best attempt they can cobble together through Corrections', rather than the integrated, multi-agency approach described in association with drug courts. ¹¹⁴⁶

FURTHER DETAIL ON DRUG COURTS

6.254 The drug court, the Deputy Chief Executive Officer told the Committee, operated in a way that was 'much more intensive':

It is structured so that really the court is almost walking the offender through the process of rehabilitation. There is intensive monitoring of that person as they proceed through the drug court process, and their participation in that process is dependent on their engagement. Someone is charged, they are before the drug court and they are walked through that process. ¹¹⁴⁷

¹¹⁴³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.133.

¹¹⁴⁴ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.133.

¹¹⁴⁵ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.133.

¹¹⁴⁶ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.133.

¹¹⁴⁷ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.131.

6.255 The Head, Criminal Law Practice, told the Committee that this was:

really what you would call therapeutic justice. It is dealing with the problem when it presents itself to the court and not letting the offender out of the system until ... [the issues have been] addressed.¹¹⁴⁸

6.256 The Deputy Chief Executive Officer told the Committee that this contrasted with present arrangements in the ACT, where:

someone is charged, someone is sentenced and then the rehabilitation and the targeting of the dealing with the substance abuse problem comes here. And what it means is that if a person breaches or gives a dirty urine sample, for instance, or does not keep appointments, the trigger for coming back before the court is what we refer to as breach proceedings. That requires Corrective Services to start, effectively, criminal proceedings against the person alleging that they have breached their good behaviour order. And that can take some time to come back before the court.¹¹⁴⁹

6.257 Moreover, she told the Committee:

Our experience would tell us that Corrective Services then do not let that person re-engage with them so that they are excluded from the regime of supervision that they have been sentenced to, and they then have to wait before their matter comes back before the court. They give an explanation for why they have not engaged, and the court has a variety of options available to them. That takes [time].¹¹⁵⁰

6.258 She told the Committee that ‘in our system, for want of a more elegant term, [offenders with drug and alcohol problems were] spat out by the justice system to the corrections system’, and it was ‘the corrections system that monitors’ offenders.¹¹⁵¹

6.259 The Head, Criminal Law Practice, commented that under these terms such matters became ‘part of the punishment rather than part of the kind of therapeutic process administered by a drug court and as a result was not, the Deputy Chief Executive Officer said, ‘part of the justice system, saying, “[w]e want you to address this”’ as a drug court would be.¹¹⁵²

¹¹⁴⁸ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.133.

¹¹⁴⁹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.132.

¹¹⁵⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.132.

¹¹⁵¹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.132.

¹¹⁵² Mr Richard Davies and Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.132.

SUMMARY

6.260 The Committee notes arguments put to it regarding offenders with drug and alcohol problems.

6.261 Arguments included:

- that alcohol and other drug use is ‘a major contributor to offending and re-offending’;¹¹⁵³
- that Australian correction systems tend to overemphasise ‘supply reduction measures at the expense of demand and harm reduction measures’;¹¹⁵⁴
- that, as a result, ‘many prisoners may not be receiving evidence based treatments they need for their alcohol and other drug problems’;¹¹⁵⁵
- that AOD treatment had also ‘been shown to be less expensive than incarceration for some populations’, including ‘Aboriginal and Torres Strait Islander people’;¹¹⁵⁶
- that out of common treatment programs and responses, ‘only an adult alcohol and drug court is not available in the ACT’;¹¹⁵⁷
- that ‘approximately two-thirds (67%) of prisoners in the Alexander Maconochie Centre have a history of injecting drug use’, while ‘79% reported being under the influence of drugs at the time of committing their most recent offence’;¹¹⁵⁸
- that ‘a national review of 12 police diversion programs in Australia’ had found that ‘the majority of offenders did not reoffend following diversion’;¹¹⁵⁹
- that ‘studies of the NSW Magistrates Early Referral Into Treatment court diversion program revealed that drug diversion offered savings equivalent to \$2.98 for every \$1 invested’, due to reductions in the costs of police investigation, hospitalisation, criminal activity and prison and probation supervision costs;¹¹⁶⁰ and
- that there was a was ‘need to develop a comprehensive AOD Diversion Strategy’ in the ACT.¹¹⁶¹

¹¹⁵³ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹¹⁵⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹¹⁵⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹¹⁵⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

¹¹⁵⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

¹¹⁵⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹¹⁵⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.10.

¹¹⁶⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.11.

¹¹⁶¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.11.

6.262 Arguments put forward by the 2012 evaluation of ACT drug diversion programs and considered by the Committee included:

- that, according to a recent evaluation, challenges in the present ACT diversion program framework included:
 - ‘Gaps in system knowledge and siloed knowledge’;¹¹⁶²
 - ‘Gaps in working as a system’;¹¹⁶³
 - ‘Increasing use of diversion programs for ‘non diversionary’ activities (program creep)’; ¹¹⁶⁴
 - ‘Lack of adequate data collection/skills in analysis’;¹¹⁶⁵
 - ‘Lack of adequate goals and direction for the ACT drug diversion system’;¹¹⁶⁶
 - ‘Confusion in communication about some programs’;¹¹⁶⁷ and
 - ‘Disconnect between drug diversion and broader system changes’.¹¹⁶⁸
- that, based on the evaluation, the ACT Government should:
 - 1. Document a comprehensive ACT AOD diversion strategy;
 - 2. Establish a facilitator position for the whole ACT AOD diversion system;
 - 3. Refocus all programs on drug diversion; and
 - 4. Establish an improved capacity for data management and evaluation of the AOD diversion system in the ACT;¹¹⁶⁹ and
- that, in addition, the ACT Government should make changes to programs comprising AOD diversion in the ACT, including changes to:
 - the Simple Cannabis Offence Notice (SCON) program;
 - the Police Early Diversion (PED) program;
 - the Early Intervention Pilot Program (EIPP);
 - the Court Alcohol and Drug Assessment Scheme (CADAS); and
 - Youth Drug and Alcohol Court (YDAC).¹¹⁷⁰

¹¹⁶² Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.80.

¹¹⁶³ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.80.

¹¹⁶⁴ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, pp.81-82.

¹¹⁶⁵ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, pp.82-83.

¹¹⁶⁶ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.83.

¹¹⁶⁷ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.84.

¹¹⁶⁸ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.84.

¹¹⁶⁹ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.13.

¹¹⁷⁰ Hughes, C., M. Shanahan, et al., (2014), *Evaluation of the ACT Drug Diversion Programs*, p.14.

6.263 Arguments put forward regarding drug courts included:

- that drug courts are ‘characterised by integrated community-based treatment program’, the aim of which is ‘is to help the offenders to develop life skills and to stop or decrease harmful drug-use, and decrease recidivism’;¹¹⁷¹
- that drug courts, were in place in all Australian jurisdictions except ‘Tasmania and the two Territories’;¹¹⁷²
- that NSW and Victoria both provide models of drug courts which could be drawn upon in framing a drug court for the ACT;¹¹⁷³
- that a ‘very significant proportion of the defendants appearing before the criminal courts ... suffer from an alcohol or drug addiction that has invariably either directly or indirectly contributed to the commission of the offence’;¹¹⁷⁴
- that ‘consideration be given to establishing a “Drug Court” as either a standalone court or a division of the existing courts’;¹¹⁷⁵
- that, alternatively, ‘the same objectives could be achieved by introducing new sentencing options (such as drug treatment orders or intensive corrections or supervision orders) into the *Crimes (Sentencing) Act* (ACT) to be available to the existing courts and designed to achieve the same ends as a separate drug court’;¹¹⁷⁶
- that ‘drug courts and intensive corrections/supervision orders require a significantly greater allocation of resources’, but ‘this would be off-set by reductions in costs in other parts of the corrections system’;¹¹⁷⁷
- that in practice drug court programs were selectively employed, usually targeting ‘offenders who have a high risk of re-offending’ and were typically used as ‘a last resort before incarceration’.¹¹⁷⁸ that ‘the investment and resourcing of a drug court could mean that there is the development of specialisation, from a prosecuting perspective, from a defence perspective and from a judicial perspective, in terms of exploring more broadly what a substance abuse problem brings to the table in terms of the need for sentencing options that cater to that’;¹¹⁷⁹

¹¹⁷¹ Legal Aid ACT, Submission No.14, p.12.

¹¹⁷² Legal Aid ACT, Submission No.14, p.12.

¹¹⁷³ Legal Aid ACT, Submission No.14, pp.12-16.

¹¹⁷⁴ Legal Aid ACT, Submission No.14, p.16.

¹¹⁷⁵ Legal Aid ACT, Submission No.14, p.16.

¹¹⁷⁶ Legal Aid ACT, Submission No.14, p.16.

¹¹⁷⁷ Legal Aid ACT, Submission No.14, p.17.

¹¹⁷⁸ Legal Aid ACT, Submission No.14, p.14.

¹¹⁷⁹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.130.

- that drug courts help to address substance abuse problems early in the process of contact with the criminal justice system, ‘before it gets to that stage where somebody is basically jailbait, an institutionalised offender’;¹¹⁸⁰
- that relationships and resources were central to the operation of drug courts;¹¹⁸¹
- that for present arrangements in the ACT ‘a lot of the information ... around breach action [for good behaviour orders or similar] is second-hand’ whereas a ‘drug court has people at the table who are directly attempting to engage with the offender’ and, as a result, ‘the accountability is high’;¹¹⁸²
- that there was a ‘real appetite from the judiciary’ in the ACT to adopt a similar approach, but there was ‘just not the regime or the structures in place to do it’;¹¹⁸³ and
- that drug courts the ‘walk’ offenders ‘through the process of rehabilitation’.¹¹⁸⁴

6.264 Arguments put forward in relation to drink driving included:

- that ‘drink driving countermeasures’ in the ACT were having a diminishing ‘deterrence effect’;¹¹⁸⁵
- that Australian studies ‘indicate that drink driving is common’;¹¹⁸⁶
- that, despite current responses and ‘significant drink driving reforms’,¹¹⁸⁷ a high proportion of drivers caught with high blood alcohol concentrations had ‘been caught drink driving previously and 10% were unlicensed’;¹¹⁸⁸
- that this showed that ‘current approaches are not preventing drink driving among a portion of the ACT population’;¹¹⁸⁹
- that the ACT Community and Work Order Program, introduced as part of ‘recent reforms to the ACT infringement system’, and currently ‘limited to traffic infringements’,¹¹⁹⁰ should be extended ‘to encompass all infringements’, including drink and drug driving offences and the Simple Cannabis Offence Notice Scheme (SCON);¹¹⁹¹

¹¹⁸⁰ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.130.

¹¹⁸¹ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.133

¹¹⁸² Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.133.

¹¹⁸³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.133.

¹¹⁸⁴ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.131.

¹¹⁸⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹⁸⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹⁸⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹⁸⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹⁸⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹¹⁹⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14. Changes to the ACT infringement system were put in place with the enactment of the *Road Transport (General) Amendment Act 2012*, <http://www.legislation.act.gov.au/a/2012-7/default.asp>

¹¹⁹¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14.

- that people ‘who receive such infringements or fines are likely to have ATOD problems’, and are’ also likely to be disadvantaged’, so that providing ‘means whereby these infringements and fines can be paid without placing relatively excessive financial difficulties on those individuals while promoting access to treatment may help to prevent the deterioration in financial, social, and health, which are known to contribute to crime and offending behaviour’;¹¹⁹²

COMMITTEE COMMENT

- 6.265 The Committee acknowledges views put to it regarding offenders with drug and alcohol problems.
- 6.266 After considering the costs of drug and alcohol problems among offenders, the Committee considers that alternative measures are needed to make a difference in this area.
- 6.267 With this in mind the Committee makes the following recommendations.

Recommendation 23

- 6.268 The Committee recommends that the ACT Government introduce legislation to the Legislative Assembly that would, if passed, create a drug court in the ACT as a separate jurisdiction of the ACT Magistrate’s Court.**

Recommendation 24

- 6.269 The Committee recommends that the ACT Government work toward a coordinated suite of drug diversion programs as recommended by the 2012 Evaluation of ACT Drug Diversion Programs, including through the adequate collection of data and ongoing evaluation of programs.**

Recommendation 25

- 6.270 The Committee recommends that the scope of the ACT Community and Work Order Program be expanded so that it becomes a sentencing option available to courts with respect to drug and drink driving and the Simple Cannabis Offence Notice Scheme (SCON).**

¹¹⁹² Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.14.

6.271 In the Committee's view these measures will, if implemented, be complimentary to the more flexible and diverse sentencing options made possible with the introduction of Intensive Corrections Orders in the ACT, as recommended by the Committee elsewhere in this report.

OFFENDERS WITH A DISABILITY

INTRODUCTION

6.272 Contributions to the inquiry expressed concern at the fate of offenders with a disability within the justice system, particular offenders with a mental health disability, and considered:

- general factors and conditions as they related to the management of offenders with a mental illness; and
- the exercise of s 334 of the *Crimes Act 1900* to divert offenders away from the criminal justice system on grounds of 'mental impairment' (s 334 ss (1), (3) & (8)), and the Director of Public Prosecutions' power of veto over this mechanism (s 334 (4)).

6.273 These are considered below.

GENERAL FACTORS

6.274 The ACT Bar Association, in its submission to the inquiry, noted that 'the role of mental illness in the commission of criminal offences is well established'. The Bar Association considered the funding of a forensic mental health unit an 'important initiative' although it was considered that 'the number of beds in that unit is unlikely to be adequate to meet demand'.¹¹⁹³

6.275 The submission of the ACT Law Society advised the Committee that '[m]ental factors in the commission of criminal offences are prevalent' and that such a pattern was 'deeply entrenched in the sentencing history of the Territory'.¹¹⁹⁴

6.276 In view of this the submission invited the Committee to 'examine, longitudinally, the effect of the criminal justice system in dealing with mentally ill offenders', including to 'what extent do the current facilities, mechanisms and legislation produce improved humane outcomes in comparison with previous approaches'.¹¹⁹⁵

¹¹⁹³ ACT Bar Association, Submission No.11, p.8.

¹¹⁹⁴ ACT Law Society, Submission No.13, p.6.

¹¹⁹⁵ ACT Law Society, Submission No.13, p.6.

ACT HUMAN RIGHTS AND DISCRIMINATION COMMISSIONER

6.277 The submission by the ACT Human Rights and Discrimination Commissioner noted that:

All Australian jurisdictions provide diversion out of the criminal justice system for people with cognitive impairment at the time of an offence, or time of trial, to enable greater access to support and treatment options.¹¹⁹⁶

6.278 In the ACT, the submission noted:

Part 13 of the *Crimes Act 1900* deals with defendants who are unfit to plead and/or suffering mental impairment in the ACT. It allows referrals to be made from the courts to the ACT Civil and Administrative Tribunal for assessment, treatment and potential detention.¹¹⁹⁷

6.279 However, the submission also indicated comments by the Federal Disability Discrimination Commissioner which identified ‘barriers to people with a disability achieving justice’, amongst which were:

Barrier 4: Specialist support, accommodation and programs may not be provided to people with disability when they are considered unable to understand or respond to criminal charges made against them (‘unfit to plead’). Instead, they are often indefinitely detained in prisons or psychiatric facilities without being convicted of a crime. This situation mainly happens to people with intellectual disability, cognitive impairment and people with psychosocial disability.¹¹⁹⁸

Barrier 5: Support, adjustments and aids may not be provided to prisoners with disability so that they can meet basic human needs and participate in prison life. They often face inhuman and degrading treatment, torture and harmful prison management practices.¹¹⁹⁹

¹¹⁹⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10.

¹¹⁹⁷ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10.

¹¹⁹⁸ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10, quoting Australian Human Rights Commission, ‘Access to Justice in the Criminal Justice System for people with disability’, Issues Paper, April 2013, p.5, available at <https://www.humanrights.gov.au/sites/default/files/document/publication/Access%20to%20Justice%20in%20the%20Criminal%20Justice%20System%20for%20People%20With%20Disability%20-%20Issues%20Paper%20April%202013.pdf>

¹¹⁹⁹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10, quoting Australian Human Rights Commission, ‘Access to Justice in the Criminal Justice System for people with disability’, Issues Paper, April 2013, p.5, available at <https://www.humanrights.gov.au/sites/default/files/document/publication/Access%20to%20Justice%20in%20the%20Criminal%20Justice%20System%20for%20People%20With%20Disability%20-%20Issues%20Paper%20April%202013.pdf>

6.280 In connection with this, the submission also noted that:

People with Disabilities Australia have similarly noted that Aboriginal people in particular in the Northern Territory, Queensland and Western Australia have been subject to indefinite detention.¹²⁰⁰

6.281 The submission went on to say, regarding this issue of people with a disability, particularly a mental health disability, being held in 'indefinite detention' that the Commissioner had, in her:

submissions to the ACT Government's Review of the *Mental Health (Treatment and Care) Act 1994* ... advocated that any amendments to this system ensure that defendants subject to Part 13 are not held in indefinite detention because of delay in court or tribunal proceedings, or because of a lack of suitable accommodation.¹²⁰¹

6.282 The submission put the view that 'such an outcome would be an unreasonable limitation on the right to liberty, and other rights such as the right to equality'.¹²⁰² It was 'unclear to what extent that [was] occurring in the ACT', but the Commissioner was 'hopeful legislative amendments arising from the Mental Health Act Review will prevent any future occurrence'.¹²⁰³

HEARINGS

6.283 When she appeared before the Committee in hearings of 26 May 2014 the Human Rights and Discrimination Commissioner told the Committee further of her concerns about 'people with disabilities who are in the criminal justice system':

The former federal Disability Commissioner, Graham Innes, has made some reports about people being unfit to plead because of cognitive impairment and not being sufficiently diverted from the criminal justice system and the possibility of justice being delayed indefinitely because there is not appropriate accommodation.¹²⁰⁴

6.284 She went on to tell the Committee that she hoped that in the ACT this issue would 'be addressed better by the secure unit that is to be built on the Quamby site'.¹²⁰⁵

¹²⁰⁰ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10, quoting People with Disability Australia, 'Indefinite incarceration of Aboriginal People with Cognitive Impairment', <http://www.pwd.org.au/adjc/issues-in-the-northern-territory-adjc.html>

¹²⁰¹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10. For further information see 'Review of the *Mental Health (Treatment and Care) Act, 1994*', <http://www.health.act.gov.au/consumers/community-consultation/review-of-the-mental-health-treatment-and-care-act-1994/>

¹²⁰² ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10.

¹²⁰³ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10.

¹²⁰⁴ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.115.

¹²⁰⁵ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.115.

VETO OVER USE OF S 334 OF THE *CRIMES ACT 1900*

6.285 Contributors to the inquiry voiced concern at the power of the Director of Public Prosecutions to veto (under s 334 (4)) use of s 334 of the *Crimes Act 1900*, under which offenders can be diverted from the criminal justice system on grounds of ‘mental impairment’ (s 334 ss (1), (3) & (8)).

6.286 These included contributions by:

- Legal Aid ACT;
- the ACT Bar Association; and
- the ACT Law Society.

6.287 These are considered below.

LEGAL AID ACT

6.288 In its submission, Legal Aid ACT stated that it was finding that:

over time an increasing number of our clients involved in the criminal justice system are suffering from a mental condition or disorder or an intellectual disability which has either played a role in the commission of the offence with which they are charged or otherwise has the effect of reducing the moral culpability of the offender.¹²⁰⁶

6.289 In the context of this, the submission sought to make comment on the use of s 334 of the *Crimes Act*, as had the ACT Bar Association and Law Society.

6.290 The submission characterised s 334 in the following way:

Although Section 334 is not a sentencing option *per se* it is, as described by Campbell J in *Mackie v Hunt* ... a ‘diversionary measure’ designed to divert appropriate offenders away for the rigours of the criminal justice system and into treatment and care in one form or another depending on the particular circumstances of the offender. It is similar to a sentencing option in that its objectives are (1) specific deterrence of the offender and (2) the rehabilitation of the offender through treatment and care.¹²⁰⁷

6.291 The submission went on to consider the power of veto held by the Director of Public Prosecutions.

6.292 The submission observed that the DPP ‘sometimes exercises the veto in relation to a Territory offence while Section 20BQ enables the court to proceed in relation to a related

¹²⁰⁶ Legal Aid ACT, Submission No.14, p.17.

¹²⁰⁷ Legal Aid ACT, Submission No.14, p.21.

Commonwealth offence'. It also noted, as had other submissions, that the prosecution was 'not required to give reasons for the exercise of the "veto"'.¹²⁰⁸

6.293 The submission proposed that there was 'no good reason for sub-section 334(4) and the exercise by the prosecution of its "veto"' which, it suggested, 'arguably operates to deny a defendant a fair hearing in contravention of Section 21 of the *Human Rights Act 2004*'.¹²⁰⁹

6.294 In view of these observations, the submission proposed that 'the provisions and operation of Section 334 are in urgent need of a comprehensive review'.¹²¹⁰

6.295 'In particular', the submission recommended, 'consideration should be given to the following matters':

1. The repeal of sub-section 334(4)
2. Broadening the options available to the court under sub-section 334(2). In this regard we note that both Section 20BQ of the *Crimes Act 1914* (Cth) and Section 32(3) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) permit the court to discharge the defendant on conditions.
3. Proceedings under Section 334 ought to be by way of an inquiry by the court rather than an adversarial proceeding. This is the case in relation to a determination of a defendant's fitness to plead under the provisions of Division 13.2 of the *Crimes Act 1900* (ACT), dispensing with the rules of evidence and permitting the court to have regard to any information it considers relevant and reliable. As is commonly but not universally the practice of the Magistrates Court, the legislation should also make it clear that the court can inform itself by requesting a psychiatric assessment and report in relation to the defendant similar to the provisions of Section 315A of the *Crimes Act* in relation to an investigation of a defendant's fitness to plead.¹²¹¹

HEARINGS

6.296 Legal Aid ACT made comment on the Director of Public Prosecution's power of veto over court diversions in certain circumstances.

6.297 The Deputy Chief Executive Officer told the Committee that:

As our submission speaks to, section 334 [of the *Crimes Act 1900*], as it is referred to in the shorthand, is a section that is available to people who are found to be mentally impaired. That definition is under the ACT *Criminal Code* [Division 2.3.2, ss 27, 28 & 29].

¹²⁰⁸ Legal Aid ACT, Submission No.14, p.22.

¹²⁰⁹ Legal Aid ACT, Submission No.14, p.22.

¹²¹⁰ Legal Aid ACT, Submission No.14, p. 22.

¹²¹¹ Legal Aid ACT, Submission No.14, p.22.

So on an outline of the statement of facts, the magistrate considers that it is appropriate that it is the sort of matter that should be dealt with under this diversionary umbrella.¹²¹²

6.298 She went on to tell the Committee that:

Section 334 is something that is raised either by a magistrate or by a defence lawyer. So an application is made to the court for consideration of the application of that provision. In matters that are indictable that can be heard summarily, the DPP obtains or remains with this power of veto. So in matters where offences that are in that category are in question, the DPP can say to the court, "No, we don't agree with you dealing with the matter that way," and that is the end of the matter; there is no right of reply.¹²¹³

6.299 At this point the Head, Criminal Law Practice, suggested that this:

robs the court of its jurisdiction if the DPP, or the prosecutor, stands up at the bar table and says, "We are not consenting." That is the end of it. The court cannot say, "Hang on a minute."¹²¹⁴

6.300 He went on to tell the Committee that this occurred 'invariably'.¹²¹⁵

6.301 The Deputy Chief Executive Officer agreed, saying that this was 'certainly a common feature of the director's position when the offences involved are indictable offences that can be dealt with summarily'.¹²¹⁶

6.302 She went on to say that:

We do not mind the DPP standing up and opposing the making of an order under section 334, which involves either dismissing the charge unconditionally or referring the matter to the tribunal for consideration of a mental health order of one form or another. I am happy for them to oppose it. It is just the veto operates to rob us and the court of any opportunity to have the particular circumstances of that particular offender aired.¹²¹⁷

¹²¹² Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.142.

¹²¹³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.142.

¹²¹⁴ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.142.

¹²¹⁵ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.142.

¹²¹⁶ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.142.

¹²¹⁷ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.143.

6.303 This was a matter of particular concern, she told the Committee, because ‘the litigation around this section [was] becoming more and more adversarial’. ‘Even’, she told the Committee:

in matters where they are summary-only matters—so a minor theft or a common assault—the DPP, as party to proceedings, can still oppose, as Richard has just referred to, the application of the provision, and increasingly they do.¹²¹⁸

6.304 ‘What this means in practice’, she told the Committee, is that:

for our clients who might potentially fall under the umbrella of that provision—for instance, if they have pleaded guilty, although that is not a prerequisite to the use of that section—we make that application, perhaps with a report from a psychologist, or a psychiatrist in most cases, with a diagnosis that will allow us to satisfy that umbrella definition under the *Criminal Code*.¹²¹⁹

6.305 However, she told the Committee:

The director increasingly is litigating that issue. They either oppose the diagnosis or they do not accept the diagnosis made by the medical practitioner and they require the person for cross-examination, or they make a submission to the effect—as in a matter I had more recently—that the diagnosis is such that it does not fit underneath the definition of “mental impairment” as it is required to do.¹²²⁰

6.306 Moreover, she told the Committee, this was ‘most always absent their own expert evidence’: that is, expert evidence on the part of the DPP that would prove that the diagnosis did not satisfy the requirements of ‘mental impairment’.¹²²¹

POSSIBLE REASON FOR DPP’S CHALLENGE TO USE OF S 334

6.307 The Deputy Chief Executive Officer told the Committee that, where applied, this ‘diversion sees a person completely moved away from the criminal justice system and moved into the mental health regime’.¹²²²

6.308 She thought it possible that the approach taken by the DPP—to challenge these diversions—was informed by a view that:

not every matter where a person is mentally impaired ... is appropriate for a person not to have a conviction recorded or to be managed within that regime that we spoke of earlier of supervision, for instance, under the corrections environment.¹²²³

¹²¹⁸ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.143.

¹²¹⁹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.143.

¹²²⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.143.

¹²²¹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.143.

¹²²² Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.144.

6.309 However, in her view these concerns were not warranted because:

The magistrate has to make an assessment of the appropriateness of the matter being dealt with. It is not like once the drawbridge is down you stroll through it. There is still the gatekeeping of the judicial officer turning their mind to whether on the facts of the matter, as alleged—and they are alleged by the director; they are the statement of facts as alleged by the director—it is appropriate for that diversionary mechanism to be invoked. We would say that that is where the gatekeeping is, with the judicial officer.¹²²⁴

6.310 She told the Committee that in the face of ‘an increasing instance of the director challenging the medical evidence or ... diagnosis’, Legal Aid would like to see:

more of a court-driven inquiry in the way that fitness to plead is, as opposed to what I would say, from my time sitting on either side of the bar table, has become increasingly adversarial in the way that normal criminal justice litigation is.¹²²⁵

6.311 Rather, in the view of Legal Aid, she told the Committee, the process should reflect ‘the philosophy of the provision’, so that it is ‘an inquiry into the person’s mental impairment and an inquiry into the appropriateness of whether or not they should be diverted’.¹²²⁶

6.312 In relation to this, she told the Committee, decision-making ‘rests appropriately with the judicial officer and the DPP having a say but not a starring role’; however ‘[a]t the moment they have a starring role’.¹²²⁷

ACT BAR ASSOCIATION

6.313 The ACT Bar Association, in its submission to the inquiry, stated that there was ‘great concern within the legal community’ about ‘the process by which proceedings involving mentally ill offenders can be discontinued’.¹²²⁸

At the moment the terms of section 334 of the *Crimes Act 1900* allows the Magistrates Court when hearing proceedings including indictable proceedings that are heard summarily involving someone who is mentally impaired to dismiss the charge and refer that person to ACAT for the making of a mental health order.¹²²⁹

¹²²³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.144.

¹²²⁴ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.144.

¹²²⁵ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.145.

¹²²⁶ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.145.

¹²²⁷ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.145.

¹²²⁸ ACT Bar Association, Submission No.11, p.8.

¹²²⁹ ACT Bar Association, Submission No.11, p.8.

6.314 However the submission noted that for ‘indictable proceedings that are being heard summarily’, the ‘DPP is given the right of veto over such a dismissal’.¹²³⁰ Regarding this power, the submission put the view that:

Its discretion to do so is not fettered by any stated consideration nor is it required to give reasons. This veto is not reflected in the comparable legislative schemes of other jurisdictions. Its existence owes more to personality considerations that were present at the time of the enactment of this veto, than to sound policy. In fact the veto has no good policy justification.¹²³¹

6.315 Regarding this, the submission suggested, the ‘Bar would urge its removal’,¹²³² as:

The Court is in the best place to give effect to the policy considerations of the mental health provisions that apply in criminal proceedings. The Court rather than a prosecuting agency best exercises the balancing of public interest considerations that is required.¹²³³

6.316 In this proposal, the submission suggested, the ‘DPP would retain the ability to put relevant evidence and submissions to the Court in relation to the exercise of the discretion’, rather than having the capacity to exercise a decisive veto.¹²³⁴

ACT LAW SOCIETY

6.317 As had the above submissions by Legal Aid ACT and the ACT Bar Association, the submission by the ACT Law Society questioned whether:

it [was] appropriate that the Director of Public Prosecutions [held] a power of veto in respect of certain court referrals for treatment in lieu of criminal proceedings continuing.¹²³⁵

SUMMARY

6.318 The Committee notes arguments put to it regarding offenders with a disability.

6.319 Arguments regarding mental illness included:

- that ‘the role of mental illness in the commission of criminal offences is well established’;¹²³⁶

¹²³⁰ ACT Bar Association, Submission No.11, p.8.

¹²³¹ ACT Bar Association, Submission No.11, p.8.

¹²³² ACT Bar Association, Submission No.11, p.8.

¹²³³ ACT Bar Association, Submission No.11, p.8.

¹²³⁴ ACT Bar Association, Submission No.11, p.8.

¹²³⁵ ACT Law Society, Submission No.13, p.6.

- that plans for a forensic mental health unit were an ‘important initiative’ although it was considered that ‘the number of beds in that unit is unlikely to be adequate to meet demand’;¹²³⁷
- that, in relation to mental health, it remains a question as to ‘what extent do the current facilities, mechanisms and legislation produce improved humane outcomes’;¹²³⁸
- that while Part 13 of the *Crimes Act 1900* provided mechanisms for diversion of defendants with ‘who are unfit to plead and/or suffering mental impairment’ in the ACT;¹²³⁹
- that it was important for accused persons found unfit to plead be provided with specialist support rather than being ‘indefinitely detained in prisons or psychiatric facilities without being convicted of a crime’;¹²⁴⁰ and
- that it was important that prisoners with a disability be provided with support, adjustments and aids and be protected from the potential for ‘inhuman and degrading treatment, torture and harmful prison management practices’ while in custody.¹²⁴¹

6.320 Arguments regarding the DPP’s right of veto over diversions under s 334 of the *Crimes Act 1900* included:

- that at present ‘the terms of section 334 of the *Crimes Act 1900* allows the Magistrates Court when hearing proceedings including indictable proceedings that are heard summarily involving someone who is mentally impaired to dismiss the charge and refer that person to ACAT for the making of a mental health order’;¹²⁴²
- that, according to Legal Aid ACT ‘over time an increasing number of our clients involved in the criminal justice system are suffering from a mental condition or disorder or an

¹²³⁶ ACT Bar Association, Submission No.11, p.8.

¹²³⁷ ACT Bar Association, Submission No.11, p.8.

¹²³⁸ ACT Law Society, Submission No.13, p.6.

¹²³⁹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10, quoting Australian Human Rights Commission, ‘Access to Justice in the Criminal Justice System for people with disability’, Issues Paper, April 2013, p.5, available at <https://www.humanrights.gov.au/sites/default/files/document/publication/Access%20to%20Justice%20in%20the%20Criminal%20Justice%20System%20for%20People%20With%20Disability%20-%20Issues%20Paper%20April%202013.pdf>

¹²⁴⁰ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10, quoting Australian Human Rights Commission, ‘Access to Justice in the Criminal Justice System for people with disability’, Issues Paper, April 2013, p.5, available at <https://www.humanrights.gov.au/sites/default/files/document/publication/Access%20to%20Justice%20in%20the%20Criminal%20Justice%20System%20for%20People%20With%20Disability%20-%20Issues%20Paper%20April%202013.pdf>

¹²⁴¹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.10, quoting Australian Human Rights Commission, ‘Access to Justice in the Criminal Justice System for people with disability’, Issues Paper, April 2013, p.5, available at <https://www.humanrights.gov.au/sites/default/files/document/publication/Access%20to%20Justice%20in%20the%20Criminal%20Justice%20System%20for%20People%20With%20Disability%20-%20Issues%20Paper%20April%202013.pdf>

¹²⁴² ACT Bar Association, Submission No.11, p.8.

intellectual disability which has either played a role in the commission of the offence with which they are charged or otherwise has the effect of reducing the moral culpability of the offender’;¹²⁴³

- that the DPP holds right of veto over dismissal of charges on grounds of incapacity under s 334 of the *Crimes Act*,¹²⁴⁴ where ‘indictable proceedings ... are being heard summarily’;¹²⁴⁵
- that sub-section 334(4) of the *Crimes Act*, providing the DPP with this power of veto, should be repealed;¹²⁴⁶
- that options available to the [Magistrates Court] under s 334(2) of the *Crimes Act* should be broadened;¹²⁴⁷
- that ‘legislation should also make it clear that the [Magistrates Court] can inform itself by requesting a psychiatric assessment and report in relation to the defendant similar to the provisions of Section 315A of the *Crimes Act* in relation to an investigation of a defendant's fitness to plead’;¹²⁴⁸ and
- that this process should be ‘an inquiry into the person’s mental impairment and an inquiry into the appropriateness of whether or not they should be diverted’,¹²⁴⁹ which ‘rests appropriately with the judicial officer’, and in which the DPP should have a say, ‘but not a starring role’.¹²⁵⁰

¹²⁴³ Legal Aid ACT, Submission No.14, p.17.

¹²⁴⁴ Legal Aid ACT, Submission No.14, pp.17-19, and see Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.142.

¹²⁴⁵ ACT Bar Association, Submission No.11, p.8.

¹²⁴⁶ Legal Aid ACT, Submission No.14, p.22, and see Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.143.

¹²⁴⁷ Legal Aid ACT, Submission No.14, p.22.

¹²⁴⁸ Legal Aid ACT, Submission No.14, p.22.

¹²⁴⁹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.145.

¹²⁵⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.145. See also ACT Bar Association, Submission No.11, p.8, and ACT Law Society, Submission No.13, p.6.

COMMITTEE COMMENT

6.321 After deliberating on views put to the inquiry, the Committee makes the following recommendations.

Recommendation 26

6.322 The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, remove the Director of Public Prosecutions' right of veto for dismissal of criminal charges due to mental incapacity under s 334 of the *Crimes Act 1900*, in this way supporting judicial discretion on questions of defendants' mental capacity.

Recommendation 27

6.323 The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, expand the options open to the ACT Magistrates Court under the *Crimes Act 1900* where it is considered that a charge should be dismissed on grounds of defendant's mental incapacity.

Recommendation 28

6.324 The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, stipulate in legislation the power of the ACT Magistrates Court to order expert assessment of a defendant's mental capacity to face charges.

WOMEN OFFENDERS

6.325 Contributions to the inquiry considered the status of women offenders, including submissions by:

- Dr Lorana Bartels;
- The ACT Council of Social Services (ACTCOSS); and
- The ACT Human Rights and Discrimination Commissioner.

6.326 These are considered below.

DR LORANA BARTELS

6.327 Dr Lorana Bartels' submission to the inquiry stated that there was 'an urgent need for effective prison programs that deal effectively with offenders' criminogenic factors', and that there a 'particularly high' need in this regard to ACT women offenders, '79 per cent of whom have previously been imprisoned, compared with a national average of 44 per cent'.¹²⁵¹

6.328 The submission also stated that there had been 'repeated reports' that 'that services provided at the AMC are inadequate, especially for special groups, such as offenders with a mental illness and female offenders'.¹²⁵² In particular the submission noted that there had been 'criticisms that women are being denied the opportunities male prisoners receive'.¹²⁵³

ACT COUNCIL OF SOCIAL SERVICES

6.329 In its submission, the ACT Council of Social Services (ACTCOSS) voiced concern over women offenders in custody, in particular regarding implications for their children:

Female offenders have different, and often more complex, needs than their male counterparts, many of which centre on their being the primary care giver to children. Conversations with women who have served time in gaol reveal that the single most important thing for many women who are incarcerated is who is looking after their children 'on the outside'.¹²⁵⁴

6.330 The submission went on to consider the effects of this on children of women offenders:

A wide body of literature has been devoted to showing the negative impact of separating mothers and their children can have, particularly in the early years of a child's life. Research also indicates young people who have a parent incarcerated are up to six times more likely to be involved in the criminal justice system when compared to other young people.¹²⁵⁵

6.331 In light of this, the submission stated:

We would value the Committee paying specific attention to the sentencing options

¹²⁵¹ Dr Lorana Bartels, Submission No.1, p.5, citing Australian Bureau of Statistics (ABS), 'Prisoners in Australia' (Cat 4517.0, 2013).

¹²⁵² Dr Lorana Bartels, Submission No.1, p.5.

¹²⁵³ Dr Lorana Bartels, Submission No.1, p.5, citing Rachel Stokker, 'Women in Jail "Denied Opportunities"', Canberra Times, 24 June 2013, <http://www.canberratimes.com.au/act-news/women-in-jail-denied-opportunities-20130623-2oqvg.html>

¹²⁵⁴ ACTCOSS, Submission No.6, p.9.

¹²⁵⁵ ACTCOSS, Submission No.6, p.9.

available for women who are the primary carers of their children with the view of reducing the inter-generational transfer of social determinants of crime.¹²⁵⁶

6.332 One approach suggested in the submission was to consider where money would best be spent in relation to an offender, given a high prevalence of short terms of imprisonment for women:

We ... believe that given the majority of women in the prison system in the ACT will serve at most a sentence of three months [and] a cost-analysis framework would be most beneficial, to determine whether the money spent on maintain the women in prison for such a short time could be better spent in non-custodial settings.¹²⁵⁷

ACT HUMAN RIGHTS AND DISCRIMINATION COMMISSIONER

6.333 In her submission to the inquiry, the ACT Human Rights and Discrimination Commissioner advised the Committee that she was:

currently undertaking an Audit under the *Human Rights Act*, and corresponding Review under the *Discrimination Act 1991* into the treatment of female detainees at the Alexander Maconochie Centre.¹²⁵⁸

6.334 The review was near completion and the Commissioner advised that the review report would 'make some recommendations regarding sentencing options for women'.¹²⁵⁹

HUMAN RIGHTS AUDIT

6.335 The report was completed in April 2014. Among other things, the report found that 'in general':

women detainees at AMC are treated humanely in custody, and that correctional staff and management are respectful of the particular needs and vulnerabilities of women. The cottage accommodation and facilities provided within the women's precinct provide a normalised environment which encourages women to maintain and develop living skills. The Commissioner was pleased to find that strip searching of women detainees occurs rarely after induction, and that the application of disciplinary processes, segregation and use of force appears to be fair and considered. The extended Throughcare Program to support detainees during the critical months after

¹²⁵⁶ ACTCOSS, Submission No.6, p.9.

¹²⁵⁷ ACTCOSS, Submission No.6, p.9.

¹²⁵⁸ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.11.

¹²⁵⁹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.11.

release from prison is a welcome development. This is available to all women released from the AMC, including those held on remand.¹²⁶⁰

6.336 The report also made findings about:

- Induction and Accommodation;¹²⁶¹
- Staffing;¹²⁶²
- Minimum Entitlements;¹²⁶³
- Visits;¹²⁶⁴
- Legal Assistance;¹²⁶⁵
- Searching;¹²⁶⁶
- Discipline;¹²⁶⁷
- Complaints and oversight mechanisms;¹²⁶⁸
- Women's Parenting Responsibilities;¹²⁶⁹
- Health;¹²⁷⁰
- Case management;¹²⁷¹
- Education and Training;¹²⁷²
- Rehabilitation Services;¹²⁷³
- Employment;¹²⁷⁴
- Exercise and Recreation;¹²⁷⁵
- Aboriginal and Torres Strait Islander Women;¹²⁷⁶

¹²⁶⁰ ACT Human Rights Commission, *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre: A Report by the ACT Human Rights and Discrimination Commissioner*, April 2014, pp.5-6, available at: <http://www.hrc.act.gov.au/res/HRC%20Womens%20Audit%202014.doc>

¹²⁶¹ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.7.

¹²⁶² *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.8.

¹²⁶³ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.8.

¹²⁶⁴ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.8.

¹²⁶⁵ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.9

¹²⁶⁶ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.9

¹²⁶⁷ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.9

¹²⁶⁸ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.9

¹²⁶⁹ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, pp.9-10.

¹²⁷⁰ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.10.

¹²⁷¹ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, pp.10-11.

¹²⁷² *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.11.

¹²⁷³ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.11.

¹²⁷⁴ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, pp.11-12.

¹²⁷⁵ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.12.

- Women from culturally and linguistically diverse backgrounds;¹²⁷⁷
- Women with disabilities;¹²⁷⁸
- Detainees with diverse sexual orientation, sex, or gender identity;¹²⁷⁹ and
- Transition and Throughcare.¹²⁸⁰

RECOMMENDATION RELEVANT TO SENTENCING

6.337 The report made included the following recommendation directly relevant to sentencing outcomes:

- 'That the ACT Government explore amendments to ACT sentencing legislation similar to s26(2)(l) of the *Crimes (Administration of Sentences) Act 1999* (NSW), to allow the conditional release in certain circumstances of a detainee who is the primary carer of a young child or young children, to serve her sentence in an appropriate and approved environment away from the AMC' [Recommendation 27].¹²⁸¹

HEARINGS

6.338 Further comment was made about women offenders by witnesses who appeared before the Committee in public hearings of 2 and 26 May 2014. In general, these comments were made in relation to:

- complex needs for women offenders in custody; and
- arrangements for women offenders in custody who have young children.

6.339 These are considered below.

COMPLEX NEEDS

6.340 In relation to complex needs of women offenders in custody, the Executive Director of Corrective Services told the Committee that:

Certainly, women in custody have greater complexity. They have often been victims of sexual violence, physical violence and emotional abuse. I have also worked for three years in a juvenile justice centre looking after young girls. While their numbers in custody are low as well, I can tell you that they come into custody with significant

¹²⁷⁶ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.12.

¹²⁷⁷ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.12.

¹²⁷⁸ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.13.

¹²⁷⁹ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.13.

¹²⁸⁰ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, pp.13-14.

¹²⁸¹ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.16.

issues in relation to how they have been parented and how they have been treated in the community. The numbers are small, but their needs are very complex.¹²⁸²

6.341 She went on to tell the Committee that:

the women we are seeing in custody are very complex. They often have considerable alcohol and drug needs, which often impacts on their ability to parent appropriately. We have a number of processes in place to assist with that process.¹²⁸³

6.342 She also told the Committee that there were 'certainly some offences' committed by women that 'require a custodial sentence' and '[u]nfortunately, a small number of women commit those sorts of offences as well', although 'less so in the ACT'.¹²⁸⁴

LOW NUMBERS

6.343 Regarding numbers of female prisoners, the Executive Director told the Committee that:

While generally in the country the number of females in custody is going up, that is not necessarily the case in the ACT, which is a good thing.¹²⁸⁵

6.344 However, the fact of these low numbers also brought further complexity in terms of providing programs:

We have small numbers of women in custody and often, apart from a couple that are sentenced to over five years, the average sentence is 100 days or less. So it is very difficult, even in terms of programming, to look at anything that is going to be viable.¹²⁸⁶

PARTICIPATION IN THROUGH-CARE

6.345 Regarding participation by female prisoners in the Throughcare program, the Executive Director told the Committee that:

because the number of women in custody is low, we do not exclude remand women from through-care. I can say that, since we have been taking clients, since 1 June, we have had 100 per cent uptake of women in custody joining our through-care program. I have not got the latest figures. I think there are about 18 or so on the books at the

¹²⁸² Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.30.

¹²⁸³ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.29.

¹²⁸⁴ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.30.

¹²⁸⁵ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.29.

¹²⁸⁶ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.29.

moment, which is encouraging for us given that we are corrections and they still want to be involved with us even if they have not got an order.¹²⁸⁷

WOMEN IN CUSTODY WITH YOUNG CHILDREN

6.346 When asked about women in custody who have young children, the Minister for Corrections responded by telling the Committee that:

it is certainly very much that the thinking that is happening over in CSD is well on the way and that the directorate is seeking to approach the human services provision in the ACT as a whole, looking at that whole life pattern, and particularly with things like through-care, which we are now running. Those sorts of factors are taken into account as well.¹²⁸⁸

6.347 The Executive Director, Corrective Services, also made comment on these matters, telling the Committee that:

... we are maintaining a low level of incarceration [for women]. It is certainly best for children to be with their mothers. However, the basis of any program about children is the best interests of the child.¹²⁸⁹

6.348 However, when the ACT Human Rights and Discrimination Commissioner appeared in hearings of 26 May 2014 she told the Committee that there was 'a policy' at the Alexander Maconochie Centre 'to allow a mother to have a child', 'but the three applications that have been received in the past three or four years have all been unsuccessful'.¹²⁹⁰

6.349 With this in mind, she told the Committee, the Commission's human rights audit of the Alexander Maconochie Centre had recommended

that the government should look at possible residential programs for mothers who are having children or already have infants. They should be in a residential facility like Karralika where their needs can be better accommodated rather than having children in prison.¹²⁹¹

6.350 She told the Committee that these measures were necessary if the ACT were to avoid the 'even worse' result of having a mother in custody, which was to have 'a mother and child separated', and the 'child going into the care of the government'.¹²⁹²

¹²⁸⁷ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, pp.29-30.

¹²⁸⁸ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.29.

¹²⁸⁹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.29.

¹²⁹⁰ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.120.

¹²⁹¹ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.120.

¹²⁹² Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.120.

SUMMARY

6.351 The Committee notes arguments put to it regarding women offenders.

6.352 Arguments included:

- That there was 'an urgent need for effective prison programs that deal effectively with offenders' criminogenic factors', and that there a 'particularly high' need in this regard to ACT women offenders, '79 per cent of whom have previously been imprisoned, compared with a national average of 44 per cent';¹²⁹³
- that there had been 'repeated reports' that 'that services provided at the AMC are inadequate, especially for special groups, such as offenders with a mental illness and female offenders',¹²⁹⁴ including 'criticisms that women are being denied the opportunities male prisoners receive';¹²⁹⁵
- that female offenders 'have different, and often more complex, needs than their male counterparts, many of which centre on their being the primary care giver to children';¹²⁹⁶
- that a 'wide body of literature has been devoted to showing the negative impact of separating mothers and their children can have, particularly in the early years of a child's life';¹²⁹⁷
- that 'young people who have a parent incarcerated are up to six times more likely to be involved in the criminal justice system when compared to other young people';¹²⁹⁸
- that there should be 'specific attention to the sentencing options available for women who are the primary carers of their children with the view of reducing the inter-generational transfer of social determinants of crime';¹²⁹⁹
- that 'given the majority of women in the prison system in the ACT will serve at most a sentence of three months [and] a cost-analysis framework would be most beneficial, to determine whether the money spent on maintain the women in prison for such a short time could be better spent in non-custodial settings'.¹³⁰⁰

¹²⁹³ Dr Lorana Bartels, Submission No.1, p.5, citing Australian Bureau of Statistics (ABS), 'Prisoners in Australia' (Cat 4517.0, 2013).

¹²⁹⁴ Dr Lorana Bartels, Submission No.1, p.5.

¹²⁹⁵ Dr Lorana Bartels, Submission No.1, p.5, citing Rachel Stokker, 'Women in Jail "Denied Opportunities"', Canberra Times, 24 June 2013, <http://www.canberratimes.com.au/act-news/women-in-jail-denied-opportunities-20130623-2oqyg.html>

¹²⁹⁶ ACTCOSS, Submission No.6, p.9.

¹²⁹⁷ ACTCOSS, Submission No.6, p.9.

¹²⁹⁸ ACTCOSS, Submission No.6, p.9.

¹²⁹⁹ ACTCOSS, Submission No.6, p.9.

¹³⁰⁰ ACTCOSS, Submission No.6, p.9.

- that ‘the ACT Government explore amendments to ACT sentencing legislation similar to s26(2)(l) of the *Crimes (Administration of Sentences) Act 1999* (NSW), to allow the conditional release in certain circumstances of a detainee who is the primary carer of a young child or young children, to serve her sentence in an appropriate and approved environment away from the AMC’;¹³⁰¹
- that ‘women in custody have greater complexity’, ‘have often been victims of sexual violence, physical violence and emotional abuse’, and ‘often have considerable alcohol and drug needs, which often impacts on their ability to parent appropriately’;¹³⁰²
- that there are ‘small numbers of women in custody and ... the average sentence is 100 days or less’, which makes it ‘very difficult’ to put specific programs in place for female prisoners at the AMC;¹³⁰³
- that women participate in the Throughcare program at the AMC, for which there had been ‘100 per cent uptake’ from women prisoners;¹³⁰⁴
- that there was ‘a policy’ at the Alexander Maconochie Centre ‘to allow a mother to have a child’, ‘but the three applications that have been received in the past three or four years have all been unsuccessful’;¹³⁰⁵
- that there should be ‘residential programs for [female offenders] who are having children or already have infants’, who should be placed ‘in a residential facility like Karralika where their needs can be better accommodated rather than having children in prison’;¹³⁰⁶ and
- that these measures were necessary if the ACT were to avoid the ‘even worse’ result of having a mother in custody, which was to have ‘a mother and child separated’, and the ‘child going into the care of the government’.¹³⁰⁷

COMMITTEE COMMENT

6.353 After deliberating on these arguments the Committee notes that many of the arguments and concerns raised in the course of the inquiry, as they relate to female offenders, may find an appropriate response if other recommendations made in this report, in particular the adoption of intensive corrections orders, are adopted.

6.354 In addition the Committee makes the following recommendations.

¹³⁰¹ *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre*, p.16.

¹³⁰² Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.30.

¹³⁰³ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.29.

¹³⁰⁴ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, pp.29-30.

¹³⁰⁵ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.120.

¹³⁰⁶ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.120.

¹³⁰⁷ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.120.

Recommendation 29

6.355 The Committee recommends that the ACT Government introduce in the Legislative Assembly legislative amendments which would, if passed, allow the conditional release in certain circumstances of a detainee who is the primary carer of a young child or young children, to serve sentence in an appropriate and approved environment away from the Alexander Maconochie Centre.

Recommendation 30

6.356 The Committee recommends that if it is not considered practicable for the primary carer of a young child or young children, to serve sentence in an appropriate and approved environment away from the Alexander Maconochie Centre (AMC), then facilities should be provided, and permission given, so that they can continue to be primary carer within the confines of the AMC.

YOUTH OFFENDERS

6.357 In committees of the Legislative Assembly for the ACT, matters relating to youth offenders fall under the jurisdiction of the Standing Committee on Education, Training and Youth Affairs. Youth offenders are considered here as part of overall picture on sentencing in ACT.

6.358 In relations to youth offenders, contributors made comment on:

- Links between early introductions to drug-taking and serious offending;¹³⁰⁸
- the effect of custodial sentences on young offenders;¹³⁰⁹ and
- findings and recommendations of the ACT Human Rights Commission's 2011 inquiry report on youth justice.

6.359 Contributions were made on these matters by the ACT Bar Association, the Alcohol Tobacco and Other Drug Association ACT (ATODA) and the ACT Children and Young People Commissioner, and are considered below.

LINKS BETWEEN EARLY DRUG-TAKING AND SERIOUS OFFENDING

6.360 When the ACT Bar Association appearing in hearings of 19 May 2014, its Vice-President told the Committee that:

¹³⁰⁸ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹³⁰⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

We also note anecdotally that much of the most serious offending that we see involves persons who came to use drugs as children, at young ages of 13, 14 or 15. We ask: what circumstances lead to a child being introduced to drugs and taking drugs at those sorts of ages? We also ask—and this is a matter which is recognised both by the High Court and by our court: what sort of development into adulthood do you have where a child has been introduced to drugs at that age? ¹³¹⁰

6.361 He went on to say that:

At the end of the criminal justice system, we see that cocktail being worked out. There is the question of how you go about unscrambling that egg so as to effectively deal with rehabilitation for serious offenders who so often come from that background. Clearly, they have to bear responsibility for their actions, but work has to be put into place to protect the community by giving those people the tools and resources to try and deal with the mess that was generally made at a point in time when they were too young to responsibly make decisions and which has damaged them into adulthood. ¹³¹¹

6.362 As a result, he told the Committee, the Bar Association saw ‘a move towards rehabilitation and perhaps intensive supervision orders [as] a positive move’. ¹³¹²

6.363 Later in the hearing, when questioned further, the Vice-President told the Committee that his comments were ‘anecdotally based’ and that he doubted that there was ‘a statistic kept about it’. Nevertheless he described it as ‘an almost universal pattern in serious offending’, ‘to see that juvenile acquisition of drugs’ and, in light of this suggested that it ‘ought to be reflected in sentencing remarks’. ¹³¹³

EFFECT OF CUSTODIAL SENTENCES ON YOUNG OFFENDERS

6.364 In its submission to the inquiry the Alcohol Tobacco and Other Drug Association ACT (ATODA) raised concerns over the effect of custodial sentences on youth offenders:

Research is demonstrating the severe adverse effects of juvenile detention on children and young people. This comes at the purposes of sentencing ... too frequently retribution and incapacitation take precedence over rehabilitation and the reduction of recidivism. ¹³¹⁴

¹³¹⁰ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹³¹¹ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹³¹² Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹³¹³ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.75.

¹³¹⁴ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

6.365 This was, the submission suggested, ‘destructive to the young person, their family and the community’ and was, moreover, ‘not cost-effective’.¹³¹⁵

6.366 The submission noted a study into the ‘effect of custodial penalties on juvenile offending’, and commented that the results of the study indicated that ‘over the time period examined, the imposition of a custodial sentence had no effect on the risk of reoffending’.¹³¹⁶ The submission also noted that ‘AOD [alcohol and other drug] use is a factor in much juvenile offending’ and ‘should be taken into account in sentencing patterns with young people’.¹³¹⁷

6.367 Regarding the prevalence of youth offenders in custody in the ACT, the submission stated that ‘the number of young people in detention continues to grow’ although there was ‘some indication that this trend is reversing’. It also stated that the ACT’s incarceration rate for Indigenous youth was ‘the third highest in Australia’.¹³¹⁸

6.368 In response to this, ATODA noted that in its submission to a Review of the ACT Criminal Justice Statistical Profile it had ‘advocated improvements to the reporting of justice data, including youth justice’.¹³¹⁹

6.369 In its submission to this inquiry, ATODA also recommended ‘establishing a health survey that can report on the health and wellbeing of children involved in the youth justice system’, which could be modelled on the NSW Young People in Custody Health Survey.¹³²⁰

6.370 Regarding this, the submission commented that this was important because ‘health is a substantial contributor to offending’, and as such ‘should be the focus of rehabilitation and diversion efforts’, since it was ‘vital to have an understanding of the needs of these young people so that appropriate sentences and health interventions can be applied’.¹³²¹

¹³¹⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹³¹⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5. The study cited was McGrath, A & Weatherburn, D, 2012, ‘The effect of custodial penalties on juvenile reoffending’, *Australian & New Zealand Journal of Criminology*, vol. 45, no. 1, pp. 26-44.

¹³¹⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹³¹⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, pp.5-6. At this point the submission referenced Australian Institute of Health and Welfare (2012). *Juvenile justice in Australia 2010-11: an overview*. Bulletin no. 106. Cat.no. AUS 160. Canberra: AIHW, and Australian Institute of Health and Welfare (2012). *Juvenile detention population in Australia 2012*. Juvenile justice series no. 11. Cat. no. JUV 11. Canberra: AIHW. Available online at: <http://www.aihw.gov.au/publication-detail/?id=60129542553>

¹³¹⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

¹³²⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

¹³²¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

HEARINGS

6.371 When she appeared in hearings of 26 May 2014, the Commissioner for Human Rights and Discrimination told the Committee that there was an established human rights principle that ‘children should be detained as a last resort’ and that this was:

why we are fulfilling those international obligations by having an absolutely comprehensive look at the youth justice system and keeping young people out of detention.¹³²²

6.372 She emphasised the importance of a justice reinvestment response to offending and told the Committee that evidence suggested that ‘the earlier you start, the better’.¹³²³ It was particularly important, she told the Committee, to target ‘intergenerational cycles of people offending’ and ‘families where it is not usual for people to be in employment but to be on benefits’. This was something to which the community could and should respond, ‘as well as through through-care and programs—diverting people from the criminal justice system, using the time in detention usefully and following up support by through-care’.¹³²⁴

REVIEW OF THE YOUTH JUSTICE SYSTEM 2011

6.373 In his submission to the inquiry, the ACT Children and Young People Commissioner referenced the ‘comprehensive review of the Bimberi Youth Justice Centre, and the broader youth justice system’ completed by the Human Rights Commission in 2011,¹³²⁵ and commented that:

Of relevance to this Inquiry is the discussion in the report about the need for decisions made by all stakeholders in the youth justice system, to be evidence based.¹³²⁶

6.374 The Commissioner went on to say that:

In sentencing children and young people, and adults, and in providing subsequent rehabilitative programs and support, all decisions need to be consistent with what has been shown to work, rather than on personal beliefs or assumptions.¹³²⁷

6.375 In light of these statements, the Commissioner cited a recommendation of the Commission’s report on youth justice, where it had recommended that the Community Services Directorate:

¹³²² Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.128.

¹³²³ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.128.

¹³²⁴ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.128.

¹³²⁵ ACT Children and Young People Commissioner, Submission No.7, p.3, citing ACT Human Rights Commission, (2011), *The ACT Youth Justice System: A Report to the ACT Legislative Assembly by the ACT Human Rights Commission*, <<http://www.hrc.act.gov.au/res/Volume%20One%20Low%20Res.pdf>>, viewed 10/02/2015.

¹³²⁶ ACT Children and Young People Commissioner, Submission No.7, p.3.

¹³²⁷ ACT Children and Young People Commissioner, Submission No.7, p.3.

- Work with the National Judicial College to develop and implement an annual training program for judges and magistrates on issues relevant to youth justice, including, for example, child development; Aboriginal and Torres Strait Islander culture; the structural causes of youth offending; the What Works principles; the provision of case management to young people involved in the youth justice system; the YSL/CMI risk assessment tool; the new Youth and Family Support Program Framework; and available supported accommodation services;¹³²⁸ and
- Develop and implement an annual education program for the ACT Police, Director of Public Prosecution, Legal Aid, Aboriginal Legal Services and the private legal profession on a range of issues relevant to youth justice, including: child development; Aboriginal and Torres Strait Islander culture; the structural causes of youth offending; the What Works principles; the YLS/CMI risk assessment tool; the new Youth and Family Support Program Framework; and available supported accommodation services.¹³²⁹

6.376 In another part of the submission the Commissioner proposed other recommendations from the report as relevant to the present inquiry, including among others, that:

- Community Services Directorate:
 - establish an expert advisory group with clear terms of reference to assist guide the development of evidence-based policy and practice’;¹³³⁰
- The ACT Government:
 - conduct ‘qualitative research into the operation of police discretion to warn, caution, charge or refer a young person to diversionary programs’;
 - examine ‘why nearly one third of adjudications in the ACT Childrens Court are withdrawn, in comparison with a national figure of 10 per cent’;
 - ‘immediately implement Phase 2 of the *Crimes (Restorative Justice) Act 2004* to allow young people to be referred to restorative conferencing for more serious crimes’;¹³³¹ and
 - ‘[work] with key stakeholders to develop an ACT Diversion Plan’.¹³³²
- ACT Policing:

¹³²⁸ ACT Children and Young People Commissioner, Submission No.7, p.3. The report, *The ACT Youth Justice System: A Report to the ACT Legislative Assembly by the ACT Human Rights Commission* is available at: <http://www.hrc.act.gov.au/res/Volume%20One%20Low%20Res.pdf>

¹³²⁹ ACT Children and Young People Commissioner, Submission No.7, p.3. The report, *The ACT Youth Justice System: A Report to the ACT Legislative Assembly by the ACT Human Rights Commission* is available at: <http://www.hrc.act.gov.au/res/Volume%20One%20Low%20Res.pdf>

¹³³⁰ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹³³¹ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹³³² ACT Children and Young People Commissioner, Submission No.7, p.3.

- ‘develop and implement guidelines regarding the use of discretion in diverting young people from the youth justice system’; and
- ‘set targets for police referral to all diversionary options, particularly in relation to Aboriginal and Torres Strait Islander young people’ and for performance ‘against these targets to be reported in the ACT Police annual report’.¹³³³

6.377 A number of these matters are also considered in this report, below, in the section concerned with bail.

HEARINGS

6.378 The Children and Young People Commissioner and the Human Rights and Discrimination Commissioner made further comment on these matters when they appeared before the Committee in hearings of 26 May 2014.

6.379 In his comments, the Children and Young People Commissioner told the Committee that a range of circumstances for young offenders, and the availability of a large quantum of research evidence had implications for how young offenders were dealt with by the justice system:

Certainly, most young people who enter the youth justice system have individual needs. So first it is recognising that one size usually does not fit all. It is also recognising that there is a fair amount of national and international evidence in this type of circumstance that a custodial sentence may be the best; it may be the worst. Court-imposed bail may be the best; it may be the worst.¹³³⁴

6.380 The Commissioner told the Committee that in his view the implications of this were that such decisions should be made on the basis of available evidence. He went on to tell the Committee that there were:

a whole range of things we can do to support young people from the very first moment they butt up against the youth justice system. It is really stepping back and saying, “What’s the best thing we can do to encourage this young person not to offend again?” and assisting them in their rehabilitation.¹³³⁵

6.381 The Commissioner also noted that research in the area showed that:

there seem to be two key factors which can assist in the rehabilitation of a young person and they are: having something to do—ideally something to do which leads to income—and having supportive functional relationships.¹³³⁶

¹³³³ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹³³⁴ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.127.

¹³³⁵ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.127.

¹³³⁶ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.120.

6.382 While it was ‘very difficult for a court or, indeed, a justice system to actually say, “Here’s a job, here’s some income and here’s a functional relationship” it was, in his view, ‘something that the system does need to keep in mind’.¹³³⁷

APPROACH BY JUDICIAL OFFICERS

6.383 Regarding current practice, the Commissioner told the Committee that judicial officers tended toward either of two approaches:

you can find magistrates who take the kind of substitute parent role and see the court as an opportunity to engage with the young person and have lengthy discussions about how we are going to fix this—and sometimes the problem is not fixable in the short term—or you can have magistrates who see this as purely a legal issue and their job is to read the legislation and make a decision.¹³³⁸

6.384 He told the Committee there were ‘strengths in both of these models’, but ‘[m]aybe looking at somewhere in the middle might help’.¹³³⁹

6.385 The Commissioner told the Committee that if, however:

you are a key player in the system and you think that by sending someone to Bimberi for three weeks and having a stern talk to them is going to make a significant change to their life, it probably is not.¹³⁴⁰

AVAILABILITY OF SERVICES

6.386 The Human Rights and Discrimination Commissioner told the Committee that judicial officers were not always completely aware of the availability of support services which they may assume are available. She told the Committee that there had been instances of:

possibly the judge or magistrate not having a full picture of what supported accommodation was available, and also presuming that certain rehabilitation courses could be done in the time available, when actually that program is full up and you are going to have to wait for a time.¹³⁴¹

¹³³⁷ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.120.

¹³³⁸ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.125.

¹³³⁹ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.125.

¹³⁴⁰ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.126.

¹³⁴¹ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.125.

6.387 Commenting on this, she told the Committee that this showed ‘a slight disconnect’ between ‘what the services are and what the judiciary thinks is available and when’, and that the quality of currency of information in this regard ‘could be improved’.¹³⁴²

6.388 The Senior Legal Officer, ACT Human Rights Commission, added to this. He told the Committee that magistrates and judges were ‘not always ... familiar with what is possible perhaps now but also in three years time’. If the judicial officer were considering referral to ‘some sort of rehabilitative program, there could be ‘a disconnect where a program finishes during that time but it is mandated in a certain way’ as part of a sentence imposed by a judicial officer. He told the Committee that this was ‘a problem across both the adult and youth justice systems’.¹³⁴³

6.389 The Human Rights Commissioner confirmed this, saying that the Commission had seen evidence of this in the course of its human rights audit of women at the AMC.¹³⁴⁴

CARE AND MANAGEMENT AFTER RELEASE

6.390 When asked about the quality and amount of support for young offenders being released after a custodial sentence, the Children and Young People Commissioner told the Committee that:

Certainly, from my perspective, and I think that of others, Bimberi and the youth justice system overall are a much better place post-review. Certainly, the number of young people going into Bimberi is significantly down. Bimberi are having some really good results with their transition unit, Bendora. Young people there have more independence within the facility and they are actively supported. A lot of them go to external education programs, work experience et cetera. So they are reintegrated slowly into the community rather than just coming out cold. They are having some great successes. I certainly think programs like that should be continued.¹³⁴⁵

6.391 He went on to say that this had to be ‘done in a timely fashion’:

You have to do this way before the young person is released from custody. This is not something that is designed the day before. You need to stick with the young person and figure out where they are going to live, what they are going to do, who they are going to hang around with, where they will be in six weeks, six months or two years, and how we assist them to do that.¹³⁴⁶

¹³⁴² Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.125.

¹³⁴³ Mr Sean Costello, *Transcript of Evidence*, 26 May 2014, p.125.

¹³⁴⁴ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.125.

¹³⁴⁵ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.124.

¹³⁴⁶ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.124.

ADVANTAGES OF A SMALL JURISDICTION

6.392 In addition, the Commissioner noted the advantages in dealing with youth offenders as a result of the ACT being a small jurisdiction:

One of the key advantages is the small numbers. We are talking about, with respect to children and young people, a very small number of young people coming in and out of Bimberi, and a larger number, but again small from a quantity perspective, of young people butting up against the youth justice system.¹³⁴⁷

6.393 In relation to the status of current services, he told the Committee:

We can always do things better, but on balance we are quite blessed with a lot of the services we have in the ACT, and it would be a shame if we started to cut back on some of those services. A lot of people say, "If you can't do it here, you can't do it anywhere," and I think that is quite true. In the ACT, geographically we are small, we have some really great workers out there and we have some great services out there. It is just about getting everyone on the same page as to what the vision is, what we are doing, engaging with kids and looking at outcomes from an evidence-based perspective.¹³⁴⁸

SUMMARY

6.394 The Committee notes arguments put to it regarding youth offenders.

6.395 Arguments included:

- that were significant links between early-years exposure to drug use and subsequent serious offending;¹³⁴⁹
- that there were significant benefits in not sentencing young people to custodial sentences;¹³⁵⁰
- that a 'a health survey that can report on the health and wellbeing of children involved in the youth justice system' should be established;¹³⁵¹
- that there was a lack of coordination between services and courts which led to instances of courts referring young people to services that were not available;¹³⁵²

¹³⁴⁷ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.124.

¹³⁴⁸ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.124.

¹³⁴⁹ Mr Shane Gill, *Transcript of Evidence*, 19 May 2014, p.68.

¹³⁵⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.5.

¹³⁵¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.6.

¹³⁵² Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.125, and Mr Sean Costello, *Transcript of Evidence*, 26 May 2014, p.125.

- that this was ‘a problem across both the adult and youth justice systems’, further evidence of which had emerged in the course of the human rights audit of women at the AMC;¹³⁵³
- that Phase 2 of the *Crimes (Restorative Justice) Act 2004*, ‘to allow young people to be referred to restorative conferencing for more serious crimes’ should be implemented;¹³⁵⁴ and
- that the ACT Government should develop an ACT Diversion Plan for young offenders.¹³⁵⁵

COMMITTEE COMMENT

6.396 After reflection, the Committee makes the following recommendations.

Recommendation 31

6.397 The Committee recommends that the ACT Government undertake targeted research on the criminogenic implications of early-life exposure to drug use and frame remedial action to reduce and prevent this exposure.

Recommendation 32

6.398 The Committee recommends that the ACT Government initiate an ongoing survey of the health and wellbeing of children involved in the youth justice system.

Recommendation 33

6.399 The Committee recommends that the ACT Government create a coordinating function that ensures that courts and other agencies are provided with up-to-date information on services that are available for the referral of children, young people, and adult offenders in the ACT.

Recommendation 34

6.400 The Committee recommends that the Attorney-General proclaim Phase 2 of the *Crimes (Restorative Justice) Act 2004*, thus allowing young people to be referred to restorative conferencing for a broader range of crimes.

¹³⁵³ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.125, and Mr Sean Costello, *Transcript of Evidence*, 26 May 2014, p.125.

¹³⁵⁴ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹³⁵⁵ ACT Children and Young People Commissioner, Submission No.7, p.3.

Recommendation 35

6.401 The Committee recommends that the ACT Government develop an ACT Diversion Plan for young offenders.

6.402 In addition, the Committee notes that other recommendations it has made in this report have implications for the matters subject to recommendation here, including recommendations to introduce intensive corrections orders and drug courts. The Committee considers that these initiatives have the potential for positive effects on young offenders, and that the ACT Government should consider these, and how to maximise these positive effects for young offenders, if and when it implements these recommendations.

7 PRACTICE AND EFFECTIVENESS

INTRODUCTION

7.1 Term of Reference 3 for this inquiry asks the Committee to consider the ‘practice and effectiveness’ of current arrangements in the ACT for:

- (a) parole;
- (b) periodic detention;
- (c) bail and remand;
- (d) restorative justice; and
- (e) circle sentencing.

7.2 These are considered below.

PAROLE AND ITS ADMINISTRATION

7.4 The *Encyclopaedic Australian Legal Dictionary* defines parole as:

The release of a prisoner from custody, after the completion of a minimum period of imprisonment determined by a court so that the prisoner may serve the rest of the sentence on conditional liberty ...¹³⁵⁶

7.5 Contributions to the inquiry in which particular addressed the matter of parole, were made by:

- the Sentence Administration Board;
- the Victims of Crime Commissioner;
- Legal Aid ACT; and
- Dr Lorana Bartels.

7.6 These are considered below.

¹³⁵⁶ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 18 September 2014), ‘Parole’.

SENTENCE ADMINISTRATION BOARD

INTRODUCTION

7.7 The ACT Government webpage for the Sentence Administration Board notes that the Board is established under section 171 of the *Crimes (Sentence Administration) Act 2005*, and that the Act provides that the Board has a determinative power to consider ‘release to parole and release on licence and breaches of periodic detention, parole and licence’.¹³⁵⁷ In response to breaches of parole, licence or periodic detention the Board may:

- ‘take no further action;
- issue a warning;
- give the chief executive directions about the offender’s supervision;
- change the offender’s periodic detention or parole obligations; or
- cancel the periodic detention or parole order’.¹³⁵⁸

7.8 The webpage states that ‘the board is required to seek victim’s views for all parole and release on licence inquiries’.¹³⁵⁹

7.9 The Chair of the Sentence Administration Board appeared before the Committee in hearings of 2 May 2014. His opening statement and responses to questions from the Committee provided further detail about the operations of the Board.

ADMINISTRATIVE ASPECTS OF THE BOARD

7.10 In his opening statement the Chair told the Committee that the present board had been established in 2006. Members were appointed to the Board for terms of three years,¹³⁶⁰ and the Board comprised ‘eight members—two judicial members and six ordinary members’,¹³⁶¹ drawn from:

a fairly wide section of the community, including an Indigenous representative a representative from the Australian Federal Police and ... a number of [other] members, some of whom are experienced in the corrections area.¹³⁶²

¹³⁵⁷ ACT Corrective Services, ‘The Sentence Administration Board’, viewed 16/01/2015 and available at: http://www.cs.act.gov.au/the_sentence_administration_board

¹³⁵⁸ ACT Corrective Services, ‘The Sentence Administration Board’, viewed 16/01/2015 and available at: http://www.cs.act.gov.au/the_sentence_administration_board

¹³⁵⁹ ACT Corrective Services, ‘The Sentence Administration Board’, viewed 16/01/2015 and available at: http://www.cs.act.gov.au/the_sentence_administration_board

¹³⁶⁰ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.48.

¹³⁶¹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.41.

¹³⁶² Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.41. The Chair also advised the Committee of current membership of the Board: see Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.47-48.

- 7.11 The Chair told the Committee that the Board held ‘weekly meetings in a hearing room in the Magistrates Court’. The Board met in two ‘divisions’— that is in two groups—however, the Chair told the Committee:

We attempt to mix the divisions, if I can put it that way. We will change people around. I will swap with Michael Chilcott and I will chair his division for a period, and he mine, so that I sit with the AFP and he sits with the Indigenous member [and the] Indigenous member sits on both divisions from time to time.¹³⁶³

- 7.12 Because it was part-time, the Chair told the Committee, the Board relied ‘heavily’ on the ‘support of a small professional secretariat’.¹³⁶⁴

FUNCTIONS

- 7.13 The Chair told the Committee that the Board’s main functions have been to ‘decide breaches of periodic detention orders’ and to ‘consider the release of offenders who have applied for parole’. ‘In doing that’, he told the Committee, the Board had to consider ‘fairly extensive criteria’ set out in s 120 of the *Crimes (Sentence Administration) Act 2005*.¹³⁶⁵

- 7.14 The Board also decided on ‘additional conditions of parole’:

As the committee is probably aware, there are core conditions which are statutory and made by regulation and sometimes particular circumstances will require additional conditions. The board reviews offenders’ parole [and] decides the consequences of breaches of parole orders ...¹³⁶⁶

- 7.15 A further function of the Board was that, ‘on request’, the Board could ‘recommend to the Attorney-General in relation to applications for release on licence those prisoners who do not fit into the normal parole system; usually life imprisonment’. The Chair stated that there had not been any instances of this during his time on the Board.¹³⁶⁷

THE APPLICATION PROCESS

- 7.16 The Chair provided further detail about the process of applying for parole.
- 7.17 He told the Committee that the Board tried to hold a hearing in each case ‘about the time of the eligibility date for parole’.¹³⁶⁸

¹³⁶³ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.48.

¹³⁶⁴ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.41.

¹³⁶⁵ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.41.

¹³⁶⁶ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.41.

¹³⁶⁷ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.41.

¹³⁶⁸ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.47.

7.18 Most applicants (that is, prisoners) ‘represent themselves’, but have ‘the probation officer there as well’ and ‘often he or she is on their side basically, unless their behaviour in the AMC has been appalling and there are other factors that do not really recommend them for parole’. In this sense the probation officer had a ‘difficult job’ because:

on the one hand he or she is there to assist the offender but on the other hand they also assist the board and also have to be quite objective.¹³⁶⁹

7.19 Asked about applications by prisoners with low levels of educational achievement and literacy, the Chair told the Committee that there was a case officer at the Alexander Maconochie Centre who was available to help prisoners with framing their applications, and there had been a recent case where an application by a prisoner who was functionally illiterate had been prepared on the prisoner’s behalf.¹³⁷⁰

7.20 The Chair was asked whether there was a mandated maximum period after which parole should be considered where a previous application had failed. He responded by telling the Committee that there was no maximum or mandated period.¹³⁷¹

7.21 Generally where the Board refused applications it made comment along the lines of:

“You haven’t got parole, for these reasons. It’s up to you to fix those things up. When you and your case officer at the AMC feel you have made sufficient progress, put another application in and we’ll consider it then.”¹³⁷²

7.22 At this point it was ‘up to the person to put another application in’, and this ‘usually happens the other way’—that is, too early rather than too late:

They put it in the next day. And we say, “No, we want to see some progress before we see you again.”¹³⁷³

7.23 Where an application is lodged in spite of these indications, it could be rejected in the ‘inquiry stage’ of the Board’s considerations ‘on the basis it is vexatious’, although this was ‘very rare’.¹³⁷⁴ Once proceedings had gone beyond the early or inquiry stage there had:

got to be consideration. And if you are going to knock it back, there has to be a hearing. So we cannot do that on the papers. We have to get the person in. Once that happens, you usually get to the bottom of what the problem is.¹³⁷⁵

¹³⁶⁹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.47.

¹³⁷⁰ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.47.

¹³⁷¹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.48.

¹³⁷² Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.48.

¹³⁷³ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.49.

¹³⁷⁴ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.49.

¹³⁷⁵ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.49.

CONSIDERATION OF APPLICATIONS FOR PAROLE

7.24 The Chair provided further detail on the Board's approach to considering applications for parole in his opening statement.

7.25 He told the Committee that:

when an ACT court imposes a custodial sentence of 12 months or more, it is obliged to set a non-parole period, unless there is a reason for not doing so and then it has to say why it is not doing that.¹³⁷⁶

7.26 The non-parole period was 'that part of the sentence that must be served by way of imprisonment'.¹³⁷⁷

7.27 In order to have their application for parole considered by the Board, 'prisoners are required to submit a written application', and were 'reminded to do that six months before their eligibility date'. This allowed 'plenty of time to look at post-release plans—accommodation and those sorts of things'.¹³⁷⁸

7.28 In response, the Board tried 'to consider all the applications by the non-parole date'.¹³⁷⁹

7.29 'Sometimes', the Chair told the Committee, the Board was:

able to decide a matter on the papers where the offender has been a model prisoner, all the reports are good, all the post-release plans are good, and there is really no need to see him.¹³⁸⁰

7.30 However, this only occurred in 'a minority of cases'.¹³⁸¹ More commonly, the Chair told the Committee:

the offender is given the opportunity to make a written submission and also to appear before the board and put his or her case. That is in the company of the parole officer, who will also inform the board of his or her views, and that is also done in a report to the board by the parole officer.¹³⁸²

¹³⁷⁶ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.41.

¹³⁷⁷ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.41.

¹³⁷⁸ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

¹³⁷⁹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

¹³⁸⁰ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

¹³⁸¹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

¹³⁸² Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

- 7.31 While approvals for parole could be granted ‘on the papers’ where the Board considered that ‘everything is in order’, in those instances where the Board had decided not to grant parole ‘there must be a hearing’ and representations by the prisoner ‘must be heard orally’.¹³⁸³

FACTORS TAKEN INTO ACCOUNT IN DECISIONS

- 7.32 The Chair told the Committee that ‘when deciding whether or not to grant parole’ the Board took into account a number of factors,¹³⁸⁴ including:

the need for offenders to have appropriate post-release plans, including an adequate case management plan supported by appropriate services, accommodation and supervision.¹³⁸⁵

- 7.33 Accommodation should not be in ‘unsuitable premises’, for example:

where if the offender has been involved in drugs and he wants to go back to a share house where it is pretty clear that there are drugs and other users, we would say, “No, you have to find something else”.¹³⁸⁶

- 7.34 Another example would be in the case of a sexual offence where, the Chair told the Committee ‘you do not want a person going back’:

Even though they say they want to link up again with the victim, it just may not be appropriate in all the circumstances. That would be unsuitable as well.¹³⁸⁷

- 7.35 Employment was another important factor in the Board’s deliberations because ‘otherwise you tend to get the revolving door: people go back to their old cohort and get in trouble again’.¹³⁸⁸

- 7.36 In considering these factors, the Chair told the Committee, it was in the end a matter of striking a balance ‘between considering the risk of reoffending and rehabilitation of the offender’.¹³⁸⁹

- 7.37 However, a further factor was that release on parole provided the means a greater level of management of prisoners once they had been released. For this reason, the Chair told the Committee, it was sometimes:

¹³⁸³ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.47.

¹³⁸⁴ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

¹³⁸⁵ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

¹³⁸⁶ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.46.

¹³⁸⁷ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.46.

¹³⁸⁸ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

¹³⁸⁹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

better to let someone out on parole for at least some period to see how they go rather than just do it cold at the end of a sentence, because then you have got no control at all.¹³⁹⁰

POST-RELEASE PLANS

- 7.38 The Chair told the Committee that post-release plans were a way to formulate and express conditions for parole:

There may be a requirement to link up with through-care. There may be a requirement to attend a particular drug rehabilitation centre, either full time or on a visit basis. There will be a requirement usually to live at particular premises which have been inspected by probation and parole and found suitable. There will be conditions, as I have mentioned, about victims, if that is a relevant factor. There might be conditions to undertake and complete the cognitive self-change family violence plan, if that has been a factor in the offending, or about associating with particular people, about curfews and counselling for alcohol and drug conditions.¹³⁹¹

- 7.39 An order to abstain from alcohol could also be attached to a post-release plan in these circumstances.¹³⁹²

- 7.40 Where the offender has been convicted for offences against the person, orders could include ‘not approaching or contacting victims’.¹³⁹³ For sexual offences orders could required the offender

not to be in the company of any child under the age of 16 years, not to attend or be involved in activities organised for the entertainment or education of children—those sorts of things—and to register on the sex offenders register.¹³⁹⁴

- 7.41 In general, ‘parole conditions are tailored for the particular circumstances’. While it had been suggested in another submission¹³⁹⁵ ‘that the board is not required to consider the circumstances of the offence’, the Chair told the Committee that although this ‘may appear not to be ‘a specific requirement’ under the *Crimes (Sentence Administration) Act 2005*:

¹³⁹⁰ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42.

¹³⁹¹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.45.

¹³⁹² Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.45.

¹³⁹³ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.45.

¹³⁹⁴ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.45.

¹³⁹⁵ Dr Lorana Bartels, Submission No.1, p.6.

we could not do our job without doing that because you have to look at whether it is a sexual offence or whether it is a violent offence to determine which treatment options are the right ones.¹³⁹⁶

- 7.42 While the Act was ‘silent in terms of that issue’, it was ‘clear from the criteria in section 120 that you would have to consider the circumstances of the offence’:

it says, for example, “the offender’s antecedents”,¹³⁹⁷ which really means his record, and even that brings you into what has happened on this occasion as well as what has happened before. It also says “any relevant recommendation, observation and comment made by the sentencing court”. So you have got to read the sentencing remarks so that you know what the offence is and what the circumstances are.¹³⁹⁸

- 7.43 When asked whether it would be beneficial to amend the Act to make this a more explicit requirement, the Chair responded that it ‘would not hurt, I suppose, to make it clear’, but emphasised that this was ‘certainly ... something the board does do [at present]’. The Chair outlined a number of ways in which such a requirement could be considered a part of the process, including through regulation and by way of another clause in s 120 the Act, subsection (2)(l), which refers to ‘any special circumstances in relation to the application’.¹³⁹⁹

BOARD’S ROLE IN DEALING WITH BREACHES OF CONDITIONS

- 7.44 The Chair told the Committee that the Board ‘also has to deal with breaches of parole conditions’. Parole officers had ‘a statutory obligation to report all breaches’. In practice this included ‘minor ones’ and ‘major ones’ and the result depended on ‘just how we classify those’.¹⁴⁰⁰

- 7.45 Powers available to the Board included the prerogative to ‘take no further action’:

You might do that in a case, for example, where urinalysis reveals a small amount of cannabis but it has been coming down and you want to give the person a chance to establish that they can get off drugs. You might give a warning about the need to comply with the parole obligations ...¹⁴⁰¹

¹³⁹⁶ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.45.

¹³⁹⁷ *Crimes (Sentence Administration) Act 2005*, s 120 (2)(b)

¹³⁹⁸ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.46.

¹³⁹⁹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.46.

¹⁴⁰⁰ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, pp.42

¹⁴⁰¹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, pp.42

7.46 Alternatively, the Board could change those obligations or, 'in the worst cases, cancel the order so that the offender goes back to jail'.¹⁴⁰²

7.47 The Chair told the Committee that it was important to note that:

if, say, the person has been three months out on parole and parole orders are cancelled, that three months does not count. That is added. So there is a big disincentive for people to breach parole.¹⁴⁰³

7.48 The Chair also noted that on occasion parole orders were 'cancelled automatically because there are further offences committed' and that this was mandated by the Act.¹⁴⁰⁴

7.49 He went on to tell the Committee that:

There is one difficult area I think the committee should be aware of, and that is, if a person is complying with their parole order but gets charged with further offences and comes before the board, there is really not a lot the board can do because the presumption of innocence applies under the *Human Rights Act*. The *Human Rights Act* applies to the board. It does not in Victoria, for example, which is the only other jurisdiction I am aware of that has a similar type of legislation. The board cannot do anything but presume innocence in that situation.¹⁴⁰⁵

7.50 The Chair noted that if it were 'a serious offence that the person is on parole for', 'it may be thought there is some risk to community safety in that person just being out in the community'.¹⁴⁰⁶

7.51 He noted that there was 'a co-extensive jurisdiction ... for the court to either grant or not grant bail in that situation', and 'one would hope that if it is serious enough, the court would refuse bail and the person would go into jail'.¹⁴⁰⁷

7.52 Nevertheless, he considered this 'an area of susceptibility':

The only way in which I think the board could intervene is that there is a requirement in our parole orders that says that anyone who is charged with an offence has to report that within two days to their parole officer. Now, if they do not, that is a breach. But

¹⁴⁰² Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, pp.42

¹⁴⁰³ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.42

¹⁴⁰⁴ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

¹⁴⁰⁵ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

¹⁴⁰⁶ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

¹⁴⁰⁷ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

whether it is a breach that ought to result in cancellation will depend on other circumstances ...¹⁴⁰⁸

7.53 The Chair provided additional information in response to further questions. He told the Committee that:

- it was a condition of parole orders that persons under orders report if they are charged of a criminal offence, and that this should be done within two days of being charged;
- that failure to do so is a breach of parole;
- that whether this would be a sufficiently serious breach to 'require cancellation' would depend on circumstances and the nature of the offence charged;
- that the provisions of the *Human Rights Act 2004* require that the person is treated as 'innocent until proven guilty' with respect to charges and their effect on parole;
- that the judicial officer/s hearing the new charge would, in the normal course of things, be informed of parole arrangements through the representations of the DPP;
- that the judicial officer/s hearing the new charge have no form role in revoking parole until such time as a conviction it obtained; and
- that parole is revoked if there is a conviction, and the charge carries a sentence of imprisonment.¹⁴⁰⁹

ACT GOVERNMENT

7.54 The Attorney-General responded to some of the concerns raised regarding parole in the wake of a notable incident in Victoria in 2012.

7.55 When he appeared in public hearings of 2 May 2014, he told the Committee that:

Last year the Callinan report by the retired High Court justice made 23 recommendations to strengthen adult parole laws and processes in Victoria.¹⁴¹⁰

7.56 He went on to say that:

The analysis carried out by the ACT government in light of this review highlighted that key measures recommended by the Callinan report are already in place in the ACT parole system. For example, the Sentence Administration Board must have regard to the public interest in determining whether parole is appropriate for an offender. An offender who has allegedly breached their parole obligations can be arrested by police and where an offender is convicted of an offence punishable by imprisonment while on

¹⁴⁰⁸ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

¹⁴⁰⁹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.50-51.

¹⁴¹⁰ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.3.

parole the court must cancel the offender's parole. These and other measures in place in the ACT ensure that community safety is prioritised when parole is being considered and where breaches of parole occur.¹⁴¹¹

VICTIMS OF CRIME COMMISSIONER

RISK TO COMMUNITY FROM OFFENDERS REMAINING ON PAROLE AFTER FURTHER OFFENDING

7.57 The Victims of Crime Commissioner's submission to the inquiry expressed concern at potential risks to the community as a result of the presence of offenders in the community on parole but following the committal of further offences. It noted recent controversial events in Victoria, where an offender had committed a very serious offence while 'on parole and on bail pending sentence following a conviction for assault'.¹⁴¹²

7.58 The submission suggested that there were aspects of the administration of parole in the ACT that could result in a similar scenario. It advised the Committee that:

section 149 in conjunction with section 161 of the *Crimes (Sentence Administration) Act 2005* provide for the automatic cancellation of parole and return to full-time custody if a parolee is convicted of an offence punishable by imprisonment.¹⁴¹³

7.59 These provisions were 'designed to address the risk to the community posed by parolees following a conviction for another offence'.¹⁴¹⁴ However, it suggested:

In practice ... the ACT Courts do not normally issue an order under s161 of the *Crimes (Sentence Administration) Act 2005* to cancel a parole order until a sentence is imposed as opposed to when a conviction is recorded.¹⁴¹⁵

7.60 While there 'may be reasons for this practice, such as the court not knowing if an offender is on parole at the time of conviction',¹⁴¹⁶ the submission expressed concern that this could allow a parolee 'to remain in the community (on bail) for some time before being returned to full-time custody', in which case he or she would remain 'a risk to the community' until such time as he or she were secured.¹⁴¹⁷

¹⁴¹¹ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.3.

¹⁴¹² Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴¹³ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴¹⁴ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴¹⁵ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴¹⁶ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴¹⁷ Victims of Crime Commissioner, Submission No.10, p.7.

- 7.61 The submission advised the Committee that the Commissioner had written to the Attorney-General in July 2013, who had referred the matter to the Victims Advisory Board ‘for advice on the operational arrangements to support the *Crimes (Sentencing Administration) Act 2005*’.¹⁴¹⁸

LEGAL AID ACT

- 7.62 In its submission to the inquiry, Legal Aid ACT expressed concern over what it regarded as anomalies in timelines for parole set out in ACT legislation, particularly in relation to court ordered parole for short sentences.

PROBLEMS WITH PAROLE APPLICATIONS FOR SHORT SENTENCES

- 7.63 The submission advised the Committee that:

Under the current sentencing laws in the ACT, the sentencing court is required to set a nonparole period in relation to sentences of 1 year or more (Section 65, *Crimes (Sentencing) Act 2005*) unless it declines to do so (s.65(4)).¹⁴¹⁹

- 7.64 Another provision of the *Crimes (Sentence Administration) Act* (s 121) required that ‘the offender may apply for parole but no earlier than 6 months before the offender’s parole eligibility date (set by the sentencing court)’. This eligibility date was ‘defined in Section 118 of the *Crimes (Sentence Administration) Act* [as] the date on which the non-parole period set by the court ends’.¹⁴²⁰

- 7.65 Further provision was made:

to enable an offender to make a ‘special parole application’, if the offender believes there are exceptional circumstances, at any time before the parole eligibility date.¹⁴²¹

- 7.66 In such cases, the submission stated:

A parole order will only be made if the offender makes a written application to the Sentence Administration Board for a parole order and the board in exercising its functions under Chapter 7 of the *Crimes (Sentence Administration) Act 2005* makes a parole order.¹⁴²²

- 7.67 The submission advised that in normal practice however — that is, in circumstances where there was no special parole application — ‘the process from the time the application for parole is lodged with the board and the date of the board’s determination can take in excess of
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¹⁴¹⁸ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴¹⁹ Legal Aid ACT, Submission No.14, p.1.

¹⁴²⁰ Legal Aid ACT, Submission No.14, p.1.

¹⁴²¹ Legal Aid ACT, Submission No.14, p.1.

¹⁴²² Legal Aid ACT, Submission No.14, p.1.

3 months'.¹⁴²³ As a result it was 'not infrequently the case that the board is only able to hold an inquiry into an application for parole after the parole eligibility date has passed'.¹⁴²⁴

A POSSIBLE SOLUTION

7.68 The submission suggested that a possible solution to this anomaly:

In our submission in the case of shorter sentences there may be merit in giving consideration to empowering the sentencing court to make the parole order, and set the parole conditions at the time the offender is sentenced.¹⁴²⁵

7.69 The submission suggested that courts would be in a position to do this because:

If the non-parole period set by the sentencing court is relatively short, then one would expect that the court would be armed with sufficient information about an offender's subjective circumstances to fashion suitable parole conditions appropriate to the particular offender.¹⁴²⁶

7.70 Regarding this proposal, the submission noted the approach taken in NSW, in s 50 of the *Crimes (Sentencing Procedure) Act 1999*, which provides that:

- (1) When a court imposes a sentence of imprisonment for a term of 3 years or less, being a sentence that has a non-parole period, the court must make an order directing the release of the offender on parole at the end of the non-parole period.
- (2) A parole order may be made under this section even though at the time it is made it appears that the offender may not be eligible for release at the end of the non-parole period because of some other sentence to which the offender is subject.¹⁴²⁷

7.71 The submission noted that s 51 of the same Act provides that a court 'may impose such conditions as it considers appropriate on any parole order made by it'.¹⁴²⁸

'STREET TIME' AND THE CANCELLATION OF PAROLE

7.72 The submission by Legal Aid ACT also expressed concern at another matter associated with parole: the degree to which 'street time' was recognised in circumstances where parole was revoked. Specifically, the submission noted that in ACT legislation, under ss 140 and 160 of the

¹⁴²³ Legal Aid ACT, Submission No.14, p.1.

¹⁴²⁴ Legal Aid ACT, Submission No.14, p.2.

¹⁴²⁵ Legal Aid ACT, Submission No.14, p.2.

¹⁴²⁶ Legal Aid ACT, Submission No.14, p.2.

¹⁴²⁷ Legal Aid ACT, Submission No.14, p.2.

¹⁴²⁸ Legal Aid ACT, Submission No.14, p.2.

Crimes (Sentence Administration) Act, time spent on parole is not acknowledged or credited in the event that parole is cancelled.¹⁴²⁹

7.73 In relation to this, the submission stated that:

The effect of these provisions is that when a parole order is cancelled the offender is required to serve the whole of the balance of the sentence period regardless of when during the period of parole the breach occurred.¹⁴³⁰

7.74 While it was 'open to the offender once the parole order has been cancelled to reapply to the board for parole'¹⁴³¹ under s 121(6) of the *Crimes (Sentence Administration) Act*, the submission expressed concern that:

the current system has the potential to create unfair outcomes if for example the breach of parole occurred late in the period of parole and the offender had otherwise fulfilled his/her parole obligations.¹⁴³²

7.75 A 'fairer system', suggested the submission, would:

give the offender credit for 'street time' with the consequence that only the balance of the period of parole from the date of the breach to the end of the sentence would be required to be served upon the cancellation of the order.¹⁴³³

7.76 This was the kind of arrangement in place in NSW, provided for under s 132 of the *Crimes (Administration of Sentences) Act*:

132 Sentence continues to run while offender on parole
An offender who, while serving a sentence, is released on parole in accordance with the terms of a parole order is taken to continue serving the sentence during the period:
(a) that begins when the offender is released, and
(b) that ends when the sentence expires or (if the parole order is sooner revoked) when the parole order is revoked.¹⁴³⁴

7.77 A further alternative, the submission suggested, was that the ACT Sentence Administration Board 'could be given a discretion to determine how much of the balance of the sentence ought to be served having regard to when the breach occurred and the nature of the breach'.¹⁴³⁵

¹⁴²⁹ Legal Aid ACT, Submission No.14, p.3.

¹⁴³⁰ Legal Aid ACT, Submission No.14, p.4.

¹⁴³¹ Legal Aid ACT, Submission No.14, p.4.

¹⁴³² Legal Aid ACT, Submission No.14, p.4.

¹⁴³³ Legal Aid ACT, Submission No.14, p.4.

¹⁴³⁴ Legal Aid ACT, Submission No.14, p.5, quoting s 132 of the *Crimes (Administration of Sentences) Act* (NSW).

¹⁴³⁵ Legal Aid ACT, Submission No.14, p.5, quoting s 132 of the *Crimes (Administration of Sentences) Act* (NSW).

- 7.78 The submission noted a precedent for this in s 77C of the *Victorian Corrections Act 1986*, which states that the Adult Parole Board:

may direct that some or all of the period during which a parole order that is cancelled or taken to be cancelled was in force is to be regarded as time served in respect of the prison sentence.¹⁴³⁶

CONSISTENCY AND WORDING OF SECTION 149, *CRIMES (SENTENCE ADMINISTRATION) ACT 2005*

- 7.79 Legal Aid ACT's submission expressed concern over the current wording of s 149 of the *Crimes (Sentence Administration) Act 2005*. Its submission noted that sections 150 and 151 of the Act had been amended in response to a decision on *Blundell v Sentence Administration Board* [2010] ACTSC 151, but not section 149.¹⁴³⁷

- 7.80 Sections 150 and 151 concern 'Cancellation of parole order for non-ACT offence' and 'Cancellation after parole order has ended', respectively. These sections make it explicit that the revocation of parole orders, whether during or after the period of parole, occurs when a crime is committed during the period of parole.

- 7.81 Currently s 149 does not. It reads:

149 Automatic cancellation of parole order for ACT offence

(1) This section applies if, while an offender's parole order is in force, the offender is convicted or found guilty by a court of an offence against a territory law that is punishable by imprisonment.

(2) The parole order is automatically cancelled when the offender is convicted or found guilty of the offence.

- 7.82 Regarding this, the submission put the view that:

Section 149 ought also to have been amended to require that the breaching offence be committed while the parole order is in force before the section operates to cancel the parole order.¹⁴³⁸

DR LORANA BARTELS

- 7.83 Dr Lorana Bartels' submission to the inquiry also noted controversy regarding parole decisions, particularly in Victoria, and noted that reviews of parole processes were currently underway in Victoria and NSW.¹⁴³⁹

¹⁴³⁶ Legal Aid ACT, Submission No.14, p.5, quoting s 132 of the *Crimes (Administration of Sentences) Act* (NSW).

¹⁴³⁷ Legal Aid ACT, Submission No.14, p.5.

¹⁴³⁸ Legal Aid ACT, Submission No.14, p.5.

7.84 She then considered three aspects of parole in the ACT:

- the basis for decisions on parole;
- conditions for parole; and
- transparency on parole decisions in the ACT.

7.85 These are considered below.

STATUTORY BASIS FOR DECISIONS ON PAROLE

7.86 In relation to the basis for decisions on parole in the ACT, Dr Bartels' submission noted contrasts between statute in the ACT where, it advised the Committee, the Sentence Administration Board (SAB) was 'not required to consider the nature or circumstances of the offence(s) committed by the offender seeking parole'.¹⁴⁴⁰ This contrasted with legislative arrangements in other some other jurisdictions, including those in NSW, Victoria, South Australia, Western Australia and the Northern Territory.¹⁴⁴¹

7.87 Moreover, the submission advised, there was, in the context of the ACT:

no publicly available guidance as to how the SAB decides parole revocations, as it the Board may cancel a parole order simply if it decides that parole 'is, or would be, no longer suitable for the offender'.¹⁴⁴² By contrast, some other jurisdictions set out the circumstances in which parole can be revoked.¹⁴⁴³

7.88 In contrast the submission advised that in NSW, under the *Crimes (Administration of Sentences) Act 1999*, the State Parole Authority may revoke a parole order:¹⁴⁴⁴

- 'if it is satisfied that the offender has failed to comply with his/her obligations under the order;
 - for an offender granted parole on the grounds that s/he is in imminent danger of dying or is incapacitated to the extent that s/he no longer has the physical ability to do harm to any person, if it is satisfied that those grounds no longer exist;
 - if the offender fails to appear before the SPA when called on to do so; or
 - if the offender has applied to have the order revoked'.¹⁴⁴⁵
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¹⁴³⁹ Dr Lorana Bartels, Submission No.1, p.6.

¹⁴⁴⁰ Dr Lorana Bartels, Submission No.1, p.6. In the ACT the basis for the SAB's decision-making on parole orders is set out in s 121 (2) of the *Crimes (Sentence Administration) Act 2005*, 'Criteria for making parole orders'.

¹⁴⁴¹ Dr Lorana Bartels, Submission No.1, p.6.

¹⁴⁴² Dr Lorana Bartels, Submission No.1, p.7. Here Dr Bartels referred to the *Crimes (Sentence Administration) Act 2005* (ACT) ss 156(1)(e), (3).

¹⁴⁴³ Dr Lorana Bartels, Submission No.1, p.7.

¹⁴⁴⁴ Dr Lorana Bartels, Submission No.1, p.7. Here Dr Bartels referred to the *Crimes (Administration of Sentences) Act 1999* (NSW), s 170.

TRANSPARENCY

- 7.89 On the above point the submission advised that, in view of this comparative absence of a clear basis for revocation of parole in ACT legislation:

It may promote confidence in the administration of justice for the SAB to make [public] the factors it takes into account in determining parole revocations.¹⁴⁴⁶

- 7.90 As noted above, the submission stated that there was ‘no publicly available guidance as to how the SAB decides parole revocations’.¹⁴⁴⁷ This was one consideration concerning the transparency of decisions on parole in the ACT.

- 7.91 Another aspect was overall reporting of parole decisions which, the submission stated, was less than completely informative in the sense that:

the data published in the JACS annual report do not provide any indication of the proportion of parole orders that are completed successfully, or the bases for cancellation (ie, by commission of a new offence or due to breach of conditions).¹⁴⁴⁸

- 7.92 The submission went on to say that a ‘separate, but linked, issue is whether the SAB’s reasons for their decisions should be made public’, and noted that this was ‘currently the subject of inquiry in NSW and Victoria’.¹⁴⁴⁹

- 7.93 In Western Australia, a 2005 review of management of offenders had recommended improving ‘[c]ommunication with the public to improve understanding of its functions’ and, as a consequence, ‘the Prisoners Review Board of Western Australia publishes its decisions where the Chair considers it in the public interest to do so’.¹⁴⁵⁰

- 7.94 The submission noted that the Parole Board of Tasmania also published ‘its decisions on its website’.¹⁴⁵¹

- 7.95 In view of this, the submission suggested that:

In the interests of promoting better understanding of parole and the processes whereby it is granted (or refused), it may be beneficial to expand the sort of

¹⁴⁴⁵ Dr Lorana Bartels, Submission No.1, p.7. Here Dr Bartels referred to the *Crimes (Administration of Sentences) Act 1999 (NSW)*, s 170.

¹⁴⁴⁶ Dr Lorana Bartels, Submission No.1, p.7.

¹⁴⁴⁷ Dr Lorana Bartels, Submission No.1, p.7.

¹⁴⁴⁸ Dr Lorana Bartels, Submission No.1, p.7.

¹⁴⁴⁹ Dr Lorana Bartels, Submission No.1, p.7.

¹⁴⁵⁰ Dr Lorana Bartels, Submission No.1, pp.7-8.

¹⁴⁵¹ Dr Lorana Bartels, Submission No.1, p.8.

information the SAB makes available to the public, and ensure it is appropriately resourced to provide it.¹⁴⁵²

7.96 The benefits of this approach were that in:

Doing so may promote a greater public understanding of what parole authorities do - and the reasons why they do so, which may also increase confidence in this aspect of the administration of justice.¹⁴⁵³

PAROLE CONDITIONS

7.97 Regarding parole conditions, the submission suggested that in the ACT 'parole conditions that can be set are more prescriptive than most jurisdictions', and this 'may set offenders up to fail'.¹⁴⁵⁴

7.98 The submission also expressed concern over 'some duplication' in legislative arrangements:

with the option of separate conditions that the offender not 'leave the ACT for longer than 1 day without the prior written permission of the director-general [of the Justice and Community Safety Directorate]' or 'leave Australia without the [Sentence Administration] Board's prior written permission'.¹⁴⁵⁵

7.99 Regarding this, the submission suggested, it was 'arguably redundant to have a separate rule for international travel and two separate levels of authority', and would be 'simpler to merge these rules to require the approval of either authority for all interjurisdictional travel exceeding one day'.¹⁴⁵⁶

RESPONSE RE PUBLICATION AND CONDITIONS

7.100 When he appeared before the Committee on 2 May the Chair of the Sentence Administration Board responded to comment by Dr Bartels regarding publication of the Board's decisions and parole conditions.

7.101 He told the Committee that such a requirement would 'certainly increase the work of the board to a large extent'. 'What happens now' in terms of the operation of the Board, was that:

¹⁴⁵² Dr Lorana Bartels, Submission No.1, p.8.

¹⁴⁵³ Dr Lorana Bartels, Submission No.1, p.8.

¹⁴⁵⁴ Dr Lorana Bartels, Submission No.1, p.6. Parole conditions are set out in *Crimes (Sentence Administration) Act 2005*, Part 7.3, 'Release under parole order'.

¹⁴⁵⁵ Dr Lorana Bartels, Submission No.1, p.6. Here Dr Bartels referred to *Crimes (Sentence Administration) Regulation 2006* (ACT) r 4(e) and r 4(g).

¹⁴⁵⁶ Dr Lorana Bartels, Submission No.1, p.6.

we will hear a matter and at the end of the matter we will talk about what the results should be and then either myself as chair or the deputy chair, if he is running the hearing, will give an *ex tempore* decision. We endeavour to comply with the requirements of the Legislation Act—that is, we make findings of fact and then we apply the relevant law to those findings. But it is all done on the transcript, and we never see that again. Sometimes the offender will ask for a copy and he is given a copy.¹⁴⁵⁷

7.102 He told the Committee that to ‘actually publish them all—I presume on a website ... I am not sure would improve the running of the board’ and would, in a small jurisdiction, ‘certainly add a cost’.¹⁴⁵⁸

7.103 On the question of conditions for parole, the Chair noted that Dr Bartels’ submission had argued that ‘parole conditions were prescriptive and set offenders up to fail’. He told the Committee that:

I was not quite sure what was being got at that there either because we try to tailor the parole conditions to the particular circumstances. There are core conditions we have to impose in every case, but then there will be additional conditions, depending on the nature of the offence and the circumstances in which it was committed.

To give an example of that, if it is a sexual offence, we would want to be assured that the person has done the sex offenders treatment course in the AMC. We may put conditions on that he is not to live within a certain distance of the victim. In one case we had him catching a different bus so he did not run into the victim. That is a particular case that meets a particular purpose.

7.104 He went on to say that core conditions attached to release on parole were, in his view, ‘not prescriptive in the sense that they set people up to fail’. Rather, they were basic requirements ‘like not taking drugs’, commonly applied simply because there was ‘so much offending that goes hand in hand with drugs’.¹⁴⁵⁹ Consumption of alcohol, while not ‘specifically covered in core conditions’, was also often the subject of ‘specific conditions’ set by the Board, for the same reason.¹⁴⁶⁰

¹⁴⁵⁷ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.44.

¹⁴⁵⁸ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.44.

¹⁴⁵⁹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.44.

¹⁴⁶⁰ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.44.

SUMMARY

7.105 The Committee notes arguments put to it regarding parole.

7.106 Arguments asserting anomalies in powers to cancel parole where a person is accused of committing an offence while on parole included:

- that 'if a person is complying with their parole order but gets charged with further offences and comes before the board, there is really not a lot the board can do because the presumption of innocence applies under the *Human Rights Act*';¹⁴⁶¹
- that similar conditions do not apply to the SAB's counterpart in Victoria, 'the only other jurisdiction ... that has a similar type of legislation';¹⁴⁶²
- that if it were 'a serious offence that the person is on parole for', 'it may be thought there is some risk to community safety in that person just being out in the community';¹⁴⁶³
- that the 'only way in which ... the board could intervene is that there is a requirement in ... parole orders that says that anyone who is charged with an offence has to report that within two days to their parole officer' and 'if they do not, that is a breach', but 'whether it is a breach that ought to result in cancellation will depend on other circumstances';¹⁴⁶⁴
- that 'section 149 in conjunction with section 161 of the *Crimes (Sentence Administration) Act 2005* provide for the automatic cancellation of parole and return to full-time custody if a parolee is convicted of an offence punishable by imprisonment';¹⁴⁶⁵
- that, however, in practice, 'the ACT Courts do not normally issue an order under s161 of the *Crimes (Sentence Administration) Act 2005* to cancel a parole order until a sentence is imposed as opposed to when a conviction is recorded';¹⁴⁶⁶
- that this could allow a parolee 'to remain in the community (on bail) for some time before being returned to full-time custody', in which case he or she would remain 'a risk to the community' until such time as he or she were secured;¹⁴⁶⁷

7.107 Arguments asserting anomalies in timelines for applications for parole included:

- that, in circumstances where there was no special parole application, 'the process from the time the application for parole is lodged with the board and the date of the board's determination can take in excess of 3 months',¹⁴⁶⁸ and as a result it was 'not infrequently

¹⁴⁶¹ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

¹⁴⁶² Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

¹⁴⁶³ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

¹⁴⁶⁴ Mr Graham Delaney, *Transcript of Evidence*, 2 May 2014, p.43.

¹⁴⁶⁵ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴⁶⁶ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴⁶⁷ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁴⁶⁸ Legal Aid ACT, Submission No.14, p.1.

the case that the board is only able to hold an inquiry into an application for parole after the parole eligibility date has passed’;¹⁴⁶⁹

- that a possible solution could be ‘in the case of shorter sentences’, ‘giving consideration to empowering the sentencing court to make the parole order, and set the parole conditions at the time the offender is sentenced’;¹⁴⁷⁰
- that if this approach this adopted it would be similar to the approach set out in NSW, in s 50 and s 51 of the *Crimes (Sentencing Procedure) Act 1999* (NSW);

7.108 Arguments regarding crediting time spent on parole where there is a breach included:

- that in the ACT ‘under ss 140 and 160 of the *Crimes (Sentence Administration) Act*, time spent on parole is not acknowledged or credited in the event that parole is cancelled’;¹⁴⁷¹
- that the ‘effect of these provisions is that when a parole order is cancelled the offender is required to serve the whole of the balance of the sentence period regardless of when during the period of parole the breach occurred’;¹⁴⁷²
- that ‘the current system has the potential to create unfair outcomes if for example the breach of parole occurred late in the period of parole and the offender had otherwise fulfilled his/her parole obligations’;¹⁴⁷³
- that a ‘fairer system’ would be to ‘give the offender credit for “street time” with the consequence that only the balance of the period of parole from the date of the breach to the end of the sentence would be required to be served upon the cancellation of the order’;¹⁴⁷⁴
- that this was the kind of arrangement in place in NSW, provided for under s 132 of the *Crimes (Administration of Sentences) Act*;¹⁴⁷⁵
- that an alternative was that the ACT Sentence Administration Board ‘be given a discretion to determine how much of the balance of the sentence ought to be served having regard to when the breach occurred and the nature of the breach’;¹⁴⁷⁶ and
- that there was a precedent for this in s 77C of the *Victorian Corrections Act 1986*.¹⁴⁷⁷

¹⁴⁶⁹ Legal Aid ACT, Submission No.14, p.2.

¹⁴⁷⁰ Legal Aid ACT, Submission No.14, p.2.

¹⁴⁷¹ Legal Aid ACT, Submission No.14, p.3.

¹⁴⁷² Legal Aid ACT, Submission No.14, p.4.

¹⁴⁷³ Legal Aid ACT, Submission No.14, p.4.

¹⁴⁷⁴ Legal Aid ACT, Submission No.14, p.4.

¹⁴⁷⁵ Legal Aid ACT, Submission No.14, p.5, quoting s 132 of the *Crimes (Administration of Sentences) Act* (NSW).

¹⁴⁷⁶ Legal Aid ACT, Submission No.14, p.5, quoting s 132 of the *Crimes (Administration of Sentences) Act* (NSW).

¹⁴⁷⁷ Legal Aid ACT, Submission No.14, p.5, quoting s 132 of the *Crimes (Administration of Sentences) Act* (NSW).

7.109 Arguments regarding the wording of s 149 of the *Crimes (Sentence Administration) Act 2005* included:

- that 'Section 149 [of the *Crimes (Sentence Administration) Act 2005* should be amended in line with amendments to s 150 and s 151] to require that the breaching offence be committed while the parole order is in force before the section operates to cancel the parole order.'¹⁴⁷⁸

7.110 Arguments regarding the basis for decisions on parole included:

- that there was 'no publicly available guidance as to how the SAB decides parole revocations, as it the Board may cancel a parole order simply if it decides that parole 'is, or would be, no longer suitable for the offender';¹⁴⁷⁹
- that , in contrast, 'other jurisdictions set out the circumstances in which parole can be revoked', as in *Crimes (Administration of Sentences) Act 1999* (NSW), s 170;¹⁴⁸⁰
- that it 'may promote confidence in the administration of justice for the SAB to make [public] the factors it takes into account in determining parole revocations';¹⁴⁸¹
- that there should be consideration of 'whether the SAB's reasons for their decisions should be made public', as in Tasmania and Western Australia;¹⁴⁸²

COMMITTEE COMMENT

7.111 With these arguments in mind the Committee makes the following recommendations.

Recommendation 36

7.112 The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would require courts to apply a public interest test as to whether parole should be cancelled in instances where a person is accused of an offence while on parole.

¹⁴⁷⁸ Legal Aid ACT, Submission No.14, p.5.

¹⁴⁷⁹ Dr Lorana Bartels, Submission No.1, p.7. Here Dr Bartels referred to the *Crimes (Sentence Administration) Act 2005* (ACT) ss 156(1)(e), (3).

¹⁴⁸⁰ Dr Lorana Bartels, Submission No.1, p.7, citing the *Crimes (Administration of Sentences) Act 1999* (NSW), s 170..

¹⁴⁸¹ Dr Lorana Bartels, Submission No.1, p.7.

¹⁴⁸² Dr Lorana Bartels, Submission No.1, pp.7-8.

Recommendation 37

- 7.113** The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would for shorter sentences give courts the power to make parole orders and set parole conditions at the time the offender is sentenced.

Recommendation 38

- 7.114** The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would in cases of breaches of parole give the Sentence Administration Board a discretion to determine how much of the balance of the sentence ought to be served having regard to when the breach occurred and the nature of the breach.

Recommendation 39

- 7.115** The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would amend the wording of s 149 of the of the *Crimes (Sentence Administration) Act 2005* to make it consistent with previous amendments to s 150 and s 151, to require that the breaching offence be committed while the parole order is in force before the section operates to cancel the parole order.

Recommendation 40

- 7.116** The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would amend the *Crimes (Sentence Administration) Act 2005* so that it sets out the circumstances in which parole can be revoked.

Recommendation 41

- 7.117** The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would require the Sentence Administration Board to publish its decisions as a matter of course.

Recommendation 42

7.118 The Committee recommends that the ACT Government to provide further resourcing to the Sentence Administration Board to support publication of its decisions, if legislation so provides.

PERIODIC DETENTION

INTRODUCTION

7.119 During the course of the inquiry, on Monday 31 March 2014, the Minister for Corrections announced that ‘from 2016-17, periodic detention will no longer be utilised as a sentencing option in the ACT’.¹⁴⁸³

7.120 This matter was considered in the Committee’s inquiry on Annual Reports 2012-2013,¹⁴⁸⁴ and in public hearings for the present inquiry, on 2 May 2014.

7.121 Periodic detention was also considered by the following contributors to inquiry:

- the Director Of Public Prosecutions;
- the ACT Human Rights and Discrimination Commissioner;
- Dr Lorana Bartels;
- the Alcohol Tobacco and Other Drug Association ACT (ATODA);
- ACTCOSS;
- Legal Aid ACT; and
- Australian Lawyers Alliance.

7.122 These are considered below.

ANNOUNCEMENT OF THE END OF PERIODIC DETENTION

7.123 In his media release announcing plans to end Periodic Detention in the ACT the Minister for Corrections (now Minister for Justice) stated that:

“The ACT is the last Australian jurisdiction that still utilises periodic detention as a sentencing option, as more appropriate and effective sentencing options have been

¹⁴⁸³ Mr Shane Rattenbury MLA, Media Release 31 March 2014, ‘Periodic detention to make way for alternate options’.

¹⁴⁸⁴ Standing Committee on Justice and Community Safety, Report on Annual Reports 2012-2013, p.31.

developed nationally and internationally that provide alternative forms of diversion from full-time custody,” Mr Rattenbury said.

“Corrective Services will move away from periodic detention to make way for future alternative options which may include intensive community correction orders, which will more effectively deliver on our goals of rehabilitation and reduced rates of incarceration.”

“Community correction orders can include compulsory participation in programs and community services obligations. Other jurisdictions have found that this type of sentencing is not only more effective, but delivers enhanced outcomes for participants.”¹⁴⁸⁵

STATEMENTS IN HEARINGS ON THE END OF PERIODIC DETENTION

7.124 The Minister and his officers provided further detail on this change in policy when they appeared before the Committee on 2 May 2014.

7.125 The Minister was asked about the reasons for doing away with Periodic Detention in the ACT. He responded by telling the Committee that:

Firstly, the ACT is the last Australian jurisdiction to utilise periodic detention. Other jurisdictions have moved away from it. The primary reason for that and the reason which corrections advised me that we should move in this direction is several fold. Periodic detention is a relatively high-cost option and, we believe, a low return on investment with regard to therapeutic and rehabilitative programs. In essence, when you are trying to target the criminogenic needs of offenders, essentially they are behavioural issues that have caused them to be involved in offending.¹⁴⁸⁶

7.126 The Attorney-General told the Committee that:

We know now that periodic detention is not operating and achieving the outcomes that it was originally set out to achieve. The ACT is now the only jurisdiction in the country that provides for periodic detention. All other jurisdictions have phased it out. They have phased it out because they have recognised it is both costly and ineffective.¹⁴⁸⁷

¹⁴⁸⁵ Mr Shane Rattenbury MLA, Media Release 31 March 2014, ‘Periodic detention to make way for alternate options’.

¹⁴⁸⁶ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.26.

¹⁴⁸⁷ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.5.

7.127 He added that he considered that the decision to end Periodic Detention was:

[i]n many respects ... a trigger for us to look more broadly at a range of other matters. For example, other jurisdictions have started to implement intensive community-based orders ...¹⁴⁸⁸

SUCCESSOR TO PERIODIC DETENTION

7.128 The Minister for Corrections went on to tell the Committee about the likelihood that intensive corrections orders would replace periodic detention in the ACT:

We believe that some sort of intensive community corrections order, more focused programs, is a better outcome than simply having somebody in for 48 hours over the weekend. It may be that somebody would get much better outcomes from being in a constant supervision program in the community or attending a different program that we are not able to offer through a weekend detention. So in the broad, that is essentially the broad policy reason.¹⁴⁸⁹

7.129 The Executive Director of Corrective Services provided further detail about Intensive Corrections Orders:

I think it is really important to remember that periodic detention is actually a custodial sentence; two days of custodial sentence. The whole idea of an intensive community order is to give the judiciary a replacement sentence for someone who they would otherwise give a custodial sentence. In my experience, the structure around the intensive community order has been quite onerous. It is probably more onerous than PDC [the Periodic Detention Centre], because with PDC there is no onus for drug and alcohol testing, compulsory programs or engagement in case management.¹⁴⁹⁰

7.130 She told the Committee that:

We would be expecting—without pre-empting what might be final—quite a strong structure, which would include curfews, regular drug and alcohol testing and compulsory program attendance.¹⁴⁹¹

7.131 This would be, she told the Committee:

really ... an opportunity for the offender to stay out of full-time custody, but there are clear obligations on them for taking responsibility to change the way that they work it, along with supporting them with through-care and other things to make sure that we

¹⁴⁸⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.5.

¹⁴⁸⁹ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.26.

¹⁴⁹⁰ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.31.

¹⁴⁹¹ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.31.

are looking after the social aspects as well keeping them out of custody and also stopping them offending.¹⁴⁹²

7.132 A further element in this approach was to reduce intergenerational drivers for crime:

there is no question that if you have a parent in custody you are actually one in four times more likely to be in custody. We really want to break that cycle for the offender but also for the family as well.¹⁴⁹³

7.133 She also told the Committee that the intention was not solely to keep offenders out of custody but, as a result, to 'reduce victims over time in the community'.¹⁴⁹⁴

TRANSITIONAL ARRANGEMENTS

7.134 In response to questions as to the end-date for Periodic Detention in the ACT, the Acting Director-General, Justice and Community Safety Directorate, told the Committee that this was scheduled for 2016-2017.¹⁴⁹⁵

7.135 The Minister for Corrections commented on this time-frame during his appearance in hearings. He told the Committee that:

Part of the reason it is such a long lead-in time is twofold. One is to give us the time to put the alternative measures in place. Having made a decision, we have sort of announced it so that we can now start consulting with key stakeholders, be that the Bar Association and the Law Society, other NGOs as well as obviously within government. There is a range of work to be done. There will need to be a level of both program development, making sure we have got the right programs in place, and also, undoubtedly, some legislative changes to put this in place. So that is the key reason for having the significant lead-in time.¹⁴⁹⁶

7.136 When asked for further details on how the transition would be managed with respect to offenders coming through the justice system, the Minister for Corrections told the Committee that one possibility was to follow the approach employed by NSW when it brought an end to Periodic Detention, where 'they had a statute set up so that the day one lot came in, periodic detention was taken away'.¹⁴⁹⁷

¹⁴⁹² Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.31.

¹⁴⁹³ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.31.

¹⁴⁹⁴ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.31.

¹⁴⁹⁵ Ms Alison Playford, *Transcript of Evidence*, 2 May 2014, p.6.

¹⁴⁹⁶ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.27.

¹⁴⁹⁷ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, pp.30-31.

7.137 However, he told the Committee:

we still need to work through the detail at this point. Clearly, we will be looking for a changeover point so that we start to end the number of people that are tailing through the PDC system.¹⁴⁹⁸

DIRECTOR OF PUBLIC PROSECUTIONS

7.138 The Director of Public Prosecutions appeared before the Committee in hearings of 19 May 2014. When asked about comments in his opening statement about Periodic Detention and sexual offences, the Director told the Committee that:

Yes. That was a limitation of periodic detention. Most of the programs for sex offenders are only available to full-time prisoners, and they are quite long-term programs, I think six months full time, for prisoners who are in full-time custody, accessing it five days a week or whatever. So that sort of program is just not possible to be delivered on periodic detention ... So that is the difficulty that we saw.¹⁴⁹⁹

7.139 He went on to say that:

sex offenders are sometimes otherwise middle-class offenders without a prior record. They are possibly in other respects the sorts of offenders, sometimes, who one would expect periodic detention to be extended to. So that is the difficulty. There were consequences in giving such offenders that outcome when it did not really meet the issue of reformation and rehabilitation because of the unavailability of programs.¹⁵⁰⁰

7.140 The Director told the Committee in relation to proposed new arrangements in place of Periodic Detention:

It may be possible, however, to ensure compliance with something like that with an intensive corrections order.¹⁵⁰¹

7.141 However he told the Committee that there would be administrative and procedural features of law that would need attention in the transition from Periodic Detention because:

we do have in the ACT combination sentences, and periodic detention was a key part of those combination sentences. If periodic detention is taken away from those then there will need to be a re-evaluation of whether combination sentences continue or

¹⁴⁹⁸ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.31.

¹⁴⁹⁹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.60.

¹⁵⁰⁰ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.60.

¹⁵⁰¹ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.60.

whether there is some alternative that can be put in the space previously occupied by periodic detention.¹⁵⁰²

7.142 As a result, he told the Committee that the discontinuation of Periodic Detention brought about ‘an opportunity—in fact probably a requirement now—for the whole scheme of sentencing in the ACT to be looked at’.¹⁵⁰³

ACT HUMAN RIGHTS AND DISCRIMINATION COMMISSIONER

7.143 The ACT Human Rights and Discrimination Commissioner’s submission to the inquiry expressed concern at limitations of rights for people required to attend periodic detention. In particular, it expressed concern at the potential for limitations on ‘the rights of families and the rights of children’, under the *Human Rights Act 2004* ‘where parents are sentenced to periodic detention’. Within this, she expressed particular concern at limitations on breast-feeding mothers.¹⁵⁰⁴

7.144 The submission noted that NSW had ‘elected to move away from this form of sentencing’¹⁵⁰⁵ after a 2007 report by the NSW Sentencing Council found that the availability of periodic detention in NSW was a significant cause for concern:

by reason of resource limitations, and the resulting discriminatory impact, the underutilisation of the current facilities, and the absence of meaningful case management for periodic detainees.¹⁵⁰⁶

7.145 The submission also noted, from the same report:

difficulties for detainees in continuing employment when sentenced to periodic detention, and the particular pressure this puts on family relationships when someone is working fulltime during weekdays.¹⁵⁰⁷

7.146 However the other, more positive aspect, commented on by the report was:

that detainees believed if they had not been sentenced to periodic detention, they may have lost custody of their children, and referred to a UK study that found the value of

¹⁵⁰² Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

¹⁵⁰³ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

¹⁵⁰⁴ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.6.

¹⁵⁰⁵ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.6.

¹⁵⁰⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.6., quoting NSW Sentencing Council, ‘Review of Periodic Detention’, December 2007,

http://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/periodic_detention_report.pdf

¹⁵⁰⁷ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.6.

the periodic detention scheme in keeping families with dependent children together.¹⁵⁰⁸

DR LORANA BARTELS

7.147 Dr Lorana Bartels' submission to the inquiry noted that the ACT was 'the only jurisdiction in Australia' to offer periodic detention as a sentencing option, and that NSW had abolished periodic detention in 2010 in favour of intensive corrections orders. In view of this, she advised the Committee that it 'may be timely to consider whether periodic detention remains an appropriate sentencing option.'¹⁵⁰⁹

ATODA

7.148 ATODA's submission to the inquiry set out its understanding of the operation of periodic detention in the ACT, and put the view that there was 'potential to run various programs are run within the centre, including alcohol and other drug programs'.¹⁵¹⁰

7.149 However it also noted an absence of information on periodic detention, saying that it would be useful if there was 'a fuller picture of the periodic detention program in the ACT, including the types of offences, numbers of people detained annually, length of sentence and sentencing breaches'.¹⁵¹¹

ACTCOSS

7.150 The submission by the ACT Council of Social Services, ACTCOSS, also noted that the ACT was the 'only jurisdiction in Australia that uses periodic detention as a sentencing option'.¹⁵¹²

7.151 It also noted that:

The historical rationale for periodic detention was that it assisted in overcoming some of the social determinants of offending (isolation, lack of employment, disconnection from family) while still imposing a sentence of imprisonment.¹⁵¹³

¹⁵⁰⁸ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.6.

¹⁵⁰⁹ Dr Lorana Bartels, Submission No.1, pp.3-4.

¹⁵¹⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.12.

¹⁵¹¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.13.

¹⁵¹² ACTCOSS, Submission No.6, p.6.

¹⁵¹³ ACTCOSS, Submission No.6, p.6.

7.152 With regard to programs for persons attending periodic detention, the submission stated that ACTCOSS understood that:

ACTCOSS understands that detainees serving periodic detention in the Symonston Correctional Centre have access to several programs during their time there, including programs on cognitive skills, family violence and alcohol and other drug programs.¹⁵¹⁴

7.153 However it expressed concern that:

access to these programs is at the discretion of the service providers and is often very limited due to resourcing (for example services needing to pay their staff overtime as it is on a weekend). In addition, there are no education (numeracy or literacy) programs provided in periodic detention.¹⁵¹⁵

7.154 ACTCOSS' submission also expressed concern regarding the termination of periodic detention in NSW as a result of which, it suggested, there had been 'an increase in full-time custodial sentences, particularly where offenders are not found to be suitable for Intensive Correction Orders'.¹⁵¹⁶

7.155 In relation to this, the submission suggested, the Law Society of NSW had:

advocated that periodic detention be reconsidered as a sentencing option where ICOs aren't appropriate as they believe it is imperative that as many sentencing options as possible are available to the courts, to allow them to make decisions that are in the best interest of the offender and the community.¹⁵¹⁷

7.156 In summary, the submission put the view that:

Our understanding is that full-time custodial sentences are the most expensive in terms of economic cost to government and social cost to individuals (through isolation from their family and their community, a lack of employment). We think there should be maximum flexibility available in sentencing to minimise the unnecessary use of custodial sentencing, including the option of periodic detention. Having said that, we would recommend the conditions during periodic detention be examined to ensure opportunities for rehabilitation and reducing social determinants of crime are maximised.¹⁵¹⁸

¹⁵¹⁴ ACTCOSS, Submission No.6, p.6.

¹⁵¹⁵ ACTCOSS, Submission No.6, p.6.

¹⁵¹⁶ ACTCOSS, Submission No.6, p.6.

¹⁵¹⁷ ACTCOSS, Submission No.6, p.6.

¹⁵¹⁸ ACTCOSS, Submission No.6, pp.6-7.

LEGAL AID ACT

7.157 The submission to the inquiry by Legal Aid ACT was distinctive in that it argued to retain Periodic Detention.

7.158 The submission advised the Committee that:

In our experience periodic detention is an effective sentencing option for many offenders whose offending behaviour is sufficiently serious to warrant a custodial sentence but for whom a sentence of full time imprisonment would be too severe an outcome.¹⁵¹⁹

7.159 Moreover, the submission envisaged a significant role for programs delivery through periodic detention:

Periodic detention should be seen as a golden opportunity to have offenders engage in a number of the programs offered by Corrective Services to offenders subject to good behaviour orders such as the Cognitive Self Change Program the Family Violence Program, Anger Management Program, and programs offered by outside agencies such as drug and alcohol programs driver education etc. We believe that Corrective Services may now be offering some of these programs over the weekend but we would see it as an excellent opportunity to address the multitude of problems that have resulted in the offenders committing offences that have resulted in the imposition of a periodic detention order.¹⁵²⁰

7.160 Less positively, the submission noted problems with access to periodic detention for 'offenders who are not physically fit or suffering from a medical condition', saying that the program 'should be sufficiently flexible to enable ... [them] ... to participate'.¹⁵²¹

7.161 In the scheme as it had been managed, however, the submission advised that:

An assessment by a corrective services officer that an offender [was] unsuitable for periodic detention because of a medical condition [would] usually leave the court with a very serious dilemma.¹⁵²²

¹⁵¹⁹ Legal Aid ACT, Submission No.14, p.5.

¹⁵²⁰ Legal Aid ACT, Submission No.14, pp.5-6.

¹⁵²¹ Legal Aid ACT, Submission No.14, p.5.

¹⁵²² Legal Aid ACT, Submission No.14, p.5.

AUSTRALIAN LAWYERS ALLIANCE

7.162 When Mr Steven Whybrow of the Australian Lawyers Alliance appeared in hearings of 19 May 2014, he told the Committee that:

the ALA [believes] that the entire ACT sentencing structure is one based on flexibility of approach—the maximum flexibility that it provides for the maximum capacity for individualised justice, which flows into increasing opportunities for rehabilitation and reducing recidivism.¹⁵²³

7.163 However, he told the Committee, ‘periodic detention seems to have proved itself to be a fairly blunt instrument over the years’, and recommended that the ACT look to the use of intensive corrections orders in NSW as the template for a successor to periodic detention in the ACT.¹⁵²⁴

7.164 Basing his comments on his experience of the NSW system, he told the Committee that:

The perception of an intensive correction order is not that it is a soft option but that it is difficult. It involves community service; it involves significant intervention. And it is for persons who might otherwise be sentenced to a period of imprisonment.¹⁵²⁵

7.165 In many respects, he told the Committee, introducing similar arrangements in the ACT would be, in effect, a new way to describe—or to ‘brand’—approaches already employed in the ACT.¹⁵²⁶

7.166 He commented that there were ‘issues raised before this committee about the increasing prevalence of shorter sentences’ however this was, in his view, a misperception of what was actually occurring in Courts in the ACT:

In many respects the current sentencing regime in the ACT effectively provides powers equivalent to intensive correction orders because the current act allows, under the good behaviour order system, for very specific and directed directions to be given to offenders who are on good behaviour orders.¹⁵²⁷

7.167 Currently, he told the Committee, the perception of good behaviour orders in the ACT is that they were ‘seen as a soft option which just means, “Don’t commit any offences” ‘.¹⁵²⁸

¹⁵²³ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵²⁴ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵²⁵ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵²⁶ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵²⁷ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵²⁸ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

7.168 However, he told the Committee:

In reality, the core conditions and the other conditions that are available provide significant capacity for Corrective Services to positively affect an offender's ongoing rehabilitation prospects.¹⁵²⁹

7.169 As a result, he told the Committee:

In some respects I would be advocating for bringing in intensive correction orders not because we do not actually have them but because it provides a ... branding of something that can get out there as, "This isn't a soft option."¹⁵³⁰

7.170 Mr Whybrow went on to emphasise obligations and conditions attached to Intensive Corrections Orders, saying that in many cases they could in fact be greater, and more effective, than those of a custodial sentence:

For many offenders, I am sure it is not a fun place to be but the AMC is far and away a better place than many of the other institutions around this country and, indeed, the world. For some people, unfortunately, they would see six months in AMC as a lot less hard work than six months on an intensive correction order where they are required to jump through hoops, undertake courses and follow directions.¹⁵³¹

SUMMARY

7.171 The Committee notes arguments put to it in relation to periodic detention.

7.172 Arguments included:

- that the ACT is the last Australian jurisdiction to employ periodic detention;¹⁵³²
- that 'periodic detention [was] not operating and achieving the outcomes that it was originally set out to achieve' and was regarded as being 'both costly and ineffective';¹⁵³³
- that intensive corrections orders were seen as a successor to periodic detention in the Act;¹⁵³⁴
- that obligations under intensive corrections orders were potentially more flexible and comprehensive and more 'onerous' than those attached to periodic detention, and were better able to support offender rehabilitation;¹⁵³⁵

¹⁵²⁹ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵³⁰ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵³¹ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵³² Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.26.

¹⁵³³ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.5.

¹⁵³⁴ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.26.

- that intensive corrections orders had greater potential to reduce rates of offending;¹⁵³⁶
- that periodic detention did not provide an effective basis for offenders to undertake and complete programs designed to reduce risks of reoffending;¹⁵³⁷
- that in the absence of periodic detention there would need to be a re-evaluation of 'combination sentences' in the ACT which had included periodic detention;¹⁵³⁸
- that periodic detention had the potential to put pressure on family relationships where the offender was 'working fulltime during weekdays';¹⁵³⁹
- that periodic detention had, potentially, protected family relationships by avoiding the potential for loss of custody if a parent with dependent children had been placed in full-time detention;¹⁵⁴⁰
- that 'historical rationale for periodic detention was that it assisted in overcoming some of the social determinants of offending (isolation, lack of employment, disconnection from family) while still imposing a sentence of imprisonment';¹⁵⁴¹
- that 'there should be maximum flexibility available in sentencing to minimise the unnecessary use of custodial sentencing, including the option of periodic detention';¹⁵⁴² and
- that replacing periodic detention with intensive corrections orders would be, in effect, a new way to 'brand' approaches already employed in the ACT.¹⁵⁴³

COMMITTEE COMMENT

7.173 Elsewhere in this report the Committee has recommended that the ACT Government introduce intensive corrections orders into use in the ACT. The Committee takes the view that a intensive corrections orders regime, if properly funded and resourced, is a superior approach to periodic detention in that it is more flexible, can be tailored more appropriately to individual cases, and is inherently more suited to a rehabilitation outcomes within the context of the criminal justice system.

¹⁵³⁵ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.31. See also Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

¹⁵³⁶ Ms Bernadette Mitcherson, *Transcript of Evidence*, 2 May 2014, p.31.

¹⁵³⁷ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.60.

¹⁵³⁸ Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.57.

¹⁵³⁹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.6.

¹⁵⁴⁰ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.6.

¹⁵⁴¹ ACTCOSS, Submission No.6, p.6.

¹⁵⁴² ACTCOSS, Submission No.6, pp.6-7.

¹⁵⁴³ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.102.

7.174 The Committee has considered arguments which proposed that the ACT retain periodic detention while adding intensive corrections orders to the suite of sentencing options available to ACT courts. However, while the Committee subscribes, broadly speaking, to the doctrine that sentencing options available to the courts should be as wide as practicable, in this case — and keeping in mind the small scale of the ACT jurisdiction — the Committee is concerned that running these schemes in parallel would sacrifice such economies of scale as would otherwise be available.

7.175 It appears on the basis of representations to the Committee that only a small sub-set of current offenders sentenced to periodic detention are, as it were, ‘uniquely’ suited to periodic detention. In view of this, and in view of the flexibility inherent in intensive corrections orders regimes, the Committee believes that it would be more practicable to tailor solutions for this cohort under intensive corrections orders than to maintain a parallel system.

7.176 Overall, it is the Committee’s view that contributions to the inquiry regarding periodic detention highlight the importance of the ACT putting in place an effective intensive corrections orders regime, properly funded and resourced, as the Committee recommends elsewhere in this report.

BAIL AND ITS ADMINISTRATION

7.177 The *Encyclopaedic Australian Legal Dictionary* defines bail as:

The release from custody granted to a person charged with an offence, on the condition that he or she undertakes to return to the court at some specified time, and subject to any other conditions that the court may impose.¹⁵⁴⁴

7.178 It also states that:

Under the statutory schemes that now regulate bail applications in every jurisdiction, there may be a right to release on bail, a presumption in favour of bail, no presumption or a presumption against bail, depending on the offence ...¹⁵⁴⁵

7.179 Contributions to the inquiry regarding bail were concerned about:

- the effectiveness and efficiency of the bail process;
- presumptions on bail (for or against); and
- the effects of current arrangements for bail on particular categories of offenders.

¹⁵⁴⁴ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 18 September 2014), ‘Bail’.

¹⁵⁴⁵ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 18 September 2014), ‘Bail’.

7.180 These included contributions by the following:

- the ACT Human Rights and Discrimination Commissioner;
- Legal Aid ACT;
- the ACT Victims of Crime Commissioner;
- the ACT Children and Young People Commissioner; and
- the Attorney-General.

7.181 These are considered below.

ACT HUMAN RIGHTS AND DISCRIMINATION COMMISSIONER

7.182 The ACT Human Rights and Discrimination Commissioner's submission to the inquiry noted that the ACT had 'the highest proportion of remandees in detention at 34.7%, compared to a national average of 23.4%'.¹⁵⁴⁶ Expressing concern at this, the submission suggested that this was 'partly explained by the increasing number of presumptions against bail made through legislative amendments enacted before the *Human Rights Act* came into force on 1 July [2004]'.¹⁵⁴⁷

7.183 Legislative activity in this direction, the submission suggested:

may indicate a conceptual shift of bail being a procedural issue relating to attendance at court to a crime prevention approach, being favoured over the presumption of innocence and general right to liberty.¹⁵⁴⁸

7.184 The submission went on to refer to the NSW Law Reform Commission's 2012 report of the NSW *Bail Act 1978* which recommended, she advised, 'that there be a justification approach to bail with a uniform presumption in favour of release'.¹⁵⁴⁹

7.185 It also noted that in 2013 the NSW government had passed a new *Bail Act* that was 'simpler in its operation' by 'removing the offence-based presumptions scheme and focusing on risk management, with reasonable and proportionate bail conditions', and suggested that this 'new model' be considered in the ACT.¹⁵⁵⁰

¹⁵⁴⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

¹⁵⁴⁷ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

¹⁵⁴⁸ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

¹⁵⁴⁹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

¹⁵⁵⁰ ACT Human Rights and Discrimination Commissioner, Submission No.8, pp.4-5.

7.186 The submission contrasted this regime with that currently applicable in the ACT. She noted that that Section 9C of *Bail Act* (ACT) required:

those accused of murder, certain drug offences and ancillary offences, to show ‘exceptional circumstances’ before having a normal assessment for bail undertaken.¹⁵⁵¹

7.187 In connection with this, the submission noted that the first ACT Declaration of Incompatibility issued under s32 of the *Human Rights Act 2004* had been made by Justice Penfold in connection with an application for bail. This had been considered necessary because the provisions of s 9C of the *Bail Act* had been ‘found to be inconsistent with the requirement in s18 of the [*Human Rights Act 2004*] that a person awaiting trial not be detained in custody as a “general rule”’.¹⁵⁵²

7.188 The submission went on to observe that:

Justice Penfold’s Declaration was in part due to the range of offences to which s9C of the *Bail Act 1992* applies. In particular, Justice Penfold referred to s9C, the ‘arbitrary or irrational operation’ of which, made it difficult to find a rational connection between the various offences covered by the provision. Although these offences all carry maximum sentences of life imprisonment, not all offences carrying such penalties are included in s9C. Her Honour also noted that s9C did not apply to a range of other serious offences carrying maximum penalties of 25 years imprisonment, or to a person charged with multiple serious offences, where there is scope for extremely long total periods of imprisonment.¹⁵⁵³

7.189 In connection with this matter, the submission noted that the Commissioner’s submission to an ACT government consultation on potential amendments to s 9C ‘suggested that the presumptions against bail based on the nature of the offence should be removed’. She remained ‘concerned’ that:

the current s9C, even with the proposed amendments, may still unreasonably limit the right to liberty under s18 of the *Human Rights Act*, by maintaining a presumption against bail and placing an additional burden on certain defendants to overcome this presumption.¹⁵⁵⁴

7.190 Later in the submission, the submission again quoted the NSW Law Reform Commission on legislative conditions for bail in NSW which then prevailed, which the Commissioner likened to the present situation in the ACT. The Law Reform Commission’s report put the view that:

¹⁵⁵¹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.5.

¹⁵⁵² ACT Human Rights and Discrimination Commissioner, Submission No.8, p.5, referring to (2010) 4 ACTLR 235.

¹⁵⁵³ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.5, referring to (2010) 4 ACTLR 235.

¹⁵⁵⁴ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.5.

The current scheme of presumptions, exceptions and exceptional circumstances is unduly complex and restrictive. It is an unwarranted imposition on the discretion of police and the courts. It throws the emphasis onto the offence with which the person is charged or onto prescribed elements in the person's criminal history, instead of allowing a balanced assessment of all the considerations which bear rationally on the question of detention or release...¹⁵⁵⁵

- 7.191 The report also noted that the 'overwhelming majority of submissions' the Commission had received had 'advocated the removal of the existing scheme of presumptions, exceptions and special circumstances, and its replacement with a uniform presumption in favour of release'.¹⁵⁵⁶

LEGAL AID ACT

- 7.192 Legal Aid ACT's submission to the inquiry also noted a high proportion of unsentenced prisoners in the ACT prison population and suggested a link between this and 'current bail legislation' in the ACT.¹⁵⁵⁷

REFERENCES TO NSW REPORT

- 7.193 The submission noted, as had that of the ACT Human Rights Commissioner, the view put in the report of the NSW Law Reform Commission criticizing the then-current NSW *Bail Act 1978* as representing a 'scheme of presumptions, exceptions and exceptional circumstances' which was 'unduly complex and restrictive'.¹⁵⁵⁸
- 7.194 The submission then went on to quote a NSW report regarding presumptions against bail in cases of domestic violence. In the report the Law Reform Commission considered the view that there should be a presumption against bail in such cases because, on a number of grounds, it may be the case that 'a person who has committed a crime' in this context may be 'more likely to see the victim – and so endanger the victim – than a person accused of a crime against a stranger'.¹⁵⁵⁹
- 7.195 The report suggested that, in light of this, judicial officers 'must therefore be alert to the importance of providing for the safety of victims and related children'. However, the Commission did not consider that 'the safety of women and children is best secured by

¹⁵⁵⁵ ACT Human Rights and Discrimination Commissioner, Submission No.8, pp.16-17.

¹⁵⁵⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.17.

¹⁵⁵⁷ Legal Aid ACT, Submission No.14, p.6.

¹⁵⁵⁸ Legal Aid ACT, Submission No.14, p.6.

¹⁵⁵⁹ Legal Aid ACT, Submission No.14, p.7.

creating a presumption against bail for all crimes committed in family violence context'.¹⁵⁶⁰

Indeed, in some instances, because such a presumption 'acts as a disincentive to victims to report family violence crimes', such a presumption 'might sometimes indirectly undermine the safety of victims'. 'Furthermore', the report added, a blanket presumption against bail 'for all family violence offences appears to deny unfairly the accused the presumption of innocence'.¹⁵⁶¹

7.196 The report indicated particular instances where a presumption against bail seemed un-called for and unhelpful:

Without diminishing the seriousness of any type of breach of a protection order, it would seem that a breach of a contact condition of a protection order that does not involve any family violence, particularly where the protected person invited the contact uncoerced, might not justify a presumption against bail.¹⁵⁶²

7.197 'For these reasons', the report continued, 'the Commissions do not support presumptions against bail for all crimes committed in a family violence context'. However, it said, this was 'not to say that there should not be a presumption against bail for some family violence crimes, such as murder'.¹⁵⁶³

7.198 In light of this, the report put the view that:

the balance is best struck by generally maintaining a presumption in favour of bail-consistent with the presumption of the accused's innocence-but removing the presumption in favour in certain specific circumstances.¹⁵⁶⁴

7.199 The report went on to 'make no specific recommendation about what those circumstances should be', but suggested that 'they would include, for example, where an accused has been violent against the victim in the past-as is the case in NSW'.¹⁵⁶⁵

7.200 The report also raised specific concerns about the state of the law on bail in the ACT, expressing concern:

with the ACT provision that provides that police must refuse bail for domestic violence offences 'unless satisfied that the person poses no danger to a protected person while released on bail' - particularly if police do not try to ascertain whether the victim will be in danger, but simply leave the decision to the court. Persons might then be

¹⁵⁶⁰ Legal Aid ACT, Submission No.14, p.7.

¹⁵⁶¹ Legal Aid ACT, Submission No.14, p.7.

¹⁵⁶² Legal Aid ACT, Submission No.14, p.7.

¹⁵⁶³ Legal Aid ACT, Submission No.14, p.7.

¹⁵⁶⁴ Legal Aid ACT, Submission No.14, p.7.

¹⁵⁶⁵ Legal Aid ACT, Submission No.14, p.7.

incarcerated unnecessarily in the period between arrest and when the court hears the matter.¹⁵⁶⁶

7.201 In connection with this, the report recommended that ‘State and territory legislation should not contain presumptions against bail on the grounds only that an alleged crime occurred in a family violence context’.¹⁵⁶⁷

VIEWS ON THE NSW REPORT

7.202 In light of the material quoted from the NSW Law Reform Commission’s report, Legal Aid ACT’s submission stated that it would:

strongly urge that consideration be given to removing the presumptions against the granting of bail within the *Bail Act* so that the decision whether or not an alleged offender is to be allowed his or her liberty is determined according to whether there are any unacceptable risks in allowing that person their liberty.¹⁵⁶⁸

7.203 The submission also noted that ‘the several presumptions against bail within the *Bail Act* offend Section 18(5) of the *Human Rights Act*’, in particular s 7C of the *Bail Act*, as indicated by the Human Rights Commissioner above.¹⁵⁶⁹

7.204 In connection with this, the submission stated that:

In our submission the only legislative provisions which would not offend Section 18(5) of the *Human Rights Act* would be those which allow an authorised officer or a court, taking into account all of the information presented to him or her, including:

- the seriousness of the charges,
 - the personal circumstances of the accused, and
 - any risk that the accused may
 - o not answer bail,
 - o commit further offences,
 - o endanger the safety of the community or individuals, or
 - o interfere with witnesses or evidence
- to determine whether it is appropriate for bail to be granted.¹⁵⁷⁰

¹⁵⁶⁶ Legal Aid ACT, Submission No.14, p.7.

¹⁵⁶⁷ Legal Aid ACT, Submission No.14, p.7.

¹⁵⁶⁸ Legal Aid ACT, Submission No.14, p.8.

¹⁵⁶⁹ Legal Aid ACT, Submission No.14, p.8.

¹⁵⁷⁰ Legal Aid ACT, Submission No.14, p.8.

APPLICATIONS FOR BAIL

7.205 In addition, Legal Aid ACT's submission raised concerns about complexity and undue difficulty in applying for bail under present ACT legislation:

In our submission the current procedures under the *Bail Act* for applying for bail in the ACT is unduly complex and ultimately may operate as a deterrent to remandees applying for bail.¹⁵⁷¹

7.206 In response to this, the submission suggested a solution, under which:

any person remanded in custody ought to have the entitlement to make one application for bail in the Supreme Court. If that application were unsuccessful, then the applicant would then need to show special or exceptional circumstances before being able to make a second application for bail in the Supreme Court.¹⁵⁷²

VICTIMS OF CRIME COMMISSIONER

7.207 The submission of the Victims of Crime Commissioner noted that its comments on bail were mainly focused on 'support for the current provisions that provide for presumptions against bail for family violence offences'.¹⁵⁷³ The submission also stated its overall support for 'retaining the presumption against bail as it relates to domestic violence offences in the *Bail Act 1992*'.¹⁵⁷⁴

7.208 In making these comments it noted that:

- the ACT Family Violence Intervention Program (FVIP) had commenced in 1998 'in response to the ACT Community Law Reform Committee's (1995) report on Domestic Violence',¹⁵⁷⁵ and that
- the principal aims of the FVIP were 'to improve victim safety and to provide opportunities for offender accountability and rehabilitation in the area of criminal family violence' while at the same time being 'firmly grounded in the basic principles of criminal justice being the presumption of innocence and due process'.¹⁵⁷⁶

¹⁵⁷¹ Legal Aid ACT, Submission No.14, p.8.

¹⁵⁷² Legal Aid ACT, Submission No.14, p.8.

¹⁵⁷³ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁵⁷⁴ Victims of Crime Commissioner, Submission No.10, p.3.

¹⁵⁷⁵ Victims of Crime Commissioner, Submission No.10, p.7.

¹⁵⁷⁶ Victims of Crime Commissioner, Submission No.10, p.7.

CURRENT LEGISLATIVE SETTINGS

7.209 The Commissioner's submission noted the following features of ACT legislation regarding bail:

- 'The *Crimes Act 1900*, section 212(1) provides that a police officer can arrest a person without warrant where they suspect on reasonable grounds that the person has committed an offence, and proceeding via summons will not achieve one of the purposes listed in subsection 212(1)(b). Simply put, section 212(1) creates a presumption that police should proceed via summons, unless the summons would not achieve one or more of the criteria specified'.¹⁵⁷⁷
- 'Subsection 212(2) creates an exception to 212(1) for domestic violence offences. It states that police may arrest a person they suspect on reasonable grounds of committing a domestic violence offence. There is no requirement that police consider whether it is feasible to proceed via summons, or whether the arrest is necessary in the individual circumstances of the case'.¹⁵⁷⁸
- 'Section 212(2) should be read in conjunction with the *Bail Act 1992*, section 9F which deals with persons accused of domestic violence offences once arrested. Section 9F provides that an authorised officer, normally the regional Watch House Sergeant, may only grant bail where he or she is satisfied that the person poses no danger to a protected person while released on bail. The standard criteria for granting bail must also be considered by the authorised officer'.¹⁵⁷⁹

7.210 Regarding these features, the submission stated that:

Taken together, these sections of legislation are provided in order to recognise the risks associated with family violence dynamics and to give police powers to recognise those risks.¹⁵⁸⁰

7.211 And that:

The police powers to arrest a person under section 212(2) of the *Crimes Act 1900* and the presumption against bail in section 9F of the *Bail Act 1992* are the foundation stones of the FVIP.¹⁵⁸¹

¹⁵⁷⁷ Victims of Crime Commissioner, Submission No.10, pp.7-8.

¹⁵⁷⁸ Victims of Crime Commissioner, Submission No.10, p.8.

¹⁵⁷⁹ Victims of Crime Commissioner, Submission No.10, p.8.

¹⁵⁸⁰ Victims of Crime Commissioner, Submission No.10, p.8.

¹⁵⁸¹ Victims of Crime Commissioner, Submission No.10, p.8.

CURRENT DEBATE ON PRESUMPTIONS FOR BAIL

7.212 The Commissioner's submission then went on to consider contemporary debate on presumptions for or against bail:

There have been discussions recently in the Territory in relation to the presumption against bail in the family violence context as a result of the Australian Law Reform Commission and NSW Law Reform Commission (the Commissions) report *Family Violence-A National Legal Response*. That report recommends that 'State and territory legislation should not contain presumptions against bail on the grounds only that an alleged crime occurred in a family violence context'.¹⁵⁸²

7.213 The submission observed that:

In attempting to strike the right balance between protecting victims and giving an accused the presumption of innocence, the Commissions view is that the balance is best struck by generally maintaining a presumption in favour of bail - but removing the presumption in favour of certain specific circumstances. The Commissions make no specific recommendation about what those circumstances should be, but that they would include for example, where an accused has been violent against the victim in the past - as is the case in NSW.¹⁵⁸³

7.214 The submission also noted that there was:

a presumption against the granting of bail where there is a history or threat of domestic violence in most jurisdictions. Presumptions in favour of bail are displaced in NSW for family violence offences and breach of protection orders in circumstances where the accused has a history of violence; has previously been violent to the victim of the alleged offence in the past; or has failed to comply with a protective bail condition. Presumptions in favour of bail are also displaced in similar circumstances in Victoria, the Northern Territory, Tasmania and South Australia.¹⁵⁸⁴

¹⁵⁸² Victims of Crime Commissioner, Submission No.10, p.8, citing *Australian Law Reform Commission, Family Violence -A National Legal Response*, Final Report, Volume 1, Recommendation 10-1, p.420, October 2010.

¹⁵⁸³ Victims of Crime Commissioner, Submission No.10, p.8, referencing *Family Violence -A National Response*. Final Report, Vol 1, p.419.

¹⁵⁸⁴ Victims of Crime Commissioner, Submission No.10, p.8, referencing *Australian Law Reform Commission, Family Violence -A National Legal Response*, Final Report, Volume 1, p.414.

PERFORMANCE OF LEGISLATIVE SETTINGS IN THE ACT TO DATE

7.215 With regard to the effectiveness of legislative settings for bail in circumstances of family violence, the Commissioner's submission noted that:

Risks to victims of domestic violence are heightened when police become involved in domestic disputes and perpetrators are arrested and charged. The existing threshold for bail in domestic violence cases in the ACT was deliberately set by the legislature to ensure as far as possible the safety of women and children who allege domestic violence and I would argue that the presumption against bail for family violence offences should remain.¹⁵⁸⁵

7.216 In addition, it suggested, arrangements in the ACT had resulted in a lower proportion of incidents which result in arrest and charges. He commented that in general 'police investigate allegations of criminal offences and take action, including arrest, based on evidence gathered in respect of the allegation'.¹⁵⁸⁶ However, under the FVIP:

it remains the case that the vast majority of family violence incidents attended by police do not result in an arrest and charge. In 2009-10, of the 4211 family violence incidents that were attended by police, only 20% (or 848) resulted in a person being apprehended for an offence.¹⁵⁸⁷

7.217 The submission put the view that 'an analysis of current data would reveal a lower percentage of arrest', and this indicated 'that police are exercising their discretion not to arrest in the vast majority of family violence cases they attend'.¹⁵⁸⁸

RESPONSES TO BREACH OF BAIL CONDITIONS

7.218 The Commissioner's submission also made comment about the outcome of breaches of bail conditions. At present, it suggested, there were:

times where an alleged offender breaches bail conditions (including what can be considered serious breaches), is brought before the court and the outcome often includes the granting of bail on similar or the same conditions as previously granted.¹⁵⁸⁹

7.219 Commenting on this the submission put the view that:

Bail should be considered an opportunity for an accused to demonstrate compliance with court orders. When the trust of the court is breached there should be

¹⁵⁸⁵ Victims of Crime Commissioner, Submission No.10, p.9.

¹⁵⁸⁶ Victims of Crime Commissioner, Submission No.10, p.9.

¹⁵⁸⁷ Victims of Crime Commissioner, Submission No.10, p.9.

¹⁵⁸⁸ Victims of Crime Commissioner, Submission No.10, pp.9-10.

¹⁵⁸⁹ Victims of Crime Commissioner, Submission No.10, p.10.

consequences for an accused. Bail conditions are there to protect the community and the court process, and victims have an expectation that a breach of bail will at least result in stricter conditions being put in place or a person's liberty will be denied them.¹⁵⁹⁰

HEARINGS

7.220 The Victims of Crime Commissioner made further comment regarding bail when he appeared before the Committee in hearings of 14 October 2014.

7.221 The Commissioner told the Committee that:

The ACT has a presumption against bail—what is termed a presumption against bail—for domestic violence offences. It means a police officer can respond to a domestic violence offence without turning their mind to whether a summons would suffice.¹⁵⁹¹

7.222 The Commissioner told the Committee something of the history behind the introduction of this measure:

The reason that provision was introduced was that the ACT in years gone by had a very poor response to domestic violence and people were not being taken into custody and families were being put at risk because of that. So in order to emphasise the risk and empower police to act decisively at the time of attending a domestic violence offence, they were given a special power to arrest a person who they believed on reasonable suspicion had committed a domestic violence offence or would commit one after they left.¹⁵⁹²

7.223 In practice, he told the Committee:

That presumption against bail works so that once people are taken into custody for domestic violence there is a very high threshold that police must be satisfied to meet in relation to the safety of victims before that person is released. On most occasions that results in the person remaining in custody until they go before a court.¹⁵⁹³

7.224 This, Commissioner, told the Committee, also had positive implications for the management of young offenders in that it provided, in the first instance, diversion from more formal custody arrangements:

¹⁵⁹⁰ Victims of Crime Commissioner, Submission No.10, p.10.

¹⁵⁹¹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

¹⁵⁹² Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

¹⁵⁹³ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

I must say that the bail option for young people, the after-hours bail service, is operating very effectively in that regard as well, because young people are being diverted from custody and being sent to a bail hostel rather than going into Bimberi.¹⁵⁹⁴

7.225 Overall, he acknowledged that presumptions against bail placed a certain reliance on the judgement of police, but told the Committee it was for the most part ‘being judiciously applied’ by ACT Policing’:

Some will give you some examples of people that may not have gone into custody, but these are subjective judgements that we must rely on our police to make, and I believe that in the vast majority of cases they are only taking people into custody who they believe should be there for their own safety and for the safety of others.¹⁵⁹⁵

ACT CHILDREN AND YOUNG PEOPLE COMMISSIONER

7.226 The ACT Children and Young People Commissioner’s submission, in its comments on bail, focused on arrangements and conditions for bail for young people.

7.227 The submission advised the Committee that in April 2013 the Commissioner had hosted a ‘Bail & Remand Roundtable’, the purpose of which was to ‘to identify ways the ACT youth justice system might improve outcomes for young people in contact with the youth justice system, particularly with respect to bail and remand’.¹⁵⁹⁶

7.228 This forum produced a number of ‘ideas for change’ which were grouped into ‘six broad themes’. These included:

- *Reduce reliance on court imposed bail:* which included a suggestion to increase ‘use of already existing supports and relationships ... to assist behaviour control and modification for young people in contact with the criminal justice (rather than court imposed bail);¹⁵⁹⁷
- *Reduce the number of young people arrested for breach of bail:* which included suggestions to give police greater ‘discretion to not arrest young people who they find in breach of their bail’, and to ‘un-arrest’ and ‘re-bail’ a young person;¹⁵⁹⁸
- *Improve the system post-arrest;* which included suggestions to introduce a Sunday court, have community youth workers on call, and develop ‘a greater range of accommodation options’ for young people;¹⁵⁹⁹

¹⁵⁹⁴ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

¹⁵⁹⁵ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

¹⁵⁹⁶ ACT Children and Young People Commissioner, Submission No.7, p.1.

¹⁵⁹⁷ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹⁵⁹⁸ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹⁵⁹⁹ ACT Children and Young People Commissioner, Submission No.7, p.2.

- *Better outcomes for young people*; which included suggestions to engage the community sector ‘as early as possible’ to provide ‘individualised support for young people in contact with the youth justice system’ and to undertake ‘early and more detailed assessments’ of young people post arrest;¹⁶⁰⁰
- *Possible legislative reform*: which included suggestions to reform the *Bail Act* ‘to more clearly articulate the best interests and needs of young people, and to ensure that there is consistency in the way that the *Bail Act* deals with young people’ and ‘to more clearly define the purpose and parameters of bail for young people’, and to allow police ‘to “not arrest”; “un-arrest”; and “re-bail” young people’;¹⁶⁰¹ and
- *Improve data collection and analysis*: which included suggestions to improve collection and analysis ‘across the system’ on young people ‘in contact with the justice system’.¹⁶⁰²

HEARINGS

7.229 The Commissioner for Children and Young People appeared in hearings of 26 May 2014 where he expanded on points raised in his submission.

7.230 In relation to whether current forms of bail were appropriate for young people, the Commissioner told the Committee that in the context of an earlier roundtable he had held on bail and young people:

one of the issues that [comes] up a lot in discussions of bail for young people is making bail relevant to young people and just moving away from the assumption that, simply by having a court tell a young person that you should do or not do something, a young person would follow those directions—and that is not in any way to underscore the authority of the court—but to look at the evidence which suggests that young people frequently respond better to community supports or from supports from the networks they already have, including agencies in the community.¹⁶⁰³

7.231 The Commissioner was asked whether there was further risk attached to suggestions, as were made in his submission, that police should have greater discretion over bail for young people.¹⁶⁰⁴

7.232 The Commissioner responded by saying:

The police may get it wrong; they may release a young person back into the community who then subsequently harms themselves or someone else or commits additional

¹⁶⁰⁰ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹⁶⁰¹ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹⁶⁰² ACT Children and Young People Commissioner, Submission No.7, p.3.

¹⁶⁰³ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.116.

¹⁶⁰⁴ *Transcript of Evidence*, 26 May 2014, p.118.

offences: absolutely. However, we are detaining a fair number of young people on an annual basis simply for breach of bail conditions. I am not just saying that it is something you enter into lightly; you need to do an evaluation of it.¹⁶⁰⁵

7.233 This evaluation, the Commissioner told the Committee, would be similar to that done in relation to after-hours bail support, and he commented that:

I would be interested to look at those young people who are, for example, found in Garema Place in the evening and are arrested by the police and go to the station. They find out that the young person has a youth worker, quite an active relationship with that youth worker, and they release the young person into the care of that youth worker. I would be interested to see whether the young person does not offend and over what period of time the young person subsequently complies with their bail conditions. Or did the young person the next day re-emerge back into the youth justice system for another offence? Some young people would; some young people would not.¹⁶⁰⁶

7.234 However, he told the Committee, exploration of this and similar alternatives was warranted because:

If you look at the data in the ACT—and the data actually is contained in the evaluation of the after-hours bail support which CSD did—in there it looked at use of bail over a period of six months. During that six-month period, there were 112 total remand episodes, of which 97 were police initiated. Forty-four of those were for breach of bail only, that is, a young person being detained by the police and remanded because of breach of bail only, with no additional offence. They were not caught doing something else. They were just caught for breaching the bail. So that is just under 50 per cent.¹⁶⁰⁷

7.235 He went on to say that:

Of those young people, 64 per cent were remanded. They went to court, they were released to their next court appearance, which is effectively a day or two later, with no additional bail conditions. So that is a fair number of young people being arrested, detained, remanded, back to court and back out again, with no additional conditions. So they were in exactly the same situation they were in the day before they were arrested.¹⁶⁰⁸

¹⁶⁰⁵ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.118.

¹⁶⁰⁶ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.118.

¹⁶⁰⁷ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.117.

¹⁶⁰⁸ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.117.

7.236 As a result of these conditions, he told the Committee, '[w]e were looking at ways to minimise that':

and the ways to do it include giving police the discretion not to arrest if they see a young person in the community who is in breach of a bail; to actually refer to those community supports we spoke about before; to allow police officers to unarrest if they have arrested a young person and taken them to the station and then found out that there are support services for those young people, and they can then unarrest them; and/or to re-bail those young people as well.¹⁶⁰⁹

7.237 This was, he told the Committee, an alternative to the present approach in which police:

detain and send a young person to Bimberi for a day or two, depending on when they have been arrested, on the weekend, and then have to go back to court and be re-bailed, the police themselves can re-bail, with the same conditions.¹⁶¹⁰

ATTORNEY-GENERAL

7.238 Responding to questions asked in the hearing of 2 May 2014, the Attorney-General told the Committee of the effect of changes to the *Bail Act 1992* in which had been made in 2011.

7.239 The Attorney-General told the Committee that:

one of the issues that we were previously facing in relation to bail in the ACT was the fact that the way our bail provisions were constructed in the Magistrates Court was such that the capacity for magistrates to refuse bail in the first instance was initially quite limited. There was really only one opportunity for that decision to be made in the Magistrates Court, and if the decision was unsatisfactory, you had to head straight across to the Supreme Court. It had become common practice that in the instances where magistrates refused bail, within hours the person involved and their legal representatives were off to the Supreme Court for review of that decision.¹⁶¹¹

7.240 The Attorney-General went on to tell the Committee that:

With the amendments the government made to the *Bail Act* in 2011, we made provision for there to be two applications for bail in the Magistrates Court. So the dynamic had evolved, when the magistrate, for example, refused bail, that the defence said, "That was an unreasonable decision because we didn't have sufficient time. They've just come out of the watch house. We didn't have sufficient time to have all the circumstances put before Your Honour. We're off to the Supreme Court for

¹⁶⁰⁹ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.117.

¹⁶¹⁰ Mr Alisdair Roy, *Transcript of Evidence*, 26 May 2014, p.117.

¹⁶¹¹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, pp.22-23.

review.” Now those matters can be dealt with on review in the Magistrates Court. So there are two opportunities for a decision on bail to be put before that magistrate.¹⁶¹²

7.241 The effect of these changes has been, he told the Committee, to :

greatly [reduce] the number of matters that end up in the Supreme Court but, at the same time, it has allowed defence counsel as well as the prosecution the time they need to get all the relevant factors before them to put to the magistrate to decide whether or not bail should be provided. That has seen a massive reduction in the controversy surrounding bail, grants of bail and also the associated issues with delay in the Supreme Court.¹⁶¹³

SUMMARY

7.242 The Committee notes arguments put to it regarding bail.

7.243 Arguments regarding presumptions against bail for certain offences included:

- that the ACT had ‘the highest proportion of remandees in detention at 34.7%, compared to a national average of 23.4%’,¹⁶¹⁴ and that this was ‘partly explained by the increasing number of presumptions against bail made through legislative amendments enacted before the *Human Rights Act* came into force on 1 July [2004]’.¹⁶¹⁵
- that this may have indicated ‘a conceptual shift of bail being a procedural issue relating to attendance at court to a crime prevention approach, being favoured over the presumption of innocence and general right to liberty’;¹⁶¹⁶
- that in 2013 the NSW government had passed a new *Bail Act* that had been made ‘simpler in its operation’ by ‘removing the offence-based presumptions scheme and focusing on risk management, with reasonable and proportionate bail conditions’, and that this ‘new model’ be considered in the ACT;¹⁶¹⁷
- that anomalies in arrangements for bail in the ACT’s statute book had been noted by ACT courts, particularly in relation to compliance with provisions of the *Human Rights Act 2004*,¹⁶¹⁸ and
- that ‘State and territory legislation should not contain presumptions against bail on the grounds only that an alleged crime occurred in a family violence context’.¹⁶¹⁹

¹⁶¹² Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.23.

¹⁶¹³ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.23.

¹⁶¹⁴ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

¹⁶¹⁵ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

¹⁶¹⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

¹⁶¹⁷ ACT Human Rights and Discrimination Commissioner, Submission No.8, pp.4-5.

¹⁶¹⁸ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.5, referring to (2010) 4 ACTLR 235.

7.244 Arguments over access to applications for bail included:

- that 'current procedures under the *Bail Act* for applying for bail in the ACT is unduly complex and ultimately may operate as a deterrent to remandees applying for bail';¹⁶²⁰ and
- that 'any person remanded in custody ought to have the entitlement to make one application for bail in the Supreme Court', and if 'that application were unsuccessful, then the applicant would then need to show special or exceptional circumstances before being able to make a second application for bail in the Supreme Court'.¹⁶²¹

7.245 Arguments made in relation to the presumption against bail in domestic violence cases:

- that the ACT should retain 'the presumption against bail as it relates to domestic violence offences in the *Bail Act 1992*';¹⁶²²
- that 'police powers to arrest a person under section 212(2) of the *Crimes Act 1900* and the presumption against bail in section 9F of the *Bail Act 1992* are the foundation stones of the FVIP [Family Violence Intervention Program]';¹⁶²³
- that there was 'a presumption against the granting of bail where there is a history or threat of domestic violence in most jurisdictions';¹⁶²⁴
- that the 'existing threshold for bail in domestic violence cases in the ACT was deliberately set by the legislature to ensure as far as possible the safety of women and children who allege domestic violence' 'the presumption against bail for family violence offences should remain';¹⁶²⁵
- that in the ACT the 'vast majority of family violence incidents attended by police do not result in an arrest and charge. In 2009-10, of the 4211 family violence incidents that were attended by police, only 20% (or 848) resulted in a person being apprehended for an offence';¹⁶²⁶
- that the 'reason that provision was introduced was that the ACT in years gone by had a very poor response to domestic violence and people were not being taken into custody and families were being put at risk because of that', and so 'in order to emphasise the risk and empower police to act decisively at the time of attending a domestic violence offence,

¹⁶¹⁹ Legal Aid ACT, Submission No.14, p.7.

¹⁶²⁰ Legal Aid ACT, Submission No.14, p.8.

¹⁶²¹ Legal Aid ACT, Submission No.14, p.8.

¹⁶²² Victims of Crime Commissioner, Submission No.10, p.3.

¹⁶²³ Victims of Crime Commissioner, Submission No.10, p.8.

¹⁶²⁴ Victims of Crime Commissioner, Submission No.10, p.8, referencing Australian Law Reform Commission, *Family Violence -A National Legal Response*, Final Report, Volume 1, p.414.

¹⁶²⁵ Victims of Crime Commissioner, Submission No.10, p.9.

¹⁶²⁶ Victims of Crime Commissioner, Submission No.10, p.9.

[police] were given a special power to arrest a person who they believed on reasonable suspicion had committed a domestic violence offence or would commit one after they left',¹⁶²⁷ and

- that the present 'presumption against bail works so that once people are taken into custody for domestic violence there is a very high threshold that police must be satisfied to meet in relation to the safety of victims before that person is released', and on 'most occasions that results in the person remaining in custody until they go before a court'.¹⁶²⁸

7.246 Other arguments relating to the efficiency and effectiveness of arrangements for bail in the ACT included:

- that there were 'times where an alleged offender breaches bail conditions (including what can be considered serious breaches), is brought before the court and the outcome often includes the granting of bail on similar or the same conditions as previously granted';¹⁶²⁹
- that 'the after-hours bail service, is operating very effectively in that regard as well, because young people are being diverted from custody and being sent to a bail hostel rather than going into Bimberi';¹⁶³⁰
- that a number of options for reform of bail arrangements for young people had been discussed in public fora hosted by the Children and Young People Commissioner;¹⁶³¹ and
- that access to applications for bail through the ACT Magistrates' and Supreme Courts had been changed by legislative amendment in 2011, and that this had led to improvements in the use of the courts' time.¹⁶³²

COMMITTEE COMMENT

7.247 The Committee considers that there are key imperatives in tension in relation to bail.

7.248 On one hand, the Committee considers that there are powerful arguments in favour of reforming bail in the ACT, in view of:

- the high proportion and number of prisoners on remand in the ACT prison population;¹⁶³³
- reports of unduly complex and restrictive arrangements which have the effect of reducing access to bail;¹⁶³⁴ and

¹⁶²⁷ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

¹⁶²⁸ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

¹⁶²⁹ Victims of Crime Commissioner, Submission No.10, p.10.

¹⁶³⁰ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.173.

¹⁶³¹ ACT Children and Young People Commissioner, Submission No.7, p.2.

¹⁶³² Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.23.

¹⁶³³ ACTCOSS, Submission No.6, p.8, citing Australian Bureau of Statistics, 4517.0- *Prisoners in Australia*, 2012.

¹⁶³⁴ Legal Aid ACT, Submission No.14, p.8.

- a series of offence-specific presumptions on bail having been written into statute.¹⁶³⁵

7.249 In the Committee's view, these factors add weight to the proposition that there should be a review and reform of bail in the ACT, along the lines of similar processes undertaken in NSW.¹⁶³⁶

7.250 In the Committee's view, factors in favour of this approach include:

- the high population of prisoners on remand increases offenders' exposure to custodial settings, and this would seem to be a risk factor for further offending;
- the high population of prisoners on remand obliges Corrective Services to place them with sentenced prisoners in the AMC, and this contravenes international conventions to which Australia is signatory and with which, by report, all other jurisdictions comply.¹⁶³⁷
- to the extent that there are, in fact, undue barriers to access to bail, this will add to upward pressure on numbers of prisoners on remand; and
- that the current legislative regime of individual presumptions against bail depending on the offence derogates from the imperative of maintaining judicial discretion, which would be better served by 'removing the offence-based presumptions scheme and focusing on risk management, with reasonable and proportionate bail conditions' as described in NSW.¹⁶³⁸

7.251 On the other hand, there are also strong arguments in favour of one particular instance of offence-specific presumptions against bail — in connection with the Family Violence Intervention Program (FVIP) and its legislative underpinnings—which appear to deliver important benefits in the safety of women and children.¹⁶³⁹

7.252 In considering this the Committee is mindful that key to the present strength of the FVIP, as reported, is that it provides for discretion to be exercised by police and that this enables protection to be extended to victims in a more immediate way, potentially, than if such matters were referred to a court.

7.253 These are difficult matters on which to deliberate. The Committee takes the view, however, that if more flexible sentencing arrangements are put in place as a result of the recommended introduction of intensive corrections orders, it is highly appropriate that arrangements for bail be reviewed and amended so as to provide consistency across the criminal justice system. In

¹⁶³⁵ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.4.

¹⁶³⁶ ACT Human Rights and Discrimination Commissioner, Submission No.8, pp.4-5.

¹⁶³⁷ Dr Lorana Bartels, Submission No.1, p.8, citing David Biles, 'No Escaping Problems at Jail', *Canberra Times*, 8 February 2013.

¹⁶³⁸ ACT Human Rights and Discrimination Commissioner, Submission No.8, pp.4-5.

¹⁶³⁹ Victims of Crime Commissioner, Submission No.10, p.9.

such review and amendment, there will of course need to be due care given to maintaining the benefits of the FVIP, albeit expressed in a form that will necessarily be different to the particular of current arrangements.

7.254 With this in mind the Committee makes the following recommendations.

Recommendation 43

7.255 The Committee recommends that the ACT Government conduct a review of arrangements for bail in the ACT and introduce in the Legislative Assembly legislative amendments to the *Bail Act 1992* which, if passed, would introduce a focus on risk management, with reasonable and proportionate bail conditions.

Recommendation 44

7.256 The Committee recommends that the ACT Government, as part of proposed amendments to the *Bail Act 1992* to be introduced in the Legislative Assembly, continue to provide legislative foundations for the ACT Family Violence Intervention Program (FVIP).

REMAND

7.257 The *Encyclopaedic Australian Legal Dictionary* provides a definition of ‘to remand’ as to:

stand a matter over until a future date and as a consequence return the accused to custody or to continue bail.¹⁶⁴⁰

7.258 A number of submissions to the inquiry, already considered above, expressed concern at the use of remand in the ACT, including:

- the ACT Bar Association;¹⁶⁴¹
- the ACT Law Society;¹⁶⁴² and
- ATODA.¹⁶⁴³

¹⁶⁴⁰ LexisNexis, *Encyclopaedic Australian Legal Dictionary* (as at 18 September 2014), ‘Remand’.

¹⁶⁴¹ ACT Bar Association, Submission No.11, pp.2-3.

¹⁶⁴² ACT Law Society, Submission No.13, p.6.

¹⁶⁴³ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.4.

7.259 These submissions expressed concern at:

- high numbers of prisoners on remand as against sentenced prisoners in the ACT prison population; and
- reduced access to therapeutic programs for prisoners on remand.

7.260 These matters are considered below.

ACTCOSS

7.261 These concerns were addressed in ACTCOSS' submission to the inquiry.

7.262 First, the submission considered the prevalence of remandees in the prison population:

Although the ACT has recorded a decrease in the proportion of its prisoner population on remand since 30 June 2011 (by 11 percentage points), as at 30 June 2012, the ACT has the second highest median number of months spent on remand by un-sentenced prisoners in custody. In addition, percentage-wise, the ACT had the highest number of people on remand for between 6-12 months, at 20.9 per cent.¹⁶⁴⁴

7.263 'This', the submission suggested, 'may be linked with the delays in handing down decisions and sentences' experienced in the ACT.¹⁶⁴⁵

7.264 Second, with regard to access to programs, the submission suggested that:

Consultations reveal that there are numerous challenges for access to programs and services faced by remandees in the AMC. For example, male remandees are unable to access the Solaris Therapeutic Community program (a voluntary program for male detainees who have alcohol and other drug dependencies), though they can access an AOD counsellor if they request one. Consultations with individuals who have been male remandees also note a lack of access to basic services such as the library and phones while they were on remand.¹⁶⁴⁶

7.265 A further dimension to this lay in lack of access to Throughcare:

men on remand do not have access to the Throughcare initiative (although female remandees do), which can reduce their access to support services in the community once they are released.¹⁶⁴⁷

¹⁶⁴⁴ ACTCOSS, Submission No.6, p.8, citing Australian Bureau of Statistics, *4517.0 Prisoners in Australia*, 2012.

¹⁶⁴⁵ ACTCOSS, Submission No.6, p.8.

¹⁶⁴⁶ ACTCOSS, Submission No.6, p.9.

¹⁶⁴⁷ ACTCOSS, Submission No.6, p.9.

7.266 This was a concern because:

Appropriate support to access mainstream social services in the first few months after release from gaol can significantly reduce re-offending, and increase the opportunity to get and keep a job.¹⁶⁴⁸

7.267 In view of this, the submission recommended that there be:

particular attention ... into the ways in which current sentencing practices in the ACT impact on people on remand both during after release from remand.¹⁶⁴⁹

DR LORANA BARTELS

7.268 Dr Lorana Bartels' submission to the inquiry noted that, as at March 2013, '33 per cent of ACT offenders in full-time custody were on remand' and that, by way of comparison, 'the national rate was 24 per cent'.¹⁶⁵⁰

7.269 In addition, the submission expressed concern at a 'particular issue noted by highly regarded criminologist David Biles', that 'female remandees and sentenced prisoners are housed together at the AMC'. It noted that 'Biles suggests that this is in breach of international human rights conventions requiring untried prisoners to be kept separate from convicted prisoners' and his view that '[t]he ACT must be unique in Australia in its disregard for this rule'.¹⁶⁵¹

SUMMARY

7.270 The Committee notes arguments put to it regarding remand.

7.271 Arguments included:

- that although there had been some moderation of numbers of prisoners on remand in the ACT, they remained high;¹⁶⁵²
- that prisoners on remand faced limitations on access to programs and services—including basic services—at the AMC;¹⁶⁵³
- that men on remand did not have access to the Throughcare program, and that this could influence the likelihood of re-offending;¹⁶⁵⁴ and

¹⁶⁴⁸ ACTCOSS, Submission No.6, p.9.

¹⁶⁴⁹ ACTCOSS, Submission No.6, p.9.

¹⁶⁵⁰ Dr Lorana Bartels, *Submission* No.1, p.8, citing Australian Bureau of Statistics, 'Corrective Services, Australia' (Cat 4512.0, March Quarter, 2013).

¹⁶⁵¹ Dr Lorana Bartels, Submission No.1, p.8, citing David Biles, 'No Escaping Problems at Jail', *Canberra Times*, 8 February 2013.

¹⁶⁵² ACTCOSS, Submission No.6, p.8, citing Australian Bureau of Statistics, 4517.0 *Prisoners in Australia*, 2012.

¹⁶⁵³ ACTCOSS, Submission No.6, p.9.

- that ‘female remandees and sentenced prisoners are housed together at the AMC’, that this has been noted as a breach of international human rights conventions;¹⁶⁵⁵ and
- that the ACT is the only jurisdiction which disregards this rule.¹⁶⁵⁶

COMMITTEE COMMENT

7.272 The Committee notes that bail and remand are closely related matters. For this reason some matters raised in connection with remand have are addressed in the previous section on bail.

7.273 In particular, as the Committee noted above, a more accessible and consistent bail regime would, and other measures recommended in other parts of this report would, if put in place in the ACT, place downward pressure on numbers of prisoners in remand.

7.274 To some extent this would also have implications for the question of access to programs by prisoners on remand: fewer prisoners on remand would lead to less demand for programs and services by unsentenced prisoners.

7.275 However in the Committee’s view this begs the question as to whether accused persons on bail, or on remand, should be excluded from programs and services. The Committee considers that it would in fact be better for accused persons to be able access programs, on a voluntary basis, where they intend to plead guilty. By doing that they would not only begin the process of rehabilitation in a more timely fashion, but also in order demonstrate remorse that could be taken into account by any court called upon to consider guilty or pass sentence.

7.276 With this in mind the Committee makes the following recommendation.

Recommendation 45

7.277 The Committee recommends that services and programs available to sentenced prisoners be made available to accused persons on bail and prisoners on remand on a voluntary basis.

¹⁶⁵⁴ ACTCOSS, Submission No.6, p.9.

¹⁶⁵⁵ Dr Lorana Bartels, Submission No.1, p.8, citing David Biles, ‘No Escaping Problems at Jail’, *Canberra Times*, 8 February 2013.

¹⁶⁵⁶ Dr Lorana Bartels, Submission No.1, p.8, citing David Biles, ‘No Escaping Problems at Jail’, *Canberra Times*, 8 February 2013.

8 ALTERNATIVE APPROACHES

INTRODUCTION

- 8.1 Submissions to the inquiry made comment on alternative approaches to sentencing practice.
- 8.2 These included the following initiatives in the ACT:
- restorative justice;
 - circle sentencing;
 - ‘justice reinvestment’;
 - alternate forms of community orders; and
 - the Ngunnawal Bush Healing Farm.
- 8.3 These are considered below.

RESTORATIVE JUSTICE

INTRODUCTION

- 8.4 A number of contributors made comment on restorative justice, including:
- the ACT Government;
 - the ACT Bar Association;
 - Legal Aid ACT;
 - the ACT Victims of Crime Commissioner; and
 - Mr Matt Casey, and Mr Terry O’Connell of Real Justice Australia.
- 8.5 These are considered below, as are comments on restorative justice taken from Bagaric and Edney’s standard legal text *Sentencing in Australia* (2011).¹⁶⁵⁷

DEFINITIONS

- 8.6 Contributions to the inquiry noted a range of definitions for restorative justice, and some sources see definitions as contentious and problematic.

¹⁶⁵⁷ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters.

8.7 The *Macquarie Dictionary* defines 'restorative justice' as:

a form of justice which focuses on sanctions designed to encourage the offender to make amends as much as is possible to the victim through programs such as community service, victim involvement, mediation and restitution.¹⁶⁵⁸

8.8 Bagaric and Edney consider definitions of restorative justice in *Sentencing in Australia* (2011). They state that '[a]t sentencing stage, there is no universally agreed definition regarding what is entailed through restorative justice programs',¹⁶⁵⁹ but that restorative justice can include:

- 'diversion from court prosecution (i.e. to a separate process for determining justice);
- actions taken in parallel with court decisions (e.g. referral to health, education and employment assessment, etc.); and
- meetings between victims and offenders at any stage of the criminal process (e.g. arrest, pre-sentence and prison release)'.¹⁶⁶⁰

8.9 They note that restorative theories of criminal justice 'represent an increasingly popular alternative to traditional methods of punishment',¹⁶⁶¹ and that views in favour of restorative justice consider that 'the emphasis of the sentencing system should not be on punishment, but rather on goals such as compensation, reconciliation and integration'.¹⁶⁶²

8.10 *Sentencing in Australia* describes the perceived advantages of theories of restorative justice as being that 'they allow victims of crime a far more central role at the sentencing stage', and that 'such theories provide a more effective means of integrating the offender back into the community'.¹⁶⁶³

8.11 It also notes that:

Some restorative theories view crime as a conflict between the victim and offender and urge that we should resolve this conflict as a step toward reintegrating the offender into the community.¹⁶⁶⁴

¹⁶⁵⁸ *Macquarie Dictionary & Thesaurus Online*, 6th ed. (viewed 18 September 2014), 'restorative justice'.

¹⁶⁵⁹ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁶⁶⁰ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12, citing Australian Institute of Criminology, *Restorative Justice as a Crime Prevention Measure* (Paper No 20, 2004).

¹⁶⁶¹ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁶⁶² Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁶⁶³ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁶⁶⁴ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

THE ACT RESTORATIVE JUSTICE SCHEME

8.12 The Committee considered different aspects of the ACT restorative justice scheme.

8.13 This included:

- the legislative framework for the scheme, as set out in the *Crimes (Restorative Justice) Act 2004*;
- an initial description of the scheme; and
- a more detailed description of the scheme's operation.

8.14 These are considered below.

LEGISLATIVE FRAMEWORK

8.15 Much of the legislative framework for restorative justice in the ACT is provided by the *Crimes (Restorative Justice) Act 2004*.

8.16 Section 6 sets out the Objects of the Act, which are:

- (a) to enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences;
- (b) to set up a system of restorative justice that brings together victims, offenders and their personal supporters in a carefully managed, safe environment;
- (c) to ensure that the interests of victims of offences are given high priority in the administration of restorative justice under this Act;
- (d) to enable access to restorative justice at every stage of the criminal justice process without substituting for the criminal justice system or changing the normal process of criminal justice;
- (e) to enable agencies that have a role in the criminal justice system to refer offences for restorative justice.¹⁶⁶⁵

8.17 Other sections of the Act set out:

- in s 8, requirements for the availability of restorative justice;
- in s 9, the stipulation that there is 'no obligation on a victim, a parent of a child victim or an offender' to take part or continue to take part in restorative justice;

¹⁶⁶⁵ Section 6, *Crimes (Restorative Justice) Act 2004*, cited in Legal Aid ACT, Submission No.14, pp.10-11.

- in s 14, that the Act ‘applies to a less serious offence committed by a young offender’ (ss (1)) and that the Act ‘does not apply to a domestic violence offence, or a less serious sexual offence, before the ‘phase 2 application day’ (ss (3));
- in s 15, that the Act ‘applies to a less serious offence committed by an adult offender’ (ss (1)), although not before the advent of ‘phase 2 application day’ (ss (4));
- in sections 17, 18 and 19, setting out conditions for eligibility of victims, parents and offenders for participation in restorative justice;
- in Part 6, setting out a framework for referrals to restorative justice, including s 22, ‘Referring entities’; s 23 ‘Referral—procedure’; and s 24 ‘Referral power’; s 25, requiring that restorative justice be explained to the offender; procedure which applies in connection with referral by the DPP (s 26) and by courts (s 27); and in s 28 providing that the director-general must provide written reports on the outcome of restorative justice where the court is the referring entity;
- in Part 7, setting out criteria of ‘Suitability for restorative justice’, how suitability may be determined, and by whom;
- in Part 8, setting out a framework for ‘Restorative justice conferences and agreements’, including the appointment (s 40) and role (s 41) of convenors in restorative justice conferences; in Division 8.3, the conduct of restorative justice conferences; in Division 8.4, providing for restorative justice agreements; in Division 8.5, providing for monitoring of restorative justice agreements; and
- in Parts 9 and 10, setting out various aspects of the administration of restorative justice and ‘miscellaneous’ matters, respectively.

INITIAL DESCRIPTION

8.18 Contributors to the inquiry provided descriptions of the ACT restorative justice scheme.

8.19 These included:

- the ACT Government;
- the Victims of Crime Commissioner; and
- Legal Aid ACT.

8.20 These are considered below.

ACT GOVERNMENT

8.21 The Attorney-General and his officers made comment on restorative justice when they appeared before the Committee in hearings of 2 May 2014.

8.22 The Attorney-General described the scope of the present restorative justice scheme as follows:

currently the *Crimes (Restorative Justice) Act* allows for young people aged between 10 and 17 years to be referred to restorative justice for less serious offences—that is,

property offences punishable by imprisonment for 14 years or less and non-property offences punishable by imprisonment for 10 years or less.¹⁶⁶⁶

- 8.23 When the Committee asked whether consideration had been given to extending restorative justice, including in this instance cases of domestic violence, the Attorney-General responded, noting that:

At the moment those types of crimes generally are not part of the RJ process. Domestic violence and sexual crimes, particularly sexual crimes which overwhelmingly are against women but not exclusively, are not part of the RJ process. The reason for that is that they bring to bear a whole range of issues. I am reminded that RJ in the ACT is limited only to juvenile offenders and not to adults.¹⁶⁶⁷

- 8.24 He went on to say that this limitation on restorative justice stemmed from the fact that:

With sexual assault and domestic violence there are issues around power and abuse of power in a relationship. Often the concern has been, legitimately, particularly from those groups that support victims, that placing victims back into the presence of the offender only reignites that very unbalanced and abusive power relationship between the two.¹⁶⁶⁸

- 8.25 However, he told the Committee, ‘the research actually highlights that crimes of violence, including domestic violence, sexual assault and related matters, are highly conducive to RJ’, so long as there were ‘effective and appropriate safeguards’ attached.¹⁶⁶⁹

VICTIMS OF CRIME COMMISSIONER: UNIQUE CHARACTER OF THE SCHEME

- 8.26 When he appeared in hearings of 14 October 2014 the Commissioner told the Committee that the ACT restorative justice scheme was unique ‘in Australia, if not the world, in that it has victims at its heart’:

The objects of the *Crimes (Restorative Justice) Act* address the needs of victims of crime. It points out that restorative justice is a process for victims and, more or less as a by-product of giving victims’ interests pre-eminence, offenders’ interests have to be given the same amount of weight in order to attract them to the scheme.¹⁶⁷⁰

- 8.27 He told the Committee that the ACT scheme was also distinctive ‘in that it has the potential for all offence types to be referred to restorative justice at any stage of the criminal justice

¹⁶⁶⁶ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.2.

¹⁶⁶⁷ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.21.

¹⁶⁶⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.21.

¹⁶⁶⁹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, pp.21-22.

¹⁶⁷⁰ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

system', and was distinctive in that it was not just 'a diversionary scheme', but was 'designed to be a diversionary scheme and an adjunct to our criminal justice system'.¹⁶⁷¹

8.28 The Commissioner went on to note that '[o]nly the most serious of offences can be referred later in the prosecution'.¹⁶⁷² He told the Committee that he considered this:

a mechanism that the courts could use to inform themselves around the details of the offence, the extent of someone's true remorse and how victims feel about what has happened to them.¹⁶⁷³

8.29 However this was one of 'a number of unique elements to our restorative justice scheme which we are not capitalising on'.¹⁶⁷⁴ He told the Committee he found this 'frustrating'.¹⁶⁷⁵

LEGAL AID ACT: COMPARISON WITH SCHEMES IN OTHER JURISDICTIONS

8.30 Legal Aid's submission to the inquiry sought to place the ACT scheme in context by considering comparable schemes in other jurisdictions.

8.31 The submission advised the Committee that:

The restorative justice process is similar to that which has been employed in circle sentencing courts for Aboriginal offenders in NSW and the ACT for a number of years. However so far as we are aware only in New South Wales and Queensland has restorative justice been extended to adult offenders.¹⁶⁷⁶

8.32 It then moved to consider the two schemes in operation for adult offenders.

8.33 The first of these was 'forum sentencing' in NSW. The submission described this as follows:

Forum sentencing is available to adult offenders appearing in the Local Court subject to selection criteria. They need to be at risk of a custodial sentence. 'Crimes are dealt with in community conference rather than in Court'.

Criteria for eligibility of offenders include being aged between 18 and 24 years, if an offender has admitted their crime, been found guilty, facing the likelihood of a prison sentence, showing a willingness to participate and not being charged with any offences

¹⁶⁷¹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁶⁷² Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁶⁷³ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁶⁷⁴ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁶⁷⁵ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁶⁷⁶ Legal Aid ACT, Submission No.14, p.9.

that automatically exclude them from participation in the program. Currently, forum sentencing operates in 13 locations servicing a total of 52 Local Courts.¹⁶⁷⁷

8.34 The submission then provided further detail on forum sentencing:

Forum sentencing brings together the offender, their victim(s) and any other people affected by a crime at a 'forum.' The offender talks about what happened; the victim and others discuss the impact of the crime and everyone contributes to creating a plan to try to repair the harm. The intervention may include some or all of the following:

- A verbal or written apology
- Voluntary work
- Alcohol/drug treatment program
- Compensation
- Educational programs
- Counselling
- Driver education
- Anything else the group feels is appropriate.¹⁶⁷⁸

8.35 The second scheme described by the submission was 'justice mediation' in Queensland under which, the submission advised:

The offender may be referred to justice mediation by either the court, police, [or] the prosecutor. The offenders legal representative may also suggest justice mediation however if the court and the prosecutor will need to agree before a case will be referred to justice mediation. Participation in justice mediation is voluntary.¹⁶⁷⁹

8.36 The submission noted that justice mediation could 'take place at any stage of the criminal justice process', but that it usually occurred 'before a court hearing or before the sentencing process has commenced'.¹⁶⁸⁰

8.37 The usual approach, if justice mediation were to be employed, was described as follows:

If a case is referred it will generally be adjourned for 3 months to allow the mediation to take place. The mediation takes place at a justice mediation centre with a trained mediator to speak with the parties. Should the parties complete justice mediation (and the matter is currently before the Magistrates Court) normally the prosecution will offer no evidence to the charge and the charge will be dismissed. In some

¹⁶⁷⁷ Legal Aid ACT, Submission No.14, p.9.

¹⁶⁷⁸ Legal Aid ACT, Submission No.14, pp.9-10.

¹⁶⁷⁹ Legal Aid ACT, Submission No.14, p.10.

¹⁶⁸⁰ Legal Aid ACT, Submission No.14, p.10.

circumstances the prosecution will remain on foot and the completion of Justice Mediation will be taken into account at sentencing.¹⁶⁸¹

- 8.38 The submission advised that justice mediation was ‘available in relation to matters ordinarily heard by the Magistrates Court’ such as ‘stealing, assault, wilful damage and unlawful use of a motor vehicle’, however it could ‘also be used for more serious offences if both parties agree and the matter is assessed as suitable’.¹⁶⁸²

OPERATION OF THE ACT RESTORATIVE JUSTICE SCHEME

- 8.39 The Committee considered the operation of the ACT restorative justice scheme in further detail. Contributors included to this discussion, considered below, included the Attorney-General and his officers.

ACT GOVERNMENT

- 8.40 When asked by the Committee for a description of measures arising from a restorative justice process, the Acting Director-General of the Justice and Community Safety Directorate emphasised the flexibility of the process.¹⁶⁸³

- 8.41 She told the Committee that while there was ‘no firm set of ideas’ about what measures might be taken under the scheme, but:

Obviously, from experience, those who have been involved in running the program for some time are aware of some of the things that tend to work.¹⁶⁸⁴

- 8.42 The Acting Director-General told the Committee that ‘[w]e have certainly had a whole range of different outcomes’, and went on to provide an example ‘of a particular case where there was some vandalism at some of the local picnic areas along the Cotter’,¹⁶⁸⁵ where:

One of the outcomes of the restorative justice process was that they actually worked with the TAMS parks people. Those parks people were actually part of the restorative justice process. One of the outcomes was that for a certain number of weekends they went out and helped to rebuild some of the facilities in those picnic areas.¹⁶⁸⁶

¹⁶⁸¹ Legal Aid ACT, Submission No.14, p.10.

¹⁶⁸² Legal Aid ACT, Submission No.14, p.10.

¹⁶⁸³ Ms Alison Playford, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁶⁸⁴ Ms Alison Playford, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁶⁸⁵ Ms Alison Playford, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁶⁸⁶ Ms Alison Playford, *Transcript of Evidence*, 2 May 2014, p.20.

8.43 She told the Committee that approach this had produced ‘a very positive outcome for all who were involved in that particular case’.¹⁶⁸⁷

8.44 The Attorney-General also commented, on this, saying that restorative justice was ‘victim and offender driven’, and that under restorative justice ‘victim and the offender ... together agree on what is a reasonable act or series of things to be done for restitution’.¹⁶⁸⁸

8.45 He went on to say that:

[that] same case ... also involved ... the offenders making a donation to a number of community-based groups who are involved in nature conservation in that area.¹⁶⁸⁹

8.46 This, he said, had been identified through the restorative justice process.¹⁶⁹⁰

8.47 The Attorney-General went on to state that the process was ‘very much fit for purpose’ and that choice of response was based on guidance from the Restorative Justice Unit. ‘Ultimately’, however, he told the Committee, each restorative justice process was based on ‘an agreement between the victims and the offenders’.¹⁶⁹¹

CONSENT AND RESTORATIVE JUSTICE

8.48 The Acting Director-General noted the reliance of the restorative justice process on the consent of the victim, and the importance of the victim in the process:

The way the process works is that the victim would generally be present and part of that process. It relies on the victim agreeing to be part of that process. One of the things around that volunteering is the supports put around the victim in terms of coming to that decision about how they will participate and how that would operate in terms of how the conference is run.¹⁶⁹²

8.49 To support this, she told the Committee:

A lot of pre-work goes on with both the victim and the offender before they are put in the same room to have a conference. There is a lot of work. There can be a lot of individual conferencing.¹⁶⁹³

¹⁶⁸⁷ Ms Alison Playford, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁶⁸⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁶⁸⁹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁶⁹⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁶⁹¹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁶⁹² Ms Playford, *Transcript of Evidence*, 2 May 2014, p.21.

¹⁶⁹³ Ms Playford, *Transcript of Evidence*, 2 May 2014, p.21.

8.50 The Attorney-General added to this, saying that:

You cannot compel people into RJ; you can strongly encourage them. RJ does not work through compulsion.¹⁶⁹⁴

8.51 However, he told the Committee:

you can set some incentives for people to become engaged, particularly the offender—that is, “You can go through RJ or we’ll see you back here in the Supreme Court for sentencing in six weeks.” So there are ways of doing that.¹⁶⁹⁵

COMMITTEE OBSERVATION OF RESTORATIVE JUSTICE CONFERENCES

8.52 In hearings of 2 May 2014 the Attorney-General offered to ‘facilitate’ an opportunity for members of the Committee to observe a restorative justice conference.¹⁶⁹⁶

8.53 In response to the Attorney-General’s invitation, members of the Committee observed restorative justice conferences on 1 and 3 July 2014.¹⁶⁹⁷

EFFECTIVENESS OF SCHEME

8.54 The Committee considered the effectiveness of the scheme.

8.55 Contributors to this discussion included:

- the Victims of Crime Commissioner;
- Legal Aid ACT; and
- ACT Government, commenting in particular on research on restorative justice conducted at the ANU.

8.56 These are considered below.

VICTIMS OF CRIME COMMISSIONER

8.57 Regarding the effectiveness of the scheme to date, the submission by the Victims of Crime Commissioner stated that:

The *Crimes (Restorative Justice) Act 2004* has been in operation for seven years. Restorative justice provides victims of crime with a rare opportunity to participate directly in a justice process. They can have their say, get answers to their questions, see

¹⁶⁹⁴ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.9.

¹⁶⁹⁵ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.9.

¹⁶⁹⁶ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.21.

¹⁶⁹⁷ Mrs Jones MLA observed on 1 July 2014 and Ms Berry MLA observed on 3 July 2014.

someone take responsibility for harming them and participate in settling the incident by way of an agreement with the person who harmed them.¹⁶⁹⁸

8.58 The submission made comment on the size and scope of the scheme, stating that the ACT Restorative Justice Unit had ‘convened nearly 1,000 conferences between victims of crime and young people who are responsible for crime’.¹⁶⁹⁹

8.59 The submission went on to speak about the reported experience of individuals taking part in restorative justice:

Over 1,500 participants (victims, young offenders and supporters) have been surveyed and the results tell us that all parties are very satisfied with their experience of restorative justice. Victims report a decrease in levels of anger, fear and anxiety following their participation in a restorative justice conference with the person who has harmed them.¹⁷⁰⁰

8.60 It also stated that:

Young offenders and their supporters report high levels of satisfaction with the process. Young people participate in restorative justice form agreements with their victims to do something to help repair the harm they have caused.¹⁷⁰¹

8.61 With regard to compliance, the submission advised that the ‘overall compliance rate’ for restorative justice agreements was 90% and that this ‘high compliance rate [was] contributing to high levels of satisfaction by all parties with their restorative justice experience’.¹⁷⁰²

8.62 When he appeared in hearings of 14 October 2014, the Commissioner expanded on these comments. He told the Committee that the research literature showed that:

when a person who commits a serious offence comes into face-to-face contact with their victim, there is a change in them about how they perceive themselves and their responsibility, and a deeper awareness of the harm that is done and a deeper motivation to address their offending behaviour.¹⁷⁰³

8.63 Moreover, he told the Committee:

I know that the relationships that are damaged by crime are important to be mended from an offender’s point of view. They want to have the respect of people and regain

¹⁶⁹⁸ Victims of Crime Commissioner, Submission No.10, p.10.

¹⁶⁹⁹ Victims of Crime Commissioner, Submission No.10, p.10.

¹⁷⁰⁰ Victims of Crime Commissioner, Submission No.10, p.10.

¹⁷⁰¹ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁷⁰² Victims of Crime Commissioner, Submission No.10, p.11.

¹⁷⁰³ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.170.

their trust and confidence. That is a motivating factor for people who have been charged with offences. Restorative justice can help build back that trust and confidence that people have with their loved ones after committing crime. I think there are a lot of benefits for offenders ... I know that, having worked in restorative justice for five years, young people feel a lot better about themselves when they take the step—the courageous step at times—to sit in front of their victim, their victim’s supporters and their own loved ones and take responsibility. That is a tough thing for anyone to do. But they come out feeling a lot better about themselves.¹⁷⁰⁴

- 8.64 However, he told the Committee, he did not think that ‘restorative justice, though, as a stand-alone intervention [was] enough’:

It needs to be married in to consequential case management. I think that a restorative justice process can inform the development of a case management plan that provides more ongoing support and intervention and also opens up avenues for access to offender programs.¹⁷⁰⁵

LEGAL AID ACT

- 8.65 The submission to the inquiry by Legal Aid ACT put forward a view on the effectiveness of restorative justice:

There has been growing realisation that often a victim's ‘voice’ is lost in criminal proceedings.

However, through the use of Restorative Justice, victims can be given an opportunity to express their emotions; acquire answers and information; and feel the sense of closure, recovery and safety.

Arguably, this can dramatically aid in the healing process for the victims, possibly diminishing any resentment or anger that they may feel as a result of the crime. This could be of great value when attempting to restore and maintain community ties, especially in Aboriginal and Indigenous communities.¹⁷⁰⁶

- 8.66 Legal Aid ACT also made comment on the effectiveness of restorative justice, for victims and offenders, when it appeared before the Committee in hearings of 26 May 2014.

- 8.67 In relation to its effect on victims, the Deputy Chief Executive Officer told the Committee:

In the current system, victims have very limited opportunity to participate in a system that really is not designed for them. In my time prosecuting, I would often say to

¹⁷⁰⁴ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.170.

¹⁷⁰⁵ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.170.

¹⁷⁰⁶ Legal Aid ACT, Submission No.14, pp.8-9.

victims who would come along and ask what their role was, “Apart from a very limited role of potentially coming to give evidence about what happened to you, there really is no role for you. This system is not designed for you.” Restorative justice can provide them, if they choose to participate, with a much larger role in the outcome for the person who has harmed them in whatever way.¹⁷⁰⁷

8.68 She went on to say that she had:

seen the impact of that and the effect of that. As I say, it can be quite powerful. The current system allows them to make a statement at the end, if they so choose, and that statement can be in court, a prosecutor can read it aloud or it can simply be tendered to a magistrate or a judge to read.¹⁷⁰⁸

8.69 Moreover, for a victim restorative justice could allay ‘fears around that person coming back to their home or that they were particularly targeted for something’:

Absent a restorative justice program, that remains an unmet concern forever in our current system, if there is no way for the victim to be involved. To hear an offender say, “Look, the door was open; I didn’t know you from a bar of soap; I still don’t. You were one of 10 houses I robbed that day. I was off my face on heroin,” or whatever, and for a person to get that small amount of comfort that they do not even remember where the house is, or they do not even remember what they took, as I said, it can be quite powerful in terms of allaying people’s fears around whether they could be a victim of this person into the future or whether there was a particular reason for them being targeted.¹⁷⁰⁹

8.70 She also told the Committee that there had been concerns from the victims’ point of view:

Wearing my other hat, I am the convenor of the ACT Women’s Legal Centre. I recall some of the fear around the sort of offences that it would be rolled out to. It was about what support there would be for victims who chose to participate in the process. It was about what sort of resources would be available to them, both in the lead-up, at the time when they participate, and afterwards in terms of counselling and support.¹⁷¹⁰

8.71 However, she told the Committee, with ‘proper resourcing and the right regime ... it could be an incredibly effective tool’.¹⁷¹¹

¹⁷⁰⁷ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.135.

¹⁷⁰⁸ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.135.

¹⁷⁰⁹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, pp.135-136.

¹⁷¹⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.136.

¹⁷¹¹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.136.

8.72 In relation to the effect of restorative justice on offenders, the Head of the Criminal Law Practice told the Committee that:

If you have a victim and an offender face to face, victims are saying how they felt as to what happened, the violation that happened to them, and the offender can hear that and express how he feels about what he has done to that person. If they did not have it before, it gives them some insight into the consequences of offending behaviour, and that in itself may operate as a deterrent. It is not going to happen every time, but they may think twice about doing it again.¹⁷¹²

8.73 He also told the Committee that:

Speaking from the offender's point of view, the way I see it is that it gives them ownership and responsibility for their offending behaviour, and an opportunity to make amends or at least express to others, including the victim, how they feel about what they have done. It also provides an opportunity, again, for problems peculiar to that particular offender to be identified and potentially addressed. I understand that happens in relation to restorative justice for children now.¹⁷¹³

8.74 The Deputy Chief Executive Officer noted a further benefit for offenders in that:

Any agreement that is reached in the course of the restorative justice session ... can speak quite legitimately and lend a lot of credibility to an offender's claim that they feel bad about what they did.¹⁷¹⁴

ACT GOVERNMENT: RESEARCH ON EFFECTIVENESS OF RESTORATIVE JUSTICE

8.75 In hearings, the Attorney-General and his officers described the outcome of a research study on the effectiveness of restorative justice.¹⁷¹⁵

8.76 The Attorney-General told the Committee that:

Findings from the Campbell collaboration review led by Heather Strang at the Australian National University ... into the efficacy of restorative justice conferences suggest that, in fact, restorative justice conferences are likely to reduce the frequency and costs of future crime. The review found that the average effect of restorative

¹⁷¹² Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.134.

¹⁷¹³ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.134.

¹⁷¹⁴ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.136.

¹⁷¹⁵ See Strang, H., L. W. Sherman, et al., (2013), *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, The Campbell Collaboration, http://www.campbellcollaboration.org/lib/download/3066/Strang_RJC_Review.pdf, viewed 22 January 2015.

justice when compared with conventional justice procedures, usually through the court, is beneficial.¹⁷¹⁶

8.77 Moreover, he told the Committee:

The review found, on average, restorative justice conferences are even more effective with repeat adult offenders rather than juveniles and for serious violent crime rather than less serious non-crimes against the person.¹⁷¹⁷

8.78 The Attorney-General went on to say that:

Perhaps the reason for that, and I think the research bears this out, is that the nature of a violent crime, a crime against a person, is that there has been harm done directly to the victim's person in some way. The process of restorative justice involves a direct engagement between the victim and the offender, albeit in a very supervised environment, where the victim is able to communicate directly to the offender the nature of the harm caused and what that meant, and the offender has to face that, has to face the person they have done wrong against, and then engage with them about why they did that and explore the issues around acceptance, responsibility, contrition and so on.¹⁷¹⁸

8.79 In connection with this he observed that:

It is a very powerful process and, perhaps because of the nature of the offending behaviour, it is more powerful when you think about the harm done compared to, say, having your car stolen. I think those are the factors that play around why RJ is so powerful and why, therefore, victims report much higher levels of satisfaction and that justice has been done because harm has been acknowledged and restitution, even if it is not monetary restitution, nevertheless emotionally has been achieved through that process.¹⁷¹⁹

8.80 In terms of the impact on victims, the Attorney-General told the Committee that:

The review indicates that restorative justice delivers emotional restoration to victims much more effectively than court processes. This was an outcome in approximately 90 per cent of restorative justice conferences.¹⁷²⁰

¹⁷¹⁶ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.2.

¹⁷¹⁷ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.2.

¹⁷¹⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.8.

¹⁷¹⁹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.8.

¹⁷²⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, pp.2-3.

8.81 And he went on to say that:

victims feel ... the lowest levels of feeling that they need to pursue it further; they are less likely to have the feeling that they want to pursue justice in other ways or take it into their own hands. They feel that it has been acknowledged and resolved through that process. They report very high levels of satisfaction.¹⁷²¹

8.82 Speaking more broadly, the Attorney-General told the Committee that:

the international research that is now coming through in relation to the effectiveness of restorative justice measures really does highlight that restorative justice as an alternative to traditional sentencing in a court delivers better restoration to victims—that is, victims feel emotionally that the wrongdoing and the harm has been acknowledged by the offender, that they have demonstrated contrition and acceptance and responsibility for their offending behaviour. It highlights that the offender is placed in a much more confronting circumstance than they may be in court, in many instances, because they cannot hide behind their lawyers and say nothing as they can in court. They have to be engaged in facing their victims and facing up to the responsibility and the consequences of their decisions. So it is far more confronting and potentially transforming for the offender.¹⁷²²

8.83 He added that:

Finally, we know that in relation to offenders the evidence demonstrates they are less likely to offend again in that circumstance and it is cheaper than the conventional justice process. For all of those reasons, there is good evidence to highlight why these matters should be pursued further.¹⁷²³

LIMITATIONS

ACT GOVERNMENT

8.84 The Attorney-General noted limitations in the scope of the restorative justice scheme in the ACT. He told the Committee that:

At the moment there are some limitations in relation to restorative justice options in the territory. We are very advanced—indeed, the most advanced in the country, compared to other jurisdictions—but we still only limit RJ to young people, not to adults, and we do not engage with the broader and more serious range of offences

¹⁷²¹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.9.

¹⁷²² Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.4.

¹⁷²³ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, pp.4-5.

which the international evidence highlights is actually where better results can be achieved in terms of delivering justice.¹⁷²⁴

- 8.85 The Attorney-General told the Committee that this was ‘something that will be a key focus as the government moves forward with this [justice] reform program’.¹⁷²⁵

VICTIMS OF CRIME COMMISSIONER

- 8.86 The submission from the Victims of Crime Commissioner considered limitations of the scheme:

Presently, restorative justice is only available to young people who have committed offences and their victims. Expanding the scheme to the adult criminal justice system is long overdue. Originally, the *Crimes (Restorative Justice) Act 2004* was to be rolled out in two phases. Phase One, for young offenders and their victims commenced in 2005. Phase Two was to commence 12 months after Phase One once systems were established and the scheme had developed some expertise in managing cases. Phase Two was to include adult offenders and their victims. Unfortunately, the scheme remains limited to young offenders and their victims.¹⁷²⁶

- 8.87 The submission noted that the Victims of Crime Commissioner had, in his annual reports of 2010-11 and 2011-12 recommended expansions to the scheme so that it would apply to young adult offenders, ‘aged between 18 and 25 years of age’, thus diverting them from the conventional criminal justice system, and to adult offenders, ‘to give more victims of crime the opportunity to have a say in matters that directly affect them’ and to broaden ‘the options available to criminal justice agencies to respond to crime’.¹⁷²⁷

- 8.88 In hearings of 14 October 2014 the Commissioner added to these comments. He told the Committee that:

Our restorative justice scheme—when I say all stages of the criminal justice system—also allows offenders to be referred to restorative justice while they are serving a sentence. I think our scheme is the broadest scheme that I have encountered. I do not have an exhaustive knowledge of restorative justice but I see that we are missing an opportunity. We are looking around for strategies to avoid people going to prison, and we have got one looking at us right in the face, and we do not seem to be able to grasp the nettle and say, “This has got real potential.”¹⁷²⁸

¹⁷²⁴ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.4-5.

¹⁷²⁵ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.4-5.

¹⁷²⁶ Victims of Crime Commissioner, Submission No.10, p.10.

¹⁷²⁷ Victims of Crime Commissioner, Submission No.10, p.10.

¹⁷²⁸ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, pp.171-172.

8.89 He also told the Committee that he thought that at present the ACT was:

missing an opportunity ... to provide diversionary options to adult offenders, particularly young adults. Young men and women who turn 18 are considered to be adults in our legal system, but we know that they have some years of growing and maturing before they become fully adult. These young people are missing an opportunity to be diverted from our criminal justice system.¹⁷²⁹

8.90 In addition, 'their victims are missing an opportunity to meet with them to have some direct participation in the justice process'.¹⁷³⁰

8.91 The Commissioner noted that:

Our restorative justice unit has been operating since 2005. There is a lot of information available about its effectiveness. The annual reports from then until now tell us that over 90 per cent of young offenders comply with the agreement that they form with their victim at restorative justice conferences. I would think that would be a higher rate of compliance than court-ordered sentences, community-based sentences. The rates of satisfaction are always in the 90 per cent mark.¹⁷³¹

8.92 Moreover, restorative justice, he told the Committee, was 'proven to reduce fear and anxiety in victims after meeting with their offenders'.¹⁷³²

PROPOSALS FOR CHANGE

ACT GOVERNMENT: USING RESTORATIVE JUSTICE ALONGSIDE TRADITIONAL APPROACHES

8.93 The Attorney-General told the Committee that:

The other issue with RJ which the Campbell collaboration confirms is that it can also be particularly effective sitting alongside conventional sentencing. So you can still be sentenced by a court but then also participate in RJ.¹⁷³³

8.94 Even at present, he told the Committee, there were 'different points for referral' for restorative justice:

You can choose. There is really a menu of where you can choose to refer or divert people to RJ. Under our current scheme, for example, police can divert to RJ directly as

¹⁷²⁹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.168.

¹⁷³⁰ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.168.

¹⁷³¹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.168.

¹⁷³² Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.168.

¹⁷³³ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.9.

an alternative to charging someone with an offence. So that can happen now under the existing scheme. The DPP can choose RJ as an alternative to proceeding with a prosecution in court. The court itself can trigger an RJ as an alternative to proceeding with the matter in the court. So there are multiple exits to RJ, multiple points to divert to RJ.¹⁷³⁴

8.95 He also told the Committee that he expected that:

we should be able to continue to select from that menu of options, depending on the circumstances and depending on the nature of the offending behaviour, should we choose to expand RJ to a broader range of offenders and offences.¹⁷³⁵

8.96 Moreover, currently restorative justice was able to 'work in parallel with circle sentencing', although:

circle sentencing, in many respects, replicates some of the attributes of RJ in that there is greater potential for the victim to be involved and for the offender to come face to face with those they have caused harm to.¹⁷³⁶

8.97 The Attorney told the Committee:

as part of the justice reform strategy, I am asking my directorate to give further consideration to how we can bring more emphasis on restorative justice to violent crime and to adult offenders, either in parallel with traditional sentencing practices or as an alternative to them.¹⁷³⁷

8.98 Consistent with this, he told the Committee that:

What I want the justice reform strategy to look at is not just RJ as a stand-alone but in what circumstances an expanded RJ program should sit alongside the conventional sentencing process in court. For some crimes it would be appropriate still to face that as well as participate in RJ.¹⁷³⁸

LEGAL AID ACT: PROPOSED CHANGES IN CONNECTION WITH YOUNG OFFENDERS

8.99 Restorative justice for young offenders, the submission stated, had:

proved to be an effective sentencing option in the ACT for punishing the offender, addressing the underlying causes and risk factors of criminal behaviour reducing

¹⁷³⁴ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.9.

¹⁷³⁵ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.9.

¹⁷³⁶ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.8.

¹⁷³⁷ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, pp.2-3.

¹⁷³⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.9.

recidivism and equally important providing the victims of crime with a forum to be heard and exploring ways of 'righting the wrong'.¹⁷³⁹

8.100 The submission went on to consider how restorative justice for young offenders may be improved in the ACT. In particular it sought to identify what it regarded as problems with access to restorative justice by young offenders:

Section 22 and Table 22 identify who are 'referring entities' and when in the process or in the course of court proceedings those entities may refer an offender to restorative justice. Once the matter is before the Childrens Court and prior to a plea being entered, the power to decide whether restorative justice will occur effectively lies with the prosecution by operation of the provisions of s 27 (1) (b) & s 27 (2) of the *Crimes (Restorative Justice) Act 2004*. If the prosecution do not agree then the court cannot refer an offender to restorative justice.

Sub-section 27(2) appears to provide that the court may only refer a matter to restorative justice 'on the application of the director of public prosecutions'.

Only once a plea of guilty has been entered (Table 22.4) can the court refer an offender to restorative justice without needing the agreement of the DPP.¹⁷⁴⁰

8.101 Regarding this the submission put the view that this amounted to the DPP holding a power of veto over access to restorative justice. In view of this, the submission proposed that 'legislation should be amended to remove any 'veto' the DPP may have over the decision by the court to refer a matter to restorative justice'.¹⁷⁴¹

8.102 Instead, it suggested:

Referral to restorative justice should be on the application of either the young person or the prosecution, or by the court on its own initiative with the agreement of the young person. The DPP would of course still have the opportunity to voice any opposition to the referral of the matter and the court would need to take such opposition into account in deciding whether or not to make a referral order.¹⁷⁴²

8.103 Further comment was made on the effective veto of the DPP on restorative justice by Legal Aid ACT made when it appeared in hearings of 26 May 2014.

¹⁷³⁹ Legal Aid ACT, Submission No.14, p.11.

¹⁷⁴⁰ Legal Aid ACT, Submission No.14, pp.11-12.

¹⁷⁴¹ Legal Aid ACT, Submission No.14, p.12.

¹⁷⁴² Legal Aid ACT, Submission No.14, p.12.

8.104 The Deputy Chief Executive Officer told the Committee that:

Currently, with the system with young offenders in the ACT, the DPP has a right of veto. We make some comments about what we think about that. Our view is that if it were rolled out in the way that we suggest in terms of having particular offenders and particular offences, it would be on the application of the DPP, the offender or the court. They could look at a matter and decide that it might be appropriate for referral.¹⁷⁴³

8.105 However, she told the Committee, it was also the case that:

A referral does not necessarily mean that it is going to become part of the restorative justice process. The referral might determine that it is not appropriate, a victim does not wish to participate or in fact an offender has no real understanding of what restorative justice is and, once they learn, says, "Actually, no, this isn't for me."¹⁷⁴⁴

CHARGES DISMISSED AS INCENTIVE TO PARTICIPATE

8.106 In addition the submission by Legal Aid ACT proposed a further step:

if the restorative justice process is completed to the satisfaction of the court, then the legislation ought to require that the charge be dismissed. In other words there needs to be a 'carrot' to encourage meaningful engagement by young offenders in the process.¹⁷⁴⁵

8.107 According to the submission, this was important because:

If offenders come to believe that the outcome will be the same whether or not they participate in restorative justice then the process will lose its effectiveness and in time offenders may choose to opt out altogether.¹⁷⁴⁶

CHANGES IN SCOPE

ACT GOVERNMENT

8.108 Regarding the possibility of changes in the scope of the restorative justice scheme the Attorney-General told the Committee:

Over the past 18 months to two years, my directorate has been in consultation with key interest groups such as the Domestic Violence Crisis Service, the Canberra Rape

¹⁷⁴³ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.137.

¹⁷⁴⁴ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.137.

¹⁷⁴⁵ Legal Aid ACT, Submission No.14, p.12.

¹⁷⁴⁶ Legal Aid ACT, Submission No.14, p.12.

Crisis Centre and others, to develop protocols and guidelines that would guide how and when certain types of sexual assault or domestic violence matters could end up in RJ, should RJ be extended to adults.¹⁷⁴⁷

8.109 The Attorney-General went on to say that the ‘only reason RJ has not been extended to adults at this time has been due to constraints about resources’.¹⁷⁴⁸

8.110 He went on to say that due to the ‘policy work that we have undertaken’ in consulting with interest groups, ‘I think we are well placed to provide RJ in those circumstances on a trialled and incremental basis, should we make that funding decision’.¹⁷⁴⁹

ACT BAR ASSOCIATION

8.111 Regarding the use of restorative justice in the ACT the ACT Bar Association’s submission to the inquiry stated that restorative justice currently involved ‘the referral of young offenders aged between 10 and 17 years in relation to less serious offences’, under ‘[p]hase one of the scheme’. The submission stated that restorative justice was ‘regarded as a very useful and important adjunct to the sentencing process’ and that this was confirmed by the fact that ‘the number of referrals [had] increased’ over time.¹⁷⁵⁰

8.112 In light of this, the submission went on to state that that the ‘Bar sees no reason for the scheme not to be extended in its operation beyond its present field of operation’.¹⁷⁵¹

8.113 The submission advised that in particular ‘the Bar would support the program being applicable to domestic violence offences particularly when young offenders are involved’.¹⁷⁵²

8.114 The submission also recommended that ‘the declaration of the Phase 2 Application date should be notified as soon as practicable’, as per sections 15 and 16 of the *Crimes (Restorative Justice) Act 2004*.¹⁷⁵³

¹⁷⁴⁷ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.22.

¹⁷⁴⁸ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.22.

¹⁷⁴⁹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.22.

¹⁷⁵⁰ ACT Bar Association, Submission No.11, p.7.

¹⁷⁵¹ ACT Bar Association, Submission No.11, p.7.

¹⁷⁵² ACT Bar Association, Submission No.11, p.7.

¹⁷⁵³ ACT Bar Association, Submission No.11, p.7. Sections 15 and 16 of the *Crimes (Restorative Justice) Act 2004* show that s 15 provides for extension of restorative justice to adult offenders, subject to certain conditions, once the appropriate minister has declared the commencement of ‘phase 2’ of the restorative justice scheme. Section 16 provides for extension of the scheme to young offenders, and adult offenders subject to certain conditions, upon the commencement of phase 2 of the scheme. See *Crimes (Restorative Justice) Act 2004*, ss 15 & 16.

ACT LAW SOCIETY

- 8.115 The ACT Law Society's submission to the inquiry put forward similar views, stating that restorative Justice appeared 'to work well in the Territory, especially for those young people who are unlikely to be before the Court on more than one occasion'.¹⁷⁵⁴
- 8.116 In light of this the Law Society's submission stated that it was 'disappointing ... and surprising ... that restorative justice remains unavailable for domestic violence offences', and unclear as to 'why the Phase 2 Application date [had] not yet been declared by the Minister'.¹⁷⁵⁵
- 8.117 Commenting on this, the submission went on to put the view that '[m]ost domestic violence offences in which a young person is the defendant involve an offence of violence towards a parent or sibling or damaging property belonging to a family member'. In light of this, the submission observed, while it 'may make sense that restorative justice is not appropriate in domestic violence matters involving serious assaults on a domestic partner', this 'should be left for the determination of the Magistrate and the Director-General in accordance with the Act'.¹⁷⁵⁶
- 8.118 The submission then went on to make comparisons with the current state of affairs for restorative justice in the ACT, noting that the 'objectives and indeed the scheme of the legislation are not dissimilar to those already operating in New South Wales and Queensland'. 'However', the submission noted, 'notwithstanding that the legislation was enacted some 9 years ago, it has only come into operation in relation to young offenders'.¹⁷⁵⁷
- 8.119 Regarding this, the submission stated that:
- In our submission, provided it is properly resourced, restorative justice for adult offenders ought to be implemented without delay as an effective sentencing option and alternative to a custodial sentence.
- By 'properly resourced' we mean ensuring that relevant agencies are available and able to address the risk factors and underlying causes of an offender's criminal behaviour, such as drug and alcohol dependency, mental health issues, gambling problems, financial difficulties etc.¹⁷⁵⁸

¹⁷⁵⁴ ACT Law Society, Submission No.13, p.5.

¹⁷⁵⁵ ACT Law Society, Submission No.13, p.5.

¹⁷⁵⁶ ACT Law Society, Submission No.13, p.5.

¹⁷⁵⁷ Legal Aid ACT, Submission No.14, pp.10-11.

¹⁷⁵⁸ Legal Aid ACT, Submission No.14, p.11.

8.120 This last issue had, the submission noted, been ‘identified by BOCSAR [the NSW Bureau of Crime Statistics and Research] as a problem with the initial pilot scheme for forum sentencing in New South Wales introduced in 2005’.¹⁷⁵⁹

LEGAL AID ACT

8.121 Legal Aid ACT also made comment on the potential for expansion of the scheme. In connection with this, the Deputy Chief Executive Officer reflected on the development of restorative justice in the ACT, perceptions of the scheme, and the initial ‘momentum’ attached to it:

My recollection of restorative justice in the ACT is that there was quite a lot of momentum around it when it was first introduced for young offenders, and for whatever reason that momentum fell away when it came to talking about adult offenders. I think there was some concern about the sorts of offences that it would be rolled out for. You can imagine that, for sexual offences or family violence, it could be highly problematic in the wrong circumstances with the wrong case.¹⁷⁶⁰

8.122 However, she told the Committee:

Once floated, that concern perhaps led to a dampening of that momentum. I do not think it is completely impossible. With the right regime and scheme, burglary offences, for instance, are the sorts of offences that you see as perfect for the restorative justice forum, because people who are robbing other people’s homes do not realise what the impact is when they take a little gold ring that might not have been worth a lot of money but is of huge sentimental value to a victim. Putting a voice to that can be quite powerful, in my experience.¹⁷⁶¹

8.123 She told the Committee that in her view the scheme could be expanded because:

With the right momentum, the right push and the right regime, you would see some of the criticism fall away, or the fear around what it might mean for offences like sexual offences or offences against a person, because the power dynamics that could come into play with family or sexual violence are very real, but with the right regime I think that would be achievable, while guarding against some of those concerns.¹⁷⁶²

8.124 The Head of the Criminal Practice of Legal Aid ACT also told the Committee that he thought it important that the program be expanded, noting that in circle sentencing—which he

¹⁷⁵⁹ Legal Aid ACT, Submission No.14, p.11, citing BOCSAR Report #129, 13/08/09.

¹⁷⁶⁰ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.135.

¹⁷⁶¹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.135.

¹⁷⁶² Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.135.

described as being closely related to restorative justice—offenders ‘had to speak for themselves’.¹⁷⁶³

8.125 This contrasted with the way things were done in conventional courts:

because if they have a lawyer, they hardly have to say a word throughout the whole process. The lawyer does all the talking for them. The lawyer expresses to the court how the offender feels et cetera ...¹⁷⁶⁴

8.126 In contrast, he told the Committee, restorative justice put:

the offender in the box seat to accept ownership and responsibility for the offending behaviour and to demonstrate that they have some insight into the problem and how they might deal with it.¹⁷⁶⁵

VICTIMS OF CRIME COMMISSIONER

8.127 In hearings the Victims of Crime Commissioner made suggestions as to how the scheme should be expanded:

I do not think the jurisdiction is ready for a full roll-out for all offence types, frankly speaking. I think that the adult criminal justice system needs to be exposed to the benefits of restorative justice. To allow that to occur, I would recommend that we hold back on the sexual assault and [Domestic Violence] offences, because they are the most problematic for people, and to allow other offence types, including the most serious of assaults, to roll forward into the adult system. It is only by experiencing restorative justice that people get to understand it.¹⁷⁶⁶

8.128 In relation to the application of the scheme to sexual assault and domestic violence specifically, the Commissioner told the Committee that:

We have different people working in the system now, and I know that many of those oppose the use of restorative justice for sexual assault and domestic violence matters. My position is that if a victim wants to take that important step to regain some power and control in their lives by having some dialogue with their offender, who are we to choose otherwise for them? [However] I think we need to ensure that the practices that we put in place protect them.¹⁷⁶⁷

¹⁷⁶³ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.134.

¹⁷⁶⁴ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.134.

¹⁷⁶⁵ Mr Richard Davies, *Transcript of Evidence*, 26 May 2014, p.134.

¹⁷⁶⁶ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.171.

¹⁷⁶⁷ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.171.

OTHER VIEWS IN FAVOUR OF EXPANDING THE SCHEME

8.129 Other witnesses who spoke in favour of expanding the restorative justice scheme included:

- Mr Anthony Hopkins;¹⁷⁶⁸
- the ACT Human Rights and Anti-Discrimination Commissioner;¹⁷⁶⁹
- the ACT Law Society;¹⁷⁷⁰ and
- the ACT Bar Association.¹⁷⁷¹

8.130 The Director of Public Prosecutions put another view, voicing concern over the extension of restorative justice into ‘certain crime types, particularly those relating to an imbalance of power’ where, he told the Committee, an ‘imbalance of power [could] distort what would otherwise be a restorative process’.¹⁷⁷²

RESOURCE IMPLICATIONS AND REQUIREMENTS

8.131 The submission from the Victims of Crime Commissioner suggested a possible reason why the scheme had not been expanded, despite the mechanisms being present in the Act to do so:

The *Crimes (Restorative Justice) Act 2004* allows restorative justice to become available to victims of adult offenders once the Minister approves the commencement of Phase Two. It appears that uncertainty about the amount of resources that would be required to open the scheme to adult offenders and their victims has delayed that decision.¹⁷⁷³

8.132 Responding to this perception, the submission stated that this was ‘disappointing’, and put the view that, in fact, ‘the resource implications for restorative justice processes [were] no greater than that required for traditional criminal justice responses to crime’.¹⁷⁷⁴

8.133 If it were expanded, however, the ACT scheme had ‘the potential to become a leader in the field of restorative justice’, as it was ‘possibly the broadest and boldest ... in the country and it is different to any other Australian scheme’. This was because it had ‘the interests of victims of crime as its objective’, and enhanced ‘the rights of victims of offences by providing restorative

¹⁷⁶⁸ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.165.

¹⁷⁶⁹ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.115.

¹⁷⁷⁰ Mr Martin Hockridge, *Transcript of Evidence*, 19 May 2014, pp.81-82.

¹⁷⁷¹ Mr Hugh Stretton, and Mr Ken Archer, *Transcript of Evidence*, 19 May 2014, pp.71-72.

¹⁷⁷² Mr Jon White, *Transcript of Evidence*, 19 May 2014, p.61.

¹⁷⁷³ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁷⁷⁴ Victims of Crime Commissioner, Submission No.10, p.11.

justice as a way of empowering victims to make decisions about how to repair the harm done by offences' under s 8 of the *Crimes (Restorative Justice) Act 2004*.¹⁷⁷⁵

8.134 In light of this, he told the Committee:

I do not understand why we have not rolled out phase 2. It was supposed to be rolled out in 2006. The only reason I can think of is that there are some concerns around the resources that would be required. I think we are caught in between not knowing and having to make a decision to act.¹⁷⁷⁶

8.135 But, he thought, 'it would not take a lot of additional resources to equip that unit to begin hearing matters for adult offenders and their victims'.¹⁷⁷⁷

CRITIQUES OF RESTORATIVE JUSTICE

MR MATT CASEY AND MR TERRY O'CONNELL

8.136 Mr Matt Casey, and Mr Terry O'Connell of Real Justice Australia, appeared before the Committee in hearings of 15 December 2014.

8.137 In his opening statement, Mr Casey told the Committee that in his view restorative justice was 'described and perceived as a process used when things go wrong'. The literature on restorative justice furnished 'quite a range of descriptions', but 'in the main they ... refer to a process'.¹⁷⁷⁸

8.138 However, he told the Committee:

None of this even comes close to getting to grips with the essential ingredients of harm in relationships. Some try, but many, if not most, are implicit about the theoretical underpinnings.¹⁷⁷⁹

8.139 Mr Casey went on to tell the Committee that:

for restorative practice to evolve and move beyond a niche within a generally retributive or oppositional system, it needs to be described in explicit terms. At present it is short on theoretical sophistication and rigorous empirical research, and limited in

¹⁷⁷⁵ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁷⁷⁶ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁷⁷⁷ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁷⁷⁸ Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, p.204.

¹⁷⁷⁹ Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, p.204.

application, in acceptance and in resilience. Importantly, it lacks a clear definition, an explicit understanding of why it works, and a discourse linking theory to practice.¹⁷⁸⁰

8.140 This, he told the Committee, was due to the fact that ‘we keep restorative justice in a box to use when the going gets tough’.¹⁷⁸¹ Rather, restorative justice had to be ‘more than what we do at work’:

It has to be the way we do business across the community. It has to be whole of government [and] [i]t really helps to have a theory so that we know what we are doing, we know why we are doing it, and we are aware of the evidence that it works.¹⁷⁸²

8.141 He went on to say that:

We argue that it is inhibited by definitions concentrated on process. More importantly, the lack of an unambiguous connection between theory and practice often results in restorative programs drifting away from explicit focus on harm and the importance of relationships in the community as the foremost predictors of wholesome behaviour.¹⁷⁸³

8.142 Mr Casey told the Committee that misunderstandings of restorative justice arise in part due to misapprehensions of the role of the victim in changing offender behaviour:

I think one of the problems that beset us around this is that when people think about restorative justice they get a picture of a conference, and you have got to have somebody who has done the wrong thing and they have got to be owning it and you have got to have a victim. I think the thing that gets missed is who actually makes the biggest difference in the conference. The really interesting thing is that often—in fact, a whole lot of times—it is not the victim. The ones who make the biggest difference are the people who are closest to the offender.¹⁷⁸⁴

8.143 Mr O’Connell also told the Committee of ways in which, in his opinion, restorative justice was commonly misunderstood. He told the Committee:

do you know what is significant? It is about building relationships, building connections. Everyone in that detention centre or in your adult prison is desperately in need of connections, relationships.¹⁷⁸⁵

¹⁷⁸⁰ Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, pp.204-205.

¹⁷⁸¹ Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, pp.204-205.

¹⁷⁸² Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, pp.204-205.

¹⁷⁸³ Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, pp.204-205.

¹⁷⁸⁴ Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, p.208.

¹⁷⁸⁵ Mr Terry O’Connell, *Transcript of Evidence*, 15 December 2014, p.209.

8.144 This, he told the Committee, was the real work of restorative justice:

I hear through throughcare that there are huge problems in terms of building connections. That stuff has to be a critical part of what happens at every point of the criminal justice system. At the end of the day the right conversation which creates connections and relationships is the guarantee that you are going to make a difference. In the absence of that, all the therapy in the world, with the best of intentions, simply ain't going to cut it.¹⁷⁸⁶

8.145 When asked by the Committee as to differences between the current ACT restorative justice scheme and the approach he outlined, Mr O'Connell responded by saying that it was a 'significant difference':

what is critical is that how the process is used. If we were to look at New South Wales as an example, they have trained up a whole lot of people who see this as a discrete, stand-alone process. The knock-on results are that it has not made any measurable difference in terms of those outcomes.¹⁷⁸⁷

8.146 He went on to tell the Committee that:

What I see happening down here ... is they are still operating within a limited framework. What I am suggesting ... is that they [should] get to really understand that this restorative process is not defined or limited to restorative conference. That is just one of many other possibilities. It is about an engagement process that takes offenders, victims and their respective families on a journey where they may not even get to meet. What is important is to challenge this assertion that the difference is made in this restorative stuff when you bring victims and offenders together. Frankly, it is not. It is when the significant others are involved with either victims or offenders that the greatest difference is made.¹⁷⁸⁸

RESTORATIVE JUSTICE IN *SENTENCING IN AUSTRALIA*

8.147 Bagaric and Edney enumerate critiques of restorative justice in their standard text, *Sentencing in Australia* (2011).¹⁷⁸⁹

8.148 These include perceptions that a clear definition is not achievable and effectiveness is unproven; and criticisms that:

- restorative justice represents too dramatic a departure from conventions of punishment;

¹⁷⁸⁶ Mr Terry O'Connell, *Transcript of Evidence*, 15 December 2014, p.209.

¹⁷⁸⁷ Mr Terry O'Connell, *Transcript of Evidence*, 15 December 2014, p.210.

¹⁷⁸⁸ Mr Terry O'Connell, *Transcript of Evidence*, 15 December 2014, p.210.

¹⁷⁸⁹ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters.

- that it produces inconsistent outcomes; and
- that restorative justice represents a very small proportion of cases disposed of by the criminal justice system.¹⁷⁹⁰

8.149 These are considered below.

ABSENCE OF CLEAR DEFINITION

8.150 *Sentencing in Australia* suggests that one difficulty in connection with restorative justice is that '[a]t the sentencing stage' there is 'no universally agreed definition regarding what is entailed through restorative justice programs'. Restorative justice could take the form of 'diversion from court prosecution', 'actions taken in parallel with court decisions' or 'meetings between victims and offenders at any stage of the criminal process'.¹⁷⁹¹

8.151 However the book states that there is common ground in that 'restorative justice approaches ... have three major characteristics that distinguish them from traditional court based approaches'.¹⁷⁹²

8.152 These are, it suggests:

- a greater emphasis on the role and experience of victims;
- lay and legal actors having decision making authority; and
- a setting where there is more interaction and discussion between all parties involved.¹⁷⁹³

EFFECTIVENESS UNCLEAR

8.153 *Sentencing in Australia* states that the 'effectiveness of restorative programs is unclear'.¹⁷⁹⁴ The most reliable study, it argues, was one conducted by the NSW Bureau of Crime Statistics, which showed that:

a large scale youth justice conferencing initiative can produce reductions of 15-20% in reoffending across different offence types and regardless of the gender, criminal history, age and Aboriginality of the offenders.¹⁷⁹⁵

¹⁷⁹⁰ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

¹⁷⁹¹ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁷⁹² Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁷⁹³ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁷⁹⁴ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁷⁹⁵ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13, citing Australian Institute of Criminology, 'Restorative Justice as a Crime Prevention Measure' (Paper No 20, 2004).

8.154 This assessment raises questions of what order of improvement should take place before it is regarded as significant. This is considered further in the Committee comment at the end of this section.

CRITICISMS

8.155 *Sentencing in Australia* considers criticisms levelled at restorative justice.

8.156 These include, it says, perceptions that restorative justice schemes:

- ‘conflict with fundamental aspects of criminal law ideology. The criminal law punishes behaviour that is (supposedly) so repugnant that it is an affront to society as a whole, not merely the victim. It is for this reason that the state steps in to conduct criminal prosecutions, rather than leaving enforcement to victims. This breaks the nexus between the accused and victim’;¹⁷⁹⁶
- ‘too arbitrary’ in that (in Wasik’s words) ‘Reparation turns both upon the differing practical abilities of offenders, and the differing predilections of victims . . . [and] allowing victims to influence the form that reparation should take can lead to inconsistency and injustice’;¹⁷⁹⁷
- in some cases involve ‘taking offenders - particularly youthful offenders - out of the criminal justice system to be dealt with by means of other interventions’ and this ‘constitutes a move towards abolishing the notion of punishment’.¹⁷⁹⁸ Regarding this, *Sentencing in Australia* comments that:

While there are plausible theoretical arguments that can be advanced towards this end, pragmatically, the institution of State-imposed sanctions for criminal behaviour is such an entrenched part of our social fabric that no amount of philosophical persuasion is likely to lead to its eradication in the foreseeable future;¹⁷⁹⁹ and that
- in terms of ‘sentencing dispositions’, ‘while there is a growing use of such techniques, in absolute terms they constitute a very small portion of sentencing outcomes’, mainly for ‘minor offences or young offenders’. In view of this, *Sentencing in Australia* states that there is ‘little likelihood that use of restorative dispositions will expand beyond this role’.¹⁸⁰⁰

¹⁷⁹⁶ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

¹⁷⁹⁷ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13, quoting Wasik M, “Reparation: sentencing and the victim” [1999] *Criminal Law Review* 470-478.

¹⁷⁹⁸ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

¹⁷⁹⁹ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

¹⁸⁰⁰ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

SUMMARY

8.157 The Committee notes arguments put to it regarding restorative justice.

8.158 Arguments regarding the distinctiveness of the restorative justice scheme, and comparisons with other schemes, included:

- that adult offenders, domestic violence and sexual crimes are currently excluded from the scope of restorative justice in the ACT;¹⁸⁰¹
- that the ACT restorative justice scheme was unique ‘in Australia, if not the world, in that it has victims at its heart’;¹⁸⁰²
- that the ACT scheme was distinctive ‘in that it has the potential for all offence types to be referred to restorative justice at any stage of the criminal justice system’;¹⁸⁰³
- that the scheme was distinctive in that it was not just ‘a diversionary scheme’, but was ‘designed to be a diversionary scheme and an adjunct to [the ACT] criminal justice system’;¹⁸⁰⁴
- that ‘[o]nly the most serious of offences can be referred later in the prosecution’;¹⁸⁰⁵
- that there were ‘a number of unique elements to [the] restorative justice scheme which [the ACT was] are not capitalising on’;¹⁸⁰⁶
- that restorative justice process was ‘similar to that which has been employed in circle sentencing courts for Aboriginal offenders in NSW and the ACT for a number of years’;¹⁸⁰⁷ and
- that ‘only in New South Wales and Queensland has restorative justice been extended to adult offenders’.¹⁸⁰⁸

8.159 Arguments regarding the history, practice, and effectiveness of the scheme included:

- that since the inception of restorative justice in the ACT the ACT Restorative Justice Unit had ‘convened nearly 1,000 conferences between victims of crime and young people who are responsible for crime’;¹⁸⁰⁹

¹⁸⁰¹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.21.

¹⁸⁰² Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁸⁰³ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁸⁰⁴ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁸⁰⁵ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.169.

¹⁸⁰⁶ Legal Aid ACT, Submission No.14, p.9.

¹⁸⁰⁷ Legal Aid ACT, Submission No.14, p.9.

¹⁸⁰⁸ Legal Aid ACT, Submission No.14, p.9.

¹⁸⁰⁹ Victims of Crime Commissioner, Submission No.10, p.10.

- that there was ‘no firm set of ideas’ about what measures might be taken under the scheme, but ‘those who have been involved in running the program for some time are aware of some of the things that tend to work’;¹⁸¹⁰
- that under restorative justice ‘victim and the offender ... together agree on what is a reasonable act or series of things to be done for restitution’;¹⁸¹¹ and
- that the restorative justice process relied on the consent of the victim and offender.¹⁸¹²
- that ‘[y]oung offenders and their supporters report high levels of satisfaction with the process’;¹⁸¹³
- that the ‘overall compliance rate’ for restorative justice agreements was 90% and that this ‘high compliance rate [was] contributing to high levels of satisfaction by all parties with their restorative justice experience’;¹⁸¹⁴
- that the research literature showed that: ‘when a person who commits a serious offence comes into face-to-face contact with their victim, there is a change in them about how they perceive themselves and their responsibility, and a deeper awareness of the harm that is done and a deeper motivation to address their offending behaviour’;¹⁸¹⁵
- that ‘restorative justice, though, as a stand-alone intervention [was not] enough’: ‘[i]t needs to be married in to consequential case management’;¹⁸¹⁶
- that in current conventional court processes ‘victims have very limited opportunity to participate in a system that really is not designed for them’;¹⁸¹⁷
- that with ‘proper resourcing and the right regime [restorative justice] could be an incredibly effective tool’;¹⁸¹⁸
- that recent research had shown that ‘restorative justice conferences are likely to reduce the frequency and costs of future crime’;¹⁸¹⁹
- that the research had found that ‘restorative justice conferences are even more effective with repeat adult offenders rather than juveniles and for serious violent crime rather than less serious non-crimes against the person’;¹⁸²⁰

¹⁸¹⁰ Ms Alison Playford, *Transcript of Evidence*, 2 May 2014, p.20.

¹⁸¹¹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.20, p.9.

¹⁸¹² Ms Playford, *Transcript of Evidence*, 2 May 2014, p.21.

¹⁸¹³ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁸¹⁴ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁸¹⁵ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.170.

¹⁸¹⁶ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.170.

¹⁸¹⁷ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.135.

¹⁸¹⁸ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.136.

¹⁸¹⁹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.2.

¹⁸²⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.2.

- that the ACT restorative justice scheme ‘also allows offenders to be referred to restorative justice while they are serving a sentence’;¹⁸²¹ and
- that restorative justice ‘can also be particularly effective sitting alongside conventional sentencing’.¹⁸²²

8.160 Arguments regarding a power of veto held by the DPP over access to restorative justice included:

- that under the provisions of s 27 (1) (b) & s 27 (2) of the *Crimes (Restorative Justice) Act 2004*, the Director of Public Prosecutions (DPP) holds a power of veto over access to restorative justice;¹⁸²³
- that ‘[o]nly once a plea of guilty has been entered ... can the court refer an offender to restorative justice without needing the agreement of the DPP’;¹⁸²⁴ and
- that instead referral to restorative justice ‘should be on the application of either the young person or the prosecution, or by the court on its own initiative with the agreement of the young person’.¹⁸²⁵

8.161 Arguments regarding the expansion of the restorative justice scheme included:

- that, as part of the justice reform strategy, the Attorney-General was ‘asking [the JACS] directorate to give further consideration to how we can bring more emphasis on restorative justice to violent crime and to adult offenders, either in parallel with traditional sentencing practices or as an alternative to them’;¹⁸²⁶
- that the ACT was ‘missing an opportunity ... to provide diversionary options to adult offenders, particularly young adults’ due to current restrictions on the scope of restorative justice;¹⁸²⁷
- that ‘the declaration of the Phase 2 Application date should be notified as soon as practicable’, as per sections 15 and 16 of the *Crimes (Restorative Justice) Act 2004*;¹⁸²⁸

¹⁸²¹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, pp.171-172.

¹⁸²² Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.9.

¹⁸²³ Legal Aid ACT, Submission No.14, pp.11-12.

¹⁸²⁴ Legal Aid ACT, Submission No.14, pp.11-12.

¹⁸²⁵ Legal Aid ACT, Submission No.14, p.12.

¹⁸²⁶ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, pp.2-3.

¹⁸²⁷ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.168.

¹⁸²⁸ ACT Bar Association, Submission No.11, p.7. Sections 15 and 16 of the *Crimes (Restorative Justice) Act 2004* show that s 15 provides for extension of restorative justice to adult offenders, subject to certain conditions, once the appropriate minister has declared the commencement of ‘phase 2’ of the restorative justice scheme. Section 16 provides for extension of the scheme to young offenders, and adult offenders subject to certain conditions, upon the commencement of phase 2 of the scheme. See *Crimes (Restorative Justice) Act 2004*, ss 15 & 16. See also Legal Aid ACT, Submission No.14, p.11.

- that an expanded restorative justice scheme be rolled-out incrementally as it ‘is only by experiencing restorative justice that people get to understand it’;¹⁸²⁹
- that ‘the resource implications for restorative justice processes [were] no greater than that required for traditional criminal justice responses to crime’;¹⁸³⁰
- that ‘it would not take a lot of additional resources to equip [the Restorative Justice Unit] to begin hearing matters for adult offenders and their victims’;¹⁸³¹ and
- that ‘if the restorative justice process is completed to the satisfaction of the court, then the legislation ought to require that the charge be dismissed’ as a further incentive for offenders to participate.¹⁸³²

8.162 Arguments regarding critiques of restorative justice included:

- that descriptions of restorative justice suffered from a tendency to focus on ‘process’ rather than ‘a discourse linking theory to practice’;¹⁸³³
- that ‘often ...it is not the victim ... who make the biggest difference [but] the people who are closest to the offender’;¹⁸³⁴
- that restorative justice ‘has to be a critical part of what happens at every point of the criminal justice system’;¹⁸³⁵
- that there is a lack of a clear, consensus definition of ‘restorative justice’;¹⁸³⁶
- that the ‘effectiveness of restorative programs is unclear’;¹⁸³⁷
- that restorative justice is in ‘conflict with fundamental aspects of criminal law ideology’;¹⁸³⁸
- that the outcomes of restorative justice are ‘too arbitrary’;¹⁸³⁹
- that taking offenders out of the criminal justice system ‘constitutes a move towards abolishing the notion of punishment’;¹⁸⁴⁰

¹⁸²⁹ Mr John Hinchey, *Transcript of Evidence*, 14 October 2014, p.171.

¹⁸³⁰ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁸³¹ Victims of Crime Commissioner, Submission No.10, p.11.

¹⁸³² Legal Aid ACT, Submission No.14, p.12.

¹⁸³³ Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, pp.204-205.

¹⁸³⁴ Mr Matt Casey, *Transcript of Evidence*, 15 December 2014, p.208.

¹⁸³⁵ Mr Terry O’Connell, *Transcript of Evidence*, 15 December 2014, p.209.

¹⁸³⁶ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁸³⁷ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.12.

¹⁸³⁸ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

¹⁸³⁹ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13, quoting Wasik M, “Reparation: sentencing and the victim” [1999] *Criminal Law Review* 470-478.

¹⁸⁴⁰ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

- that ‘while there is a growing use of such techniques, in absolute terms they constitute a very small portion of sentencing outcomes’, mainly for ‘minor offences or young offenders’;¹⁸⁴¹ and
- that there is ‘little likelihood that use of restorative dispositions will expand beyond this role’.¹⁸⁴²

COMMITTEE COMMENT

8.163 After deliberating on restorative justice In light of views put to the inquiry, the Committee considers that the ACT Government should expand its implementation of the framework put in place by the *Crimes (Restorative Justice) Act 2004*. In particular the ACT Government should initiate an expansion of present restorative justice practice to more serious crimes, in the case of youth offenders, and also to adult offenders.

8.164 This should be a ‘phased’ or ‘incremental’ expansion, so that new offences and new categories of prisoner are gradually added to the scheme so long as each individual case meets requirements to ensure that restorative justice can be effective.

8.165 The Committee acknowledges that adequate funding and resourcing will be critical in achieving success for an expanded program. The ACT Government should establish accurate assessments of funding and resource requirements for different real-world scenarios in restorative justice and fund the expansion accordingly.

8.166 In connection with the greater funding and resource requirements attached to an expanded restorative justice scheme the Committee notes that, given positive research data on the present restorative justice scheme, it can be anticipated that an increase in investment of this kind prior to or ancillary to sentencing will result in reduced costs arising from offenders serving custodial sentences. The Committee also notes that this principle is consistent with that of the ‘justice reinvestment’ considered in this report below.

8.167 In light of these deliberations the Committee makes the following recommendations.

Recommendation 46

8.168 The Committee recommends that the Attorney-General proclaim ‘phase 2 application day’ provided for under the *Crimes (Restorative Justice) Act 2004*.

¹⁸⁴¹ Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

¹⁸⁴² Bagaric, M. and R. Edney (2011), *Australian sentencing*, Pyrmont, N.S.W., Thomson Reuters, p.13.

Recommendation 47

- 8.169** The Committee recommends that the expansion of the ACT restorative justice scheme, subsequent to the Attorney-General's proclamation of 'phase 2 application day', take the form of a stepped or incremental expansion which sees restorative justice applied to 1) more serious offences of which young offenders are accused; and (2) adult offenders, beginning with less serious offences.

Recommendation 48

- 8.170** The Committee recommends that the Attorney-General, as responsible minister, ask his officers to generate accurate assessments of the funding and resource cost of supporting restorative justice processes for real-world scenarios, and for this to be reported in the Justice and Community Safety Directorate's annual reports for the next and subsequent reporting periods.

Recommendation 49

- 8.171** The Committee recommends that the restorative justice scheme be funded and resourced consistent with these assessments of the funding and resource cost of supporting restorative justice processes for real-world scenarios.

Recommendation 50

- 8.172** The Committee recommends that the Justice and Community Safety Directorate report, in its Annual Reports, on costs and savings in other parts of the criminal justice system as a result of the expanded use of restorative justice processes, and its effect on key indicators such as recidivism.

Recommendation 51

- 8.173** The Committee recommends that the ACT Government take further steps to formalise the restorative justice scheme so that restorative justice in the ACT develops a more formal series of precedents and conventions; develops its own jurisprudence; and integrates more effectively with the other components of the ACT criminal justice system.

CIRCLE SENTENCING

INTRODUCTION

8.174 The *Macquarie Dictionary* defines 'circle sentencing' as:

a form of court process for some types of crimes in which the case is heard by a circle comprising Aboriginal elders, a police prosecutor and a defence solicitor, with the offender and the victim contributing to a presentation of the facts and an evaluation of the appropriate sentence.¹⁸⁴³

8.175 In the ACT Circle Sentencing takes place in the Galambany Court, a jurisdiction of the ACT Magistrates Court, as defined in *Galambany Court Practice Direction No. 1 of 2012*, a practice direction of the ACT Magistrates Court.¹⁸⁴⁴

DESCRIPTION

8.176 The webpage for the Galambany Court states that the 'specialist Aboriginal and Torres Strait Islander Galambany Circle Sentencing process has existed as part of the ACT Magistrates Court jurisdiction since 2004'.¹⁸⁴⁵

8.177 The webpage describes the purpose and process of the Galambany Court as follows:

The purpose of the Circle Sentencing Court is to provide a culturally relevant sentencing option in the ACT Magistrates Court jurisdiction for eligible Aboriginal and Torres Strait Islander people who have offended.

The specialist Circle Sentencing process gives the ACT Aboriginal and Torres Strait Islander community an opportunity to work collaboratively with the ACT criminal justice system to address over representation issues and offending behaviour.

Until recently the ACT Circle Sentencing Court only dealt with adult defendants (people who have offended) but has now expanded to include young people who have offended. The Circle Court differs from mainstream sentencing processes in a number of ways:

¹⁸⁴³ *Macquarie Dictionary and Thesaurus Online* (at 18 September 2014), 'Circle sentencing'.

¹⁸⁴⁴ Magistrates Court of the Australian Capital Territory, *Galambany Court Practice Direction No. 1 of 2012*, <http://www.courts.act.gov.au/magistrates/page/view/3308/title/galambany-court.-practice-direction-no>

¹⁸⁴⁵ Magistrates Court of the Australian Capital Territory, 'Galambany Court', last updated Wednesday 20 July 2011, http://www.courts.act.gov.au/magistrates/courts/galambany_court; Galambany Court Practice Direction No. 1 of 2012 is available at: http://cdn.justice.act.gov.au/resources/uploads/Magistrates/Practice_Direction_1_of_2012_Galambany_Court.pdf

- The Circle Court Magistrate sits alongside panel members and Elders who are invited by the Magistrate to contribute to the sentencing process;
- Panel members and Elders contribute to the process in a variety of ways and have a major role in explaining culturally relevant details to the Court; and
- Panel members and Elders also have a role to let the defendant know that they do not accept or tolerate criminal behaviour in the Aboriginal and Torres Strait Islander community. They also have an opportunity to speak with the defendant to explore ways in which criminal behaviour can be avoided in the future.¹⁸⁴⁶

AIMS

8.178 The practice direction of the ACT Magistrates' Court¹⁸⁴⁷ which creates the jurisdiction of the Galambany Court states that the Court's aims are to:

- (i) involve Aboriginal and Torres Strait Islander communities in the sentencing of Aboriginal and Torres Strait Islander defendants,
- (ii) increase the confidence of Aboriginal and Torres Strait Islander communities in the sentencing process,
- (iii) reduce barriers between the ACT Magistrates Court and Aboriginal and Torres Strait Islander communities;
- (iv) provide culturally relevant and effective sentencing options for Aboriginal and Torres Strait Islander defendants;
- (v) provide Aboriginal and Torres Strait Islander defendants with support services that will assist them to overcome their offending behaviour;
- (vi) provide support to victims of crime and enhance their rights and participation in the Galambany Circle Sentencing Court process; and
- (vii) reduce repeat offending by Aboriginal and Torres Strait Islander defendants.¹⁸⁴⁸

ABORIGINAL LEGAL SERVICE NSW/ACT

8.179 The submission to the inquiry by the Aboriginal Legal Service NSW/ACT quoted a report of the NSW Law Reform Commission, stating that while Circle 'may not reduce reoffending', its:

¹⁸⁴⁶ Magistrates Court of the Australian Capital Territory, 'Galambany Court', last updated Wednesday 20 July 2011, http://www.courts.act.gov.au/magistrates/courts/galambany_court; Galambany Court Practice Direction No. 1 of 2012 is available at: http://cdn.justice.act.gov.au/resources/uploads/Magistrates/Practice_Direction_1_of_2012_Galambany_Court.pdf

¹⁸⁴⁷ Magistrates Court of the Australian Capital Territory, *Galambany Court Practice Direction No. 1 of 2012*, <http://www.courts.act.gov.au/magistrates/page/view/3308/title/galambany-court.-practice-direction-no>

¹⁸⁴⁸ Magistrates Court of the Australian Capital Territory, *Galambany Court Practice Direction No. 1 of 2012*, <http://www.courts.act.gov.au/magistrates/page/view/3308/title/galambany-court.-practice-direction-no>

key purposes ... must be to reduce perceptions of cultural alienation, ensure that sentencing orders are appropriate to the cultural needs of Aboriginal and Torres Strait Islander offenders and to better educate magistrates about the needs of Aboriginal and Torres Strait Islander offenders.¹⁸⁴⁹

8.180 The submission went on to make the following recommendations for the consideration of the Committee:

(i) That the purpose and aims (including procedure) of circle sentencing be legislated, similarly to the *Crimes (Restorative Justice) Act 2004* (ACT).

(ii) That the ACT Government begin consultation with Aboriginal and Torres Strait Islander community organisations and other key stakeholders with a view to expanding the jurisdiction of circle sentencing to Supreme Court matters (noting that legislation concerning the Galambany Court is currently located in Chapter 4C of the *Magistrates Court Act 1930* (ACT)).

(iii) That s.33(1)(y) of the *Crimes (Sentencing) Act 2005* (ACT) be amended to state-- if the offender has accepted responsibility for the offence to take part in 'restorative justice under the Crimes (Restorative Justice) Act 2004, or to participate in sentencing in the Galambany Court-- that fact.¹⁸⁵⁰

8.181 The Aboriginal Legal Service NSW/ACT expanded on its submission when it appeared before the Committee in hearings of 19 May 2014.

8.182 Mr Michael Lalor, solicitor with the Service, told the Committee that:

One of the guiding principles of circle sentencing is that there is a role for victims to play and that an offender confronts their victim. In a real sense, the lawyers play quite a minimal role in circle sentencing in that offenders are encouraged to speak for themselves. They speak to a panel of elders of their local Aboriginal community. In my experience, it is a very powerful process and there are outcomes that are perhaps unlikely, if you like, to come out of traditional court processes because of the unique character of the circle court.¹⁸⁵¹

¹⁸⁴⁹ Aboriginal Legal Service NSW/ACT, Submission No.15, p.10, citing NSW: New South Wales law Reform Commission, Report 139, *Sentencing*, p.362.

¹⁸⁵⁰ Aboriginal Legal Service NSW/ACT, Submission No.15, p.10.

¹⁸⁵¹ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.93.

8.183 Representatives of the Aboriginal Legal Service expanded on points made in its submission about the importance of more formal status for the Galambany Court under statute. Mr Raymond Brazil, solicitor, told the Committee that:

the restorative justice legislation at the moment is in many ways a model of its kind, but there is a gap between the restorative justice act and the recognition of particular processes, such as the Galambany court. We are proposing that if that gap could be filled and recognition given under the restorative justice legislation to restorative justice processes, including the Galambany court, that would make the hard work of particularly busy courts much easier. When there are these gaps in the legislation, many of the courts, particularly the local court, which is a very busy court, feel constrained in what they are able to do and not do.¹⁸⁵²

8.184 Mr Lalor told the Committee that:

As the matter stands, circle sentencing and the deliberations on appropriate penalty for people coming before the circle are really undertaken by community panel members themselves—guided, of course, by the circle sentencing magistrate. Those decisions, in the absence of any legislative guidance on principle and what matters can be taken into account, are capable of being appealed and overturned.¹⁸⁵³

8.185 He went on to say that this process of appealing Galambany Court decisions in conventional courts brought with it a ‘danger’ that ‘that the standards of a normal sentencing court will be applied to the circle court’, thus subtracting from the unique value and purpose of the Galambany Court.¹⁸⁵⁴

8.186 He went on to say that there was ‘a danger’ that:

by comparing the process of the circle sentencing court to traditional sentencing courts, you thereby take away the unique aspect of circle sentencing. From the various pronouncements by the attorney and the steering committee, the circle is there as an intervention program, as an alternative to traditional sentencing means.¹⁸⁵⁵

8.187 He went on to say that:

What we seek, in enshrining a principle in legislation, is really nothing more than has been said in public by, for instance, the attorney in commenting on the circle sentencing process.¹⁸⁵⁶

¹⁸⁵² Mr Raymond Brazil, *Transcript of Evidence*, 19 May 2014, p.94.

¹⁸⁵³ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.94.

¹⁸⁵⁴ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, pp.94-95.

¹⁸⁵⁵ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, pp.94-95.

¹⁸⁵⁶ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, pp.94-95.

8.188 Mr Brazil added to this, saying that was a:

need to have the objects and the purposes of the Galambany court set out in a list of objects and principles. What we have found in a range of legislative instruments is that when these objects and principles are actually laid out in legislative form ..., they show the intention of the legislature: "This is what we perceive to be the purpose, the reason, that these processes are carried out." ¹⁸⁵⁷

ACT BAR ASSOCIATION

8.189 The submission to the inquiry by the ACT Bar Association noted that in addition to its commencement in the ACT Magistrates Court in 2004, circle sentencing had been in use since 2009 in the Children's Court. It commented on an increase in adult referrals, described circle sentencing as 'a very important sentencing option for Magistrates who are dealing with indigenous offenders', gave support to 'the extension of the scheme to the Supreme Court'. ¹⁸⁵⁸

ACT LAW SOCIETY

8.190 The submission to the inquiry by the ACT Law Society described circle sentencing as:

a "diversionary" initiative focused on reducing rates of incarceration of Australian and Torres Strait Islander (ATSI) people by involving respected members of the ATSI community in the sentencing process. ¹⁸⁵⁹

8.191 It described a 'typical sentencing outcome' as one in which 'the ATSI community members involved in the sentencing process recommend that a defendant/participant enter into some form of conditional liberty in the form of a bond', and noted that '[r]ehabilitation of a participant is considered of high importance'. ¹⁸⁶⁰

8.192 The submission went on to state that there was 'a need for the supervision under these bonds to be administered or supervised by ATSI people'. There was also a need 'for input into the formal sentencing process', but this met with some difficulty because the 'established structure of the corrective services program does not allow for the flexibility of approach that is a fundamental characteristic of the circle sentencing program'. ¹⁸⁶¹

¹⁸⁵⁷ Mr Raymond Brazil, *Transcript of Evidence*, 19 May 2014, p.94.

¹⁸⁵⁸ ACT Bar Association, Submission No.11, p.7.

¹⁸⁵⁹ ACT Law Society, Submission No.13, p.5.

¹⁸⁶⁰ ACT Law Society, Submission No.13, p.5.

¹⁸⁶¹ ACT Law Society, Submission No.13, p.5.

8.193 It also noted the results of reviews of circle sentencing. These had, among other things, posed questions as to 'the role that victims should play within the process. In addition, there was 'need for further thought' as to:

how to quantify the weight that should be given to the therapeutic or restorative nature of the circle process where the perpetrator is required to "face" his/her victim or community and account for themselves.¹⁸⁶²

8.194 Moreover, it was suggested:

The application of existing legislation and sentencing law in reviewing outcomes is inadequate when applied to a court based diversionary program administered in part by community members with no legal training.¹⁸⁶³

8.195 In view of this, the submission proposed that:

Consideration could be given to legislative acknowledgement of the unique nature of circle sentencing, if only to protect the flexibility of approach that distinguishes the circle court from traditional sentencing courts.¹⁸⁶⁴

LEGAL AID ACT

8.196 The submission to the inquiry by Legal Aid ACT put the view that:

From our experience of representing our clients before the Galambany Court, circle sentencing is an effective way of addressing offending behaviour by members of the Aboriginal and Torres Strait Islander community and meets its objectives of providing culturally relevant and effective sentencing options and providing support services to assist offenders to overcome their offending behaviour.¹⁸⁶⁵

DR LORANA BARTELS

8.197 The submission to the inquiry by Dr Lorana Bartels noted positive and negative aspects to current arrangements for circle sentencing, and the situation of Indigenous offenders in the ACT more broadly.

¹⁸⁶² ACT Law Society, Submission No.13, p.5.

¹⁸⁶³ ACT Law Society, Submission No.13, p.5.

¹⁸⁶⁴ ACT Law Society, Submission No.13, p.5.

¹⁸⁶⁵ Legal Aid ACT, Submission No.14, p.12.

POSITIVE ASPECTS

8.198 The submission's positive observations noted data on circle sentencing in the ACT:

According to the March 2013 criminal justice statistics published by JACS, there were 28 adults and seven young people referred to the circle sentencing court in the 2012-13 financial year to March 2013.²⁴ There were 22 and five people respectively assessed and 18 and two people sentenced.¹⁸⁶⁶

8.199 The submission also noted that the Galambany Court Practice Directions of August 2012 included 'a presumption that all Indigenous offenders be assessed for the program if they so choose and are not otherwise excluded'. This, the submission suggested, was a 'welcome development', in light of 'previous research with Aboriginal Legal Service lawyers indicating support for increased access to and use of circle sentencing for Indigenous offenders'.¹⁸⁶⁷

NEGATIVE ASPECTS

8.200 In putting forward negative comment on circle sentencing in the ACT, the submission stated that it was 'unfortunate' that there was 'no further information available about the operation of the Court, for example, the types of offences committed, the gender of participants, and their reoffending patterns'.¹⁸⁶⁸

8.201 In addition, there was a continuing need for further 'appropriate programs for participants in the circle sentencing process and the Indigenous offender population more generally'. This was particularly the case in light of comments by the Chief Justice of the ACT. He described the 'Indigenous imprisonment rate in the ACT as "appalling", and called for "more service[s] for young people particularly at the point before they get into trouble with the criminal law"'.¹⁸⁶⁹

8.202 The submission went on to describe Dr Bartels' involvement in planning and grant applications to develop a program under the name of 'Circuit Breaker', which was intended to be:

a mentoring program for young offenders referred to Galambany ... designed to divert and then to change offending behaviours by investing in Indigenous cultural laws and traditional cultural ways of behaviour.¹⁸⁷⁰

8.203 The grant application had in that instance been unsuccessful, but the submission noted support for the proposal by prominent players in the justice system, and stated that alternative sources of funding were being sought.¹⁸⁷¹

¹⁸⁶⁶ Dr Lorana Bartels, Submission No.1, p.8.

¹⁸⁶⁷ Dr Lorana Bartels, Submission No.1, pp.8-9.

¹⁸⁶⁸ Dr Lorana Bartels, Submission No.1, p.8.

¹⁸⁶⁹ Dr Lorana Bartels, Submission No.1, p.9.

¹⁸⁷⁰ Dr Lorana Bartels, Submission No.1, p.9.

8.204 The submission also stated that the group behind the bid ‘would be happy to work with the ACT Government on developing and evaluating a program of this nature’.¹⁸⁷²

SUMMARY

8.205 The Committee notes arguments put to the inquiry regarding circle sentencing.

8.206 Arguments included:

- that the Galambany Circle Sentencing Court had a ‘unique character’ in that ‘that there is a role for victims to play’; that ‘an offender confronts their victim’; and that ‘lawyers play quite a minimal role’ compared with conventional courts;¹⁸⁷³
- that without formal recognition under statute the decisions of the Galambany Circle Sentencing Court were more vulnerable to appeal in other courts, and that this brought a ‘danger’ that ‘that the standards of a normal sentencing court will be applied to the circle court’, thus subtracting from the unique value and purpose of the Galambany Court;¹⁸⁷⁴
- that the Galambany Circle Sentencing Court should be formally provided for and recognised under statute;¹⁸⁷⁵
- that there was a ‘need to have the objects and the purposes of the Galambany court set out in a list of objects and principles’;¹⁸⁷⁶
- that there was a need for a greater level of reporting on outcomes from the Court;¹⁸⁷⁷ and
- that there was a need for a more developed system of programs to which offenders who had appeared in the Court could be referred.¹⁸⁷⁸

COMMITTEE COMMENT

8.207 In deliberating on the arguments put to the inquiry, the Committee considers that there are, indeed, powerful reasons for the Galambany Circle Sentencing Court to be formalised in statute. As for the ACT restorative justice scheme, this would not only strengthen the Court and provide greater certainty in connection with its decisions, but would also support the formal integration of the Court into the ACT criminal justice system as a whole.

¹⁸⁷¹ Dr Lorana Bartels, Submission No.1, p.9.

¹⁸⁷² Dr Lorana Bartels, Submission No.1, p.9.

¹⁸⁷³ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.93.

¹⁸⁷⁴ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, pp.94-95.

¹⁸⁷⁵ Aboriginal Legal Service NSW/ACT, Submission No.15, p.10.

¹⁸⁷⁶ Mr Raymond Brazil, *Transcript of Evidence*, 19 May 2014, p.94.

¹⁸⁷⁷ Mr Michael Lalor, *Transcript of Evidence*, 19 May 2014, p.93.

¹⁸⁷⁸ Dr Lorana Bartels, Submission No.1, p.9.

8.208 In light of these reflections the Committee makes the following recommendations.

Recommendation 52

8.209 The Committee recommends that the ACT Government introduce in the Legislative Assembly legislative amendments which would, if passed, result in the Galambany Circle Sentencing Court being provided for and recognised under statute, and that these amendments set out the objects and purposes of the Court.

Recommendation 53

8.210 The Committee recommends that the Justice and Community Safety Directorate develop and report on key indicators for the Galambany Circle Sentencing Court in its Annual Report for the next and subsequent reporting periods.

Recommendation 54

8.211 The Committee recommends that the ACT Government further develop, and fund appropriately, the suite of programs to which the Galambany Circle Sentencing Court can refer offenders.

NGUNNAWAL BUSH HEALING FARM

8.212 Submissions to the inquiry made reference to the proposed Ngunnawal Bush Healing Farm (NBHF).

ACT GOVERNMENT

DESCRIPTION

8.213 The ACT Government, in its 2012 'Ngunnawal Bush Healing Farm – Factsheet' described the NBHF as an initiative involving:

the establishment of an Aboriginal and Torres Strait Islander alcohol and other drug residential rehabilitation service implementing culturally appropriate prevention and education programs.¹⁸⁷⁹

¹⁸⁷⁹ ACT Government Health Infrastructure Program, 'Ngunnawal Bush Healing Farm - Factsheet - Time to Talk': [http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20\(FINAL\)%20-%20Web.pdf](http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20(FINAL)%20-%20Web.pdf)

8.214 More specifically, the NBHF was to be ‘a therapeutic community; in which people voluntarily choose to enter a residential community for personal growth and rehabilitation’,¹⁸⁸⁰ founded on principles of:

reconnecting Aboriginal and Torres Strait Islander peoples to land and culture, using participation in land management activities and programs, with the aim of assisting residents to better respond to life’s challenges.¹⁸⁸¹

8.215 In terms of size and scope, the NBHF would ‘initially be an eight-bed facility’, but ‘the ACT Government’s intention is to deliver the full scope of 16 beds should funding become available in the future’.¹⁸⁸²

8.216 Regarding management and governance, the factsheet stated that in the first instance ‘the ACT Government Health Directorate will manage the NBHF and surrounding property with guidance from the NBHF Advisory Board’, however the Government would ‘then implement transitional arrangements to transfer governance to a community controlled (or nongovernment) organisation’.¹⁸⁸³

BACKGROUND

8.217 The factsheet noted that the NBHF had been ‘promoted by the United Ngunnawal Elders Council (UNEC) since 2002’, and was ‘identified by the local community for inclusion in the 2005 Council of Australian Governments (COAG) coordinated care trial for the ACT’. Following this, the ACT had ‘committed a total of \$5.883 million in capital funding’ for its construction, and the Commonwealth had also ‘committed \$1 million in funding’.¹⁸⁸⁴

ALCOHOL TOBACCO AND OTHER DRUG ASSOCIATION ACT

8.218 In its submission to the inquiry, Alcohol Tobacco and Other Drug Association ACT noted that:

after about 10 years, the Ngunnawal Bush Healing Farm (an AOD residential rehabilitation service) remains unbuilt. We understand that there have been

¹⁸⁸⁰ ACT Government Health Infrastructure Program, ‘Ngunnawal Bush Healing Farm - Factsheet - Time to Talk’: [http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20\(FINAL\)%20-%20Web.pdf](http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20(FINAL)%20-%20Web.pdf)

¹⁸⁸¹ ACT Government Health Infrastructure Program, ‘Ngunnawal Bush Healing Farm - Factsheet - Time to Talk’: [http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20\(FINAL\)%20-%20Web.pdf](http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20(FINAL)%20-%20Web.pdf)

¹⁸⁸² ACT Government Health Infrastructure Program, ‘Ngunnawal Bush Healing Farm - Factsheet - Time to Talk’: [http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20\(FINAL\)%20-%20Web.pdf](http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20(FINAL)%20-%20Web.pdf)

¹⁸⁸³ ACT Government Health Infrastructure Program, ‘Ngunnawal Bush Healing Farm - Factsheet - Time to Talk’: [http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20\(FINAL\)%20-%20Web.pdf](http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20(FINAL)%20-%20Web.pdf)

¹⁸⁸⁴ ACT Government Health Infrastructure Program, ‘Ngunnawal Bush Healing Farm - Factsheet - Time to Talk’: [http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20\(FINAL\)%20-%20Web.pdf](http://timetotalk.act.gov.au/storage/NBHF%20Plans%20-%20Factsheet%20(FINAL)%20-%20Web.pdf)

development challenges; however, this continues to leaves a significant and ongoing gap in culturally secure AOD treatment, support and sentencing options in the ACT.¹⁸⁸⁵

DR LORANA BARTELS

8.219 In her submission to the inquiry, Dr Lorana Bartels also noted 'the Government's commitment to the Ngunnawal Bush Healing Farm', which would 'offer holistic care for ACT Aboriginal and Torres Strait Islander peoples requiring alcohol and other drug rehabilitation and will focus on "cultural healing" - reconnecting Aboriginal and Torres Strait Islander people to land and culture'.¹⁸⁸⁶

8.220 Regarding this, Dr Bartels put the view that:

This initiative is to be welcomed, although there have been criticisms of the lack of progress on the project and there is limited information about it on the ACT Government's websites.¹⁸⁸⁷

SUBSEQUENT DEVELOPMENTS

8.221 The following reports relating to the Ngunnawal Bush Healing Farm appeared in media sources:

- in August 2014 it was reported that the ACT Government had called for tenders for a contractor to build the Ngunnawal Bush Healing Farm;¹⁸⁸⁸
- in October 2014 it was reported that the Minister for Planning had used call-in powers to approve plans for construction of the Ngunnawal Bush Healing Farm;¹⁸⁸⁹ and
- in January 2015 it was reported that the parcel of land chosen for the Ngunnawal Bush Healing Farm contained a number of sites which were affected by asbestos contamination.¹⁸⁹⁰

¹⁸⁸⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

¹⁸⁸⁶ Dr Lorana Bartels, Submission No.1, p.11, citing Katy Gallagher MLA in 'Bush Healing Farm Plans to be Made Public', *City News*, 25 May 2012, <<http://citynews.com.au/2012/bush-healing-farm-plans-to-be-made-public/>>

¹⁸⁸⁷ Dr Lorana Bartels, Submission No.1, p.11, citing Scott Bridges, 'Aboriginal Health a "Political Football"', *Crikey News*, 10 October 2012, <<http://blogs.crikey.com.au/next-act/2012/10/10/aboriginal-health-a-political-football/>>

¹⁸⁸⁸ Peake, R., (2014), 'Tenders called for contractor to build indigenous drug and alcohol retreat', *Canberra Times* (online), August 15 2014, <<http://www.canberratimes.com.au/act-news/tenders-called-for-contractor-to-build-indigenous-drug-and-alcohol-retreat-20140815-1046x9.html>>, viewed 22 January 2015.

¹⁸⁸⁹ Osborne, T., (2014), 'Bush healing: Call-in powers used to push through controversial centre', *ABC News Online*, 9 October 2014, <<http://www.abc.net.au/news/2014-10-09/bush-healing-centre-pushed-through-by-act-government/5800290>>, viewed 22 January 2015.

¹⁸⁹⁰ Knaus, C., (2015), Indigenous leader criticises lack of warning about asbestos contamination on bush healing farm site, *Canberra Times* (online), January 18 2015, <<http://www.canberratimes.com.au/act-news/indigenous-leader-criticises->>

SUMMARY

8.222 The Committee notes arguments put to the inquiry regarding the Ngunnawal Bush Healing Farm.

8.223 Arguments included:

- that ‘after ... 10 years, the Ngunnawal Bush Healing Farm (an AOD residential rehabilitation service) remains unbuilt’;¹⁸⁹¹
- that this ‘leaves a significant and ongoing gap in culturally secure AOD treatment, support and sentencing options’ for Indigenous offenders in the ACT;¹⁸⁹² and
- that ‘there have been criticisms of the lack of progress on the project and there is limited information about it on the ACT Government’s websites’.¹⁸⁹³

COMMITTEE COMMENT

8.224 After deliberating on views put to the inquiry regarding the Ngunnawal Bush Healing Farm, the Committee makes the following recommendation.

Recommendation 55

8.225 The Committee recommends that the ACT Government construct and commission the Ngunnawal Bush Healing Farm, to be completed by or before December 2017.

8.226 The Committee notes that recommendations made, above, in connection with the Galambany Circle Sentencing Court are relevant to concerns about the Ngunnawal Bush Healing Farm.

JUSTICE REINVESTMENT

8.227 Contributions to the inquiry considered justice reinvestment as part of their observations on sentencing. These included contributions by:

- the ACT Government;
- the Alcohol Tobacco and Other Drug Association ACT (ATODA);

[lack-of-warning-about-asbestos-contamination-on-bush-healing-farm-site-20150118-12rzqv.html](http://blogs.crikey.com.au/next-act/2012/10/10/aboriginal-health-a-political-football/)>, viewed 22 January 2015.

¹⁸⁹¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

¹⁸⁹² Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.3.

¹⁸⁹³ Dr Lorana Bartels, *Submission* No.1, p.11, citing Scott Bridges, ‘Aboriginal Health a “Political Football”’, *Crikey News*, 10 October 2012, <http://blogs.crikey.com.au/next-act/2012/10/10/aboriginal-health-a-political-football/>

- the ACT Human Rights and Discrimination Commissioner; and
- Dr Lorana Bartels.

8.228 These are considered below.

ACT GOVERNMENT

8.229 The Attorney-General spoke to the Committee about justice reinvestment when appeared in hearings of 2 May 2014.

8.230 He told the Committee:

There are a range of measures that the government has in place that are supported by justice reinvestment principles. I will mention a couple of programs that we have in place. For example, the property crime reduction strategy is a whole-of-government strategy. So it is not just police; it is justice, community services, youth services and so on. It is focused on breaking the cycle of reoffending when it comes to property crime. We know there is a lot of recidivist behaviour with property crime, and tackling that issue will reduce overall levels of those types of crimes in our community.

The strategy not only provides for targeted enforcement and intelligence-led policing by ACT Policing, but also it focuses on stopping the cycle of offending—for example, by providing assistance to young people in relation to education, training and opportunities for employment, and also regarding their social circumstances, such as reliability of housing. By providing more reliable housing options for people, safer and securer housing options for people, they are less likely to find themselves in a circumstance where they are stealing property to get money to survive on the street or whatever their more unreliable housing circumstances are.

Of course, unreliable or transient housing circumstances also contribute to people's ability to stay at school or to stay in training, because they just do not have that routine that you need to manage the discipline of training and education. So the strategy focuses very strongly on the delivery of those services to young people as well as focusing on the enforcement end, which is also important.¹⁸⁹⁴

8.231 Another example, he told the Committee was high density housing safety and security project:

This project has been running for a number of years. It is funded through the crime prevention budget to the tune of \$120,000 a year. It is, again, cross-collaborative and it is focused on security, community development, crime prevention and reduction and access to services for people who live in high density public housing complexes. We have had really good feedback from residents in these complexes. We know that a

¹⁸⁹⁴ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.7.

number of our older, high density public housing complexes face particular challenges when it comes to criminal activity. We know that some of the tenants of those properties have previously been engaged in crime and face the potential of getting into reoffending behaviours. The focus, again, is on building community engagement and building support with community service providers as a way of keeping people on track and giving them hope and opportunity beyond that associated with crime.¹⁸⁹⁵

ATODA

8.232 The submission to the inquiry by the Alcohol Tobacco and Other Drug Association ACT (ATODA) advised the Committee that justice reinvestment was:

a data-driven approach to reduce spending on corrections and reinvest identified savings in evidence-based strategies designed to increase public safety, promote accountability and improve offender and community outcomes.¹⁸⁹⁶

8.233 The submission went on to say that this represented a 'shift away from an ACT justice and service system that deals largely with the consequences of crime towards a justice and service system that addresses the causes of crime'.¹⁸⁹⁷

8.234 This, ATODA advised the Committee, was 'increasingly being proposed as a model to assist the ACT to slow the growth in the ACT's prison population'.¹⁸⁹⁸ The submission noted '[s]ubstantial work undertaken in the ACT to progress justice reinvestment', including:

- Exploring the feasibility of Justice Reinvestment in the ACT workshop and associated report (November 2011)
- Justice Reinvestment Forum - Is Justice Reinvestment needed in Australia? and associated report (August 2012)
- Inclusion of justice reinvestment in a number of youth justice policy documents, including:
 - 2011 Discussion Paper: Toward a diversionary framework in the ACT
 - Blueprint for Youth Justice in the ACT 2012-2022.¹⁸⁹⁹

¹⁸⁹⁵ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.7.

¹⁸⁹⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.9, citing US Department of Justice, Bureau of Justice Assistance and Justice Reinvestment Initiative, 'What is Justice Reinvestment?', available at: <https://www.bja.gov/Programs/JRlonepager.pdf>

¹⁸⁹⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.9, citing Justice and Community Safety Directorate, 2012, 'An opportunity to talk Smart Justice with Judge Peggy Hora'.

¹⁸⁹⁸ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.9

¹⁸⁹⁹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.10, citing Guthrie J A, Adcock F, Dance P, 'Exploring the feasibility of Justice Reinvestment in the Australian Capital Territory', AIATSIS Workshop Report, November 2010, http://ncis.anu.edu.au/lib/doc/JR_workshop_report_nov2011.pdf; Guthrie, J. A. (ed.) 2012: 'Is Justice Reinvestment Needed in Australia?', http://ncis.anu.edu.au/lib/doc/jrf_proceedings.pdf; Department of Disability, Housing and Community Services, 2011, Discussion Paper: Towards a Diversionary Framework for the ACT,

8.235 The submission also noted that in March 2013 ATODA had, with the ACT Council of Social Service and the Mental Health Community Coalition 'made a Joint Submission on the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia'.¹⁹⁰⁰

8.236 In light of this work, the submission put the view that '[i]ncreasing sentencing options and changing and improving sentencing practices will necessarily form part of any justice reinvestment initiatives in the ACT' and recommended that 'the Committee consider this through the Inquiry process'.¹⁹⁰¹

ACT HUMAN RIGHTS AND DISCRIMINATION COMMISSIONER

8.237 In her submission to the inquiry the Act Human Rights And Discrimination Commissioner advised the Committee that she had 'continued to progress our recommendations regarding a Justice Reinvestment strategy' in the ACT since the release of the Human Rights Commission's 2011 *Review of Youth Justice*.¹⁹⁰²

8.238 She noted that these recommendations had been motivated by consideration of 'the continued over-representation of Aboriginal and Torres Strait Islander young people and adults in the justice system and more specifically, in detention'.¹⁹⁰³

8.239 The Commissioner advised the Committee that in light of this she had been working with:
the ACT Aboriginal Torres Strait Islander Elected Body (ACT ATSIEB), Aboriginal Justice Centre, Australian Institute of Aboriginal and Torres Strait Islander Studies, ANU National Centre for Indigenous Studies, Community Services Directorate, Justice and Community Safety Directorate and the ACT Chief Minister and Cabinet Directorate to further explore justice reinvestment research in the ACT.¹⁹⁰⁴

[http://www.dhcs.act.gov.au/data/assets/pdf_file/0003/18827/4/T awards a diversionary framework for the ACT Discussion Paper.pdf](http://www.dhcs.act.gov.au/data/assets/pdf_file/0003/18827/4/T%20awards%20a%20diversionary%20framework%20for%20the%20ACT%20Discussion%20Paper.pdf); Youth Justice Implementation Taskforce, 2012, 'Blueprint for Youth Justice in the ACT, 2012-2022', [http://www.dhcs.act.gov.au/data/assets/pdf_file/0009/337590/Blueprint for Youth Justice in the ACT 2012-22.pdf](http://www.dhcs.act.gov.au/data/assets/pdf_file/0009/337590/Blueprint%20for%20Youth%20Justice%20in%20the%20ACT%202012-22.pdf).

¹⁹⁰⁰ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.10, citing ATODA, ACTCOSS, MHCC ACT, 2013, 'Joint Comment on the Senate Inquiry into the Value of Justice Reinvestment Approach in the Australian Criminal Justice System', [http://www.actcoss.org.au/publications/Publications · 2013/0413SUB.pdf](http://www.actcoss.org.au/publications/Publications%202013/0413SUB.pdf). The report of the Senate Standing Committee on Legal and Constitutional Affairs, 'Value of a justice reinvestment approach to criminal justice in Australia', 20 June 2013, is available at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/justice_reinvestment/report/report.ashx

¹⁹⁰¹ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.10

¹⁹⁰² ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

¹⁹⁰³ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

¹⁹⁰⁴ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

8.240 The Commissioner also that ‘more research and consideration of how this over-representation could be addressed’ was necessary.¹⁹⁰⁵

8.241 The Human Rights and Discrimination Commissioner added to this when she appeared in hearings of 26 May 2014.

8.242 She told the Committee that there were ‘human rights issues’ in connection with the criminal justice system and that ‘one of the biggest ones would be justice reinvestment, looking at the whole system’.¹⁹⁰⁶

8.243 She, she told the Committee, had been ‘a recommendation in the review of the youth justice system that Commissioner Roy led’.¹⁹⁰⁷

8.244 There had also been ‘some movements on that in the ACT’:

Certainly we have attended some Indigenous research bodies that wanted to have a pilot in the ACT, and I think that is something very promising. The Attorney-General’s review of the justice system at the moment in relation to adults, I would have thought, could have something very fruitful.¹⁹⁰⁸

DR LORANA BARTELS

8.245 In her submission to the inquiry, Dr Lorana Bartels observed that in its report on justice reinvestment the Senate Standing Committee on Legal and Constitutional Affairs had noted that:

the ACT had the highest national rate of return to corrective services (56%) and ‘72 per cent of inmates in the ACT [compared with 61 % in NSW] stated that their current imprisonment was due to being intoxicated while offending, showing the direct link between alcohol and drug use and involvement in the justice system’.¹⁹⁰⁹

8.246 In view of this, Dr Bartels put the view that it was ‘vital that the ACT take an active role in promoting justice reinvestment approaches as a means of reducing offending and reoffending and ensuring effective use of public resources’.¹⁹¹⁰

¹⁹⁰⁵ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

¹⁹⁰⁶ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.115.

¹⁹⁰⁷ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.115.

¹⁹⁰⁸ Dr Helen Watchirs, *Transcript of Evidence*, 26 May 2014, p.115.

¹⁹⁰⁹ Dr Lorana Bartels, *Submission No.1*, p.11, citing Senate Legal and Constitutional Affairs Committee, ‘Value of a Justice Reinvestment Approach to Criminal Justice in Australia’, June 2013, paragraph 4.37.

¹⁹¹⁰ Dr Lorana Bartels, *Submission No.1*, p.11.

8.247 Dr Bartels also noted similar comments in the submission to the Senate inquiry by ATODA, ACTCOSS and MHCC ACT, which suggested that in view of ‘the AMC being at capacity’, ‘decisions need to be made to either reduce the prison population or to invest in the building of new facilities to cater for an increase in the prison population’. This, the submission to the Senate inquiry suggested, placed the ACT in ‘in a prime position to benefit from initiatives that help to reduce prison populations’, as justice reinvestment offered promise as a way ‘to reduce future growth in prison expenditure by removing the need to build new facilities’.¹⁹¹¹

8.248 Dr Bartels also, however, noted that the submission to the Senate inquiry had noted that ‘challenges exist for a small jurisdiction like the ACT to employ justice reinvestment strategies’.¹⁹¹²

8.249 More broadly, Dr Bartels noted that the submission to the Senate inquiry had proposed a focus on the following measures for the implementation of justice reinvestment in the ACT:

- Analysis of the strengths and weaknesses of current criminal justice systems (though noting full reviews are not required prior to beginning a justice reinvestment initiative);
- Police, Court and Corrections training and support;
- Comprehensive community and work order programs;
- Effective and comprehensive diversion programs;
- Targeted courts (e.g. Aboriginal and Torres Strait Islander, mental health and drug and alcohol; families);
- Effective community based and short (e.g. weekend) detention;
- Diversion of first time offenders from the criminal justice system;
- Strengthened parole systems;
- Comprehensive infringement scheme reforms;
- Effective and accessible treatment systems;
- Comprehensive and ongoing throughcare systems and programs;
- Access to targeted legal services (e.g. alcohol and other drug, prison); and
- Appropriate screening and assessment for cognitive and other disabilities that cause offending behaviour.¹⁹¹³

¹⁹¹¹ Dr Lorana Bartels, Submission No.1, p.10, citing *Alcohol Tobacco and Other Drug Association (A TODA)*, the ACT Council of Social Service (ACTCOSS) and the Mental Health Community Coalition ACT (MHCC ACT), ‘Joint Submission on the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia’, March 2013, n 28, p.5.

¹⁹¹² Dr Lorana Bartels, Submission No.1, p.10.

¹⁹¹³ Dr Lorana Bartels, Submission No.1, pp.10-11, citing *Alcohol Tobacco and Other Drug Association (A TODA)*, the ACT Council of Social Service (ACTCOSS) and the Mental Health Community Coalition ACT (MHCC ACT), ‘Joint Submission on

SUMMARY

8.250 The Committee notes arguments put to the inquiry regarding justice reinvestment.

8.251 Arguments included:

- that programs currently in place in the ACT implemented justice reinvestment principles, including the Property Crime Reduction Strategy and the High Density Housing Safety and Security Project;¹⁹¹⁴
- that justice reinvestment could be defined as ‘a data-driven approach to reduce spending on corrections and reinvest identified savings in evidence-based strategies designed to increase public safety, promote accountability and improve offender and community outcomes’;¹⁹¹⁵
- that this represented a ‘shift away from an ACT justice and service system that deals largely with the consequences of crime towards a justice and service system that addresses the causes of crime’;¹⁹¹⁶
- that ‘[i]ncreasing sentencing options and changing and improving sentencing practices will necessarily form part of any justice reinvestment initiatives in the ACT’;¹⁹¹⁷
- that there had been dialogue between key stakeholders in the ACT on how to ‘further explore justice reinvestment research in the ACT’;¹⁹¹⁸ and
- that justice reinvestment could have particular relevance for groups overrepresented in the ACT criminal justice system.¹⁹¹⁹

COMMITTEE COMMENT

8.252 In light of these views the Committee welcomes further discussion about the extension of justice reinvestment principles in connection with the ACT criminal justice system.

8.253 As noted above, the Committee takes the view that a number of the recommendations it has made elsewhere in this report, in implemented, would in fact further the cause of justice

the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia’, March 2013, p.9.

¹⁹¹⁴ Mr Simon Corbell, *Transcript of Evidence*, 2 May 2014, p.7.

¹⁹¹⁵ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.9, citing US Department of Justice, Bureau of Justice Assistance and Justice Reinvestment Initiative, ‘What is Justice Reinvestment?’, available at: <https://www.bja.gov/Programs/JRlonepager.pdf>

¹⁹¹⁶ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.9, citing Justice and Community Safety Directorate, 2012, ‘An opportunity to talk Smart Justice with Judge Peggy Hora’.

¹⁹¹⁷ Alcohol Tobacco and Other Drug Association ACT (ATODA), Submission No.5, p.10

¹⁹¹⁸ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

¹⁹¹⁹ ACT Human Rights and Discrimination Commissioner, Submission No.8, p.8.

reinvestment in the ACT, particularly through instituting and adequately resourcing intensive corrections orders and providing a bail regime which, together, represented a regime of more flexible, and better funded alternatives, to traditional sentencing dispositions.

9 SENTENCING REFORM

INTRODUCTION

- 9.1 The Committee notes that while contributors to the inquiry, in some areas, took different views on important features of sentencing in the ACT, they were broadly in agreement about the need for reform.
- 9.2 Some contributors to the inquiry noted the need—and favourable conditions—for sentencing reform in the ACT.
- 9.3 The ACT Government also responded to this by announcing a Justice Reform Strategy within which there is to be a focus on sentencing
- 9.4 Both of these matters are considered in sections below.
- 9.5 A final section, Committee comment, presents the Committee’s reflections and recommendation on the material considered in the chapter.

LOCAL CONDITIONS FAVOURABLE TO REFORM

- 9.6 Contributors to the inquiry noted conditions specific to the ACT which could support future sentencing reform in the ACT.
- 9.7 Dr Lorana Bartels told the Committee that the ACT had a number of advantages when compared with other jurisdictions. These included:
 - that the ACT ‘traditionally’ had ‘fairly low crime rates and fairly low imprisonment rates’;¹⁹²⁰
 - that the ACT did not have ‘the tyranny of distance’, in contrast to jurisdictions such as NSW and, as a result, in terms of ‘access to the courts and access to treatment’, ‘you do not have people who are hundreds of kilometres from anything’;¹⁹²¹ and
 - that the ACT had the benefit ‘of not having to deal with some of the ill-informed media debates clamouring for harsher sentences that we see in New South Wales and Victoria’.¹⁹²²

¹⁹²⁰ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

¹⁹²¹ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

- 9.8 Mr Anthony Hopkins, appearing before the Committee in hearings of 26 May 2014, also made comment on the advantages for the ACT as a smaller jurisdiction:

I suppose that comes back to what I think is a privileged position we have in the ACT. In total terms we are not talking about enormous numbers. I do not know whether any questions have been asked about this, but it may also be that that means that behind the scenes you are talking about, for example, not enormous numbers of families with a whole lot of related issues that are happening within them.¹⁹²³

- 9.9 As a result, Mr Hopkins told the Committee:

It may well be that the ACT is just such a place where innovations can achieve success, with some of the mechanisms that have been set up already there within JACS or restorative justice and so on in terms of statistics gathering, to see something that really makes a difference.¹⁹²⁴

- 9.10 Mr Steven Whybrow of the Australia Lawyers Alliance (ALA), appearing before the Committee in hearings of 19 May 2014, also spoke positively about the potential of the ACT for sentencing reform. He told the Committee that the ALA was ‘interested in the ACT’ because:

in many respects—not just sentencing; civil law wrongs and human rights—it is perceived to be a leader in terms of an enlightened approach or resistant to what might be seen to be outside influences trying to push it one way or another.¹⁹²⁵

- 9.11 Mr Whybrow spoke highly of the *Crimes (Sentencing) Act* which, he told the Committee, was:

a comprehensive, well thought out, quite complex document, but when you follow it through, the options are there. It provides a degree of flexibility consistent with other jurisdictions. It appears to have been designed taking into account what works in other jurisdictions and what does not.¹⁹²⁶

- 9.12 He also noted advantages in the political climate in the ACT, saying that:

in a lot of jurisdictions—I will not say that there is no hope, but you cannot really turn up to a sentencing committee in Western Australia and suggest that there needs to be greater focus on this, that or the other because of certain aspects that are expected in that jurisdiction where law and order are going to get you votes ahead of anything else.¹⁹²⁷

¹⁹²² Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146.

¹⁹²³ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.164.

¹⁹²⁴ Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.164.

¹⁹²⁵ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.112.

¹⁹²⁶ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.112.

¹⁹²⁷ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.112.

- 9.13 'Thankfully', he told the Committee, the ACT was 'a bit more of a broader church'. As a result, sentencing the ACT reflected:

a realistic approach—not so much a common-sense approach—that human behaviour is multifaceted. People do all sorts of things for all sorts of reasons, and whoever has got to determine the consequence of that behaviour needs to have all sorts of options to deal with it.¹⁹²⁸

- 9.14 The Deputy Chief Executive Officer of Legal Aid Commission, appearing in hearings of 26 May 2014, made comment which embraced both the challenges and opportunities for sentencing in the ACT. She told the Committee that:

As a criminal lawyer, having practised in the ACT for nearly 14 years, I think that the opportunity is ripe for us to think about how we might do things better, to improve both our incarceration rates and our impact in terms of community corrections and the engagement of offenders in rehabilitation if we agree as a community that that is something we all strive for and aim for in terms of making sure that people who do come before the court do not come before the court again.¹⁹²⁹

- 9.15 In making this comment the Deputy Chief Executive Officer also made reference to rates of imprisonment and repeat offending in the ACT, a topic which attracted the concern of other contributors to the inquiry and which is further dealt with in other sections of this report.

JUSTICE REFORM STRATEGY

- 9.16 On 2 May 2014, at a public hearing conducted by the Committee for its inquiry on sentencing, the Attorney-General announced that the ACT Government had 'decided to pursue targeted sentencing reform work as part of a justice reform strategy'.¹⁹³⁰

- 9.17 He told the Committee that recent decisions 'to repeal periodic detention in the ACT and the planned expansion of the Alexander Maconochie Centre' had:

provided the government with the opportunity to examine the operations of the territory's sentencing regime and related matters with a view to considering substantive long-term improvements.¹⁹³¹

¹⁹²⁸ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.112.

¹⁹²⁹ Ms Louise Taylor, *Transcript of Evidence*, 26 May 2014, p.129.

¹⁹³⁰ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.1.

¹⁹³¹ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.1.

- 9.18 As a result, he told the Committee, as ‘part of the repeal of periodic detention’ the Government would ‘embark on a justice reform strategy that will investigate new sentencing approaches, expansion of restorative justice measures and related reforms’.¹⁹³²
- 9.19 The Attorney-General told the Committee that because ‘issues around sentencing and social and economic drivers of criminal behaviours [were] extremely complex’, these reforms would need to:
- have consideration of the diverse drivers and components of the justice system in the ACT and other jurisdictions, including sentencing principles and practices, crime prevention strategies, community safety expectations, justice reinvestment measures and a focus on reducing recidivism.¹⁹³³
- 9.20 Speaking in greater detail, he told the Committee that:
- The strategy will target an engagement with the chief justice, the chief magistrate, legal practitioners and the broader community. It will involve consideration of a broad range of issues relevant to the criminal justice system, including the adequacy of existing sentencing options in the context of the decision to decommission the periodic detention centre at Symonston and repeal periodic detention as a sentencing option; mechanisms for addressing reoffending and making the justice system more effective and efficient; opportunities to reinvest resources towards primary crime prevention activities; identifying key research and evaluation opportunities that arise within the scope of these terms of reference; engagement of researchers and academics to ensure proposals are informed by the available national and international evidence; and the preparation and delivery of interim recommendations on proposals for legislative and system reform by July 2016.¹⁹³⁴
- 9.21 The Attorney-General also told the Committee something of the concerns and general approach the strategy would address, stating that its ‘purpose’ was to:
- recognise that, in many instances, people who are ending up in prison perhaps should not be there. But because of the nature of their offending behaviour and because of the way sentencing laws are currently constructed, they are being sent to prison.¹⁹³⁵
- 9.22 Appearing on the same day of hearings, the Minister for Corrections also spoke about the Justice Reform Strategy. The Minister told the Committee about specific characteristics in the offender population in the ACT, most notably that ‘when it comes to those offenders being

¹⁹³² Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.1.

¹⁹³³ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.1.

¹⁹³⁴ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.2.

¹⁹³⁵ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.4.

sent to prison in the ACT, we are talking about a group of people who present with very complex issues’.¹⁹³⁶

ACT incarceration rates remain low, which means that those that the courts send to prison are usually at a medium to high risk of reoffending. They tend to have had some considerable track record before they are sent to jail in the ACT. They have an offending history of multiple episodes and they have significant problems with alcohol and drug abuse typically. They are people who require considerable and sustained assistance to address their offending behaviour.¹⁹³⁷

9.23 As a result, the Minister told the Committee, while this assistance could be provided in prison, ‘we also need structures in place so that suitable assistance is available for offenders being supervised in the community’.¹⁹³⁸

9.24 In part, the Minister told the Committee, this could be addressed by ‘alternative sentencing options’ after the abolition of periodic detention, through which ‘we could better manage offender behaviour’, such as ‘intensive community supervision orders’.¹⁹³⁹

SUMMARY

9.25 The Committee notes the arguments put to the inquiry regarding sentencing reform.

9.26 Arguments included:

- that the ACT was well-placed to undertake sentencing reform in view of its small size and low crime rates;¹⁹⁴⁰
- that the climate of debate on sentencing in the ACT was also more favourable to reform than those of some other Australian jurisdictions;¹⁹⁴¹
- that ‘recent decisions ‘to repeal periodic detention in the ACT and the planned expansion of the Alexander Maconochie Centre’ had ‘provided the government with the opportunity to examine the operations of the territory’s sentencing regime and related matters’;¹⁹⁴²
- that the purpose of the Justice Reform Strategy that emerged from this was to ‘recognise that, in many instances, people who are ending up in prison perhaps should not be there

¹⁹³⁶ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.25.

¹⁹³⁷ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.25.

¹⁹³⁸ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.25.

¹⁹³⁹ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.26.

¹⁹⁴⁰ Dr Lorana Bartels, *Transcript of Evidence*, 26 May 2014, p.146. See also Mr Anthony Hopkins, *Transcript of Evidence*, 26 May 2014, p.164.

¹⁹⁴¹ Mr Steven Whybrow, *Transcript of Evidence*, 19 May 2014, p.112.

¹⁹⁴² Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.1.

... [but] because of the nature of their offending behaviour and because of the way sentencing laws are currently constructed, they are being sent to prison’;¹⁹⁴³ and

- that this brought a need for ‘structures in place so that suitable assistance is available for offenders being supervised in the community’.¹⁹⁴⁴

COMMITTEE COMMENT

9.27 After deliberating on the arguments put to the inquiry regarding the potential for sentencing reform, the Committee considers that these are important reflections, which can have a useful input into the implementation of sentencing reform.

9.28 In the Committee’s view, the most important reforms recommended in this report are:

- to establish and properly resource an intensive corrections orders regime;
- to review and reform the ACT bail regime such that it is consistent with the spirit and letter of the proposed intensive corrections orders regime;
- to implement minor adjustments to the ACT parole regime that will see it strengthened in terms of protecting public safety and have its criteria and processes more accessible to the public; and
- to institute a sentencing council, charged with processing, researching and publishing on sentencing in the ACT, and acting as a mediator between the courts, the ACT Government and the ACT public.

9.29 Implementing these, and the other recommendations that are proposed in this report, will result in an ACT sentencing regime that is consistent, to an enhanced degree, with the consensus principles voiced by contributors to the inquiry, including those presented in this chapter.

¹⁹⁴³ Mr Simon Corbell MLA, *Transcript of Evidence*, 2 May 2014, p.4.

¹⁹⁴⁴ Mr Shane Rattenbury MLA, *Transcript of Evidence*, 2 May 2014, p.25.

Appendix A

Submissions

Submission No.1 - Dr Lorana Bartels

Submission No.2 - Mr Christopher Ryan

Submission No.3 - Director of Public Prosecutions

Submission No.4 - Australia Lawyers Alliance

Submission No.5 - ATODA

Submission No.6 - ACTCOSS

Submission No.7 - ACT Children & Young People Commissioner

Submission No.8 - ACT Human Rights and Discrimination Commissioner

Submission No.9 - Mr Anthony Hopkins

Submission No.10 - Victims of Crime Commissioner (amended)

Submission No.11 - ACT Bar Association

Submission No.12 - ACT Government

Submission No.13 - ACT Law Society

Submission No.14 - Legal Aid ACT

Submission No.15 - Aboriginal Legal Service

Submission No.16 - Mr Greg Cornwell AM

Submission No.17 - Bravehearts Inc

Submission No.18 - Prisoners Aid ACT

Submission No.19 – Mr Terry O’Connell

Exhibits

Exhibit No.1A - Real Justice Australia and Re-engage Youth Services

Exhibit No.1B - Real Justice Australia and Re-engage Youth Services

Exhibit No.1C - Real Justice Australia and Re-engage Youth Services

Exhibit No.1D - Real Justice Australia and Re-engage Youth Services

Exhibit No.1E - Real Justice Australia and Re-engage Youth Services

Exhibit No.1F - Real Justice Australia and Re-engage Youth Services

Exhibit No.1G - Real Justice Australia and Re-engage Youth Services

Exhibit No.2 - Mr Matt Casey

Exhibit No.3 - Mr Terry O'Connell

Appendix B

Witnesses

Friday 2 May 2014 — Legislative Assembly for the ACT

Witnesses:

- Mr Simon Corbell MLA, Attorney-General and Minister for Police and Emergency Services;
- Ms Alison Playford , Acting Director-General, Justice and Community Safety
- Dr Karl Alderson , Deputy Director-General, Justice, Justice and Community Safety
- Deputy Chief Police Officer David Pryce, ACT Policing
- Mr Victor Martin , Director Criminal Law Group, Legislation, Policy and Programs, Justice and Community Safety
- Ms Janet-Lee Hibberd , General Manager Community Corrections, ACT Corrective Services, Justice and Community Safety
- Mr Shane Rattenbury MLA, Minister for Corrections
- Ms Bernadette Mitcherson , Executive Director, ACT Corrective Services, Justice and Community Safety
- Mr Graham Delaney, Chair, Sentence Administration Board

Monday 19 May 2014 — Legislative Assembly for the ACT

Witnesses:

- Mr Jon White—Director of Public Prosecutions
- Mr Greg Stretton SC, Mr Shane Gill, Mr Ken Archer—ACT Bar Association
- Mr Martin Hochridge, Mr Michael Kukulies-Smith—ACT Law Society
- Mr Michael Lalor, Mr Peter Rose, Mr Raymond Brazil—Aboriginal Legal Service
- Australian Lawyer's Alliance

Monday 26 May 2014 — Legislative Assembly for the ACT

Witnesses:

- Dr Helen Watchirs, Commissioner for Human Rights and Discrimination, and Mr Alasdair Roy, Commissioner for Children and Young People—ACT Human Rights Commission
- Dr John Boersig—Legal Aid ACT
- Dr Lorana Bartels—Associate Professor of Law, University of Canberra
-

Tuesday 14 October 2014 — Legislative Assembly for the ACT

Witnesses:

- Mr John Hinchey—Victims of Crime Commissioner
- Dr Brian Turner, President, and Dr Hugh Smith, Secretary—Prisoners Aid ACT

Monday 15 December 2014 — Legislative Assembly for the ACT

Witnesses:

- Dr Judy Putt, Official Visitor
- Ms Tracey Whetnall, Indigenous Official Visitor
- Mr Matt Casey, Professional Standards Officer, Catholic Archdiocese of Canberra and Goulburn
- Mr Terry O’Connell OAM, Australian Director, Real Justice