LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON COMMUNITY SERVICES AND SOCIAL EQUITY

(Reference: Inquiry into the rights, interests and wellbeing of children and young people)

Members:

MR J HARGREAVES (The Chair)
MS R DUNDAS (The Deputy Chair)
MR G CORNWELL
MRS H CROSS

TRANSCRIPT OF EVIDENCE

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Secretary to the committee
Ms J Carmody (ph: 62050129)

By authority of the Legislative Assembly for the Australian Capital Territory

The committee met at 4.06 pm.

THE CHAIR: I will ask you to make an opening statement. Before you do that, please identify yourself into the microphone, so we get that onto the *Hansard* record. That's part of the process.

KENNETH CRISPIN was called.

Mr Justice Crispin: I'm Ken Crispin. I appreciate the opportunity to come and talk to you. As I mentioned before the session was opened, I was somewhat concerned that the Law Reform Commission wasn't in a position to make an extensive submission early on. We have, effectively, five part-time members and no secretariat or research officers. So a major exercise of this kind is a bit beyond us, at the moment, until we can do something about further research facilities.

Nevertheless, I was grateful for the opportunity to receive a paper from you, raising specific issues, and have a chance to make comments about them. I think it is sometimes very easy for people within departments to have an appreciation of what happens in courts that isn't entirely in accordance with the judges or the magistrates, or other people who have a constant involvement in them. I noticed this particularly when the Law Reform Commission was receiving public submissions in relation to the reform of the law of sexual assault. I found that people would constantly announce that something should be done about particular practices that occurred in all rape trials, for example.

Such things may have occurred, from time to time, but I haven't ever seen them in 30 years in law, about 20 of which were as a defence counsel. I was the Director of Public Prosecutions for three and a half years; I've been a judge for five and a half years, and I haven't encountered them even once. However, there was a sincere and widespread belief that these things were universal.

Many of the examples given of the types of cases were put forward as though this was the stereotypical case. Even the type of case wasn't what was normally occurring in those sorts of situations. At the moment, we have a situation where there is something of a gulf between the community's understanding of how cases are conducted right across the board, be they civil or criminal, and what in fact happens in them.

THE CHAIR: We have heard that sort of comment before. Whilst talking about it recently during evidence that's come to the committee, we have had people tell us their case histories, if you like, but it's been the negative side of the stick. I don't recall ever hearing evidence from people who, for example, had a good experience in the Children's Court, the Family Court or within Family Services. It seems to be easy to make sweeping generalisations that the system is not working, because of the exposure we get to the information we receive, but we don't necessarily get the whole picture.

I think it would be fair to say that there would be a few of us here who could verbally walk us through the process. In fact, perhaps it would do us good to know what the process is, if we're trying to recommend any kind of reform that might take place.

In the paper, when we talked about the quality of the judiciary, or the quality of the legal profession, there was no intention to say, "Okay, what we've got is poor representation or poor adjudication." We were posing the question of whether it is time for some cultural change, in much the same way that, within the legal profession generally, such a cultural change occurred when we moved from the Matrimonial Causes Act and the Family Law Act and took away the whole concept of fault. That was a paradigm shift in matrimonial law.

We were toying with the question—and this is where we thought we might obtain your views—of whether we are at the stage where we need such a paradigm shift in representation for kids.

MR CORNWELL: I hope not.

THE CHAIR: And, if so, which way should it go—or, if not, why not? We thought we would try to explore that from the perspective of the law generally. That is where the commission would come into it and, more specifically, the kids court. We'll talk to Magistrate Burns later, if he's good enough to do that.

I wanted to indicate to you that there was no intention on the part of the committee—and we are conscious that there will be no perception of this—to be critical of either individuals or the local system—this is merely the systemic approach to it. I seek your response.

Mr Justice Crispin: Whilst I have every sympathy for that approach, one of the problems is that, at the moment,, there seems to be a phenomenon which occurs throughout the whole of Australia—it has been going on for some years—that particular problems will be highlighted in a case that will get a lot of publicity. It doesn't matter what type of case it is—it occurs across the board.

Frequently, that problem will have occurred because either the investigating authorities haven't done the job properly, the prosecutor—using the word "prosecutor" in a wider sense, being the person in charge who is responsible for bringing the case, be it civil or criminal—hasn't prepared the matter properly; there's been a failure to understand basic principles; or there has been some other thing which could properly be "stuff-up".

That usually produces a raft of approaches—that either there's something radically wrong with the system or we need to change the law in some way. So, within the criminal law, for example, there is a constant litany of cases that are bungled and which are immediately followed by the suggestion that the case was lost only because the law did not sufficiently intrude upon the rights of individuals—or something along those lines.

That, I regret to say, happens in the Children's Court as well as in any other court. I don't want to throw rocks at anybody, either. However, it is not just a case of saying that there needs to be that kind of paradigm shift—I believe it's also a matter of recognising that

sometimes the way in which things are done needs to be addressed, and that one simply needs to try to look for better standards than one is getting at the present time.

MS DUNDAS: Can I ask a quick question on that?

THE CHAIR: You can ask a long one!

MS DUNDAS: You used the terms "bungled" and "stuff-up". Can I quickly say that we need to look at how cases are being prepared by the people who are gathering evidence—and prosecutors. Do you think we should set higher standards, or do we need to go back to the basic training level for our law enforcement agencies, or for our children's protection agencies in Children's Court matters?

Mr Justice Crispin: It is difficult to know exactly what the solution is. Let me give you a practical example, to put it into some kind of context. A couple of years ago, I presided over a trial in which a violent man, who had been released on parole four days earlier, held up a taxi driver with a screwdriver. His record was appalling—for violence—and there was some evidence that he was psychotic.

The man having produced the screwdriver, the taxi driver hit the button. There's an arrangement whereby that means that the conversation is relayed into the controller's room and the cab can be tracked.

The controller called several other cabbies, who converged upon a corner to which the taxi was proceeding. The taxi driver then leapt out of the vehicle and the offender with the screwdriver was confronted by about 10 taxi drivers. Nobody wanted to tackle him, because he was a big man and he had a screwdriver.

What then happened was that the man pushed through them, ran through a wooded area near Fyshwick and disappeared from sight. The police were duly called. An hour later, they found a big man of the same description, behind a fence. It was obvious that he'd climbed over the back fence, and, because he couldn't get out at the front, was still there. When the police arrived, they arrested him and he made a full confession.

You would have thought that, with 10 ten eyewitnesses and a full confession, you'd have a pretty fair walk-up start. But the Commonwealth law requires that witnesses be cautioned; they needn't answer questions; they are told they can have a solicitor; the interview must be tape-recorded and, if the person is an Aboriginal, they must be given certain other rights, such as to have a trusted friend present.

The police ignored all those requirements. The only explanation they offered me was, "We didn't think it was really worth the trouble." Surprise, surprise! The evidence of the confession had to be rejected. As far as the eyewitnesses were concerned, the police then showed a photo board of several people to the taxi driver who was held up. He said, "Mate, if I had to guess, I'd go for the bloke in No 3, but it could be the one in No 7."

Faced with such a clear-cut identification, they didn't bother to ask any of the other nine drivers, so we wound up with a purely circumstantial evidence case. A big Aboriginal

man holds up somebody in a taxi and, an hour later, a couple of kilometres away, they find another big Aboriginal man behind a fence. Not surprisingly, the jury said, "Not guilty"—and everybody went home. How do you fix a problem like that by changing the legislation?

MR CORNWELL: In the meantime, the community says there's no justice.

Mr Justice Crispin: That's right. You've got to address the competency with which the investigation is carried out and the case presented.

There are similar problems in care proceedings, where cases are brought to court about whether or not a young child should be removed from parents. There's almost no evidence in the case. What evidence there is, is third and fourth-hand hearsay. The person presenting it has some kind of half-baked idea that they're entitled to take the child away unless the parents can demonstrate that they should keep him.

The magistrate says, not surprisingly, "That's not the law. You've got to present a case. Where's your evidence?" People then go away, talking about how the law has to be changed to cope with this problem.

It is terribly difficult to address these kinds of systemic considerations. People dig in their toes. They don't like the amendments which have been made and, therefore, they won't comply with them.

I guess there will always be people who don't do the job properly. Then there is the problem that the public sector can't pay what the private sector can pay. There's a host of problems that lead to this kind of situation.

THE CHAIR: You talked about behavioural problems on the part of the people presenting evidence—or not, which is more the point. So we can't fix up the legislation. What we talk about in the legislation is whether or not the court officers have the right, or the obligation, to remove kids or sustain a case. One of the issues for us was whether the Evidence Act was strong enough to assist in the court thing. Also, of course, there is the other subordinate legislation, in a sense—the Children and Young Persons Act.

Magistrates are adjudicating on care and protection of young children in purported situations that might threaten their safety. I wonder if the Children and Young Persons Act ought to have some sort of inclusion within it, detailing the degree of evidence that has to be provided before such a thing would happen.

One of the things we've been struggling with, which you've addressed in here—and so has Magistrate Burns—is best interests versus the right to stay with natural parent. We've had differing views given to us in the course of this inquiry. I must say that you've put it quite nicely—for me, anyway. It's been very helpful in that it's not an either/or situation. Indeed, I read somewhere else that the best interests of the child are served by attempting to put it back into a functional, natural family.

Mr Justice Crispin: Yes, if that's possible.

THE CHAIR: The problems, of course, are in providing evidence or scenarios to the courts to say, "This is how we see the situation. We want you to give us an order to take this child away from its parent because the child is in an unsafe situation."

I'm getting a feel from much of the evidence given to us that, in those sorts of situations brought on by extended family members—grandparents and whatnot—firstly, the evidence is pretty ordinary. Secondly, it seems to be a case of them suggesting to the courts that they'd be better parents, not that these ones are unsafe parents. It seems that the compilation of a case by Family Services needs to be looked at long and hard.

Mr Justice Crispin: I don't think there's any doubt about that. One of the things that must be borne in mind in relation to this type of case, and also in relation to protection order litigation, is that people either make an application themselves or complain to somebody else to have an application made when, usually, there has just been a row of some description and they're angry. And it's commonplace to find that the first complaint is in very florid and exaggerated terms.

When the matter comes to court two or three weeks later, even the person making the complaint is making it in much more temperate terms. You find that the position doesn't seem to be anywhere near as bad as it looked as though it was going to be. Then, when you have evidence called from other people—not just the respondent to the application but other people like neighbours, people who visited at various times, or members of an extended family—you often find that a lot of the allegations are attributable to an emotional response and the objective facts are not the way they are painted.

So there is a need to be very careful about whipping children out of families, on the basis that people have come to see somebody in a department and made various kinds of allegations which are not supported. That was one of the problems the department had in the case referred to. The mother-in-law in that case didn't live up to what she told the department.

MS DUNDAS: How do you pick up cases where there might have been a series of these incidents and none of them, on the evidence, or balance of probabilities, was in any way a dangerous situation? There have been so many of them that the psychological damage and the long-term impacts are definitely pointing to the fact that something needs to be done—but that might not be flagged until six or seven cases down the track, when violence occurs. How do we bring about early intervention in those kinds of situations, so that the violence doesn't need to occur for a measured intervention to take place?

Mr Justice Crispin: With great difficulty.

MS DUNDAS: I appreciate that.

Mr Justice Crispin: One of the problems is that the fact that you have a disaffected family member who makes a lot of complaints on many occasions doesn't make them any more likely to be true than if the person has made them on one occasion. That is why

I'm a bit nervous about just sort of jettisoning-in the burden of proof, even on the balance of probabilities, which is all it has to be.

There would often be other material you could find, if there was a developing problem of that kind. With school-aged children, often a school counsellor or teacher will give some evidence of it, or the marks will have gone down. In younger children than that, there will often be evidence of distress noted by a social worker or medical practitioner. There will be grandparents, uncles, aunts and neighbours. There are all sorts of people who can be contacted, with a view to seeing whether they think there is some kind of problem.

The real difficulty is knowing how one can regulate it by an act. Ultimately, however the legislation falls, there has to be a decision made by somebody, on the basis of the best information available to that person.

THE CHAIR: I want to go down that track for a second, and I'd appreciate your response on this—from your experience on the bench, and within the commission. I refer to the paucity of quality information being provided to the bench. I'm getting a feeling from witnesses that the reporting and recording of the encounters of the family services people—or non-government people in that same area—is disjointed. It's not on a multidisciplinary sort of cross-agency perspective—it's episodic at best; there's very little competent memory about.

So, when somebody is seeking advice on the history of a child at, say, age eight, if one were able to track the history of that kid, you would get the sort of thing Ms Dundas is talking about here. You get the repeated occasions that didn't proceed to anything, and then the aggregation of that is much more serious.

I suppose the question is: are we correct in our understanding that what is needed very severely is a consistent approach—one file on a child, as it were, who is initially identified as being at risk; then all of the support agencies feed into that—and that is the information given to the bench?

Mr Justice Crispin: Yes, I think there's great scope for doing that. There's also no doubt that the department is pretty strapped financially. The impression I get when I want reports on somebody—I understand that the magistrates have the same experience—is that it takes a fair while. I wonder, in some of these cases where we have had a series of reports of incidents—seven or eight of them—what's been done along the way. The Supreme Court doesn't hear these cases—it only gets them on appeal.

I understand from some of the magistrates that there are sometimes cases which will arrive in court where there have been reports over a long period of time. The magistrate will say, "Has anybody intervened? Has somebody been to see the parents? Has there been a discussion about this with them? Has this been raised directly?"—No.

THE CHAIR: Do you think that's because it hasn't, or because there's no record of it ever happening, and no-one would know that it did?

Mr Justice Crispin: It may be either.

MRS CROSS: Is it limited resources? Is that what you're saying—stretched resources?

Mr Justice Crispin: That's what I'm told. I'm not in a position to know personally, but that's what I'm told. The consequences of that are fairly dire. On the one hand, it could be a problem which might have been nipped in the bud by some sort of intervention—not everybody needs to be dragged into court kicking and screaming.

Many people will respond to an expression of concern by a government authority. That opportunity may have been lost. Then, if they do have to go to court, the information you might have got out of that is lost. You raise something with somebody about a bruise seen on the kid yesterday, for example. If you're not happy with the parent's explanation, you can ask for a doctor to look at it. Six months later, how do you resolve that? It's virtually impossible to say.

Incidentally, harking back to the question you raised a minute ago, I should mention that, in the Family Court in custody proceedings, they will take into account the risk of a child being seriously abused. Even if it isn't a probability, it may be that the gravity of that risk is sufficient to sway custody one way or the other.

I don't think it's necessarily the case that it has to be proven, on the balance of probabilities or beyond reasonable doubt, that a particular act of violence has occurred. What has to be established is that, viewed overall, the interests of the child require that they be taken away. That can be simply because the risks are too great. It doesn't have to be because those risks have actually been realised, as I would understand the law.

THE CHAIR: Can I ask you to expand on one of the issues you've raised? I might say it is the first time this has been raised—out of all of the people we have spoken to. We have spoken to children's commissioners, guardians, and heaven knows who, but your submission—from the Law Reform Commission—was the first one to say that, if you regulate it too tightly—if you put too much legislation in place—you remove the discretion on the part of the courts to be able to dispense justice fairly and, in fact, the likelihood of somebody being treated unfairly is higher, the tighter the legislation is.

That's the way I read it. One end of the spectrum is to have no legislation at all—and let the judges do what they like in respect of the wellbeing of the child. The other, ridiculous, end is where you have it so tight that the public service can tick the box, and somewhere in the middle you want to have the guidelines—but the discretion. At the end of the day, the life of this young person is in your hands. Do you want to expand a bit for the purposes of the committee on what your thinking was on that?

Mr Justice Crispin: Yes. It's very difficult to draw a line in the sand and say that that's precisely where the balance should be. There are established principles in the Children and Young People Act. There are also established principles which have come out of the common law. Of course, the Family Court—and, before that, the Supreme Court, under the old Matrimonial Causes Act—has been making orders about the care and custody of children for a very long time now, so it's a field which has been well worked over.

There seem to be two comments that keep being made. One is that it is just a matter of judges doing what they please. That ignores 50 years of established principles, and it is not the case. The second comment is that magistrates need to be made accountable. Well, every word a magistrate says in court is recorded—every single word. Even the jokes are recorded.

MRS CROSS: Like Hansard.

Mr Justice Crispin: Like Hansard—exactly. If you don't like the decision, whatever the decision may be, you can appeal. If you don't like the decision you get from me or one of the other Supreme Court judges on the appeal, you can appeal to the Court of Appeal and have it reviewed by three judges. If you think there's a serious error in a principle that's being applied, you can either seek special leave in the High Court, or you can come back and say, "There's something radically wrong with the act, and it needs to be changed."

I think both those principles are largely misconceived. What frequently happens is that there is a reaction to a decision made by a magistrate. It may be that the magistrate has simply got it wrong; it may be that the side which has lost doesn't like the decision—which is scarcely surprising; or it may be that somebody who appeared for the side that lost didn't do the case properly and doesn't want to admit that—and so will suggest that the system needs to be changed—that there's some terrible defect in the law.

However, I have not been able to identify any legal principles that basically stand in the way of people presenting an adequate case dealing with the welfare of a child; which suggest that that evidence will be ignored; or suggest that, in some way, the results are distorted by the process.

I believe the appointment of a dedicated Children's Court magistrate was a good move, and I think the benefits of that will come. I understand, anecdotally, that John Burns has been rather more keen than his predecessor perhaps was to take in hand people appearing in cases and suggest what was wrong with the way in which the case has been prepared and presented, and how it might be improved. I'm not being critical of his predecessor. There are different schools of thought among the judiciary as to the extent to which judges or magistrates should intrude into the conduct of the case, but I think that will have a flow-on effect in time to come.

The difficulty of rigid rules is becoming increasingly evident in courts, in all sorts of areas. Hence, I quoted that American writer who pointed out that a lawyer has to deal with the situation she encounters, not the one the system designer anticipated. Increasingly, you find that cases before the courts are quite different from the ones people had in mind.

MRS CROSS: What percentage of children do you think are not well serviced by adequate representation, because of lack of training or experience by those representing them? One of the areas of complaint we have heard before this committee is from people who have said that the children's interests—the welfare of the child—don't seem to be the first priority with those representing them, perhaps because they've got no experience

in children's matters. So whatever's presented to the person on the bench is less than adequate.

Mr Justice Crispin: I can't offer an opinion about percentages. John Burns might be able to, but I don't see enough of them. As I say, I only see the odd ones that come on appeal.

There is a problem with people from the department appearing in cases of this sort because, generally speaking, their experience is fairly narrow. I don't say that critically of anybody. It is just that, in many cases, they have not had the opportunity and, as I said earlier, the salaries and so on paid are much lower than in the public sector.

They're also lower, in some respects, here than they are in New South Wales—with prosecutors, for example. The kinds of people who prosecute cases in the Supreme Court are usually on about $70,000 a year and a New South Wales Crown Prosecutor is on $173,000 a year. So there are not too many traffic jams of New South Wales prosecutors on the highway trying to get jobs here.

Then there is the other type of person who appears for children—a private solicitor who appears as a child's representative. I have provided some figures there. People who don't understand how heavy the overheads are in law tend to think that $100 an hour is a lot of money, and that people are going to do very well out of that. In fact, that doesn't cover overheads. So the solicitors doing those kinds of cases are actually sustaining a loss. They're paying for the privilege of appearing for these kids.

Surprise, surprise, that tends to mean that you don't get the senior partners of firms, you get the ones who are pretty new, green, and fairly inexperienced. Furthermore, they will be buffeted by the demands of those who employ them to not spend too much time on cases that are going to cost money, but to make sure they give priority to commercial cases and others which are better remunerated. The public purse is not boundless. There's a limit, obviously, to the extent to which one can do something about that.

There is, I think, a case for training. One solicitor I spoke to has already attended a couple of courses. I understand the Family Court is about to issue guidelines. Whether that will ripen into seminars and further training, I'm not sure. However, I do believe there's a need for the development of special skills and, at the moment, the profession isn't providing for that.

THE CHAIR: You went into detail there. For those members who want to have a quick scan, the practice costs are on page 13 of the commission's submission.

Mr Justice Crispin: I don't want to belabour the point. That's a suburban firm whose overheads, on a percentage basis, are significantly lower than the ones in the CBD.

THE CHAIR: One of the things we wanted to have a look at was whether we have cross-jurisdictional differences in two aspects. One aspect is whether there is any potential for conflict between family law legislation and the Children and Young People

Act—whether one could act against the other; whether someone could cop a ruling on one and say, "No, I don't like that" and go to the other and try to get it changed.

We wanted to look at whether, therefore, we need to have some national attention paid to this, possibly in the form of template legislation by the state Attorneys-General, in partnership with the Commonwealth Attorney-General, to make sure that the legislation in all states regarding children is consistent with the Family Law Act—whether either of them needs to be changed to bring about consistency.

I'm interested in your view on that, and also whether, in your experience, you have found that there's any difficulty between the physical jurisdictional differences by, say, applying the Children and Young Persons Act in the ACT to a child whose parents are not together. They don't have a single custody order—they've got joint custody by default. You've got one person living in New South Wales and the other living in the ACT, and they have ended up with a difficult child. Therefore, the administration of support services for them is half by DOCS and half is done here, depending on where the child decides they're going to live. Have you ever heard of—or is there a reason for us to be concerned about—a jurisdictional issue that we can address legislatively?

Mr Justice Crispin: Yes. Jurisdictional issues are always a problem in a place as geographically small as the ACT, because you have to drive only as far as Queanbeyan and you've got a new jurisdiction. I'm not sure how that can be addressed. There certainly are problems that occur from time to time. Only a couple of weeks ago, I had a case before me in which somebody had applied for restraining orders in the Family Court and then came back to apply for the same orders in the Magistrates Court. The question was whether that was an abuse of process.

The Family Law Act provides that, where there are protection orders made under a state or territory law, any enforcement of orders in the Family Court has to be deferred. The Commonwealth legislation would normally overrule state and territory legislation, to the extent of any inconsistency, but it seems to imply that Magistrates Courts may in fact vary the orders.

Both counsel in the case were of the view that if, for example, you had a judge sitting in Childers Street and a Magistrate's Court sitting on London Circuit, and they disagreed with each other about the operation of the case, the parties could walk backwards and forwards having the orders made and overruled all day.

This seemed to me to be completely absurd. So the ruling I gave in the case was that, once somebody goes to court, litigates an issue and gets an order, it is an abuse of process to try to re-litigate the same issues, all over again, in another court later that day. It may be different if you've got changed circumstances but, if you want to keep running the same case again and again, then it's an abuse of process.

The wider question of people living in different places is a potential problem. It's very hard to know what to do with that. If, for example, you have the department here investigating an allegation that the children are being mistreated by their father, and they then move to Sydney to live with their mother, there may be nothing wrong with that.

That may be an ideal outcome. On the other hand, she might be just as addicted to heroin and just as hopeless a parent as the other one, and you have the problem all over again. DOCS goes in to bat, and the children get freighted back again. I don't think it happens much but undoubtedly it does happen.

The other thing that can happen is that the whole family can pick up and move across the border, to try to prevent jurisdiction. That's generally less effective, because then the departments will liaise with one another. The department in the new jurisdiction will usually jump on the bandwagon and take the proceedings over.

THE CHAIR: That raises with me a problem which I understand to exist. Say we're talking about a probation order—as I understand it, we have legislation governing the monitoring and administration of probation orders—dished out here. If the person is a resident of New South Wales, the New South Wales corrections people will pick it up, but not so care and protection orders.

Mr Justice Crispin: Yes.

THE CHAIR: I've got a feeling that that is so—such that if, for example, a person gets an order in court for a certain situation to apply in the ACT, governing the way in which a child will be looked after, and then moves out of the territory, that's the end of it. As you say, there's a possibility of that. Perhaps we need a piece of legislation similar to the transfer of offenders act. I think that talks about a transfer of responsibility for that.

I'm wondering if we should be looking at the possibility of recommending that the government consider that in respect of court orders for the welfare of young people across jurisdictions. That would have to be something picked up by both jurisdictions. If a recommendation were put forward, it would be that SCAG have a look at it and recommend a cross-jurisdictional approach—that the Standing Committee of Attorneys-General pick it up.

Mr Justice Crispin: Yes. I must confess I haven't had a look at the problem of enforcing care orders interstate at all, but that obviously makes a great deal of sense.

THE CHAIR: I got the feeling about that when we were talking to Father Chris Riley in Sydney, in the Youth Off The Streets scheme, when he was talking about kids going to his facility in Bowral from Canberra. In New South Wales, kids can be told by the courts to go to his facility in Bowral but, in the ACT, we can't tell them to go to his facility in Bowral. If we had such a piece of legislation in force, what would happen is that the court would order the child to go to a facility which does the following—blah, blah, blah. We happen to know that the nearest one is in Bowral. If the child did go to that particular facility, then the maintenance, monitoring and administration of the order would be picked up by DOCS—and vice versa if people came back the other way to go to the Ted Noffs Centre, for example, in Watson. I don't have an answer to that one.

Mr Justice Crispin: It's a very good question.

THE CHAIR: It might be worthwhile for us to do some research on that.

Perhaps I could go off on another tangent, to the neglect versus abuse thing. One of the things you say in your submission is that we ought to be looking at the reporting of neglect, but let us tread very carefully as to how we go about it. In your submission, there is only a short paragraph on it. Did you want to expand on your thoughts and concerns about that?

Mr Justice Crispin: Firstly, I believe mandatory reporting is widely resented by many medical practitioners and other people who are subject to it. Personally, I think it's an entirely defensible proposition, and I believe it should be extended to cases of reasonably obvious and fairly substantial neglect. However, I think the system would soon break down if this became carte blanche—if, every time a kid turned up at school dirty or didn't have shoes on or something, there was an obligation on the teacher to start ringing the department and making a complaint about it. There is a very great difference between a kid who's dirty,, and a kid who's undernourished—or a kid who has some long-term, potentially serious, illness who's not being adequately treated and cared for.

My feeling would be that it should be subject to a requirement that the neglect be of a nature likely to give rise to a serious risk to the child's health or safety—or something along those lines—rather than being left entirely open.

THE CHAIR: Once you create such an issue as serious risk, we will then be employing lawyers to argue on what is serious and what is not serious, presumably. Then people who are supposed to be reporting it in good faith will say, "If their idea of serious is different from mine, I'm going to be in all sorts of strife here, so I'm not doing it."

Mr Justice Crispin: Yes. You'd certainly need to have a provision in the act to protect people who have acted bona fide—in good faith.

MR CORNWELL: It seems to me that it's not being reported anyway. Part of the problem is that people are required by law to report it. They don't do so, and they suffer no penalties whatsoever.

Mr Justice Crispin: Yes, I agree.

MR CORNWELL: This is a case for repeal. There's no point in having a law that nobody is going to bother to put forward.

Mr Justice Crispin: What concerns me is that, although, as you say, it isn't enforced, it is the kind of law where two or three high profile prosecutions might change the culture. A child may wind up being seriously injured.

MR CORNWELL: They could be dead.

Mr Justice Crispin: That's right—they could be dead—and, objectively, various people of the kind to whom the legislation was directed were painfully aware of the risk for a long time; they ignored it and effectively let the kid die. It seems to me that it would be

entirely appropriate to prosecute that person. I think that, once you did prosecute, there would be a change in the culture.

By parity of example, when the Commonwealth set up a commission to investigate bottom of the harbour schemes, it was widely panned as a complete failure because they only prosecuted about two people. Nevertheless, upon the first person going to jail, the Taxation Office saved $1 billion per annum, because the practice stopped. It seems that sometimes the effects of taking decisive action in relation to particular breaches are more widespread than is readily appreciated.

MR CORNWELL: I'm happy to go along with that, except that I'm told it is the police who have to do the prosecuting; I'm told that it might be the organisation itself which brings peer pressure to bear on the person who doesn't do the reporting—and I am told that the Coroner has another role.

I do not see any role whatsoever for Family Services, in what I regard as a farce, because Family Services seem to be passing the buck all the time. "Well, it's up to the police to prosecute, the Coroner has another role", et cetera. I don't think anybody's ever going to be prosecuted for failure to mandatorily report, under these circumstances.

THE CHAIR: I'd be interested in your views on this, too, Ken: one of the difficulties within the context of mandatory reporting of either abuse or neglect is the possibility that people are, firstly, unsure of the level of their duty of care; and, secondly, they are frightened to go with reporting in terms of honouring their duty of care—in particular, professionals who have no idea about the protections which do or do not exist for them through the bona fide discharge of that duty of care. Perhaps what's needed is some sort of enlightenment or clarity on this, because of the possibility of being sued for defamation, or a stack of other things. Is it because people are scared of litigation, or scared of being held up, because they are obliged to do that? Are they therefore deliberately not doing it because they're scared of their duty of care?

MRS CROSS: Why would they be afraid of litigation, if they're doing something for the good of someone else—when all they're doing is reporting it?

THE CHAIR: A vexatious complaint, or defamation, can be levelled against them.

MR CORNWELL: I was told by the minister, in answer to a question on notice, that Family Services have sent information to everybody who is required by law to mandatorily report, explaining what their obligations and responsibilities are—and presumably the protections they have—but it still doesn't seem to occur.

Mr Justice Crispin: They are not getting them. I suspect it's largely cultural. Doctors, in particular, have a very strong ethical tradition of the confidentiality of the patient.

MRS CROSS: It's a little like a lawyer and client.

Mr Justice Crispin: Yes—very close.

MRS CROSS: Or a priest.

THE CHAIR: It's like a confessional.

Mr Justice Crispin: Well, that's another thing. You've mentioned three professions which have strong ethics of confidentiality. Many social workers and so forth—people like school counsellors, for instance—will adopt the view that, if they're told something in confidence by a child, the child's confidence has to be respected, no matter what. You can pass a piece of legislation, but it's still very hard to change the culture. People who have had 20 or 30 years professional experience in which they have gained this understanding are not going to shift from it overnight.

I found this quite remarkable in the Royal Commission into Deep Sleep Therapy, where I appeared for 200-odd mentally ill patients. We had doctor after doctor who would explain that everybody knew that the late Harry Bailey, who was running this program, was completely nuts and that the program was very dangerous. This was a man who apparently made a speech at a medical conference in which he stated that there are two types of people on earth—earthlings and Martians—and that, if his colleagues would only understand that the Martians couldn't be expected to adhere to the petty ethical rulings of the earthlings, it would save a lot of confusion.

MRS CROSS: We've got a few Martians in this place!

Mr Justice Crispin: Although many people had the view that Harry was barmy and the treatment was inherently dangerous, probably 30 doctors who gave evidence explained that it would have been a breach of ethics to question the clinical judgment of a colleague.

I would ask tactful questions like, "Are you suggesting that clinical judgment is hallowed ground upon which your colleague should be permitted to commit manslaughter with impunity?" The answer, when they stopped spluttering, was, essentially, "Yes", because of this deep-seated ethical conviction. I suspect that confidentiality is held with almost that kind of religious fervour.

MR CORNWELL: "I was only following orders."

Mr Justice Crispin: That too.

MRS CROSS: Well no—it's a cultural thing. It's a cultural problem which costs lives. It is unacceptable—we've got to change it.

THE CHAIR: I guess the question then is—this goes to something Mr Cornwell has been consistently talking about in the course of the inquiry—why do you have a piece of legislation in force if no-one is going to use it—if no-one is going to do it? Are we creating an ass for people to poke fun at later on? Should we be trying to create a culture where people will automatically do it? Should we in fact not create a mandatory reporting regime, but create protection regimes for bona fide reporting?

Mr Justice Crispin: In my view, it would be a great leap forward if there could be the bringing together of different professional groups to discuss some of these issues.

A few years back, I had a go at establishing a kind of council of ethics that would bring together doctors, lawyers and people from other professional disciplines, to discuss ethical issues in circumstances in which all of their different professions might impinge upon it. As an example, if a kid goes into a police station and complains of being sexually abused, that kid will be seen by police officers. In due course, they will be passed over to a medical practitioner for examination. They will then perhaps see a police psychologist, go to a prosecutor and then wind up in court.

The perceptions of those people will all be different. Their approaches to the ethics of the situation will all be driven by different backgrounds, perceptions. But the one thing they have in common is that none of them will take an overview and say, "Is there a better way of dealing with this child from start to finish?"—so that the kid isn't passed around like a relay baton; so that the kid isn't constantly re-interviewed and perhaps unintentionally emotionally brutalised in the process.

MRS CROSS: Do you mean a holistic view?

Mr Justice Crispin: Yes.

MRS CROSS: No-one will commit to it.

THE CHAIR: That goes back to the interagency, multidisciplinary, team approach I was talking about earlier on.

Mr Justice Crispin: Yes. It's very important. I think frequently that perhaps one could get a group of people—say the AMA—to indicate who is on their ethics committee, for example, and see whether a group of doctors could be persuaded to talk on that.

THE CHAIR: We have an ethics unit at the ANU which could possibly be invited to give some sort of lead role, conceptually, on how such a group of people could be brought together. We will take that suggestion on board and give a bit of thought as to how it may or may not affect the context of this report. It may be another one.

MS DUNDAS: You responded to the question about the right of children and young people to have their views represented in proceedings. You brought out some issues with the position of a guardian ad litem, who wouldn't necessarily know the legal ramifications of what was going on, and then wouldn't necessarily be able to converse—enough to express the children's concerns. I'd like you to expand on that.

Also, do you think we need a person who goes the other way—who explains what's going on in the court to the children in ways they will understand that a lawyer might not be able to do? Once you finish that, perhaps you could talk a little more about the court counsellors in the Family Court. You said it might prove to be expensive because they don't instruct legal representatives. But are their views put forward to the court and

counted as much as anything else? There are three questions there. I'm sorry about that—I should have taken a breath in-between.

Mr Justice Crispin: I may leave something out—you might have to remind me. First, as far as explaining the procedure goes—yes, that should always happen. When I was Director of Public Prosecutions and there was a child or, for that matter, an adult in a sexual case, for example, who was going to have to go to court, I would—or I would have somebody else do it—take that person over to the court. It would usually be a woman, rather than me, but somebody from the office would take that person into a court and sit them in the back of the court. It may not be a case of the same sort, but they have a chance to see the physical configuration of the court. They'd see how a witness was sworn in, and they'd see how the person was asked questions—cross-examined, and so forth.

The person who took them over would explain it while she was there. She would also explain to them what was likely to happen when they were called to give evidence at the trial. She would tell them that they'd begin by being asked to take an oath; that they had a choice—they could take an oath or make an affirmation—that they would then be asked to sit; that questions would initially be asked by the prosecutor; and that they'd initially be straightforward things like their name, address and occupation—so it wasn't all entirely alien—somebody wouldn't walk through the door with every hair on his or her head standing up at how alien and strange it all was. I don't think there's any particular magic in that—it should happen in every case.

MS DUNDAS: Who should be providing that service? Should it be the lawyers, Family Services, or the court, saying, "We know that this case is coming up" and taking the onus of responsibility for it?

Mr Justice Crispin: It shouldn't be the court, I don't think, in an adversarial system. It would be very difficult for it to be the court because that would mean that somebody who was a representative of the body who was supposed to hear the case impartially and make the decision had a pre-existing relationship with the person. It could be either whoever is presenting the case or somebody from the department. There's no magic in that. It should just happen, and it shouldn't be difficult to arrange.

Perhaps I can leap ahead to court counsellors. They might also, in part, provide an answer to the question of a guardian ad litem. The Family Court itself employs counsellors. The role of the counsellors falls into two categories. Firstly, they will counsel parents in relation to custody disputes; they'll try to assist them to understand how the emotional state of the child might be affected by the litigation; they'll examine the issues that are raised between the two parents and try to assist in resolving them. Sometimes they find that the problem is simply different perceptions, or failure to understand.

Occasionally it will work out that a kid is playing both ends against the middle because he's decided that he'll do very well out of that kind of arrangement—but they try to arrange things on an amicable basis. Very frequently that helps—surprisingly often.

With custody cases, as with property cases, only about 5 per cent are litigated—the rest are resolved by agreement, one way or another. There may be issues where a couple has, say, a three-year-old child. The husband now lives in Brisbane and the wife is reluctant to let the child go. She thinks that her ex-husband will look after the child, but what kind of emotional impact is it going to have on the child? How can it be accomplished?

The counsellor, who will usually be a qualified psychologist with a lot of experience with kids, will be able to say, "We've made a study of that. Kids usually handle that fine, provided it's done in this particular way"—and the problem will be overcome.

The second function counsellors perform is to provide reports to the court. In a custody case, the counsellor will interview the child with both parents; we interview the child with each parent—the other not being present—and interview the child alone. We usually watch the child in the waiting room, interacting with the parents separately, at a time when the child doesn't know that he or she is being observed.

The social worker will then be in a position to provide a report to the court which is both independent and reasonably expert. If one party or the other requires it, the social worker will come to court to be asked questions in open court about the report. They might be asked questions about whether little Johnny was only saying what dad put him up to saying, or something like that. That's also a valuable exercise.

Incidentally, it frequently happens that little Johnny is not playing both ends against the middle deliberately—little Johnny just can't bear to tell his mother that he'd rather live with his father, and can't bear to tell his father that he'd rather live with his mother. So he tells each of them that he wants to live with them. A court counsellor is able to ferret that kind of thing out, and convey it to the court.

Sometimes that means the parents are able to understand what's going on and come to an agreement. At other times, the judge, who makes the decision, will do so in a much more informed manner. It seems to me that that's a very good system. I would say that is the greatest single improvement the Family Law Act brought in, apart from getting rid of fault divorce.

MS DUNDAS: How do you see that we could pick up that model and apply it in other court proceedings?

Mr Justice Crispin: I guess the difficulty is simply one of money—it always seems to come back to resources.

Resources are sometimes discussed, in this town, in a very compartmentalised manner. I can remember the DPP opposing bail for somebody a little while ago, on the basis that their visa had run out. They'd have to fund them within the community and it was going to cost $200 per week if I granted them the bail. I said, "Yes, but it will cost $2,000 a week to keep this person in the Belconnen Remand Centre." The reply was, "Yes, that may be right, but it doesn't come out of our budget." I kid you not—that was said in open court.

When you look at things like the provision of a court counsellor for the Magistrates Court, somebody will undoubtedly come up with a draconian figure—that, with the cost of an office, a secretary and all the rest of it, it'll be a $100,000 a year or something. But then you have to take into account what savings you might effect as a consequence of it. Litigation, after all, is pretty expensive.

If you reduce the number of cases running to court, you defer the need to employ an additional magistrate. You might need to have fewer resources spent on running cases and so forth. I suspect that, in many cases—in the criminal area, for example—money that's spent on kids and getting them out of the criminal justice system may be much better, cost benefit-wise, even if you look at cold-blooded dollars and cents, than the more traditional approaches.

MR CORNWELL: Are there different approaches to Aboriginal children? Does that increase the costs? I guess what I'm asking is, are there increasing costs if you start bringing cultural aspects into it?

Mr Justice Crispin: I suspect the answer is yes. I don't think you can keep them out of it. What happens is that many Aboriginal kids will be moved back to the country areas when they get into trouble. That's a common Aboriginal reaction. The kid's in trouble in the city—take him off to Moree or somewhere like that and sit him down with the elders. These days, of course, it's a multicultural society. It's not just Aboriginal kids, it's kids from an enormous diversity of races and ethnic backgrounds.

MR CORNWELL: So you're going to have different costs involved for different cultures, are you?

Mr Justice Crispin: I don't think anybody's ever quantified it, but there's an incredible variation. You could look at the kids from two dysfunctional parents—a brother and a sister, or even two brothers. The amount of money that would be spent on trying to keep one out of trouble might be 10 times the other.

MRS CROSS: Irrespective of culture?

Mr Justice Crispin: Irrespective of culture. Because it's—

MRS CROSS: Complex.

Mr Justice Crispin: It is. It is very demanding of time and effort.

THE CHAIR: But that research has been done in general terms when justifying restorative justice principles, in terms of corrections versus the warehousing model, in respect of its cost on society. As you say, it costs a fortune to keep a person in Belconnen Remand Centre for a night. Not only that, there could be a poor outcome at the end of the day, exacerbated by any cultural implications—whether its Aboriginal, Vietnamese, Asian or any other body, for that matter. The cost to society, if it is an unsuccessful program for that individual, will far outweigh the input cost of having something a little extra in the court system, to prevent them going down that track in the first place.

Mr Justice Crispin: The other thing that has to be said is that the media always wants to focus on the cases, such as where somebody has given the kid a bond and the kid's got into trouble again. But, if you look at the overall figures, it's pretty successful. The majority of kids, given a chance, coupled with some supervision, will not offend again.

THE CHAIR: Would you agree or disagree with the move of the Quamby Detention Centre from the adult corrections part of justice and community services into the family services system?

Mr Justice Crispin: I don't have enough knowledge to express an opinion about that.

THE CHAIR: Can I give you a hypothesis, so you can give an off-the-cuff response?

Mr Justice Crispin: Yes. The answer is that I believe it depends on how it's run, rather than who runs it.

THE CHAIR: All right—point taken. Therein lies part of the difficulty we've encountered in the course of this inquiry. I guess the thinking and theory about which part of the corrective system in which one sits is that, for adults, you would employ the most successful one in current literature—the restorative justice process—but it's still a case of de-socialising a prisoner. Recreate them, re-socialise them and then send them off.

With kids, though, you don't have to full-on de-socialise them, because their norms aren't yet fully created. You need to be talking about a holistic environmental aspect, to change the direction of the child. Instinctively, one would assume that that would be better placed in the family services or educational-type bucket rather than the corrections bucket. How does that philosophy, or instinct, grab you?

Mr Justice Crispin: As a matter of abstract theory, it sounds pretty good. However, many of these discussions seem to assume that a kid whose 18th birthday is going to be tomorrow is a child, and a kid whose 18th birthday was yesterday is an adult, but there's an enormous gulf between the two. Then, when you take into account the number of them who are emotionally or psychologically dysfunctional, or suffering from some kind of psychological difficulty, mental illness or retardation—or are the victims of sexual abuse as children—all kinds of privations—the difference is often artificial. You know, you can have somebody of 22 who is emotionally 14 or 15.

MR CORNWELL: How do you take the view that if you are 16 and you commit an adult crime, you can't be named? What's your view on that one—if, at the same time, you've said that somebody of 22 can have the mentality of a 16-year-old and yet they are named?

Mr Justice Crispin: My own view about that kind thing doesn't seem to accord with anybody else's—that is that it would be better to consider the situation on a case-by-case basis, having regard for the nature of the offence. For instance, your 16-year-old might have committed an offence which suggests that he's a potential danger. Other people

should be aware of the risk posed by that person. Conversely, with your 22-year-old, there might be evidence before the court which suggests that this young man is on the verge of suicide, and too much of an adverse reaction from somebody in the neighbourhood fruit shop might be enough to push him over the edge.

MR CORNWELL: I'll buy that, yes—that seems a reasonable argument.

MRS CROSS: That's a good point.

MR CORNWELL: I don't mind that.

MRS CROSS: Where we go to the length of protecting someone's identity because of their age, irrespective of the severity of the crime, you believe that should be assessed on a case-by-case basis, depending on the severity of the crime?

Mr Justice Crispin: Yes.

MRS CROSS: And that the judicial system should make the decision to release or not release their name?

Mr Justice Crispin: Yes. Even victims vary enormously in what they want people to know. In sexual assault cases, for example, I've had victims say to me, "I want to have my say in open court, because I want everybody to know why I suffer. The focus is only on offenders. I want people to know what I've been through—personally."

I've had other victims say to me, "Look, can you keep me out of this? Can you keep my name right out of this? I would be mortified—I would never recover if this were to be revealed in open court." Of course, cultural influences may have an effect on that too, but I think it's difficult to have a hard and fast rule that's going to be fair to everybody.

THE CHAIR: I'm conscious of the time. We might have some last questions. Thank you very much for sparing us your time.

Mr Justice Crispin: Perhaps I could make a plea before I go—that some special consideration might be given to mentally dysfunctional children.

THE CHAIR: Yes. One of the issues we have canvassed and will be reporting on is the need for a juvenile psychiatric unit, within the hospital system, which is not within the adult one. We don't know how, or what the government may do, but we've had strong representations that such a facility is drastically needed in this town. That's just one aspect of mentally dysfunctional children that we're looking at—so yes.

MRS CROSS: What specific aspect of that were you looking at us addressing?

Mr Justice Crispin: Simply—it's not simple. It's both the provision of facilities and the question of legislation. Within the criminal law, we have two fundamental problems in the ACT—one is drugs and the other is mental illness. It is rare for anybody to commit an armed hold-up in the ACT which is not intended to get money for drugs. We also

have enormous problems with mental illness. I mentioned the case of the girl who attempted suicide—who had committed an armed robbery to get money to commit suicide.

About a month or so after that case, I had another one of a young man who had climbed out the window of a psychiatric ward at 5 o'clock in the morning and held up a service station—also with a view to getting money to commit suicide. As with the girl, he told the person behind the counter he didn't want all the money, he wanted only enough to get the drugs to kill himself. There's that kind of extremity of need in the community, and it's an area that doesn't seem to have been examined carefully.

I have just heard another case at a special hearing, after somebody had been found unfit to plead—admittedly this person was an adult, in fact a person of 40-odd. There was a great debate about what the relevant principles were, and as to whether or not you needed to prove that the person had the necessary mental understanding required by the offence, or whether it was sufficient merely to prove the facts.

Neither answer is very satisfactory. If you have to prove that a person is so mentally ill that they can't even understand what the case is about, yet knew exactly what they were doing in the offence, what's the point of having the legislation? On the other hand, if you don't have to prove it, then you treat any accident as a murder. Even if the person wasn't negligent, you'd treat it as a murder. That doesn't make sense either.

One of the fundamental questions that kept popping into my head while I was hearing this case was: why have we embarked upon this exercise anyway? The legislation doesn't enable the person to be convicted or punished, so why are we trying to determine whether or not the conduct of that person, a year or two earlier, fell within a series of pigeonholes of the criminal law? Why aren't we focusing upon the question of whether the conduct of that person at that—or any other time—reveals that he's a continuing danger to the community and needs to be incarcerated and dealt with in some way? In any event, why is that a matter for a jury trial, or a trial by judge alone? Why don't we have a legislative regime that will enable that to be dealt with by the Mental Health Tribunal, where people with training in psychiatry are looking at it and making the decision?

It's that kind of issue—are we sufficiently focused upon the special needs of people who are psychiatrically ill and addressing them in a rational sort of way? What tends to happen is that we simply allow them to fall into the criminal justice system. We then use sentencing powers, or other provisions, that were intended to deal with people who have knowingly committed a crime. We use those as a means of trying to funnel them out for some sort of therapeutic intervention. It seems to me that, both conceptually and practically, it's a pretty poor way to approach things.

THE CHAIR: Might I explore with you your response? Touching on this area we're talking about, my experience with the Department of Health—and, in fact, from people I know—is that we certainly have that in respect of people who have a condition which is defined under the Mental Health Act. You could have an administrative regime administered by that tribunal.

However, I understand there are quite a number of people in this town—probably 20 to 25, or maybe more—who suffer from personality dysfunction, which is not defined by the Mental Health Act, and fall between the cracks. A young 35-year-old female comes to mind. You were talking about the robbery—you know the one I mean.

Mr Justice Crispin: Yes.

THE CHAIR: There is not an agreed diagnosis. The only thing agreed about this particular case, and others like it, is the frequency with which they appear before the bench and enjoy the hospitality of the Belconnen Remand Centre. Despite attempts to do anything else, they seem to always end up in the same spot. There doesn't seem to be the attention. This particular person, if we're talking about the same one, first came to the attention of the authorities when she was a mid-teenager.

Mr Justice Crispin: Yes, I think we are talking about the same one. I spent some time talking to her parents—with the DPP. They were terribly nice people. Yes, they are intractable problems. It's very difficult to know what to do.

THE CHAIR: We've got a definitional problem here. If, for example, we told the government of the day: we need you to apply your mind to mentally dysfunctional young people, as to how we deal with them as a society—because there is a massive hole in what we do here. Will we give them the easy way out by saying, "Here you go"? What they'll do is hang their hat on the fact that there must be a mental health diagnosis before they'll even contemplate something. We need to ask if there is another term we can hang our hat on which talks about behaviourally dysfunctional people who are not, I suppose, mildly dysfunctional but chronic. But they don't get psychiatric treatment—they never do.

Mr Justice Crispin: No. I think there is a real problem. I sent somebody who had evidence of serious delusions to the Mental Health Tribunal a while ago. This was a person who had been acquitted of murder on the grounds of self-defence. He had become quite delusional and told the police that he had thought about killing his girlfriend. He wouldn't actually do it, although he had driven her out to the bush on one occasion and sat in the car with her while he thought about it. It was enough to give me the shivers.

His statement to the police was full of ghosts on motorbikes roaring around his house in the middle of the night and so on. He was obviously quite loopy—to use a technical term, since we're discussing delusions. The answer came back that yes, he was delusional, but it was attributable to a depressive illness rather than a psychotic illness and, therefore, he didn't fit their definition.

MRS CROSS: Withdrawal from Zanax, probably.

Mr Justice Crispin: One of the consequences of that is that, whether you let that person go, imprison them for a period and then release them on parole or whatever, you will ultimately want to make sure that they receive counselling. Because they haven't fitted the criteria, they'll have to pay for it personally—but you know they haven't got any

money. The fact that they've been excluded from the statutory criteria means they're going to run loose in the community and be back in front of you within a short period of time. It really is a matter of concern. You see it with quite young kids, as well as with adults.

MRS CROSS: So we need to amend the legislation, or introduce something new to cover that category. What do we need to do?

Mr Justice Crispin: I think there needs to be a broader approach to the legislation. I don't suggest that that's going to provide a panacea for all ills, because then there's the question: what do you do with these people?

Another of our candidates, who you probably know too, was a very intelligent young man who suffered brain damage in a car accident. When he comes into court, he is sometimes almost incoherent, yet at other times has great presence. You have to be careful with him, lest you wind up playing the straight man to his jokes. I reprimanded him on one occasion for referring to the magistrates as "those morons". He looked at me with an air of hurt innocence and said, "I do apologise. I hadn't intended to be offensive. As your Honour would well know, a moron is somebody with an IQ of between 60 and 70. I thought I was being quite flattering." So you must be very careful how you come back to that. That's a person who constantly frightens people by his demeanour. They take out restraining orders and he ignores them.

MR CORNWELL: He is a nuisance.

Mr Justice Crispin: He's a complete nuisance.

MRS CROSS: You never know what they're going to do.

Mr Justice Crispin: He occasionally carries out a minor assault—usually when somebody tries to throw him out of a building. On the other hand, it would be hard to justify making an order that he be held in custody for the rest of his life. He's never going to get any better—it's a problem attributable to brain damage. So the question is, how does society manage somebody like that? I'm afraid there aren't any easy answers to that.

THE CHAIR: As I was saying before, in the context of our report—and it's somewhat limited to children and young people—we will be making a certain number of recommendations. We will be making a recommendation of sorts about the psychiatric facility for adolescents.

As I mentioned first up, we will also be posing questions where we consider there are real holes that need serious attention. The one you've raised is a large area. I don't have the answers. It's probably going to be the subject of some other inquiry, quite specifically, further down the track. So if we can raise this in the public arena, that's what we'll do.

Mr Justice Crispin: Drugs is the other one.

MRS CROSS: We could talk to you all day, you know.

THE CHAIR: No, you cannot, because I am going to call the public part of the meeting to a close. Thank you very much for your time.

The committee adjourned at 5.28 pm.