LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: annual and financial reports 2002-2003)

Members:

MR W STEFANIAK (The Chair)
MR J HARGREAVES (The Deputy Chair)
MS K TUCKER

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 3 FEBRUARY 2004

Secretary to the committee:
Ms J Henderson (Ph: 6205 0199)

By authority of the Legislative Assembly for the Australian Capital Territory

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

The committee met at 2.02 pm.

Appearances:

Mr J Stanhope, Chief Minister, Attorney-General, Minister for Environment and Minister for Community Affairs
Department of Justice and Community Safety
Mr T Keady, Chief Executive
Mr M Ockwell, Executive Director Corporate Services
Mr B Lenihan, Director Resource Management
Ms E Kelly, Executive Director Policy and Regulatory Division
Mr T Brown, Director Office of Fair Trading
Ms T Burgess, Manager, Business Services Unit
Mr J Leahy, Parliamentary Counsel
Mr P Mitchell, Chief Solicitor, ACT Government Solicitor
Mr J Ryan, Director ACT Corrective Services
Mr B Kelly, Courts Administrator
Mr A Taylor, Registrar-General
Legal Aid Commission
Mr C Staniforth, Chief Executive Officer
Ms S Davidson, Business Manager
Public Trustee
Ms D Kargas
Mr D Gillespie
Ms J Thompson
ACT Ombudsman
Prof. J McMillan, ACT Ombudsman
Ms D Sykes, Senior Assistant Ombudsman
Victims of Crime Support Program
Ms R Holder, Victims of Crime Coordinator
Director of Public Prosecutions
Mr R Refshauge, Director of Public Prosecutions

THE CHAIR: Today is the second hearing relating to the committee's examination of the annual and financial reports assigned to it and the committee will be examining these reports in the following order: the JACS report, except for the ESB, which has been done; the Legal Aid Commission; the Public Trustee; the ACT Ombudsman; the victims of crime support program; and the DPP.

The transcript will be sent to witnesses later this week. Please note any commitments you make to take questions on notice as we go along. In order to meet the requirement to report to the Assembly on Tuesday, 10 February, we will need to have responses to any questions taken on notice by 1.00 pm on Friday, 6 February. Please deliver those to the secretary.

During the afternoon we will have a break, depending on how things are going. The usual time is from 3.30 to 3.45 pm. I understand that the Chief Minister has to be away by 5.00 pm.

I think everyone is aware of the requirements of witnesses, but I will explain them again for everyone present. Before doing so, I formally welcome the Attorney-General and the officials. People speaking for the first time as a witness should state their name and the capacity in which they are appearing before the committee. As soon as I finish reading the requirements, Mr Hargreaves will move a motion authorising for publication the correspondence the committee has received.

Those who give evidence today should understand that these proceedings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections, but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a serious matter. Does everyone understand that? Anyone who does not should stick up his or her hand.

Resolved:

> That, pursuant to standing order 243, the documents and evidence received thus far be received and authorised for publication.

Mr Keady: Mr Chair, I wish to raise a preliminary issue, with your indulgence. Ms Holder is required to be somewhere else shortly before 3.00 pm. Would it be possible to have questions about the victims of crime support program addressed in time to allow her to meet that commitment?

THE CHAIR: There being no objections, we will do that program first. I have a number of issues to raise in relation to the program and report. I refer firstly to the budget for the victims of crime support program. Ms Holder, at page 6 of your report you expressed concern that the four-year allocation made in 2000-01 had been underspent, whilst services had been unable to meet demand. Could you elaborate on that? Has there been an underspend this year?

Ms Holder: As I understand that underspend—perhaps this is something that Ms Kelly can elaborate on—there were some questions about how the original contract was issued for the victims services scheme and some questions about the dispersal of funds to certain other areas within the department. That is my understanding as to that underspend.

THE CHAIR: Does anyone want to elaborate on that?

Ms Kelly: There was, in fact, an underspend on that cost centre of $143,254 last financial year. The way the contract was structured for the victims services scheme was that there was an escalating payments schedule attached to the contract. The payments started quite low because, as you would know with establishing a new service, the demand built and the payments increased each year. Unfortunately, the budget was allocated evenly across the period of the contract, which meant that during the first years of the contract there was a very significant underspend—in fact, in excess of $1 million—and that underspend has continued, although it has reduced each year as the contract payments have increased. Last year, the underspend was $143,000. This year, it

goes into an overspend. This year, we expect an overexpenditure on the cost centre of over $100,000 because the contract payments now exceed the budget allocation for that cost centre.

MR HARGREAVES: Where retrospectivity was disallowed, did that disallowance have an effect on the amount of money that you thought you were going to need?

Ms Kelly: The two things are quite separately funded. Mr Keady can explain.

Mr Keady: The amounts of compensation awarded under the victims scheme are separate from the allocation we are now talking about. They are paid, typically, through the Government Solicitor's Office. So we are talking about an entirely different area of expenditure. Those payments are not affected and they do not affect this allocation.

MR HARGREAVES: Presumably, one makes provision for likely legal liability.

Mr Keady: That is correct.

MR HARGREAVES: I imagine that it is just a huge bucket and you are really trying to guess what is going to happen. Was there provision in there in case that case was not successful and we did have to go back?

Mr Keady: It was forecast as a potential liability. You are correct: there is a range of liabilities which are assessed each year. Obviously, it is an assessment or an estimate and it depends very much on what occurs, usually, in the courts. Actual decisions or settlements, in the main, come within a range and all we can do is attempt to forecast. Sometimes we get caught out but, in general terms, we are fairly close.

THE CHAIR: Where can the financial information by found for the victims support program?

Ms Kelly: The cost centre is a cost centre administered by my division. I will just check on where it is in relation to the annual report, if you will excuse me for a moment. I am sorry, we will have to take that on notice.

THE CHAIR: You are involved in the bill of rights consultation, a bill which will be debated in the March sittings of this Assembly. On page 8 of your report you expressed a preference for a legislated bill, which we seem to have. You also expressed a preference for a number of other things. They include acknowledgment of victim notification and inclusion within an updated encoding of fair trial proceedings, and recognition of citizens' rights to safety and security. On page 9 you state:

> The omission of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) as part of the raft to binding international documents is, however, puzzling. A consequence of this omission is that the Report fails to address some substantive questions as to the content of a proposed Human Rights Act.
>
> The principles contained within the UN Declaration of Basic Principles have been incorporated into legislative effect in most Western democracies, and in the majority of Australian jurisdictions.

I take it that is in other legislation. You continue:

> Its tenets have been given constitutional effect in the United States...and, most recently, in the Rome Statute for the creation of an International Criminal Court. The European Court of Human Rights has ruled that aspects of a victim of crime's rights are not incompatible with the right to a fair trial for an accused person…In the report of the ACT Consultative Committee, however, not a mention of them is made.
>
> The omission from consideration of issues and rights for victims of crime has a number of disturbing consequences. The absence of discussion in relation to, for example, the right to safety and security vis a vis the right to privacy may throw into question current proactive interventions by state agencies into the family to protect adults and children.

Firstly, I take it that you were consulted. Were the comments in your report made after you saw the final bill?

Ms Kelly: I made comments to the consultative committee. Agencies were then asked to comment on the consultative committee's final report and I provided my comments to the attorney through that process.

THE CHAIR: Perhaps my next question should go to the attorney, then. Given those concerns—I am certainly a great fan of bills of rights—if you were to have a bill of rights, and all the other states seem to have provision for one, is that an omission that the government would seek to rectify?

Mr Stanhope: Not at this stage, no. We have made our decision in relation to the content of the human rights act and I am more than happy to debate that with you in a couple of weeks time. Certainly, the consultative committee received representations from the victims of crime coordinator, just as the consultative committee of the government received submissions from a whole raft and range of other interesting perspectives. We accepted some; we did not accept others. Suffice to say that the recommendations or the conclusions drawn by Ms Holder were not at this time supported by either the consultative committee or the government.

THE CHAIR: Why?

Mr Stanhope: They were decisions we took in relation to the nature of the human rights bill or the bill of rights as drafted and presented. There is a whole range of views proposed by Mr Spry in today's paper on why we did not entrench it. The force and import of the significant article the *Canberra Times* published today was that we had gone soft, that he would support the bill of rights if only it had some teeth, if only it allowed the Supreme Court to order intervention, if only it allowed for damages to be claimed. I think Mr Spry was saying that if it were entrenched he would then be inclined to support a bill of rights.

THE CHAIR: I think that is probably right.

Mr Stanhope: I reckon that what he was saying was that he supports a bill of rights; he

just wants one that is good, tough and robust. We took decisions for a range of reasons. It is a very lawyer response, isn't it—that it is not real law and they are not real rights if there is not a dollar figure attached to the end of them and that you cannot assert that your rights have been respected if you do not receive compensation? That is a view that I do not accept and it is a view that the government has not accepted in this case. We have delivered a model of a bill of rights which we believe appropriate to the circumstances of the ACT at this stage. It is groundbreaking. It is the first bill of rights in Australia. We ought to be able to be able to fly any flag up any mast in ideal circumstances.

As it is, there is a range of views within the community around a bill of rights and there is a range of views within the ACT government and its agencies in relation to the optimum form. I have taken a decision as attorney and as Chief Minister on what is achievable, what is doable and what will gain support around this place. As much as there are people with specific interests—for instance, victims of crime—who might like to see issues in relation to victims of crime at the top of the mast, I have made a decision based on lots of other considerations that lead me to suggest that that is not the way to go at this stage.

THE CHAIR: I note that you have mentioned dollars. I would not necessarily think that recognition of a citizen's right to safety and security necessarily has anything to do with dollars. If it appears in virtually all other areas of civil rights legislation around the world, surely that type of principle, which I would hope you would certainly agree to—and I think everyone in the community surely would—would be something worthy of putting in a bill of rights. It does not seem to be a question of dollars.

Mr Stanhope: It is certainly worthy of consideration and it is being considered. To the extent that you wish to move amendments to the human rights bill to ensure that we have a bill of rights that you are more comfortable with, I am more than happy to receive your amendments, but at this stage, for policy and other reasons, it is not a position that has been accepted by the government.

THE CHAIR: Would you consider this particular issue at any length? It would seem fundamental.

Mr Stanhope: Yes. There is a whole range of issues to consider. We have developed a model of a bill of rights quite deliberately, quite knowingly, and you see it as tabled. In the context of the debate we have had, the level of support which the government has received from the community, acknowledging a range of other factors, is groundbreaking for Australia. I have a view about change and how to achieve change. Change is achieved incrementally, particularly if you want it to endure. There is a whole range of other aspects of the bill of rights that perhaps reflect my personal view. It may be, for instance, that I would be more inclined personally to go for broke and to entrench, but I believe in delivering change and I need to ensure that I do that, particularly in a minority parliament.

THE CHAIR: Thank you for those elaborations, Chief Minister. We will have this debate again shortly in a more substantive form.

Mr Stanhope: I look forward to your support.

THE CHAIR: You probably won't get it. You might well get an amendment along those lines. A valid point has been raised there.

MR HARGREAVES: I have been reading the victims of crime annual reports for some years now. They make interesting reading, especially the summaries at the back of the reports of those who have been getting compensation. I do not know what the value is of going into that level of detail other than that there would be those who would be entertained by some of the rather gory stories. Have you considered not going to that level of detail and merely leaving it at a statistical level?

Mr Keady: Perhaps I could just offer a comment, namely, that my colleague Ms Kelly can expand on it. I think we are probably following what has become a tradition in the ACT, where previously these reports were provided by the registrars of the courts. I think there was an expectation that they would provide that level of detail so there was an understanding of the circumstances in which payments were made. I think we have simply repeated what has become a tradition. I think you raise a valid point about just what purpose it serves, other than, perhaps, to satisfy the curiosity of those who would like to have some understanding of the range of circumstances in which payments were made and the values, if you like, of compensation where it is paid and the circumstances that relate to individual values. Perhaps it sets a tariff for the assistance of the legal profession and others who become regularly involved with these. The point you raise, I think, is worth taking on notice next time around.

MR HARGREAVES: I urge you to give some thought as to whether or not it should be included. From where I am sitting and as a member of this committee, I think it is valid for this committee to ask those sorts of questions: please explain to us what these claims are made up of and give examples and that sort of stuff. I just question the value of putting them in the public arena. When I looked through some of these I quite easily identified three of my constituents who were in that story. I imagine if somebody wanted to, it wouldn't be too hard for them to work it out. I don't know how the chairman feels, but I would like to encourage you to consider dropping that from your annual report in future years.

Ms Kelly: Mr Stefaniak, could I just provide the information you requested earlier? I apologise for not being able to point that out more quickly. Output 2.6, in the cost measures, there is only a cost measure for the victims services scheme, on page 90 of the annual report.

THE CHAIR: Ms Holder, in the last two lines on page 11 of the report you stated that the quality and reliability of court support remains a concern. That is currently provided by community groups. In what way is that a concern?

Ms Holder: Some of the concerns that have been expressed to me, both by clients and by practitioners in the agencies, have been along the lines of the quality of the service, its professionalism. To be fair, the questions about reliability are somewhat more solid than are those other two issues.

THE CHAIR: I understand the report, on page 23, states that ACT Community Care and VOCAL met in July 2002 in regard to service level agreement with the provision of volunteer services to victims of crime, and the development of an effective and prior

cooperative arrangement continues to be a concern. You state that VOCAL has experienced a number of internal difficulties which made the performance of its obligations to Community Care difficult. Have they been overcome, as far as you are aware? Are things improving with that particular concern?

Ms Kelly: That is my area of responsibility. VOCAL has a new board that was put in place at the end of last year. The new board has indicated a willingness to put its house in order. It has received some assistance from ACOSS in relation to putting internal governance structures in place, and certainly seems to be functioning better than it had been earlier in the year. As you may also be aware, the contract for the provision of the VSS, the victims services scheme, expired on 31 December. We then reviewed future arrangements that will be put in place and we were aware of the difficulties with VOCAL and there had been some difficulties in the relationships with all of the stakeholders involved. We have extended the contract for six months, until 30 June, and we are in the process of participating in a mediation with VOCAL, ACT Health and the department of justice to confront the issues that Ms Holder mentions in her report and to more clearly specify in the contract the obligations of all of the parties so we avoid this confusion and difficulties in future.

THE CHAIR: In correspondence to this committee VOCAL claims that its clients have encountered difficulties in dealing with the scheme. For example, I mention four points: level one counselling, they say, seemed to be insufficient; a lack of continuity between counsellors; delays in intake of clients; and a lack of appropriate support response in the 100 telephone service.

Ms Kelly: VOCAL has made an extensive submission to the department of justice in the course of preparing for the mediation, because VOCAL considers there are some aspects of the performance of ACT Health that are unsatisfactory and they wish those matters to be addressed. I don't recall any of those three issues. There is some uncertainty about who is able to provide level one counselling, and VOCAL would certainly like VOCAL to be able to provide level one counselling, and they are not currently able to do that, they are not accredited to do that. So, that is an issue we are going to deal with in the mediation, to see whether or not VOCAL itself can be accredited to provide the level one counselling services. I am not sure whether that has manifested itself in their issuing in relation to availability, but the issue they raise with use is that they would love to be able to provide level one services themselves. That is what we hope to resolve in the mediation scheduled for the first week in March.

THE CHAIR: Yes, I have had regular correspondence. I have had some representations from them. About that level one counselling, I understand they have a trained person there who is full time and who people get on with but then they have to hive them off to another service, and it just seems to me, if that is so, that would be very good use of a resource, make the victims feel more comfortable and probably help provide a more senior service.

Ms Kelly: And that is something that that will look at. I think the original contract can definitely be improved upon insofar as it clarifies the obligations of all of the parties. There was a certain lack of clarity in relation to who was responsible for what. So, VOCAL asserting a change in its role probably reflects that lack of clarity in the original contract.

THE CHAIR: They identified a couple of other things, too: some confusion due to duplication of services between the victims of crime coordinator, the victims services scheme and the victims liaison program, and also a lack of a shared client database, which apparently is inconsistent with the service level agreement with VOCAL. Are those things being addressed as well?

Ms Kelly: They are. The issue of the shared database is something that ACT Health has some major confidentiality issues with. It is specifically required under the service level agreement, but as yet it has never been established. The parties have very strong views about whether or not that is appropriate. It is certainly on the list of issues for the mediation in March. The new service level agreement we put in place from 1 July will clarify one way or the other whether or not it is feasible to have a shared database. It is sensitive personal information, health information, so these issues need to be resolved to everyone's satisfaction.

THE CHAIR: I suppose fundamentally the role of the department and all the government services is to be as responsive as possible to the needs of victims within that scheme and obviously to deal sympathetically with victims and, indeed, with a body like VOCAL, which has been around since about 1988 or 1989 to support victims. Neither of you would resile from any of that, would you?

Ms Kelly: No.

Ms Holder: No.

THE CHAIR: Thank you, Attorney, for your answers to quite a few of the questions on notice. Several others probably arise from that, but a number of questions have been answered and authorised for publication. My first question is in relation to the policy and regulatory division, at page 23. I note there output 1.1 and output 3.1, regulatory services. The policy advice was $4.710 million. At first glance that seems to be a fairly significant figure. Just what is that? I take it that is more than just policy advice to the minister?

Ms Kelly: That is a cost centre that consists of the legislation and policy branch of the division. The ministerial services unit is within that output. The Essential Services Consumer Council budget and the victims services scheme are within that output, and the crime prevention program is also. It is actually a conglomeration of a large number of different cost centres.

THE CHAIR: I know that this question was raised about reports during the term of the previous government. For clarity's sake, it might be simpler to report it as such—rather than policy advice, which can be misinterpreted—in a much more narrow sense. That is something people might take on notice, and I thought we were starting to do that over the last few years.

Ms Kelly: Could I qualify that last answer? Crime prevention and the victims services scheme are not in it; it is the others that I mentioned. Crime prevention and the victims services scheme sit under a separate cost centre. We find the nature of the roll-up problematic as well. On 1 July last year, ministerial services was removed from that cost

centre. From now on the legislation and policy branch and the Essential Services Consumer Council will be the two areas considered within that output.

THE CHAIR: The next area in the actual report is courts and tribunals. Firstly, thanks for the response.

Mr Keady: Are we moving on now to output 2.1—courts and tribunals?

THE CHAIR: Yes.

Mr Keady: Ms Kelly might be excused, then.

THE CHAIR: Anyone who is here for previous outputs can go. Chief Minister, the ability of courts to give reasonably detailed information on what occurs in them concerned you even when you were shadow attorney. A number of questions were put on notice on the basic figures in relation to courts. On page 8 of the response, while you were able to state how many charges there were in the Magistrates Court, how many defendants pleaded guilty, how many civil matters were stood over and how many were not completed, there was still difficulty in doing that for the Supreme Court. In the report, it is a court that has a much lower volume of traffic, and we still have to search every file to provide a breakdown of the offences. I assume that you did search every file—you haven't given a breakdown.

MR STANHOPE: This has been an issue of interest to you, me and other attorneys over a number of years, and I am determined, resources permitting, that we establish systems in the courts that give us a much greater capacity to understand more exactly their activities. I cannot answer exactly where we are up to with the institution of those systems, but it is the issue we are dealing with.

Over time, as we find the capacity to increase resources to the courts to deal with the collection, collation and use of information, we will provide that fine detail. Be assured that I am keenly interested in refined information—of course, without ever trespassing across that boundary of the separation of powers and the autonomy and independence of the courts. But the community and government certainly have a real interest in knowing exactly what our courts are doing.

Mr Kelly will be able to answer your question more fully. Be assured that the capacity to access detailed information about the operations of our courts is an issue dear to my heart and one that I will continue to pursue. Mr Kelly might be able to explain the difference between the data collection in the Magistrates Court and in the Supreme Court and where we are up to.

Mr Kelly: Two initiatives will bring improvements in this area, hopefully, in the current financial year and certainly in the period after that. The first is the introduction of the new case management system in the criminal jurisdictions of all courts—the Children's Court, the Magistrates Court and the Supreme Court—forcing us to come to terms with common definitions for "charge", "person", "case", "matter" and that sort of thing. My own view of the statistics that are published is that, while they have been consistent across years, they are not particularly helpful and we could do a lot more in terms of the public accountability and transparency of the work of courts.

The second initiative, which was introduced last financial year, is the adoption of national key performance indicators across all the courts across Australia. That has gone a very long way towards improving comparability of what a case is, what a person is and what a matter is. It has also provided that foundation for reasonable comparisons between the various jurisdictions. It might be nice to know that the Magistrates Court dealt with 30,000 matters, but that on its own does not tell us much about comparative performance. The benchmarks and the national key performance indicators which underpin them will improve the comprehensibility of the statistics that will be reported.

THE CHAIR: What stage are you at with that? That information would be very helpful to the Assembly and to the government.

Mr Kelly: The KPIs were incorporated in last Friday's release of the report on government services, so the first cut of those is in the public domain as we speak. It deals with things like the clearance index. Are the courts in front or behind? Are they disposing of more cases than they are receiving? That is a useful management indicator. It deals with things such as the attendance index: how many times a case has to come before a court for it to be disposed of.

Most importantly, and a real mind shift, is the move away from elapsed time for a case and a much stronger emphasis on the age of the pending caseload in the courts. That is, after all, the people who are still awaiting access to justice. Those are important and fundamental changes which have been worked on for three or four years at a national level and were implemented in the last report on government services.

I hope that by the end of this financial year we will have some really comparable data, we will all understand what we are talking about in terms of definitions and we will have a useful debate about improving the system, as opposed to all the effort going into the data collection and production of a report that sits on a bench and no-one actually pursues.

THE CHAIR: Is that comparative data between all courts? Is it, say, between magistrates courts and local courts in other jurisdictions? Is it between our Supreme Court and other comparable jurisdictions, which might include district courts, county courts and supreme courts, depending on the matter?

Mr Kelly: The structural differences in jurisdiction between the states and territories will always remain: those who have three-tier jurisdictions and those who have two tiers. The important thing is that the underlying data definitions are all the same. So there is a higher level of confidence that we are not just playing a statistics game; they are actually reporting on outcomes for the community.

THE CHAIR: Will that go to the extent, in a civil jurisdiction, of comparing average awards of damages, average success rates and average failure rates and, in a criminal jurisdiction, differences in sentencing and the number of convictions and acquittals in certain types of criminal matters?

Mr Kelly: We need to stand back a bit if we are to understand the difference between useful, comparative longitudinal data over the long term and what might be special

interest research questions about law reform and similar issues. The Australian Bureau of Statistics publishes its annual report on criminal courts on 25 February. That contains comparable data across Australian courts. That data collection, which is now focusing on the outcomes of court cases, is starting to distinguish not just between those who are convicted; it is also distinguishing between the types of penalty outcomes that are handed down by courts for various categories of offences under the Australian national classification.

We need to look at various sources and we need to understand that some will be genuine research questions—some things that we do not need to know every month in order to manage the business of courts. Some of it will be of a criminological or sociological nature so you would require the capacity to interrogate that database in order to get those answers.

THE CHAIR: You do not yet have that detail?

Mr Kelly: Not yet, no.

THE CHAIR: If I asked you for a comparison of the sentencing patterns in the ACT Supreme Court and in the New South Wales District Court and Supreme Court that would not be a simple exercise?

Mr Kelly: The ABS would be able to give you how many people were convicted, what cases were adjudicated and it would be able to give you plea rates. However, it is not yet in a position—although this is its goal—to tell you the difference in the jurisdictions between terms of imprisonment by offence category let alone offenders' characteristics, such as age, gender and socioeconomic circumstances.

THE CHAIR: I will not expect any information in relation to that issue during the course of this hearing. I might place that question on notice. Obviously, those statistics cannot be provided very quickly. Under the system that has now been developed you do not have that information available to you. However, you have given us some fairly detailed and useful information. Attachment 1, which refers to the Supreme Court, states that the Supreme Court dealt with a total of 97 criminal offences. Those offences are then broken down into categories. Did you have to do that manually, or do you have in place systems to easily extract information from the court?

Mr Kelly: It is a two-stage process. The systems can identify the types of cases. However, in order to obtain the fine characteristics a manual search is required.

THE CHAIR: I take it that in future years those sorts of questions will be easier to answer.

Mr Kelly: If they are not, I am sure that the chief executive officer and the Chief Minister will be asking why.

THE CHAIR: It appears as though you have sorted out the Magistrates Court pretty well, but glitches are apparent in courts that have a lower volume of work, for example, the Supreme Court.

Mr Kelly: It has a lower volume of work, but the cases are more complex. They involve multiple accused and changes of indictment. The process in the Supreme Court is not as linear as it might be in the Magistrates Court.

THE CHAIR: My other questions relate more to the Director of Public Prosecutions. I refer to page 43 of the annual report, which relates to court matters that have been finalised. There was a steady increase in the number of matters that were finalised in the Magistrates Court.

Mr Kelly: Yes.

THE CHAIR: Was that simply because a greater volume of matters was going before that court in the civil jurisdiction?

Mr Kelly: There was a marginal increase. If you look at the number of matters that were listed, or the number of matters that went before the courts over the past few years, you will see that the number has steadily risen. That is as a result of the court being more active in its case management. Cases are brought before the court more often and they are pushed along. The case management system, which is not ideal at the moment, can be improved. That end result has been achieved because of a greater effort by the court to focus on criminal cases.

THE CHAIR: I have some questions concerning the Court of Appeal. The Supreme Court has a fairly similar number of court sitting days. However, those figures were down for this reporting period. The figure for the matters that were lodged—2,019—was fairly steady and did not rise very much. There was a steady increase in the matters that were listed, much like the increase in civil matters in the Magistrates Court.

Two years ago that figure increased from 5,800 to 7,290. Despite that increase in the number of matters that were listed, the figure for matters that were finalised was fairly static. There were 1,800 matters finalised in 2000-01; 1,748 matters finalised in 2001-02; and 1,841 matters finalised in 2002-03. Those figures have remained fairly static even though the number of matters that are listed has risen each year. Is there any reason for that?

Mr Kelly: That is as a result of the introduction of active case management in the Supreme Court, in particular in crime, at the end of 2001. No longer is there a gap between committal and arraignment for the first appearance for call over. Those dates are fixed straightaway. Other national comparators indicate that the ACT Supreme Court is finalising matters that have to go to trial within national benchmarks. We have seen a satisfactory reduction in the number of criminal cases pending. That is reflected as about 140 per cent in the clearance index of the COAG report.

The court is disposing of 40 per cent more cases than it is receiving, which is very satisfactory. As yet that has not flowed on to delay numbers. I have some confidence in the fact that the wheat and the chaff are being separated earlier. So plea matters or matters that can be withdrawn are starting to come to light much more quickly. Not as many cases are pending today as there were two years ago. In 2001 about 135 criminal trials were pending. Today that figure is down to about 40.

THE CHAIR: I have not heard any criticism recently but over the decades it has been suggested that our superior court has been leisurely in the way in which it has finalised matters as opposed to larger jurisdictions in New South Wales. The figures that you have given to the committee tend to indicate that that is not necessarily the case; that that is an unfounded criticism.

Mr Kelly: This might or might not be useful, but an analysis of cases for every judicial officer across the nation puts the ACT fairly close to the top of the list. That gross measure takes no account of different types of disposals, case characteristics and all that sort of thing. As a headline indicator, the ACT is comparable in that area. I have not broken it down by jurisdiction. The ACT is doing as well as the bigger states per judicial officer. We are certainly doing better than Tasmania and the Northern Territory—states with which we always compare ourselves.

THE CHAIR: I have been critical of some aspects of the courts, but that is a pleasing trend.

Mr Kelly: It is attributable to the adoption of active case management. The clearing of the wheat from the chaff has been very pleasing. However, I believe that we can do better.

THE CHAIR: In terms of the ongoing saga of the Supreme Court—I note that there is a fair bit of work now occurring—I probably asked questions this time last year as to when exactly the work would be done in terms of wheelchair accessibility, and for the Supreme Court I think we were told that that would start during the 2003-04 summer break, and that is obviously occurring now.

Mr Kelly: Absolutely, as we speak.

THE CHAIR: I understand that was meant to be concluded by the time the court sat again, which would be about now, but there have been further delays. Could you elaborate on why that is so and what is now the anticipated time for that court to be fully operational in terms of those improvements?

Mr Kelly: Perhaps in reverse order: at this stage, the target date for completion of the refurbishment works to court No 2 and associated wheelchair accessibility issues is 28 February, so by the end of this month those matters will be finalised. That brings those courts back online as quickly as possible. The lift had to be ordered from overseas and it will not arrive until the week of 23 March. There will be about five weeks worth of installation, so by the end of April the whole project will be finished. Obviously, across the break we have been trying to do the very noisy, dusty and dirty work—demolishing stairs, rebuilding jury rooms, rebuilding court 2 and all the other things that needed to be done—to isolate the impact on the court. The courts are operating—they commence sittings today—and they are doing that within the confines of the courts that are available. The reasons for the delay? With the lift, we miscalculated how long it would take to get a lift from Italy. We were told 12 weeks when we started the planning, and it turns out to have taken 24 weeks.

MR HARGREAVES: Was that on Italian time?

Mr Kelly: I would not dare to comment on that. There have been some other delays in the substantive construction process. I suppose I could say that we are pleased in one way to have a drought as water penetration is a big issue because of the nature and condition of the existing building. We have found rusting in downpipes, inadequate roof sealants and all that sort of stuff during this project. While we would have liked to fix them, really we have to get on with the main game, and that is making justice more accessible for people with disabilities. So, all things being equal, by the end of April the whole project will be ready to be commissioned.

THE CHAIR: I suppose that leads on to the announcement you made fairly recently, Chief Minister, that you are looking for a new signature building for the Supreme Court, Court of Appeal, government office blocks, et cetera. Is that just at the conceptual stage? Where are you at with it?

Mr Stanhope: Some of it is just at the thinking stage but, no, I have asked Mr Keady to prepare a submission for cabinet to be considered at this stage in the budget context in relation to the development of a new supreme court. We have had this discussion before; in relation to any decision to build a significant building or to expend a significant amount of funds on a major capital project, there is always a range of competing projects and other priorities. I was interested, though, in taking consideration of the Supreme Court to the further stage of a detailed analysis of costs, so we are looking for a business case to be worked up. I have acknowledged that, in terms of the other major capital priorities for the community, the Supreme Court certainly is climbing the list.

I acknowledge the imperfections of the existing Supreme Court as a supreme court for the territory. Lovely though the old building is, it does have some significant deficiencies. In the context of Mr Keady and the department of justice developing that initial cabinet submission and that initial work, thinking aloud I indicated a potential site for a supreme court. This was not in concrete; it was just an indication of a potential site for a new supreme court building. I think it is appropriate that we acknowledge that the Supreme Court and our courts are major institutions and are fundamental to the community, our notions of community, essentially the strength of our democracy and all of those other ideals.

A good site would be the site on the corner of Northbourne Avenue and London Circuit, adjacent to the Magistrates Court. I think that is a particularly important and significant site. It is a real gateway to some extent between the city of Canberra, the home of Canberrans, and the parliamentary triangle and those national capital parts or aspects of the national capital. There is some very significant symbolism to be attached to us as a community developing a significant building on that site. That was just some thinking in relation to the site and why a signature building on that corner has some real appeal. But the bottom line, of course, is dollars and cents. We will be looking over the next couple of weeks at how many dollars and cents we have and at exactly how high up the slippery pole the Supreme Court has managed to climb.

THE CHAIR: I note that in some information about 2½ years ago—I think the then court administrator had a fair bit to do with it—there were some figures floating around about if you put JACS, the DPP and private barristers' space in that building the government would save about $2 million in rent. The cost of the building was about $40 million or so, including refurbishing the old Supreme Court building for the

overflow and whatever. I think the site was different from where you are thinking—and I note you are only thinking—but I recall in your more recent opinion that there seemed to be a second building for public service. I might have misread that. Are you still thinking along the lines of the suggestion of two or so years ago?

Mr Stanhope: No, it was slightly different. But, as I said, once again with some lateral thinking I had envisaged the Supreme Court as a stand-alone signature building to house the court, judicial officers and those who serve and support them. My thinking in relation to a second building was for a separate and distinct—perhaps ACT public service—office block. Of course, that is a very significant and large site on the corner of Northbourne Avenue and London Circuit, and London Circuit is a very significant street in Canberra. I was making the point that, if we were to build a supreme court on that site, that was a possibility.

A second possibility, and one that we are also pursuing through the Chief Minister's Department—I have asked the acting chief executive of the Chief Minister's Department, in consultation with the Acting Under Treasurer and the Department of Urban Services, to prepare a further submission for cabinet consideration, not necessarily in the same timeframe as we are looking at for the Supreme Court—is the prospect of the ACT government constructing an ACT office block or tower anywhere in Civic. I simply postulated that the leftover part of the site on which I envisaged the Supreme Court being built might be appropriate for a dual project—if we could find the money to build our own office block.

THE CHAIR: You would not consider putting them in the same building? It just seemed a bit of a waste having two buildings, and you don't have much space there in terms of putting public servants in the same building.

Mr Stanhope: That is the sort of issue that I expect to be pursued through the work being done now by the department of justice and also by the Chief Minister's Department with the Treasury. We are in that phase of developing business cases and looking at how we might afford that major new infrastructure.

THE CHAIR: Thank you for that. I have one question in relation to the stats you provided about the break-up of matters in the Supreme Court. You have a number of categories of what occurred to people there. You have custody in corrections/community. What do you mean by "community" because you then go on to say "fully suspended sentences". Are you talking about home detention and periodic detention?

Mr Kelly: Yes, community service orders.

THE CHAIR: Why weren't you able to break that up in terms of those types of orders—home detention and periodic detention, as opposed to full custody?

Mr Kelly: The numbers are fairly low. The question is how meaningful it is the closer to the ground you drill down. I suppose the decision was made that it is probably more useful like that. But we could certainly find that.

THE CHAIR: If you could, that would be very helpful. I have just one other thing on that. I notice that you have "unknown" as well. You have done a pretty good break-up,

might I say, if you have had to do it all manually, which I suppose I read from your earlier points. But then, under "unknown", you have about eight matters. Why are they unknown, given that you have a pretty good break-up for other categories?

Mr Kelly: I am tempted to say that the answer to that question is unknown, but I wouldn't say that. I genuinely do not know. I would have to ask for some further advice from the registry about what constitutes "unknown". It could well be matters that have lapsed. It could be a combination of cases where the documents have been withdrawn and perhaps the matter is left swinging with an incomplete file.

THE CHAIR: It is interesting. You have actually got more robust sentencing there in that, of those eight people, five actually ended up in custody and three had fully suspended sentences. So they would seem to be fairly serious offences, when one looks at the fact that there are 97 cases and only 37 ended up in "custody, corrections and community". Five out of eight in the unknowns would indicate that they would be fairly substantive matters.

Mr Kelly: They could be. Again, I don't know as yet.

THE CHAIR: If you could find out later, please. I note that you would not be able to find out something I will just take on notice in terms of comparing our sentencing rates with other jurisdictions for those categories, but at least thank you for those particular figures.

Chief Minister, today we saw the appointment of a new magistrate. Both you and I have known him for many years. He is a most competent operator, and I certainly stand by everything I have said. After you made the announcement, a number of persons in the profession certainly came to me and complained about not being consulted. Now, you obviously consulted me, but who did you actually consult about that?

Mr Stanhope: It was a two-part process, Mr Chair. I did consult with the Chief Magistrate. And, as you are aware, within the last 12 months Mr Lalor had spent a significant term as a special magistrate in the ACT Magistrates Court. Prior to his appointment as a special magistrate, expressions of interest had been called for from the profession. A number of people expressed interest through that process and, following consultation at that time with, I think, yourself, the president of the bar, the president of the Law Society, the Chief Justice and perhaps others, although I cannot quite remember at this stage, the decision was taken to appoint Mr Lalor as a special magistrate, a function which he performed for a considerable number of months. I cannot remember how many, but I think seven or eight.

On all the advice to me, he performed as a special magistrate with the utmost diligence, professionalism and integrity, and he fulfilled all of the expectations that I and the community could possibly have of him as a special magistrate. I subsequently made a decision to appoint an additional magistrate. I am prepared to say that I did not then go through the entire process again. But I did consult with you. I did consult with the Chief Magistrate. I sought assurances from the Chief Magistrate that he was fully and absolutely satisfied with Mr Lalor's performance as a special magistrate, and I made the appointment.

Yes, I am aware of the public expressions of concern, which, I have to say bluntly, I regret. I think they reflect on the court. I think it was an unhappy start to a very good appointment. I will say no more about it than this: I had some issue with some of the motivation for some of those comments. I will say no more.

THE CHAIR: You mentioned that he did a reasonable stint—I cannot remember what it was, seven or eight months; it was initially for three. Magistrate Dingwall, I think, was off for some time. You said you got some very good feedback then. Was that from various sources?

Mr Stanhope: From the Chief Magistrate.

THE CHAIR: I know you have known Mr Lalor a long time, and some of the complaints have been that he is an old mate. What role did you actually play yourself in the process?

Mr Stanhope: Let me say, nobody has said that to me, Mr Stefaniak.

THE CHAIR: There have been complaints, but I gather they don't—

Mr Stanhope: I guess that goes to the point I make about some of my suspicions around the nature of some of the commentary that actually accompanied the announcement. I think it is small-minded, I think it is puerile, I think it is personal, and I think it is seriously to be regretted. I think it reflects particularly poorly on some of those that have made those comments, and they do not deserve the dignity of a response from me.

THE CHAIR: I mention it merely by way of process. I hear what you say in relation to how Mr Lalor performed. I have a personal view and experience of Mr Lalor which I have made quite plain, too. But, in terms of the process, in relation to those comments, what role did you play in the selection process? I know Canberra is a small town, but—

Mr Stanhope: I played the role that every attorney has played, I think, in relation to the appointment of every magistrate and every judicial officer probably in the history of certainly the ACT since self-government. I essentially made the decision, and made a recommendation to my cabinet colleagues, and that was the process. I do not know whether you appointed any magistrates or judges in your time as attorney, Mr Chair, but I know your predecessor did, and I know that that is precisely the process that your predecessor followed.

Indeed, you did make an appointment, Mr Chair. You appointed the chair of the Court of Appeal, and you consulted me, and I gave you certain advice. And we will not discuss that, and that is the nature of the process. That is, the process I followed is the same process you followed. I might just say, Mr Chair, this sort of questioning, in a public forum, does not bode well for the dignity of the court, or for the institution. As I say, it is seriously to be regretted, and I think you might just ponder on whether or not you are doing the court, or the institution, any favour in raising it here.

THE CHAIR: It is just that it has been raised publicly. My views have been well known, and I stand by them. Your views are well known. The matter was raised. There is some issue of process, and for that reason I think it is appropriate to ask those questions.

I do not think I need to say any more. I have a relationship too with Mr Lalor, as a former colleague. I have the highest regard for his ability, and I have made public comments to that effect and I will continue to do so. People have, however, raised with me and raised publicly some other issues just around process, and that is why I posed those questions to you. You obviously make no bones about the fact that you have known Mr Lalor for many years. The issue has simply been put: did that have some effect on your reasoning?

Mr Stanhope: I certainly know him well, Mr Chair, but you need to put these things into context in a small town and small jurisdiction such as this. I do not want to go into the rights and wrongs of Mr Lalor's appointment. I went to the Australian National University, Mr Chair, as did you. A significant number of the people that I attended university with now hold senior and significant positions both within and outside the ACT public service. I did my degree with Mr Lalor. I did my degree with you. I did my degree with Mr Refshauge. I have just reappointed Richard Refshauge as the Director of Public Prosecutions.

I could tick off the names of a dozen senior members of the profession employed both within and without the ACT public service. Now, do we need to go through the nature of my relationship with every one of them? This is a small town, a small jurisdiction. It just so happens that we middle-aged white blokes, Mr Chair, have reached a stage in our lives and careers where we are achieving some significant positions around town, and I would like to think that we are actually achieving on the basis of merit and not on the basis of who we did our degrees with. But this is a very unhelpful line of questioning, and certainly impacts on the dignity of the court and the institution. I have to say I regret it.

I could go through all of my relationships with everybody that I have ever appointed, and you would find that a significant number of them I know well, and have known well over 30 years and, indeed, I did my degree with. Don't you ever ask me for a job, Mr Stefaniak.

THE CHAIR: Thank you very much for those answers, Chief Minister. I note that you are a bit uncomfortable with it. I note that we are in a small town, but people have raised—

Mr Stanhope: I am uncomfortable because I find it puerile, I find it petty and small-minded, and it offends my sensibilities and it does make me angry.

THE CHAIR: A lot of things make you angry.

Mr Stanhope: Let me tell you, we need to go through the list. Terry Higgins lectured me at university. I appointed him chief justice. Terry Connolly was a one-time member of my party. I appointed him a justice of the court. We can go through every legal appointment in town, but it is undignified, unnecessary and demeaning.

THE CHAIR: Let us conclude this section, Chief Minister and attorney, by wishing our latest magistrate all the very best with his appointment.

Mr Stanhope: It is too late.

THE CHAIR: It is not too late. He is an excellent practitioner. I have said I think he will be a very good magistrate. It was always a pleasure to work with him. I have merely raised those questions because of a number of persons expressing concerns. You have answered them and you have made some comments in relation to them. I think that is entirely appropriate. There would be absolutely no way in which I as chair or I as a former practitioner would want to impinge on the dignity of the court and certainly in relation to a person whom I have held in very high regard and, quite frankly, would have liked to have seen in a position like that earlier.

MR HARGREAVES: For mine, I am scared of fronting him if I get a drink-driving charge.

THE CHAIR: We have certainly covered that. We are probably through the courts.

MR HARGREAVES: Unless we go to the results of the courts, and just say how delighted I was to see the progress on the new prison. I think it is a magnificent move forward and I look forward to construction starting and people being transferred in.

THE CHAIR: That is another issue entirely.

MR HARGREAVES: I know this is a big departure, because we deal with the examination of annual reports, so we should restrict ourselves to the examination history and not look into the teacup of the future, which we tend to do.

THE CHAIR: It does happen a lot, doesn't it?

MR HARGREAVES: Perhaps we might have some discipline ourselves, and I will lead the charge by not asking questions on the prison.

Mr Stanhope: I would be more than happy to take them.

THE CHAIR: I think unfortunately it is here in the annual reports, though. We have done the courts. Does anyone have any burning questions in relation to the ACT Government Solicitor's Office?

MR HARGREAVES: No, they do a great job.

THE CHAIR: Parliamentary Counsel's Office?

MR HARGREAVES: Ditto.

THE CHAIR: No? Another group that does a wonderful job, the Registrar-General's Office? We have done the ESB.

MR HARGREAVES: Yes.

THE CHAIR: Okay, ACT Corrective Services? Is there anyone here from them?

Mr Ryan: Yes.

THE CHAIR: I note recently there has been an announcement on the site of a new prison. When would you expect work to commence on that, gentlemen? I understand there are a few issues yet to be resolved before the site is finalised.

Mr Ryan: The first act will be to go through the preliminary assessment process, and that will start next weekend when the advertisement appears in the paper to call for tenders to carry that out. That process is somewhat indeterminate. It could be as short as three or four months or as long as six or seven. Once that is decided, obviously we then have a firm site.

MR HARGREAVES: Mr Ryan, when we looked at the Symonston site you said to me, if I recall properly, "If you want to find a legless lizard, this is the time to do it. Stick your PA sign out the front and they'll all come to the bottom of that sign." Is that right?

Mr Ryan: That is correct.

THE CHAIR: When the Symonston site was identified several years ago as the better site and then scrubbed, I recall a number of environmental assessments were done around the area, including, I thought, an area of land that has been earmarked for the prison. Is that so or am I confused with some other area of land?

Mr Ryan: We do have some information on sites up and down the highway there, on both sides. At this stage it looks as though the site selected should be acceptable.

THE CHAIR: And that is immediately north of the SouthCare helicopter?

Mr Ryan: Correct.

THE CHAIR: How many hectares are we looking at there?

Mr Ryan: It is in excess of 50, which is our requirement.

THE CHAIR: Is that greater than what was proposed at Symonston?

Mr Ryan: By the time we finished up with what was left of Symonston, when we excised the lizards area and the trees and the heritage area around Callan Brae, it finished up being something considerably less than 50 but enough for us to work on.

THE CHAIR: With the prison you aim to have, I think, something like 300.

Mr Keady: Can I talk about sites, too?

THE CHAIR: If you want to, yes.

MR HARGREAVES: I just wanted to ask a question, too. I sounds superfluous, but it might not be. It is roughly across the road from the model aeroplane site, is it?

Mr Ryan: Correct. It is on the other side of the road.

MR HARGREAVES: Am I correct in my memory that a model aeroplane arrived inside a prison in recent times? Some character lost it in flight—accidentally.

Mr Ryan: Yes, that is always a danger, but I think you could argue that if someone wanted to get a model aeroplane inside a prison, they could carry it anywhere and launch it.

MR HARGREAVES: Sure. I am just wondering what plans you might have had or discussions you might have had with those people across the road. It is a bit close.

Mr Ryan: I think you are right. We would need to have some discussions with them, as with those who operate the helicopter site as well, with respect to where they fly and who does what.

MR HARGREAVES: That would happen in the PA process, wouldn't it?

Mr Ryan: Yes, but I don't think it would finish there.

MR HARGREAVES: And there is a 200-metre setback from the road where your footprint starts, isn't there?

Mr Ryan: Yes, but that is negotiable, hopefully, with the NCA.

Mr Keady: I think the significance of the 200 metres is that that is the zone that excites the interest of the NCA within the approaches to Canberra, but if you look at the Hume industrial area, for example, it seems that the setback isn't that great; so this is something we have to negotiate with the NCA.

MR HARGREAVES: Except the NCA wasn't terribly interested in the Hume industrial setback, but it certainly was interested in the airport. I would like to see it 200.5 metres back from the road.

Mr Keady: There will be quarantine zones and so forth to take account of.

Mr Ryan: Our buffer zones, for a start, will take us back 170 metres anyway.

THE CHAIR: I understand you are going to have about 300 prisoners there.

Mr Ryan: 370.

THE CHAIR: Who else would be on site? You have step-down facilities and what else?

Mr Ryan: The site will consist of two compounds. One compound contains remand and sentenced prisoners, male and female separated. The second compound is a compound that would accommodate 60. It is for those who are on transitional release. In other words, those who are of a low security classification and are in the stages of preparing for release.

THE CHAIR: A lot has been made that we can do a lot of good things with our first prison. We can do more rehabilitation than other systems do. I recall in the prison project

several years ago there was a raft of schemes for rehabilitation. What types of rehabilitation would you propose for this new prison that you would seek to build on the site?

Mr Ryan: It is similar to what was proposed previously. The difference is that we now think we will place a greater emphasis on integrating those programs with what exists in the community, in particular for those aged 60 who are preparing for release. Rather than having to spend most of their time behind the perimeter doing that preparation we would like, where possible, for them to go into the community to get their education and work experience prior to their release. We think that is the best way of doing it.

THE CHAIR: What happens before they get to that stage? Do you have ongoing programs?

Mr Ryan: Before they get to that stage we have ongoing programs concentrating, in particular, on basic aspects such as literacy, numeracy, addressing offending behaviour and dealing with substance abuse problems. Those are the main issues. Beyond that they need to start getting into programs that can be delivered, preferably by CIT, to give them some life skills and something to take away when they leave prison to help them to obtain employment.

THE CHAIR: Is that amount completely separate from the $13 million that has been allocated to rebuild Quamby?

Mr Stanhope: It is a different department.

THE CHAIR: Some people might have been confused by that amount. That amount is completely separate?

Mr Ryan: Yes, it is not part of that project.

THE CHAIR: Some of the questions that have been placed on notice relate to the new corrections facility. You indicated earlier that you presently have a holistic approach to the treatment of prisoners. You gave a fairly comprehensive answer to earlier questions that were asked about drug-related issues. You said that prisons should not become epicentres of infection that compromise public health. You referred also to ongoing methadone programs and things like that. I refer to the vexed issue of needles in prisons. Am I correct in stating that needles are not available in any other prison system in Australia?

Mr Ryan: That is correct.

THE CHAIR: There is a real concern about the dangers to staff and other prisoners if needles are available.

Mr Ryan: That is correct. From where I sit I believe that that is unlikely to change in any other jurisdiction.

THE CHAIR: So you do not envisage needles being available in other jurisdictions?

Mr Ryan: That is a decision to be made by governments. Great pressure is being brought to bear by interest groups to ensure that needles are provided in correctional facilities. There are problems in relation to that proposal. It is certainly not something that the operators of any prison system would like to see.

Mr Stanhope: You would be aware that a recent report of an Assembly standing committee recommended that the government give consideration to a needle exchange facility in the new correctional facility. The government, in its formal response to that report, has not accepted that recommendation. However, it has agreed to continue to give consideration to the very vexed question of injecting drug use, which occurs in any event, despite the best efforts of most corrections facilities in Australia. As you said, this is a vexed question.

We have in place tough inspection regimes in our existing facilities, as do all correctional facilities in Australia. Acknowledging that, injecting equipment and drugs are still part and parcel of most correctional facilities in Australia. A number of issues have to be considered in the provision of syringes in correctional facilities, not least the occupational health and safety aspects for staff and prisoners. In the context of prisoners, that begs the question: what sort of substance will these prisoners inject?

That leads into another difficult area of debate. Communities, governments and corrections authorities have an obligation to continue to grapple with drug abuse, drug use and injecting drug use issues in correctional facilities. We cannot hide from it; we cannot pretend that it does not happen; and we have to continue to look for appropriate responses to that issue.

THE CHAIR: I do not believe that I have spoken to one custodial officer who wants to see needles in prisons. However, I note that you said that governments should provide treatment, such as the provision of methadone programs and other treatment that comes to light, in an attempt to assist in getting prisoners off these substances. Will those sorts of programs be available in this prison?

Mr Ryan: Yes.

THE CHAIR: I refer to the mental health area. Several years ago provision was made for mental health units within prisons. Is that what is envisaged? If not, what will be provided to enable inmates with health problems to be treated?

Mr Stanhope: I will let Mr Ryan respond to that question in detail. In this debate we have to be particularly clear about the definitions and terminology relating to the sorts of inmates or detainees in prisons, corrections and forensic facilities. There are ambiguities in the coverage of some mental health, psychiatric, forensic patients, inmates, detainees or defendants. Those ambiguities are a matter of some concern because of the picture that is being painted in the community about these difficult issues.

We must clearly understand the classifications, definitions and different categories of prisoners, detainees or defendants. We will have state-of-the art facilities in the ACT prison to deal with that large raft of detainees that we know will present with mental health problems. There are separate questions relating to forensic and other prisoners who require facilities over and above what is currently proposed.

Mr Ryan: The Chief Minister answered most of your question. Specifically, we do not intend to include in the new facility a forensic mental health facility. However, we will be able to cope with a large percentage of inmates who will require some sort of treatment for their mental health conditions. Those inmates, who can be dealt with in the mainstream prison, can contribute to normal prison activities.

Two types of prisoners are involved. When they reach the stage where they cannot be dealt with in the mainstream prison—and that would represent a small number—they would have to be moved somewhere else. That is not to say that they would be moved to another location on the same site. We are not different from other jurisdictions. We will be following existing mental health national guidelines.

THE CHAIR: Where would those prisoners be moved?

Mr Ryan: At present the small number of forensic inmates would have to be moved to New South Wales.

Mr Stanhope: For the sake of this discussion and because this is something that is of concern to me, could you give a closer description of a forensic inmate or prisoner?

Mr Ryan: I do not have a good description. A forensic inmate or prisoner is one whose mental health condition cannot be dealt with in the mainstream prison in a way that enables that prisoner to participate in normal activities in the facility without any detriment to his or her treatment or the routine of the facility. In other words, such an inmate could not be fitted in or treated without some detriment to other prisoners.

MR HARGREAVES: A clinical decision would have to be made rather than a correctional decision. Such a decision would have to be made by qualified psychiatrists through the corrections health board process.

Mr Ryan: It would, but only after close consultation with custodial staff who, after all, live and work with these people on a day-to-day basis. Usually we know about such a diagnosis or decision when the prisoner arrives in our system. However, that does not mean that some inmates would not develop a condition during their stay in the facility that then requires them to be moved out.

MR HARGREAVES: I presume surplus capacity will be used to accommodate overflows from other jurisdictions nearby, which shall remain nameless, at a greater than break even cost, I would hope. Have you had discussions with New South Wales to try to target people from the south-east region, now affectionately known as the capital region?

Mr Ryan: It has been some years since we have had any discussion at all about use of spare capacity in the ACT by New South Wales. Those discussions related to periodic detention, not to remand or sentence, for which we did not have beds anyway. Before we went too far down that track, first and foremost there would be a need to look at issues relating to legislation—if we wanted to. I am not too sure that New South Wales would be terribly interested anyway. I think that they would be looking to meet their own requirements, which are substantially more than ours, within their own system and not rely on anything else. It does make sense for them to look at other options for periodic

detention. I do not think we will get too far with the rest—if we want it.

MR HARGREAVES: Is legislation in place or being prepared that will enable us to just do it when that construction is complete or will we have to amend our current suite of legislation to do that?

Mr Ryan: The legislation is not yet complete to enable us to do what we want to do. It is in the process of being prepared this year. A lot of work has been done on it in previous years. Now that we know where we are going, it will be drafted in the next few months.

THE CHAIR: There being no further questions on the prison, this is a convenient time to take a short break.

The meeting adjourned from 3.32 to 3.52 pm.

THE CHAIR: The report refers to serious pressures that the family law section, in particular, of the Legal Aid Commission has been exposed to. It also makes the comment on page 23 that private practitioners were declining to do legal work and, as a result, the office had to decline to take on new matters for five weeks. How many matters would have been affected during that five-week period? Were you able to catch up on those matters and ensure that those clients received aid or did some slip through the net as a result of the problems you experienced?

Mr Staniforth: I start the answer by saying that family law matters are matters that are brought under the umbrella of Commonwealth legal aid funding. I think that we have had the bipartisan support of attorneys in the ACT for the quite obvious difficulty which the commission has in dealing with a very pressing demand when underresourced. The previous Commonwealth attorney acknowledged that in a quite public statement in 1993 when he said that, nationwide, Australia is facing a difficulty of practitioners who are unable to meet the demand which is being made evident. Sadly, the situation does not get better merely by constantly seeing it.

At this stage, because of the nature of the funding agreement which the Commonwealth insisted upon, we have not been in a position to be able to do anything about that underresourcing. We are told that there will now be negotiations for a new level of agreement. Those negotiations have not started yet, but I would suspect that the departmental people who would be involved in that process will be very clear about the need to rectify what has been a very bad situation.

As to that part of your question which relates to whether people have fallen through the net, yes, they have. People are falling through the net daily—not only in the ACT but throughout Australia—and they are people with the most pressing circumstances. It really is a very serious situation. Unfortunately, until that point is made clear to those who control the purse strings in this matter, we will be left to do the best we can with what we are given.

THE CHAIR: What would you pay a practitioner in the family law jurisdiction?

Mr Staniforth: $130 an hour, but that is not as good as it sounds. The most recent survey done by the Law Council shows that the cost for a practitioner to keep open a

practise such as legal aid would fund is about $155 an hour; so a practitioner in Canberra, Sydney or Melbourne is doing cold, to use a very sophisticated financial term, $25 every hour on that sum. The difficulty is that the Commonwealth insists on a regime of lump sum funding which is clearly pitched far too low. It is impossible to do the work for the amount of funding which the Commonwealth requires, so there is a double whammy. The effective hourly rate isn't $130 at all; it is quite considerably lower.

THE CHAIR: What percentage of the practitioners would have dropped out of that type of practise over the period of this report? Is it a significant drop or is it something that you have noticed over time and this is just a continuation of the problem?

Mr Staniforth: There has been a decrease over a period of years—not so much on the territory side, because there is much more flexibility there. Certainly, I am confining these comments to the Commonwealth side of our activities. There are two problems, though. The first is that there is a trend to juniorisation in those doing legal aid work. Without being critical of any practitioner who does legal aid work, I think that we all know that, whatever profession or trade you are in, if you are skilled at it you can usually do it better and faster than someone who is less experienced in it. So there is a real problem developing in this juniorisation process. As to raw numbers, as to the level of practitioners dropping out, that juniorisation process masks the outcome figure. I can say that none of the major family law firms in Canberra have partners who regularly do legal aid work because they could not possible afford to do so. About half of the major family law firms have someone who will do a legal aid matter, but few will regularly do them.

THE CHAIR: You say that it is not so much of a problem in your other areas. In terms of the other areas in which you fund the private profession, what are the rates in, for example, the criminal law jurisdiction?

Mr Staniforth: $100 an hour in criminal matters and pretty much across-the-board territory matters.

THE CHAIR: It seems to have stayed much the same for a number of years.

Mr Staniforth: Perhaps, Mr Chair, when you were treading the boards it was about $80 an hour; so it has not kept up with the CPI.

MR HARGREAVES: That was a long time ago.

THE CHAIR: It certainly was. Yet you are not having the same problem there with practitioners as you are having in the family law jurisdiction.

Mr Staniforth: No.

THE CHAIR: There is less complexity.

Mr Staniforth: I sense that there are two dynamics working there. The first is that the ACT, in its wisdom, has allowed a flexibility to the commission, which means that we can give and take. We can effectively agree on a work lot and it can be done and we can pay as best we can. We do not have the regime that the Commonwealth imposes, and that suits us all better as practitioners. The second point, and we should never forget this,

is that legal aid is very much a professional obligation of practitioners. It is the practitioners' willingness to do this work which allows this program to survive. Of course, the day we forget that will be the day that this program falls over.

THE CHAIR: Chief Minister, Mr Staniforth has mentioned that the problem is significantly a Commonwealth one. What steps is the ACT government taking to ensure that the office is adequately resourced so that it can meet community needs?

Mr Stanhope: As with all the resourcing decisions that the government takes, we seek to ensure to the greatest extent possible that we resource the full range of programs, organisations and responsibilities. That, of course, applies to our provision of support for people needing assistance with the law.

THE CHAIR: There being no further questions, I thank you, Mr Staniforth, and the officers of the Legal Aid Commission for your sterling efforts over the last 12 months.

Mr Staniforth: Thank you.

THE CHAIR: I have a number of questions on the annual report of the Director of Public Prosecutions. I think the court administrator is here. As there may be a bit of an overlap, he has kindly stayed in case he is needed. On page 1 of your report you state:

> For example, a few years ago, the then Chief Justice of the Supreme Court—

I take it that would have been Chief Justice Jeffrey Miles—

> complained that offenders who breached recognizances were not prosecuted for the breaches and brought back to Court. With the support and assistance of the Registrar of the Supreme Court, Mrs Jill Circosta, and Corrective Services, my prosecutors put additional effort into ensuring that this occurred. An analysis of breach prosecutions in the last year—

I take it that is the year this report covers, 2002-03—

> has revealed, however, that in 67% of cases, no action was taken on prosecuted breaches. Quite apart from disinhibiting the prosecution of breaches, this approach tends to devalue the importance of court orders and recognizances and sends the message that compliance with them is optional.

You obviously had some real concerns in relation to that.

Mr Refshauge: I did.

THE CHAIR: And that was something the media might have picked up on, too. It is a pretty big figure, 67 per cent. How many matters does that refer to?

Mr Refshauge: About 15 over the year, so of the 15 about 10, which is still relatively small but sufficiently large to indicate that the special circumstances that might occur in one, two or three cases are not really the answer to what is a significant trend and one of concern.

THE CHAIR: Yes, that is something that you rightly raise. Have you taken any further steps in relation to that?

Mr Refshauge: It is difficult. We prosecute the breaches and we prosecute them as promptly and as effectively as we can, put before the courts the views that we have and, ultimately, it is a matter for the courts.

THE CHAIR: I take it those are breaches for committing further offences while under recognisance. Have you got any break-up of that?

Mr Refshauge: No, I haven't. It is difficult. As you know, our statistical capacity is very limited in this territory, so it is difficult to get a great deal more information.

THE CHAIR: Is that a fairly common thing? I seem to recall that 20 years ago there was a problem with no action taken on a breach by courts. I do not know whether it was to the same extent, 67 per cent.

Mr Refshauge: It is certainly not the case, for instance, in the Magistrates Court that we have the same situation. The difficulty is that in the Supreme Court, as I have indicated, we made a special effort because of the view that the court itself had taken. We think that, having made that effort, it is now at least curious that the court does not see itself presently in a position where it wants to reinforce the obligation that the bond had imposed on the offender.

THE CHAIR: Attorney, is there anything you can do? I take it you have noted the director's report. Is there anything that the government intends to do about that or any steps that you could take?

Mr Stanhope: There is always an issue of resources in every decision the government takes. This goes to some of the questions you have asked in relation to the government's response to the points that have been put. Once again, I guess that if we doubled Mr Refshauge's budget there might be additional initiatives he could take. I have to say, in relation to the work of the office of the Director of Public Prosecutions and the work of the courts, that I am always very sensitive to and mindful of Mr Refshauge's statutory independence—the importance for him to work independently—and I have the same view and respect for the independence of the courts and all of the judicial officers there. To some extent these particular issues are beyond the ken of an attorney or a government, appropriately.

THE CHAIR: Yes, I appreciate the subtleties; I appreciate that point entirely. I just wondered whether you or the director had had any meetings with the court to discuss the issue.

Mr Stanhope: I haven't had discussions of that order and I am not sure it would be appropriate if I did.

THE CHAIR: Have you appealed any of those matters?

Mr Refshauge: No.

Mr Stanhope: I am very sensitive to the separation of powers. It is a doctrine that I take incredibly seriously and I of course by example do hope, and in most respects am satisfied, that most of those who serve judicially in the ACT similarly respect the doctrine. I certainly do. I am a great defender of the courts and a great defender of, to a detail or a fault, the doctrine of the separation of powers, just as I am enormously sensitive to the statutory role and responsibilities of statutory officers. I do not and will not interfere or cross the boundary.

THE CHAIR: I just wondered whether there might be an appropriate legislative measure you could take if this continues to be a problem, being very mindful, of course, of the role of the Assembly, the executive and the judiciary—the separateness of them.

Mr Stanhope: I would be happy to take advice from Mr Refshauge and Mr Keady on that.

THE CHAIR: Thank you. On page 2 you talk about the case management system. I think we have heard a fair bit about case management. You have had a problem with the ability of the office to deliver its services efficiently and in terms of the adjournment of case management hearings this has put pressure on your prosecutors who are tasked to manage particular cases in the list but who may be rostered into different tasks on the day. Similarly, you have indicated that there is a burgeoning part-heard list and that that can reduce the efficiency of the office when cases have to be transferred between prosecutors, sometimes at short notice. You say that, while those adjournments may be appropriate for the court and beneficial for the defendants, they impose quite significant burdens on the ability of the office to deliver quality services. You go on to say that you hope that the review of listing procedures that is being undertaken in the Magistrates Court will address that. Does that mean that if you have a part-heard case that you have had a prosecutor following through—it might be a reasonably complex case—because of these problems that has to be flicked to another prosecutor who obviously would not have the same knowledge of the case and would have to pick it up at short notice and run with it?

Mr Refshauge: As you know, that has always been a possibility. Prosecutors are experienced enough to be able to deal with that situation. This refers specifically to the case management hearing process where in its pure form it was intended that a prosecutor be assigned at an early stage to major matters where there were pleas of not guilty entered, so that that prosecutor could prepare the case for the case management hearing, negotiate and discuss with the defence counsel as to whether there might be issues that are not in contention and therefore might be agreed—the subject of admission, the subject of tender of statements rather than the calling of witnesses and the like—or indeed some kind of charge negotiation that might resolve the matter altogether.

A whole range of issues has arisen that has caused the purity of that process, which is highly desirable and on national and international best practice would be the way to go, not to be successful. A not insignificant part of that is the difficulties that private practitioners have in preparing the cases themselves before the case management hearing. Some of that is caused by resourcing difficulties. It is notorious that, for example, scientific material from the police is often delayed and often not available until shortly before or indeed after the case management hearing. Sometimes the brief is not delivered. Sometimes the private practitioner is unable to get instructions and to discuss

the case with his or her client before the case management hearing. That has resulted in the case management hearing then being adjourned to another date so that it can effectively take place, there being no point in the holding of it if both parties are not completely ready to discuss the case in detail, agitate the issues, agree on admissions, agree on pleas and so on.

In its pure form, the office is able to assign to each case management hearing day two prosecutors and they would be able to manage the preparation of the cases, the case management hearing and then the hearings, because it is important also that the prosecutor at the case management hearing, if possible, be the prosecutor who conducts the hearing itself, because the assessment of the case, the case theory and the way in which the case is presented ought to be consistent, and that consistency is best delivered by the same prosecutor doing it. When they are adjourned, then of course the matter goes over to another case management hearing date, where that assigned prosecutor may well not be otherwise assigned, have other duties, be on leave or whatever. So gradually as that happens, and sometimes happens again and again—no appearance of defendant, continued delay in delivery of forensic material, additional statements and so on—that then complicates that process and puts resource pressures on the office and difficulties in maintaining the desirability of the one prosecutor following the case through.

We are now proposing a seminar which the Law Society and the Bar Association are joining in presenting with the courts and the police later in February—I think 24 February—at which these issues will be discussed. We will be consulting with the profession in an attempt to identify how we can assist them, what efforts we can make. Something we have already put in place is a requirement for prosecutors to be more proactive, to seek out defence counsel and commence the negotiation and the discussion so that they can profitably identify where the issues might be addressed and where solutions might be identified. But at the moment it has become a bit of a hotchpotch and so there are difficulties in the pure system. Although the system is delivering very substantial savings, they are coming at a somewhat increased cost in terms of workload and resource pressures on the office.

THE CHAIR: Thank you for that. On page 4 you state in the second paragraph that the repatriation of appeals has been successfully implemented. You praise the generous commitment of the Federal Court of Australia, its chief justice and judges for making a number of judges available and you state:

> There have been a number of significant appeal decisions, although it is too early to tell yet whether the Court will develop a more coherent jurisprudence especially of sentencing.

Could you elaborate on what you mean there?

Mr Refshauge: One of the difficulties of having the Federal Court as our appellate court has been that the judges assigned to hear appeals from the territory were not infrequently from different parts of the country and would not maintain a place on the appellate court over a series of appeals. We would have a decision that would look at, for example, rehabilitation as a factor in sentencing or the influence of drug treatment on sentencing processes. The views that the various appellate benches of the court would take from time to time did not develop a coherent jurisprudence of sentencing that was appropriate,

in the same way as, for example, the Court of Criminal Appeal in New South Wales has been quite successful at a very base level.

At one time it was a very tough court; it has now become a somewhat lenient court perhaps in New South Wales. There was a degree of consistency among the judges because they were sitting regularly and the same judges were delivering judgments. A body of learning, a body of leadership in sentencing, is after all is what appellate sentencing is all about, but that was not clear in our system because the same judges who were working regularly together were not delivering the judgments on the whole.

It is a bit early yet to say whether we will get a more coherent jurisprudence, but one expects that that is likely to be so. There are still some difficulties. It is, we hope, the continuing wish that the Court of Appeal will be staffed by two visiting judges and one local judge, although the tendency in the last set of appeals and perhaps the next set of appeals has been for two local judges and one visiting judge. That has the significant advantage of a small jurisdiction having access to a wider pool of judicial talent and that has been of advantage.

There has been a smaller concentration, particularly in the criminal area, because of the diverse nature of the Federal Court jurisdiction and the lack of familiarity with many of those judges with criminal jurisprudence. There has been a narrowing of the base of the judicial talent that has sat on the Court of Appeal more recently. It is hopeful that that will start to build up genuine territory jurisprudence, in particular in sentencing, which is the majority of the appellate work.

THE CHAIR: You mentioned that sometimes there have been two ACT judges and one outsider as opposed to one ACT judge—obviously not being the judge who dealt with the initial matter—plus two judges from interstate. I thought there had to be two judges from interstate.

Mr Refshauge: Not in the legislation, but it was an understanding.

THE CHAIR: It must have been an understanding. I was not sure whether it was in the legislation. Was that the understanding then?

Mr Refshauge: Yes.

THE CHAIR: Do you think that it is a desirable situation if you can do that?

Mr Refshauge: Given the small size of the resident judiciary, particularly at an appellate level, there is a transparency and a judicial creativity that are valued in the territory by a wider choice of appellate judicial talent.

THE CHAIR: I thought that was in the legislation, but I am obviously mistaken on the point that the director raises.

Mr Stanhope: I am not sure whether there are any issues with the arrangements. I am not suggesting that you are. It is not a matter of concern to me.

THE CHAIR: Is it something that is becoming a trend or has it just happened?

Mr Refshauge: It happened in the last sittings. It may be that the Federal Court could not release enough judges to provide the range that was necessary.

THE CHAIR: It is something worth monitoring because if it was not the law certainly the intention was that there should be a significant pool of judges available and that there should be one resident ACT judge and two outsiders. Thank you for your comments. You have had a number of appeals yourself to the Court of Appeal.

Mr Refshauge: Yes.

MR HARGREAVES: When the victims of crime coordinator was here I mentioned the publishing of cases at the back of her report and queried whether it was absolutely necessary to go to that level of detail with particular cases. I wish to make the same point to you, Mr Refshauge. On pages 13 to 15 you have listed some case highlights. They are very interesting and make very good reading—thank you very much; they spice the book up no end—but do they add much value to the report? For the purposes of examination of annual reports in the public arena is this not a tad unnecessary? It is something that you might not have to bother about in future years. If committees want to find that information they only need to ask. If we get that sort of thing, they can say, "Do you mind giving us a briefing?" I know that people are interested in how you are getting on with Eastman and things like that. Does this add value? It might save you a bit of work if you don't do it. I urge you—I don't speak for the Chair—to give some thought to the value that is being added.

Mr Refshauge: Saving a bit of work is certainly something that is desirable, and this would achieve that. One would have to think about the cases that would be involved and then one would have to summarise them. Annual reports are not designed solely for this committee; one would hope that members of the community would read them. That has been regarded, rightly or wrongly, as an accessible way for them to see some of the work that is being done rather than having to trawl through important statistics that often do not give a human view of what is happening. Like good lawyers, we follow precedents in other annual reports. The Office of the Director of Public Prosecutions regularly does that. We often follow precedent. However, as that good thought has now been raised, I will turn my mind to it.

MR HARGREAVES: I raised that issue because I suspect that members of the general public read annual reports as frequently as I did before I became a member of parliament, which was not very often. People in the trades read annual reports. I would not worry about the fact that only a select number of people are reading these reports. I refer to page 26 of the annual report which deals with briefs and the AFP. The document states that 87% of the working briefs are returned to the AFP within two working days of the matter being fixed for hearing and 65% of briefs were returned to the AFP within two working days of the matter being completed. What is happening to the other 35 per cent of briefs? When those matters are completed, why are they not returned to the AFP?

Mr Refshauge: I do not have an answer to your question. I will provide an answer to the committee later.

MR HARGREAVES: It appears as though you cannot wait to get rid of the paperwork

once the briefs have been completed.

Mr Refshauge: Sometimes things have to be done, for example, other agencies have to be advised and so on. I suspect that that is the answer to the question. When you finish a case and put it down it should then be sent off. However, you take a deep breath when you are dotting the i's and crossing the t's in order to complete a case.

THE CHAIR: I said earlier to the ombudsman that his summary of case events was particularly helpful. He gave quite a good synopsis of the work that is being done at more senior levels. I agree with the statement made earlier by Mr Hargreaves. I do not know how many members of the general public read these reports.

Mr Refshauge: It is not an insignificant number.

THE CHAIR: I believe that those synopses are extremely useful. You said earlier that you conducted the first criminal electronic appeal in the Court of Appeal.

Mr Refshauge: Yes.

THE CHAIR: How was that done? Was it a successful way of doing things?

Mr Refshauge: It was quite successful. The appeal notice was filed physically but the appeal book was prepared electronically, circulated and dealt with by way of laptops. Parties at the bar table and court officials had laptops. The appeal book was on CD. The operation was quite successful. The Luddite in me resulted in me having a hard copy of the appeal book beside my laptop. I found it quicker to flick the pages of the hard copy than to find anything on the laptop. It has not taken off in a big way.

However, those opportunities are available, not so much in sentencing appeals where the book is very thin and the reference to the book is not always extensive. In an appeal in a building case, for example, which might involve five days of hearing, thousands of pages of expert reports and so on, it is extremely helpful to have it available with an appropriate search facility. If we had to run the Eastman matter again, that would be a classic case in which an appeal in electronic form would be essential. We would then be able to manage in a reasonable time the huge amount of material that would be necessary.

THE CHAIR: Favourable comments have been made about the work of the drug courts throughout Australia. Do you see any benefits in having a similar operation in the ACT?

Mr Refshauge: It is a complicated problem. On the one hand, the drug courts have been relatively successful in New South Wales. The bureau report was clear. On the other hand, they are quite expensive and limited in their reach. It involves a relatively small number of people compared to the drug-affected offenders who come before the courts and who are going through the drug court process. Our jurisdiction is quite small, so it would not be feasible on any scenario to have a dedicated drug court, although if we had a dedicated therapeutic court that dealt with drugs, sexual assault and family violence, that might be an appropriate jurisdiction.

In our jurisdiction the courts are not using the Drugs of Dependence Act substantially,

effectively or as it was intended to be used. My view, which might be of some value because of my experience, is that the courts are concerned about the chasm between the criminal justice imperatives that the courts are dealing with and the therapeutic imperatives that the panels and therapists working with the panels under drugs of dependence orders are operating from. There is some concern that the courts do not have the same level of accountability, transparency and process in the follow through of drug treatment orders.

That happens in drug courts where there is a greater level of supervision. That might even strain the separation of powers, resulting in judges becoming administrators of corrections which, of course, is not within their capacity. Obviously there is a balance in New South Wales, and other jurisdictions are obtaining that balance. We might need to look at changing our processes. There has been a review of the Drugs of Dependence Act. I participated in and made submissions to that review. In fact, I was a member of a steering committee. That committee might do something about this area.

THE CHAIR: You made some comments earlier about mental impairment in the criminal area—a difficult area. You expressed concern in relation to that issue. You said that there was difficulty in distinguishing between major and minor mental impairments. That issue has cropped up in court on a number of occasions. The community is obviously concerned about those who should be securely locked up and/or brought to justice and punished for their misdeeds. Often they are not; they are hived off into another system.

That is an ongoing problem not only in this jurisdiction but also in other jurisdictions. Often someone who has been released goes into the community and commits another crime. Obviously those sorts of people have not been treated for their illnesses. There are concerns about this issue and where it is going. You also appear to have some concerns. Do you have any comment to make about those concerns? Do you have any suggestions which this committee and government generally might be interested in?

Mr Refshauge: It is a terribly difficult area. There is no doubt that the mental health system is impinging on the criminal justice system increasingly, whether as some function of society I do not know and I am not competent to comment on. There are no quick fixes. It does need review. It does need consideration. One of the things we need is to start the conversation about the extent to which mental health replaces the criminal justice imperative when we are looking at what ultimately is the regulation of society and to what level mental health issues should change the traditional criminal justice responses to breaches of the norms of society that the legislature has made or created or set down in the legislation.

We haven't really had that conversation. At one level we know that someone who is not responsible for their actions cannot in any rational sense be held accountable, but the continuum, even on something like depression, is a very wide one and the articulation, the categorisation, of the mental dysfunction in that way does not now respond in a unilateral way to the criminal justice outcome. Someone who is so clinically depressed that they are mentally dysfunctional perhaps falls into the category of those who should not be held accountable in the same way. Not necessarily what we used to call insanity—not guilty by reason of insanity—but in areas where general deterrence is inappropriate because they are not a suitable vehicle for the expression, the denunciation, of the

conduct because of the mental health influence there.

But at the same level it is difficult to see anyone faced with a major criminal offence and the trial, and so on, not being depressed. That is at the other end of the spectrum. There one would expect, nevertheless, to hold them accountable in the same way and that issues of personal and general deterrents, issues of denunciation, perhaps even of punishment or retribution, are still appropriate. But we haven't yet got the subtlety and the sensitivity in the system to know how we are going to deal with that widely. The courts, as are other agencies, are struggling with the way in which the categorisation of some mental contribution to the offending behaviour should be metered out in accountability terms and responsibility terms through the criminal justice system.

THE CHAIR: I know a lot of people might be affected by it. Certainly I have received some representation about it, and no doubt the attorney has, from affected individuals who feel that the system can be abused. It is a way that someone who commits a fairly nasty criminal act can escape the consequences of that act and the system is open to abuse. Do you have any suggestions as to how those sorts of issues can be overcome in developing an effective method?

Mr Refshauge: Again, it is extremely difficult. I mean, the issue about won't and can't is simple: someone who can't give instructions to their solicitor because they are mentally dysfunctional and someone who won't give instructions to their solicitor is something that relies upon the expertise of psychiatrists. And, I think with some cause, we are less comfortable with delegating that difficult decision simply to one psychiatrist, for example, or one professional, and allowing our system to rely simply upon a single opinion that many people might want to challenge.

The traditional way of challenge, of course, is through a hearing and examination and cross-examination and so on. That is not available to victims, and yet it is the victims who take a view that may be difficult to actually marry with the evidence that is given to the court and for them to be satisfied when they have no participation in the process itself. And that we need to struggle with, because, while of course victims have an important place in the criminal justice system, they also inevitably have a very important stake, which gives them a perspective that is not necessarily consistent with what an application of the rule of law should apply through the coercive powers that the state uses to enforce the norms that the legislature imposes.

THE CHAIR: I will now ask my final question in this area. You said that there is still a lack of suitable facilities for the securing of mentally impaired offenders and alternatives that are appropriate for their situation. Do you have any suggestions as to the type of secure facility that you think would be appropriate in this territory?

Mr Refshauge: My view is that we need a facility that is not a remand centre or a jail, although it may be associated with those facilities, where persons who are dangerous to themselves or others who have come into the criminal justice system but who have significant mental dysfunction can be detained, so that they can be managed and so that they are not a continuing danger to the community or to themselves, but in a circumstance where they are provided with mental health assistance, treatment and supervision.

THE CHAIR: I have a few questions in relation to the general report. Under statutory powers, you mentioned that you have the power to take over private prosecutions. I thought we did not have them any more.

Mr Refshauge: No, no.

THE CHAIR: We do.

Mr Refshauge: It is a fundamental constitutional right.

THE CHAIR: Good, I would have thought so. So we still have them.

Mr Refshauge: We do.

THE CHAIR: Do you actually allow quite a few just to go through? Do you actually tend to take many over?

Mr Refshauge: I have taken over, I think, two, and I am now in the process of considering taking one over. There are not many. There are huge problems and cost pressures and so on of people doing it, but it is important that they have that capacity.

THE CHAIR: You also expressed concern about an increase in the number of common assault matters going to the Supreme Court—common assault, of course, having a maximum imprisonment of two years—and that being a problem.

Mr Refshauge: Yes. In our jurisdiction we have no intermediate court and the present legislative provisions provide that any offence that is punishable by imprisonment for 12 months or more is an indictable matter. An indictable matter can be dealt with by the Magistrates Court to a certain level, but only with the consent of the defendant. If the defendant does not consent, then the matter has to go to the Supreme Court for jury trial. In recent years—I suppose, in the last three or four years—there has been a disturbing trend of some of the minor matters, particularly assaults, where defendants, for reasons that are not expressed and need not be expressed—all they need to do is say, "I do not consent"—choose to take their trial in the Supreme Court. It may be a perception that they have got a better chance of getting off or a better chance of getting a lenient sentence, but that is the position.

THE CHAIR: It has obviously concerned you because you suggest that you might need legislative amendments to address it.

Mr Refshauge: It is a huge waste of resources to do petty pub brawls in the Supreme Court.

THE CHAIR: What sort of legislative amendments do you think it might need?

Mr Refshauge: The difficulty is that the obvious amendment is to change the criterion: to set—instead of 12 months—two years or five years, or something like that, as the minimum whereby consent can be considered. That needs discussion and there is obviously resistance from the profession, who would see advantages in that because they would choose that course of action.

THE CHAIR: On page 14 of your report you appealed in relation to R v Yilmaz & Others. You were awaiting a decision at the time of doing this report.

Mr Refshauge: A decision has been handed down, and the appeal was dismissed.

THE CHAIR: On the table on page 42, trials from the last two years are compared. Under trial dispositions, in 2001-02 there were eight guilty verdicts, 15 not guilty verdicts and 13 other. This year it was 18 guilty, nine not guilty and 10 other. There is a significant difference in acquittals and guilty. Can you give an explanation for that?

Mr Refshauge: Not easily. Again, we have such a small jurisdiction, such a small number of trials, that it is difficult to see trends. We might run a few fraud trials in one year because they happen to come up. Fraud trials are quite difficult. Sex cases are quite difficult to succeed in, and there might just happen to be a preponderance of those in one year as opposed to in another year. I have not done a careful analysis of those.

THE CHAIR: Are they jury trials?

Mr Refshauge: Some will be jury trials; some will be judge-alone trials. As for the trial disposition, I do not have a precise figure for jury trials as opposed to judge alone. It would be a small percentage of judge-alone trials, probably 10 or 15 per cent—not a large number.

THE CHAIR: I think that was what you indicated last year for judge alone. The report also indicates a number of matters that did not go any further. That number is up from 24 to 43 this year in terms of the number of accused. That is a significant increase. Is there any reason for that?

Mr Refshauge: We have a considerable number of sexual assault cases, and they are notoriously difficult. You also might recall that last calendar year was the first full year of the criminal listing system in the Supreme Court, which brought something like 100 cases into the system, so they had to be dealt with in a more focused way and according to a timetable set by the court. We probably caught up with some of those that were long outstanding and were brought into the system, which neither party—defence or prosecution—was focusing on at that time. They were dealt with and disposed of.

THE CHAIR: In the report you mentioned some matters where the jury was discharged. With what regularity did that occur in this reporting period?

Mr Refshauge: It is a worrying trend, and we are looking internally to see what we can do. The difficulty is that, when a jury is discharged, there is very little we can realistically do about it. Legally, I could probably appeal the decision. The appellate provisions are probably wide enough to appeal against that decision, but the utility of the appeal is zero, other than to agitate the decision that was made if it was a decision that we thought had some systemic implications.

Generally, where a jury has been discharged, you either have to rerun the trial or enter a nolle. Unfortunately, there have been a couple of cases where I have been convinced that the decision to discharge the jury was wrong, yet there was really nothing one could do

about it. In one case, a sex case, the victim decided that, having been cross-examined quite vigorously at committal and then at the first trial, she was not prepared to go again, and I discontinued that. That caused some difficulty because the accused was a person in a position of authority, and without a conviction there was difficulty in using the child protection processes of the jurisdiction to protect what might happen in the future.

THE CHAIR: Do other jurisdictions have the ability to take an appeal on a point such as that?

Mr Refshauge: We do. We have the capacity to do it, but why would you do it? You can't re-call the jury and keep going with the trial unless there is a great systemic issue or unless the judiciary is exercising a power regularly. But if it just happens to be that a judge has taken a view about an inadmissible question or the effect of an answer on the jury, or so on, that is a one-off that you have to live with. That is fine.

We will have to do that. My colleagues in the other states do it regularly. But when the percentage is high—and you only need three or four in this jurisdiction to start giving you a higher percentage—it starts to have a systemic effect and a flow-on, where in other jurisdictions three or four would be minimal and not a blip on the radar screen. That is a difficulty. As judges who have not practised in crime become more familiar with crime, one hopes that that kind of thing happens less.

THE CHAIR: There are no further questions. Thank you for your attendance.

Resolved:

> That, pursuant to standing order 243, the committee authorises the publication of evidence and submissions received by the committee during this hearing, together with any supplementary material arising from the public hearing.

The committee adjourned at 4.49 pm.