LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: Annual and financial reports 2004-2005

Members:

MR B STEFANIAK (The Chair)
MS K MACDONALD (The Deputy Chair)
DR D FOSKEY

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 10 NOVEMBER 2005

Secretary to the committee:
Ms R Jaffray (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 9.18 am.

Appearances:

Mr Jon Stanhope, Chief Minister, Attorney-General, Minister for the Environment and Minister for Arts, Heritage and Indigenous Affairs

Department of Justice and Community Safety
- Ms Elizabeth Kelly, Acting Chief Executive
- Mr Brett Phillips, Acting Deputy chief Executive
- Mr Peter Garrisson, Chief Solicitor
- Mr John Leahy, Parliamentary Counsel
- Mr John Paget, on behalf of Executive Director, ACT Corrective Services
- Mr Bruce Kelly, Courts Administrator
- Ms Diane Spooner, Acting Director, Policy and Regulatory Division
- Ms Danielle Krajina, Deputy Registrar-General, Registrar General's Office
- Mrs Lana Junakovic, Acting Director, Corporate Services
- Mr Derek Jory, Director, Justice Planning and Programs
- Mr Tony Brown, Director, Fair Trading
- Mr Karl Phillips, Acting Chief Financial Officer

Office of the Community Advocate
- Ms Anita Phillips, ACT Community Advocate
- Mr Alasdair Roy, Deputy Community Advocate
- Mr Brian McLeod, Deputy Community Advocate

Human Rights and Discrimination Commissioner
- Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner

ACT Electoral Commissioner
- Ms Alison Purvis, Acting Electoral Commissioner

ACT Legal Aid Commission
- Mr Chris Staniforth, Chief Executive

Director of Public Prosecutions
- Mr Richard Refshauge, Director of Public Prosecutions

THE CHAIR: Good morning and welcome. Thank you for coming to the hearing today. Dr Foskey sends her apologies. She is unable to be here today. Very briefly, because I know Peter Garrisson has got to leave in about five minutes, I will read out the privilege caution.

You should understand that these hearings are legal proceedings of the Legislative Assembly protected by parliamentary privilege. That gives all witnesses 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.

This is a small committee room, ladies and gentlemen, and there are a large number of

potential witnesses. To assist in the smooth running of the hearing, please find your nameplate, which is on the bundle on the chairs in the front row there, as you are called to the table. I would like you to place the nameplate in front of you so that *Hansard* and the committee members can identify you. Thank you for that. I would also ask anyone with a mobile phone to turn that phone off or put it into silent mode. Before we start, I remind witnesses to state their name and the capacity in which they appear.

I will direct my first questions to Mr Garrisson. Thank you for attending. The part of the report dealing with the Government Solicitor's Office starts at page 63. I note on page 67 that you use a large number of counsel. There are two questions. Firstly, is there any office policy in just how you pick counsel? Secondly, what percentage of your work would be done by in-house counsel or by the solicitors in your office?

Mr Garrisson: With respect to the selection of counsel, indeed over the last two years there has been a deliberate policy to broaden the range of counsel used within the office. This does two things. It obviously expands the range of experience and knowledge that we can draw on, but it also quite positively follows the model briefing policies in terms of, for example, greater use of female counsel, where possible. I think it also reflects the increase in work within the office and the fact that we do have a very large range of matters with which we are dealing. Over the last two years in particular, there has been a very significant increase in applications relating to children in need of care. While many of those are handled by our internal lawyers conducting the appearance, a number are briefed out to external counsel.

THE CHAIR: Would it be easy to ascertain what percentage you have actually handled internally?

Mr Garrisson: It is not possible to really do that. There are obviously a large number of attendances and appearances that are undertaken on each file.

THE CHAIR: Right. My other question relates to page 65. You state that you provided advice to and representation of the territory in the inquests and inquiry by the coroner into the fires, the representation of the Attorney-General in a range of court proceedings and also the inquiry by Acting Justice Miles in relation to Eastman. I note on page 118 of the department's report that some $4.9 million was spent in relation to the coronial matter and $1.1 million for Eastman. Would you be able to tell the committee what percentage of those figures related to the Government Solicitor? Take that on notice if you have to.

Mr Garrisson: I can give you up-to-date figures.

THE CHAIR: Thank you.

Mr Garrisson: To date, the GSO's costs in relation to the coronial inquest is $5.188 million. In relation to Eastman, unfortunately, Mr Chair, the figures are still being consolidated. There have been a number of different proceedings over a period of some five years and we have been putting that material together. It would be the smaller part of that figure.

THE CHAIR: Finally from me, I heard or read somewhere that Mr Eastman was

considering taking further action. Is there any further action after the latest—?

Mr Garrisson: Mr Chair, you probably learnt that from the same source as I did. There has been no direct contact with my office in relation to any further steps that Mr Eastman might choose to make.

THE CHAIR: Thank you.

Ms MacDONALD: Mr Garrisson, I am going to take pity on you and allow you to go.

THE CHAIR: Thank you very much for your attendance.

Mr Garrisson: I thank the committee for its indulgence in hearing me first.

THE CHAIR: We should probably go through the report logically. We will deal firstly with ACT Corrective Services, which is on page 15.

Ms Kelly: Mr Ryan is actually on annual leave at the moment. Mr Paget is acting as executive director.

THE CHAIR: I note that the section deals with the prison project, so we will deal with all that together. On page 16, looking at the figures in relation to prisoners actually sentenced in New South Wales, it seems to have been reasonably static for the last couple of reporting periods at around about 115 or so. I suppose you cannot really tell, but would you envisage that would more or less continue at around that figure or cannot you say?

Mr Paget: The average for July-September currently is 121.5.

THE CHAIR: Thank you. I note the figures, too, here in relation to people on remand. I saw about 69, I think. Is there any update on those? What would the figures be, the latest figures you have there?

Mr Paget: I think they are relatively the same, Mr Chair.

THE CHAIR: Just in relation to the prison, I understand that roadwork has now commenced. What is the current estimated time the prison will actually open?

Mr Paget: The roadworks do not impact upon the time because they are a separate package. They are due to be concluded by the end of this year. The prison project remains on schedule at this stage for completion, as we have said before, in October 2007.

THE CHAIR: In terms of the accelerator, I think the latest figures we had for the project was $128 million as the current cost. Have you any update in terms of any additional costs that are likely between now and October 2007? Has there been any update on the accelerator effect?

Mr Paget: No, except that June this year we had advice from the master builders association that, in fact, the residential sector was declining in costs and

therefore that would flow through to some particular trades which the nature of our building project would be interested in. That will have an impact on it, but at this stage of the process the escalation rates that are published by the Australian Institute of Quantity Surveyors or Westpac BRIX or the ABS are largely academic because by the end of this year we are going to tender, and that is the real test of what the marketplace is. So we are not proposing to put anything to government about changing the current agreed escalation factor.

THE CHAIR: When would you envisage the tender being finalised?

Mr Paget: Early in 2007.

THE CHAIR: Any particular month?

Mr Paget: We would hope to do that around about no later than certainly April.

THE CHAIR: 2007 or 2006?

Mr Paget: 2006.

THE CHAIR: I thought you said 2007. Thank you. In relation to current prisoners, the 121 or so in prison in New South Wales, that includes all prisoners, prisoners recently sentenced plus prisoners awaiting release on parole? It is not just—

Mr Paget: Yes, sentenced prisoners.

THE CHAIR: I thank the Attorney for answering a question that I think I asked in the last Assembly. I note that New South Wales is planning to build a 500-bed prison at Kiama. I recall that when the prison project first started—and it was around the same number of beds, 374 or thereabouts, maybe even a few more—it was suggested that we would actually get New South Wales prisoners in to make sure we had a pretty full prison to start with and that they would help defray the costs.

I note recently that the Attorney has responded to me that planning for the Alexander Maconochie Centre is based on data which showed that approximately 75 per cent of ACT prisoners reported ACT addresses. That has been increased to 78 per cent. Only 16 per cent of ACT prisoners have a postcode in New South Wales and, of those, 50 per cent are in Queanbeyan. In relation to whether there was any agreement with New South Wales to send prisoners to the ACT, there was not, and it seemed there were not any plans to actually have New South Wales prisoners come to the ACT.

Mr Paget: Correct.

THE CHAIR: I am just looking at the figures. There is 121, plus about 69 on remand. It is certainly less than 200. The prison is for 378. Is that too big? What do you envisage occurring in terms of filling up that actual number of beds in the prison?

Mr Paget: Just to go back one step, the first point that you made about the proposal envisaging at some stage that New South Wales would be used to fill it up, that has never

been on the agenda since I have been here. The New South Wales prison population is currently at about 9,000. I estimate that—

THE CHAIR: Sorry. Just on that, how long have you been here Mr Paget?

Mr Paget: Since early 2003.

THE CHAIR: Thank you.

Mr Paget: The New South Wales prison population is currently at about 9,000. They estimate it will be 10,000 by 2003. Straight away they have a requirement for that extra capacity. They also, between then and now, anticipate taking out of action some of their 19th century facilities like Parramatta. As late as a week ago one of their assistant commissioners advised me that, even though they have an active building program, the prison population is going up so fast, they really do not have spare capacity. So the idea that Kiama somehow changes the dynamics of the need for the ACT in terms of prisoner numbers does not stand up to scrutiny. But the other question, of course—

THE CHAIR: Just on one point of clarification, I think you said 10,000 by 2003?

Mr Paget: 2008, sorry.

THE CHAIR: Thank you.

Mr Paget: They are certainly expecting that growth to continue. The ACT prison project was premised on a range of considerations, not just about prisoner numbers. Even though the prison population will, on opening, be less than capacity, the surge rates are built into it. Most prison systems use either a Council of Europe or an American Correctional Association factor of 15 per cent to allow them to have capacity to deal with all the groups that should be kept apart. Since we are a single population, we have to keep apart remands and sentences. We obviously have to keep apart male and female. We have to keep apart those who need particular care and protection, those who have got risks to their own wellbeing, those who are intellectually disabled and those who are physically disabled. So, even though there will be spare capacity, they will actually be spread over that capacity.

In addition, we need to have a capacity to deal with the peaks and troughs, and that is usually about 26 per cent. So we have to build into any new facility these additional spaces to cater for those peaks and troughs, and some of those peaks and troughs are quite severe. So, yes, there will be, in theory, capacity that is not utilised upon commissioning. There might be some areas that might have only a very few people in them, but that is necessary.

THE CHAIR: The answer to my question in the Assembly was that the government is not in the process of negotiating any agreement with New South Wales, but is it anticipated that there would be any negotiation with New South Wales to take an overflow from there? Perhaps that might be better directed to the Attorney.

Mr Stanhope: I am not aware that we would be anticipating that. I would defer to Mr Paget in terms of our capacity to enter into agreements with not just

New South Wales, but with the commonwealth. There is from time to time, of course, a commonwealth need for correctional facility space or access to a fresh facility. Those are things that we would not dismiss. They are not things at this stage that we have actively pursued that I am aware of, but I would expect that there would be an opportunity for us in the context of significant space, perhaps, at the outset, or capacity, to at least have a discussion or a conversation with both the commonwealth and New South Wales in relation to some capacity to utilise any additional space we have.

Mr Paget has just explained succinctly the basis on which the size of the Alexander Maconochie correctional facility was arrived at. He makes the point that, in relation to the surge in numbers across the board that is experienced, it was just three years ago that I think we had 160 sentenced prisoners. I think it was only something like three years ago. I think we got up to about 100—

THE CHAIR: 148.27 in 2001.

Mr Stanhope: It makes the point that Mr Paget just made—

THE CHAIR: Twenty-six per cent.

Mr Stanhope: Yes, in the space of three years. On these numbers, you are right. It goes from 148 to 115. It could be back to 148 next year. That might be across a range of classifications. As Mr Paget has just indicated, with a 15 per cent surge capacity, say, in remand numbers or sentenced prisoners or women or prisoners that require protection or high security prisoners, there has to be a capacity to meet that surge across the spectrum. That is one of the issues we responded to. We responded, of course, to the economy's acknowledging that, as the population grows, it could be expected that our prison population will grow, and that impacts on the economies of providing for expanded utilisation into the future. This prison will have an anticipated life of at least 30 years and we are building a prison for 30 years.

THE CHAIR: **A** long time ago, when we were in government, I saw figures like those. That is a reasonable figure for me, too. I am just interested, though, in the figures we have had, which might indicate that it may be a bit too big. But I hear what you say there. Thirty years is not a very long time in terms of what is going to be a new building.

Mr Paget: It is 40 years.

Mr Stanhope: It is 40 years, sorry. The prison has an anticipated life of 40 years. That is probably not unusual with any infrastructure. Would that be correct, Mr Paget?

Mr Paget: Certainly for prisons. But history shows they are still running 1890s facilities all around Australia at the moment.

THE CHAIR: Yes. Forty years, I take it, is sort of the optimum life, all things being equal? If you had the money, you could then perhaps do significant modifications, rebuild or whatever?

Mr Paget: Clearly, yes. That is not to say that at the end of 40 years it falls down. There is a refurbishing all the way through it.

THE CHAIR: Yes.

Mr Paget: You would have to say at the end of 40 years, if we are still doing what we are doing now, it does not particularly reflect well on all of us.

THE CHAIR: Karin, do you have some questions?

MS MacDONALD: Not specifically about the prisons, Mr Stefaniak, but I do have a question about restorative justice, if I can ask that?

Ms Kelly: That might be a question for Mr Phillips.

MS MacDONALD: Yes.

THE CHAIR: I suppose my final question simply is: you are comfortable, Mr Paget and Attorney, that 374 is a correct number, rather than perhaps a lesser number, in the light of recent figures we have actually had in these reports?

Mr Paget: I am happy with it.

Mr Stanhope: I understand the point you make, Mr Chair, that, with existing numbers of 121 sentenced prisoners as of today and 60-odd prisoners on remand—we can all do the sums—we have got about 200 people that we require a custodial facility for. There is an obvious shortfall of 170 places there if those numbers were to persist into the future. Mr Paget has just indicated that at this stage we still anticipate the Alexander Maconochie facility being opened in October 2007.

The raw numbers support certainly the legitimacy of the question: if you have currently got 200 people that you require accommodation for and you are building for 374, why are you doing that? Mr Paget has given an explanation in relation to the surge in numbers. We need only to look at the number of sentenced prisoners of four years ago. Four years ago we had 148.27, on average, and I know that at different times it exceeded 160. I recall that there were months during that year when sentenced prisoner numbers got to, I think, 160 and averaged 148.27. So it is almost —

THE CHAIR: I think, at the top, remandees would have been about 90 at one stage.

Mr Stanhope: At one stage we did.

THE CHAIR: Yes. So that is your 250.

Mr Stanhope: At one stage we had over 90. So, all of a sudden, taking into account the surge that Mr Paget talks about, in one month three or four years ago there were 160 sentenced prisoners with 90 remandees. All of a sudden the numbers have changed most dramatically. They are pushed up to 250, and that does not account for the different classifications of both remandee and sentenced prisoner and the need to ensure that there is sufficient space for them. It also needs to be remembered, in the context of the structure of Alexander Maconochie, that 60 of the places that are being provided are for transitional release or early release. So, of the 370, 60 are not secure. Is that an

appropriate description?

Mr Paget: Less secure.

Mr Stanhope: Less secure. I do not want to set hares running. So it is 60 of the 370. Already it might be that in a particular month you do not have any early transition people, if you understand what I am trying to say. So you can take 60 out as less secure transitional release places that will be constructed at Alexander Maconochie, and all of a sudden the entire dynamic or nature or structure of the available beds changes dramatically because at any one time it is very, very difficult to anticipate what the need will be.

THE CHAIR: Finally, I note the plans are now available publicly. No doubt people will object. It goes through a process. If, for some reason, people objecting were actually successful and there were some problems there, do you have a plan B in terms of another site to build a prison?

Mr Stanhope: I will let Mr Paget answer this, Mr Chair. We are going through the statutory processes. It might be that there might be some objection to some aspect of the plan. If there is, then we will, of course, work appropriately to resolve any issue that might be seen as fatal to a particular aspect of the prison. It is beyond comprehension that any objection to the plan could be such as to preclude the construction of a prison on this site.

I have absolutely no doubts about the planning system and the rights of those to pursue their statutory rights. Consistent with that, there is no possibility that the Alexander Maconochie Centre will be built anywhere other than on the designated site. That is acknowledging, of course, the right of people to raise issues or objections to aspects of the plan. But to suggest that a prison of some plan or configuration will not be constructed on this site is not realistic. The Alexander Maconochie Centre will be built on this site—

MS MacDONALD: Attorney, I noted on that point that—

Mr Stanhope: irrespective of Mr Nairn thinks.

MS MacDONALD: Yes. On that point, I noted Mr Nairn on the radio this morning, scaremongering about the disruption that the prison would continue to cause. He was making bold statements, I would suggest, about reductions in speed along the Monaro Highway to 80 or even 60 kilometres an hour, which seemed a bit far fetched to me, and also talking about 100-year flood lines for the creek. Do you or Mr Paget care to comment on those statements?

Mr Stanhope: I welcome your invitation to comment on the 100-year flood plain nonsense, the implied insult, the quite defamatory suggestion that the ACT government or ACT government officials would be so negligent or so derelict in their duty that they would not take into account issues such as that in the planning and construction of a facility of this order and of this cost. It is just an outrageous and, if not defamatory, certainly highly offensive comment by Mr Nairn.

I might just say that—and this, is course, is wholly political of me—Mr Nairn really ought to concentrate on, say, the Kings Highway and some of the other roads within Eden Monaro. Mr Nairn is the member for Eden Monaro. He is not a particularly effective member, admittedly. I urge Mr Nairn to stop worrying about the Monaro Highway within the ACT and to start worrying about roads such as the Kings Highway, perhaps the deadliest road in Australia, certainly one of the deadliest roads in New South Wales.

If there is a road that Mr Nairn should be worrying about and concentrating on, it is the Kings Highway, a road that takes a significant number of Canberran lives each year. Mr Nairn might concentrate perhaps on the quality of roads to the snowfields, roads that run through his electorate. Mr Nairn really ought to stop interfering in the ACT. He should stop worrying about roads that are my responsibility and worry about some of the roads in his own electorate.

I think he ought to go back and revisit some of the promises that he made in relation to major infrastructure development within Eden Monaro, such as the Defence headquarters. It is quite obvious that Mr Nairn has misled his electorate and the people of Eden Monaro in promises he made.

THE CHAIR: Perhaps if we get back to—

Mr Stanhope: No. Let us get back to Mr Nairn and the prison site and comments that were made just today on ABC radio by Mr Nairn, the member for Eden Monaro, about infrastructure development—

THE CHAIR: Direct it to the prison site, then.

Mr Stanhope: I will. Mr Nairn ought to stop worrying about an alternative site for the prison. He has suggested that it might go in the Molonglo Valley on a site that he claims, erroneously and quite falsely, to have been offered to the ACT government. There was no site ever offered—and that is the nub of the matter—in the Molonglo Valley. But, having regard to the obvious availability of this site in the Molonglo Valley for significant development, I will be writing today to the Prime Minister and the Minister for Defence and urging them to relocate the flawed Defence headquarters proposal that is currently mooted for Bungendore back into the ACT, where it belongs.

Mr Nairn obviously has absolutely no interest in it, will not fight for it, has let it slip and quite obviously has misled his constituents in relation to it in the first place. The Defence headquarters should come back and I suggest, on the basis of Mr Nairn's identification of an appropriate site, that we place the Defence headquarters in the ACT, if not at Harman, certainly in the Molonglo Valley.

THE CHAIR: Now the flood, the 100-year flood.

Mr Stanhope: Mr Paget will not be so overtly political, but certainly just as polite.

Mr Paget: All the environmental factors, including transport, were dealt with through the statutory processes of preliminary assessment, which included public consultation. The buildings are well outside the flood plain. The transport consultants examined the

impact of the prison on the traffic flow on the highway. Frankly, it is negligible. It is not as if we are going to time our shift patterns to be the same as peak hour. So there are ways of getting around this pretty sensibly. That was all available publicly.

MS MacDONALD: Thank you.

THE CHAIR: You had some other questions.

MS MacDONALD: I did, although not on the Alexander Maconochie Centre.

THE CHAIR: That is fine.

MS MacDONALD: Mine is a question about restorative justice. I refer to page 9 of the report. The Crimes (Restorative Justice) Act 2004 was passed last year, of course. Underpinning this legislation has been the establishment of a new restorative justice unit at the end of 2004. Could you briefly outline for the committee how a referral is made? What are the processes involved from the time of a referral through to the conference proceeding? What is involved in the preparation when a referral gets made? We will start there.

Mr Brett Phillips: The restorative justice unit currently has four officers, together with a full-time AFP officer attached to it. The referrals are made through a number of potential referring points. The primary ones that we have in the ACT to date have been the DPP, the police and the Children's Court. Once the referring authority provides a referral to the restorative justice unit, the unit sits down and has a series of protocols and goes around and defines and interviews the victims, defines and interviews the offenders and addresses issues of suitability and eligibility. It's quite an extensive task. They do home-based visits so they will hunt out whoever is involved in the process on both sides.

Understandably, some people don't want to be involved. Some people have moved on in life and want to put it behind them. Some people are so affected they can't bear to have contact with an offender. Offenders sometimes aren't known. Victims sometimes can't be found. So there are all sorts of reasons that a referral won't proceed any further. But, once the criteria for eligibility and suitability have been addressed, they organise a conference where they will have a victim plus a support person, an offender plus a support person, and other people who are invited, plus someone who will undertake that conciliation or the conference.

MS MacDONALD: Thank you. Have you received any feedback on the restorative justice project from victims of crime representatives or stakeholders?

Mr Brett Phillips: We have received feedback from the victims and offenders, and I can say that the feedback that we have received from those people that actively participate in the process has been largely positive. As you would expect, a number of people do feel uncomfortable in the process, but by and large we have almost universal support from people, who believe that they have been able to express their views and that they have been treated fairly in relation to the conciliation process, so the feedback has been positive to us. I think the legislation requires us to do a review at some stage down the track, but I can't tell you exactly when.

MS MacDONALD: And have victims of crime representative organisations given any feedback at all?

Mr Brett Phillips: Not that I'm aware. I can take that on notice.

MS MacDONALD: Okay. At June 2005 I understand 27 referrals had been made to the restorative justice unit. Is the rate of referral expected to increase in the coming year or is the unit operating at a full—

Mr Brett Phillips: The referrals to the end of October have been 76 for the calendar year. I think we started in February so February and March were quite slow with referrals, with the system kicking in. But it seems to have become constant. So we have had 76 for the first eight months of the legislation operating.

MS MacDONALD: We were commenting last Friday, when we had the minister for police before us, that acts of crime seem to get busier as the year proceeds; that people seem to get bored or something.

Mr Brett Phillips: We will see what happens in February and March once we come back from over the Christmas period. But at that time we hadn't been set up properly.

MS MacDONALD: Okay, thank you for that.

THE CHAIR: Just before we move to courts and tribunals, I have one further question for Mr Paget in relation to corrections. Is it the case that the government will continue to send violent offenders, and indeed offenders who have suffered from severe mental problems, to New South Wales institutions and prisons after the new ACT prison is finished?

Mr Paget: The original proposal always envisaged that, if we had somebody who represented an acute risk to the ACT community, we would contemplate a fee for service arrangement for New South Wales to put them into a facility that was appropriate to that level of risk. I think the question dealing with forensic mental health people is more appropriately dealt with by health than us.

THE CHAIR: Okay. Just in terms of the acute risk to the ACT: how many of our prisoners in New South Wales at present would be in that category? I imagine we're talking a small handful.

Mr Paget: I don't think there are any. We were premised on, say, one every 10 years. But the question was really a public one: how many people of the calibre of some of the more notorious characters in Goulburn does the community expect to spawn in the next 10 years? We thought one every 10 years might be reasonable for costing purposes.

THE CHAIR: Okay, thanks.

Mr Stanhope: Just so we all understand it: it is our expectation that the prison, the Alexander Maconochie Centre, will contain a high-security unit or capacity. So, for instance, people that attract that classification will be housed at the Alexander

Maconochie Centre. I just want to be sure that you and Mr Paget are talking about the same class of detainee or prisoner when you talk about a person representing that level of extra concern.

THE CHAIR: Yes, thanks for clarifying.

Mr Stanhope: That's correct, Mr Paget?

Mr Paget: Yes. It's certainly high security, but we're talking somebody—

Mr Stanhope: We're not talking just about somebody who has been convicted of murder and who is a dangerous person.

THE CHAIR: No, no, they can be housed in the Maconochie Centre. It's those extreme cases, I suppose, like if you had an Ivan Milat or something, or some prisoner who was particularly aggressive to everyone.

Mr Paget: Somebody like that who was assessed to represent a really severe risk to the community.

THE CHAIR: Okay. I understand and thank you for clarifying that too. We will now move on to ACT law courts and tribunals. I've got several questions in this area. The annual report states that the courts and tribunals business centre provides integrated administrative, policy and operational support to the judiciary and the registrar for case management and associated services to the clients and stakeholders of the court system. However, the Auditor-General was critical of the division of responsibility between the judicial and administrative functions, finding that governance and accountability were not clear. What is the department doing and what are the courts doing about improving that situation?

Ms Elizabeth Kelly: I think the Auditor-General talked about requiring greater role clarity, and the department has responded to the Auditor-General's report by a whole range of measures, because, obviously, the Auditor-General's report covered a great range of areas. The key governance initiative will be the creation of the courts governance committee, which is due to have its first meeting in early December. Within courts administration, as you will recall, there is an area that is clearly within the sole control of the judiciary, there is an area that is clearly within the sole control of the department, and then there's a great area in the middle, which is an area of shared responsibility that requires the development of a partnership. The court's strategic governance committee is about making that partnership work, working through the issues in that area together and moving forward to improve the way that we do things.

I think it is really important with courts to recognise that the satisfaction of our users has been consistently high. So we are producing a result that is satisfying the customers of the court and our courts customer satisfaction survey, our most recent one, confirms that. The Auditor-General has said that there are inefficiencies in the processes that sit behind that, and that is what we need to work through to move forward with the recommendations of that report.

THE CHAIR: You might have answered my next question, which is that the auditor was

also critical of the administrative efficiency of the courts, finding that significant efficiency could be achieved with greater cooperation between the judiciary and the department in court management. I take it your answer—

Ms Elizabeth Kelly: Very much so, and in the process that we're doing at the moment, in reviewing the processes within the registry, it has been very much a joint process with the Chief Magistrate, the Chief Justice, Mr Kelly and I going through, analysing the way we do things, possible ways they could be done differently, with the assistance of an expert who has done a great deal of work with the family court. So it has been very much a joint process. But there will never be absolute role clarity in courts administration; it's the nature of the business.

THE CHAIR: That report also found that the ACT community have less information about their court system and its performance compared with that available in many other jurisdictions. This lack of information about the performance of the court system generally also extends to information about sentencing in the ACT. Perhaps Mr Kelly or someone else would like to comment on that finding. That is of assistance to this committee in another inquiry we are doing.

Mr Bruce Kelly: Yes, certainly, I'm aware of that. I would have to say that the performance indicator set that has now been developed for courts is probably the most comprehensive and robust that we've ever had, and it really is pitched towards improving the business rather than worrying about results three years ago. I think the Auditor-General was alluding to the fact that in many states and territories the judiciary—the Supreme Court, the district/country court or a Magistrates Court—the head of their jurisdiction, publishes an annual review, sometimes called an annual report, sometimes called an annual review. That is basically a report from an independent judiciary to the community to the government to the Assembly. That was a recommendation that has been taken up and agreed in principle, so that both heads of jurisdiction will have the opportunity to put, I'm sure in their usual plain way, their perspective on the administration of justice in the territory in the future. I would expect that will be available at next year's annual report.

THE CHAIR: Obviously there are a lot more cases in the Magistrates Court—about 250 or whatever cases, 200 in the Supreme Court, which end up in some type of sentence being imposed. I take it then there would be some raw data similar to what you get interstate in relation to that, certainly from the Supreme Court, and hopefully some raw data too in relation to the Magistrates Court, albeit they have a much greater volume.

Mr Bruce Kelly: Yes. I would think that those are matters that the heads of jurisdiction will properly determine what they might put in their report. There is already in the public domain considerable information about comparative sentencing in terms of custodial versus non-custodial through the Australian Bureau of Statistics. They publish an annual report on the Australian criminal courts. They will do so again. Last year's report, I think, showed that in terms of just that raw custody/non-custody outcome the ACT was comparable to just about every other jurisdiction in the Australian average. There is a whole other level of information under that, of course, which relates to particular sentences for particular offence types.

THE CHAIR: Even things like, for example, armed robbery; in some jurisdictions you

could well get a break-up of more than five years in prison and less, between two and five, between zero and two, in non-custodial.

Mr Bruce Kelly: The difficulty in a small jurisdiction like the ACT is that sentencing is all about tailoring the sentence to the individual and the offence. So, when you have relatively small numbers, that is subject to a lot of fluctuation. In the larger states, the averages start to become more reliable. I'm not sure about the long term, although it's almost a holy grail, I guess, for criminologists to try and make those sorts of comparisons. Things as simple as definitions—the way particular crimes acts are structured in various jurisdictions—lend themselves to interpreting those results really carefully.

THE CHAIR: That perhaps might lead to my next question. The data for the ACT courts are released every quarter in our criminal justice stats profiled by the department. However, it could be said that the JACS profile provides raw data but its ability as an information source is limited for a number of reasons, including lack of a time series and the absence of summary findings to inform potential users of the data. It seems further that the data collected doesn't necessarily conform to national data collected by the ABS. Has the department, and indeed the courts, got any plans to assess its data collection and change the way it reports on matters before the court?

Mr Bruce Kelly: I'm pleased you asked that question.

Ms Elizabeth Kelly: Because it's Mr Jory who is responsible for the criminal justice statistical profile. We are conscious of the inadequacies of that document, and I'm sure Mr Jory will explain to you those limitations.

Mr Bruce Kelly: If you wanted, I could update on that project.

THE CHAIR: You can do that, then Mr Jory can add whatever he needs to.

Mr Bruce Kelly: We're in the process of finalising the scope of a study by the Australian Bureau of Statistics on that very collection, for the very reasons that you have outlined. There are lots of numbers. Sometimes what the police count and report is different to the way we count and report. So the ABS has a program of outplaced officers. One is to the ACT from the local ACT office. That project is under way as we speak. We're scoping up the best way of looking at that quarterly report to see if we can improve its consistency, its quality, timeliness, and, most of all, the usability of the statistics, if you like. So we have already recognised that as an area of great opportunity for us—to look at an ACT wide justice system approach to that report—and we would expect that the project is going to run for about 12 months. We're just scoping it up now, finding out what it is and how everyone counts in what unit. So watch this space. I think that will be a very worthwhile project when it comes to fruition.

THE CHAIR: And the heads of jurisdiction that you mentioned earlier: will that data be available in the next annual reports? Are they envisaging putting something—

Mr Bruce Kelly: I'm not sure that those two things are necessarily connected. I think that the thing to understand most fundamentally about an annual review by a court, if we could just distinguish it that way, is that that's an independent judiciary and it's very

much their call what goes in. Some publish workload statistics; some focus more on the policy issues surrounding the administration of justice. Some inevitably talk about terms and conditions of judicial officers. There seems to be a fair range across Australia in the way those things are approached. There is no uniform approach.

Ms Elizabeth Kelly: But we probably see it focusing on accountability issues rather than recording of performance in terms of sentence outcomes and conviction rates. They perhaps wouldn't necessarily be something that would live in there. It would continue to live in the work that the department does in the criminal justice statistical profile.

THE CHAIR: Does Mr Jory want to add anything further? No. Okay.

MS MacDONALD: I have a question about the Ngambra circle sentencing program. You'll have to forgive me; all the public hearings this year have blurred into one for me, so I can't remember if it was the annual reports hearings that we did at the beginning of the year or the estimates committee hearings that we had where I raised the issue of circle sentencing. Obviously, the goal of circle sentencing is to reduce the recidivism in Aboriginal and Torres Strait Islander offenders. Could you provide an outline of the processes and procedures involved in circle sentencing, just to refresh my memory?

Mr Bruce Kelly: Certainly. Circle sentencing has a two-stage approach, two-stage test. First and foremost, any Aboriginal or Torres Strait Islander who has entered a plea of guilty to an offence that might be finalised in the Magistrates Court, so it's within the summary jurisdiction, can apply to be assessed for entry into the program. The DPP has the option of making that application as well. The only restrictions on that initial consideration are offenders who are charged with more serious offences that must proceed to the Supreme Court, those who have unresolved illicit drug dependency problems—they are particularly difficult to manage and not suitable for this sort of environment—and those who are charged with a sexual offence. So effectively there is a front end screen at that point.

If the magistrate believes that the offender meets those threshold tests, the case is then referred to the elders panel. That comprises respected senior members of the local Aboriginal community, appointed by the Attorney-General for that purpose. The panel then assesses the offender, primarily by reference to kinship or other ties to the local Aboriginal community. The idea there is to ensure that offenders are willing to participate, what the potential benefits are for the victim, the offender and the community and, as importantly, whether a community-based order, supervised by local community members, will be effective; that is, whether the person is prepared to accept that level of supervision. So, if the panel believes that the person is suitable, a report is made to the Ngambra circle sentencing magistrate. He then has a discretion to proceed with the referral and a circle would be convened. That's the beginning of the formal process.

There is one, perhaps two, and on occasions three, very intensive sessions of up to two hours—very confronting sessions for an offender because they must not only confront the police and the prosecution but the victim and their supporters—and their own family and their supporters. So they are very intense sessions and, after that is done, the panel recommends a sentence to the magistrate and the magistrate can accept that, subject to the usual rules about proportionate sentencing and that type of thing. So there are a number of gates and checkpoints to make sure that people are basically prepared, are

suitable to be included and, most importantly, that they have local kinship ties. Then they go through the process. It is not easy to get in, in that sense. Those who do participate really have to demonstrate—not just say—that they're prepared to accept supervision, so sometimes those cases will be adjourned while they are given an opportunity to demonstrate those things.

MS MacDONALD: Yes, I notice that to date 17 offenders applied in the year, 15 were accepted and one offender was removed from the program for re-offending. So it's not a bad set of figures even for a small number.

Mr Bruce Kelly: Certainly, since 30 June there have been another four referrals. Two of those are listed for circle and two are pending assessment. I don't count any of those removals as a failure. It proves that the system has got a fair degree of rigour to it. I think there's probably one case where you could say that the offender—the one that was removed for re-offending—had not engaged properly in the process. At the other end is an example of an offender who had a criminal history, probably as good as anyone I've seen in 30 years, facing very serious family-related assault occasion; someone with entrenched drug dependency and a number of other issues—in fact, someone who was a perfect candidate for jail; almost, you would have thought, compulsory for jail. Through the circle process, that person has been taken through a number of programs such as cognitive development, been into employment and has had to confront their family. At this stage, given that five have fully completed sentences without re-offending, for that person this program was their last best hope. Big time, I guess, is the best way to put it for attempt murder and other quite serious violent offences. That person now has engaged, and I think that one saving, if that's how it turns out, could well have an enormous ripple effect in the community over time as that person comes back on the rails after 20 or 30 years of spending most of their time behind bars.

MS MacDONALD: That's a very good outcome; touch wood that it continues.

Mr Bruce Kelly: Certainly, the Chief Justice of New South Wales said the other day that he thinks the New South Wales equivalent program is the most worthwhile criminal justice initiative for the Aboriginal community since the seventies.

MS MacDONALD: Just one last small question on it. Do you speak expect the numbers to remain about that amount or for the program to increase at all?

Mr Bruce Kelly: Because the program is now permanently in place, we're finding that, a bit like restorative justice, as it has settled down and people have become more aware of it, there is a reasonably constant demand. Around two a month, roughly, seems to be the area it is settling at. But you can't tell; much depends upon policing strategy and the other things that underpin the workflow into the courts. I think there's a better than even chance that there will be a steady demand for the circle as we go forward.

Mr Stanhope: It has to be said, of course, as I'm sure the committee realise, that issues related to indigenous justice continue to be amongst the most intractable that this community, and I think all communities in Australia, face. The circle sentencing initiative is one response to that, but we do need a range of other responses as well. It's fair to say that Mr Paget and Mr Ryan, in the detailed planning for the Alexander Maconochie Centre, are placing enormous care and consideration into the planning of the

prison and its services in the context of another fundamentally important aspect of dealing with indigenous people in the criminal justice system. Very significant thought and planning are being put into how best to ensure that not just indigenous but all people are supported and rehabilitated to the extent we can through the prison process. But there is a raft of other pressures and initiatives, of course, dealing at the outset with indigenous disadvantage. Our statistics on indigenous people in the criminal justice system I don't think are moving positively at all. There are a lot of new initiatives being pursued and a new focus on indigenous people in the criminal justice system, but it remains the most difficult issue—almost one of the most intractable issues—we face, demanding more of the community and of governments.

THE CHAIR: I thought I had seen a bit of a drop in terms of—

Mr Stanhope: I haven't seen the statistics, but I'm aware—

THE CHAIR: It might have been for Quamby.

Mr Stanhope: Yes. I'd be surprised if that were the case.

THE CHAIR: No, it was in this report, but it wasn't much—it was 7.8 down to four point something. Just in relation to tribunals, I see on page 131 that, whilst there has been a drop in timeliness of disposal of matters by the AAT, the timelines seem a bit concerning. The percentage of applications finalised in the period which had been lodged within one year: there was a drop down to 80 per cent. In the previous period it was 99 per cent, which is pretty good, it seems, and it dropped down to 80 per cent. In previous years it was 97, 96, 92 respectively. I note in the Discrimination Tribunal that as at the end of this reporting period 39 matters were outstanding, of which 22, which is more than half, had been with the tribunal for more than one year. Why is it taking so long for those matters to be finalised and is it the case that we need more tribunal members or is it the case perhaps of something wrong with the case management? What are the problems in relation to tribunals that lead to those figures?

Mr Bruce Kelly: The issues around the Discrimination Tribunal turned far more on the fact that the majority of the applicants in those cases do not have legal representation. I don't say that they should, but it does make it quite challenging, given the nature of that clientele and quite often the nature of the complaint, to achieve compliance with directions and things like that. A tribunal would be reluctant to dismiss solely because of noncompliance for an unrepresented person who may, for instance, have some underlying social issues. There could be consideration of, as we move towards harmonised rules, bringing the tribunals into that, and, hopefully, at some stage in the future that would provide a mechanism to more surely enforce things like directions hearings. People just refuse to turn up, file documents and those sorts of things. In that sensitive area, there is an understandable reluctance to summarily dismiss those applications. But that's not a matter of insufficient members; case management is probably up to the same standard as we except in any other tribunal. It is solely the nature of the cases and the people who are bringing them that cause the delay.

THE CHAIR: Over this financial year we're reporting on, I think about this time last year there were concerns that the Magistrates Court was losing 13 staff or 13 positions. How many, if any, positions were cut?

Mr Bruce Kelly: For this year, this financial year?

THE CHAIR: This reporting year; the one we are doing.

Mr Bruce Kelly: There was no efficiency dividend asked of the courts in the last financial year, so our staff number has stayed relatively steady. There are ups and downs always—some people coming and going.

THE CHAIR: Were any positions abolished?

Mr Bruce Kelly: No.

THE CHAIR: None at all?

Mr Bruce Kelly: None at all.

THE CHAIR: In relation to the year we're in now, we've heard talk about efficiency dividends across government. Have any efficiency dividends been applied to the courts, either the Supreme Court or the Magistrates Court?

Mr Bruce Kelly: I think the answer to that question is no as well.

Ms Elizabeth Kelly: Obviously, the question of efficiency dividend is a matter for the budget—and it's not operable this year. There is no efficiency dividend applied for the last budget for this financial year to the courts, so there is nothing being experienced this financial year.

THE CHAIR: Okay, thank you. Mr Kelly, on the AAT question I asked, the 80 per cent finalised within a year down from 99 per cent: can you explain that figure?

Mr Bruce Kelly: Underpinning that are a couple of effects, particular in planning. I think the president in his report talks about those that were outside the statutory time frame of 120 days and gives examples for each—I think there were four or five occasions. When you've got a statutory time frame, that starts from the first application. Then people who join later need to be notified later, but they're still caught with that 120 days. So I'm not particularly alarmed by 80 per cent; 80 per cent in 12 months is not bad as a benchmark. It would be lovely to be at 99 per cent. But, again, when you look at the number of cases in the AAT, it's not large. Again, you get variation year to year because of demand.

THE CHAIR: Thanks, Mr Kelly. We will now move on to the Parliamentary Counsel's Office. Has anyone got any questions? No. And nor do I, except one, but it's quite a pleasant one, I think, about the graphs on pages 50 and 51. It would seem there—correct me if I'm interpreting them the wrong way—that your target productivity in terms of pages of legislation produced in graph 1 was considerably under the result productivity, which seems to be a very good result for you; you've been more productive than you anticipated being; and graph 2, your page production cost, the resultant cost is less than you projected and has been tracking down since 1998-99. Is my interpretation correct?

Mr Leahy: That is correct. As the annual report explains, we use a five-year average, because that takes into account one election cycle. There are still some factors from the past that keep the targets relatively low but, without a doubt, the figure has been increasing overall. Graph 3 shows the position best, because it has a trend line. The trend line makes it quite clear that the overall demand and production continues to increase fairly substantially.

THE CHAIR: Yes, indeed. To an extent, it seems to trend around election cycles.

Mr Leahy: It is influenced by the election cycle. You normally get—and there is nothing abnormal about this—the figures going up before an election, which is not surprising, and the figures going down the year after that.

THE CHAIR: I note the increase in work being done. There are no particular problems with staffing?

Mr Leahy: We are coping, but just. It's an ongoing problem. We have an issue with the number of senior staff who have retired in recent years. We need to train more junior people and bring them on. It takes a long while to train drafters. For us it's a constant struggle to keep up with the demand.

THE CHAIR: Are you having any trouble recruiting? Are there any potential problems in the outyears?

Mr Leahy: Simply money. We can recruit. In fact, we have recently recruited a senior drafter from the Office of Legislative Drafting. The reputation of the office is very good and we can indeed recruit people, but it's simply a matter of money.

THE CHAIR: Congratulations on those graphs, which show that you are doing an exceptional job, although perhaps under a bit of strain. Thank you for the service you provide to the Assembly.

Mr Stanhope: There is another matter on which Mr Leahy should be congratulated. I notice from the staff photographs in the report that he is the only male with hair!

THE CHAIR: Mr Dalton had hair last time I saw him, but you didn't put him in the photo!

Mr Leahy: We do not pick them that way; they just turn out that way.

THE CHAIR: I now welcome the Commissioner for Fair Trading.

Mr Brown: Thank you.

THE CHAIR: I note that some new rules which your office administers in relation to the registration and training of various groups in the community, including people in the real estate industry, came into play during this reporting period. Is that so?

Mr Brown: That's correct. That legislation commenced in 2003.

THE CHAIR: Yes. It commenced in November 2003. This would be the first full year of the applicability and operation of that legislation.

Mr Brown: Yes.

THE CHAIR: I invite your comments on this: I have had a number of complaints from people who have been in the industry for a while. I have sent some of those complaints to the attorney, in his capacity as minister responsible, in relation to people who have certain roles. In one instance a person had been around the industry for 50 years. There was a more recent complaint about people who have been in the industry for five or six years who have already done courses but are now required to do additional courses. I invited them to contact you about that. Is there any review going on in relation to how that is operating? Some of those issues seem to be causing concern.

Mr Brown: The issues you raise relate to some of the transitional provisions and some of the general provisions that apply to people who are going to be registered salespersons. The Agents Act 2003 introduced the new category of registration of a registered salesperson. That category did not exist under the old Agents Act of 1968. When that was introduced, along with the introduction of training obligations and educational standards for persons involved in real estate, a standard was struck for people who wish to be registered salespersons. That sets out 15 units of competency that they are required to achieve. Those units of competency are part of the national training program for real estate agencies.

The transitional provisions allowed persons who had been associated with a real estate agency under the old legislation and either held a licence or were registered under the old scheme to elect whether or not they wanted to be a licensed person or a registered salesperson under the new legislation. If they elected to be a licensed person, they essentially had their prior status protected under the act and the only training obligation they assumed was one associated with continuing professional development.

THE CHAIR: Could they still be salespersons as well?

Mr Brown: Yes. As licensed agents they could undertake all the activities covered by the legislation, including those of a registered salesperson and those of an auctioneer. If they elected to not maintain a licence but to become a registered salesperson, on the renewal of their licence this year—two years from the time of the introduction of legislation in 2003—they assumed an obligation to establish as part of that renewal that they had the requisite educational qualifications.

Most of the people who had undertaken prior courses or had been in the industry for a very long period of time would be able to do that either through the recognition of prior learning—and that would be in respect of most, if not all, of the 15 core units—or at most they would be required to undertake one or two courses of short duration. Most of those would be around issues to do with the modern legislation. They would satisfy the rest. The industry was on notice. Those who elected to become registered salespersons were on notice, both last year as part of the renewal process and generally.

THE CHAIR: What are the fees to become a registered agent or salesperson?

Mr Brown: To be a registered salesperson it is $154 and to be a licensee it is a bit over $500. For some of them it was a money issue—they decided it was a money issue—but they had the option. They could elect to go one way or the other. Those who elected to be registered salespersons now find that they are not prepared, or are unwilling, to undertake the necessary educational work to meet the renewal process. Some of those have now elected, because their position has been preserved, to apply for a licence. I think the person you made reference to, who has been in the industry for 50 years, has now elected to do that. We expect to process that application in the next few days. It is a transitional thing.

There are a number of agents who are yet to complete their educational requirements. Some have applied afresh, which will give them another two years. Some are very close to meeting those requirements. We have indicated to them that, under the legislation, they can take one of two options. They have three months in which they can reapply and that registration will be backdated until 1 November or, alternatively, if they are very close—and it is a matter for them—we will accept an application for renewal from them and they will have a period of six weeks in which we are entitled to consider it. We will grant them that full period of time and, as long as they provide us with their completed educational certificate within that period, we will process it. Everything else being okay, we will renew their registration. We hope, through those sorts of processes, to deal with everybody. I have had some discussions with a few licensees or principals of agencies. We have essentially been able to accommodate all the concerns which have been raised at this stage.

THE CHAIR: Thank you, Mr Brown. I now call the Registrar-General's Office.

MS MacDONALD: On page 31 there is mention of the certificate validation service. I understand the aim there is to reduce the opportunity for the use of fraudulent certificates of birth, death, marriage or change of name in the proof of identity process.

Ms Krajina: That is correct.

MS MacDONALD: Can you tell me how developed CVS is and what the relationship with other jurisdictions is in the development of CVS, noting that the departments of births, deaths and marriages in Victoria and New South Wales have been involved?

Ms Krajina: The system was developed by New South Wales in about 2003, and Victoria came on line probably in mid-2003 under a pilot scheme. The results of the first 12 months of that pilot scheme—which was conducted with Westpac Bank in New South Wales—suggested that there was a 12 per cent fraudulent production of certificates through the process.

That project continued down the track. The ACT came on line about 12 months ago and, more recently, Western Australia has been participating. The remaining states have data conversion issues. Whilst they are all committed to coming on line, they are not all in a position to participate at this stage. The ACT was in a good position; our data has been converted for a number of years now. We have been through a number of cleansing processes, so the data integrity is quite high for the ACT.

The way the process works is that subscribers data enter certain fields from a certificate

and their unique field, which is the person's name, the date of birth, the certificate number and the registration date. In the ACT we also have a print number. That is all entered onto a computer system. It goes away, hits our system and comes back to say it is either a match and verified or there is an issue with it. If there is an issue with the certificate, the subscriber agency would contact the registry direct and we would do a minimal verification. In the past 12 months the ACT has been able to verify every single certificate that has been re-presented to us through this process. I must admit that I don't have any statistics on the New South Wales and Victorian experience at the moment but I could track those down.

MS MacDONALD: That would certainly be interesting. I would appreciate that, thank you. Obviously the aim is for this eventually to go nationwide.

Ms Krajina: National, that's right.

MS MacDONALD: I have to say that you were talking a language there for a moment and I thought I was in a foreign country!

Ms Krajina: This is an exiting concept that New South Wales and the registrars came up with about six or seven years ago, way before all the proof of identity issues were as serious as they are now. It is certainly something financial institutions are finding helpful. Motor vehicle registries also subscribe to the pilot system at the moment and are using it to verify people when they come in for licences. Financial institutions are using the system to make decisions on offering loans, credit cards and so on. It's starting to get out in the community that it's important to have appropriate ID and that agencies will no longer accept bits and pieces of paper that cannot be verified.

Passports are another subscriber. When you apply for a new passport or even renew your existing one, you are required to produce your birth certificate, marriage certificate and change of name certificate. For example, you may have registered a deed poll years ago. Agencies such as passports will not accept those any more. You have to go and do a formal change of name under our legislation so those documents can be verified through the CVS process.

MS MacDONALD: Thank you.

THE CHAIR: Thanks very much, Ms Krajina. That probably concludes this part of the proceedings. Ms Kelly, could you take a question on notice for me regarding the Official Visitor? I do not think we asked for them. On page 217 of the report, halfway down, it talks about the availability of drug and alcohol programs for detainees at the remand centre. It says that they appear not to have been provided on a regular basis, particularly during 2005. I wonder why that is the case and what is being done in relation to that.

Ms Elizabeth Kelly: I think Mr Paget can deal with that now.

Mr Paget: It was related to absences. It says that, during the period from mid-April to the end of June 2005, the drug and alcohol staff experienced a large number of absences due to illness, which in turn affected the delivery of the program.

THE CHAIR: Thank you very much for that.

Meeting adjourned from 10.36 to 10.55 am.

THE CHAIR: Congratulations and welcome to Canberra, Ms Phillips. I will start with a couple of questions. The Community Advocate last year, your predecessor, indicated that this year there would be quite a number of improvements as a result of a lot of work being done, and that certainly appears to be the case. On page 16, under "Review of last year's outlook" a number of indicators have been achieved. Only one is partially achieved—and that is right at the bottom—and that was to "promote and provide input to reviews of hospital policies on consent and not for resuscitation orders". That seems to be the only one partially achieved. Why is that so, and what is happening there?

Ms Anita Phillips: It is my understanding that, since producing the report, that has been achieved. Maybe Mr McLeod would like to give you the details of that.

Mr McLeod: There have been further meetings with the appropriate hospitals to further review those policies. We are looking at a completion of that program this year, with the Canberra Hospital undertaking a project, which is being funded nationally, to look at end-of-life and resuscitation issues. It is hoped that, with that project and the funding that has been received for it, we will be able to complete that particular outlook statement.

THE CHAIR: In relation to section 267 reports to the chief executive officer of the Office for Children, Youth and Family Support: since the last reporting period and during this reporting period, there were some 401 individual reports regarding 335 children or young people and two separate reports on 66 children or young people, in line with the chief executive's statutory authority.

I note that 94 per cent of all reports provided sufficient information, which was better than the previous year's 85 per cent. You still have a couple of areas of concern. What are they and what is being done to address them?

Ms Anita Phillips: We are addressing that with the new office. Maybe Mr Roy can elaborate a little more on that.

Mr Roy: As you noted, we received 401 section 267 reports last year. We audit those reports against a criterion which we have developed within the office. The primary purpose of that is to look at whether the report, as is required by law, provides sufficient detail regarding the circumstances of the child. As you noted, last year 94 per cent of those, overall, provided that information.

The prime areas we assess provide sufficient information about the placement of the child, contact arrangements, education and health. We also look at extra curricular activities, which, as a package, provide us with sufficient information about the care of the child.

THE CHAIR: What do you look at there? The info on extra curricular activities is still a bit scarce, but what do you define as extra curricular activities? What do you look at there?

Mr Roy: I guess we are looking at: do you get a picture of the child's interaction from a social perspective? Do they have hobbies? Do they have friends at school? What,

outside of their educational, health and more concrete functions, is happening in the child's life? You are right: sometimes the reports are scant. We are working with the office to improve those areas, and improvements are being seen.

THE CHAIR: And certainly the reports are now being forwarded on to you as required?

Mr Roy: Certainly. We receive a report for every child who we believe is in care, yes.

Ms Anita Phillips: Can I add: we have had recent discussions, since I have been employed, with regard to the 267 reports. I am optimistic that, by next year's review, the report will be substantially different. One of the things that we are talking about incorporating in these histories of the children is photographs and some comments from the children themselves, so that they will be very valuable documents for them as a record of a period in their life. We are looking at them in a positive frame rather than just in complying with the regulations.

THE CHAIR: I note on page 62, under timeliness of the annual review reports, 109 were received on time but 292 were not on time. Why was that and what is being done to improve that for next year?

Mr Roy: The Children and Young Persons Act specifies that 267 reports need to be provided within certain statutory time frames, within a drop month or a month prior to the anniversary of each order being made. Historically, the office had great trouble meeting the deadlines. They are certainly improving with respect to those deadlines. They still have a long way to go.

One of the issues is: how do we measure the anniversary of each order? It is not as simple as you may think. We have recently put together, with the office, a list of when those reports are due. The office provides us with that list. We monitor that list and when a report comes in we assess whether it is late or early. That is certainly one step that will assist.

As Ms Phillips indicated also, the greater attention the office is giving to the reports, moving away from being an administrative problem to being a fundamental part of case management—and that is happening within the office as well—the more it is assisting the office to prepare these reports routinely. They are getting better with time.

THE CHAIR: I note that you have done a few big projects this financial year. There is an interesting one in relation to young people in the court cells waiting for court appearances. There were some pretty good, frank answers by all concerned, including the staff there. Have you got any other significant projects like that which you will be undertaking? I must say that there seem to be a couple of interesting projects you have done last year which the office probably wasn't able to do in years gone by. Do you have any specific projects for next year?

Ms Anita Phillips: We haven't identified specific ones at this stage. We have talked about it. It is a matter of resourcing as well. I would like us to be able to look at those systemic recommendations that we make, which come out of both our work with individuals and our work with groups, and look then at the trends that might come out of that so that we can then investigate those in a project manner. But it means taking

someone offline to do that. But I see it as a very important part and very important role of the office. We will be endeavouring to do that for the rest of this financial year, yes.

THE CHAIR: I note that the office had a lot to do with a review started by the previous government and completed by this one in its first term in relation to looking after people with severe disabilities and some unfortunate deaths that had occurred. In terms of those persons who are totally unable to look after themselves, what ongoing role is the office playing?

Ms Anita Phillips: Our role is very much concerned with advocating for the best interests of people, particularly people with disabilities, and looking at the services and the programs that are provided. Maybe Mr McLeod could add something to that.

Mr McLeod: It is something that we do on an ongoing basis each day of the week, particularly for the most vulnerable people who don't have family or friends who are able to represent their interests or their rights. The Community Advocate is appointed guardian of last resort. The report indicates the numbers we have had in that area. We undertake a very close monitoring role when there are complex issues or issues of concern, neglect or exploitation being raised.

We have an inquiry service, which we provide on a daily basis. That is where anyone from the community, if they have a concern about an individual in the arena that you have indicated, can phone our office and raise those issues with us. If warranted, we will undertake an investigation and take appropriate action as necessary in those circumstances.

THE CHAIR: Have you had cause to do so in this reporting period?

Mr McLeod: We have, and that is recorded in the report, yes. It is looking at it very briefly from an individual perspective. From a systemic perspective, we also meet regularly with the executives of other departments, organisations that have responsibilities in those areas, to raise with them the issues of concern that we have. Ms Phillips is undertaking that now. We hope that, within the next couple of months, we will have had the opportunity to complete that review with those individuals. I could go on much further if you like.

THE CHAIR: That is an ongoing process?

Mr McLeod: It is.

THE CHAIR: When you had concerns, were you able to rectify the problems, or are some still ongoing?

Mr McLeod: Some are still ongoing, particularly the complex issues. Some will go on for a number of years, particularly when the judicial process is involved, if we have to take judicial action on behalf of those individuals. We often have to do that. But often we are able to resolve them within a very short time frame, from the perspective that the interests of the person that everyone is concerned about are maintained in a respectful, dignified manner.

MS MacDONALD: On page 41, there is reference to the Community Advocate meeting with the Brian Hennessey Rehab Centre on a regular basis but also being a member of the rehab centre model of care review committee that met fortnightly from October until June. It was anticipated that the committee would be contributing to a proposed review of the mental health rehabilitation services in the ACT. So far, at that stage, at the end of the 2004-05 financial year, that hadn't happened. Is that happening to date, do you know?

Ms Anita Phillips: That refers to a review, as you said, of the mental health services to be undertaken by that department. We were involved in the review of the model of care that is being used at Brian Hennessey, and that is the process we were involved in. They were fortnightly meetings. That was to look at whether that was an appropriate model of care to be replicated or to be changed or altered. That information will be fed into the ongoing review of mental health services. Again, Mr McLeod might like to add something to that.

Mr McLeod: It was looking at the collaborative recovery program, which is the model of care that has been accepted at the Brian Hennessey Rehabilitation Centre, and the continued appropriateness of that particular model within that centre. I note that there is to be a general overview in terms of mental health services, and we would certainly be part of that when that has formally begun. We have very informal, but also quite formal, meetings with the chief psychiatrist and senior management in mental health services on a very regular basis to raise the issues of concern that we have.

MS MacDONALD: I might also mention that the health and disability committee is conducting an inquiry into appropriate accommodation for people with mental health issues. It is an area that that committee would certainly be interested in. I am hopeful that we will get in contact with the Community Advocate once we start our public hearings on that inquiry.

Ms Anita Phillips: Very good; we would welcome that.

THE CHAIR: Thank you all very much. We turn now to the Human Rights and Discrimination Commissioner. Welcome, Dr Watchirs. I will start off with a few questions. Thank you for a comprehensive report. Turning to page 7, you talk about the review of the Human Rights Act. In short, it provides for the attorney to present to the Assembly by 1 July next year a report on the first year's operation of the act. It sets out there what has to be considered.

You indicated you will be targeting and no doubt are playing a central role in the participation in the review of the first year of the Human Rights Act's operation. There was a forum held on 1 July 2005. You mentioned:

> Issues papers have already been circulated to stimulate discussion and to provide a framework for recommendations to the review, in the areas not only of economic, social and cultural rights and environmental rights, but also in areas of high interest ...

You go on. Whom were those issues papers circulated to?

Dr Watchirs: We convened a community forum. The first one was held on 10 December last year, International Human Rights Day. The second one was the one you mentioned, on 1 July 2005. Currently, it consists of about 40 people, but we are planning to extend the reach of that group for the next forum on 9 December. On 1 July we had about 35 representatives from community groups like ATCOSS, ADACAS and statutory officeholders such as the Community Advocate, the Director of Public Prosecutions and experts, academics like Hilary Charlesworth who chaired the consultative committee.

THE CHAIR: I note that elsewhere in the report you indicated who has participated in the forums. In two reports that we looked at, the DPP report and the report on the victims of crime support program, the Victims of Crime Assistance League, VOCAL, were featured. Were they included in any of these forums?

Dr Watchirs: The Director of Public Prosecutions and the Victims of Crime Coordinator were.

THE CHAIR: But not the Victims of Crime Assistance League?

Dr Watchirs: No. But I am very happy to invite them. In fact, we have booked a bigger venue for 9 December, to expand.

THE CHAIR: It would be great, if you could. I thought they may be there, but that would be handy.

Dr Watchirs: There is a forum next week, on 16 November, at Rydges Capital Hill, on human rights and victims' rights.

THE CHAIR: I don't think they were invited to that. Maybe if you talked to them or contacted them, that would be handy. There was some issue around that.

Dr Watchirs: Robyn Holder was taking the lead on that forum.

THE CHAIR: If you were having forums, they would want to be included. I wasn't too sure if you had or not. Going now to page 9, you have, as a target for the first year of operations of reporting on occasions of service by the Human Rights Office, 6,500. The result was a bit higher than expected, 7,066, a variance of 8.7 per cent. The average cost was $125.10. That seems to me to be a fairly low cost per service to any clients of the office.

What sort of service do you provide? Would some of these contacts simply be one phone call, one email or something like that? What are we talking about here in terms of those 7,066?

Dr Watchirs: There is a big range of matters that we include. Number one is the number of formal complaints we get. Number 2 would be education sessions we have held and people have come to. And then there are inquiries, some of which are written, some of which are oral. If they are written, then we have higher reporting obligations. Absolutely, there is a huge range in the amount of labour required in that, such as a 16-page opinion on the anti-terrorism bill. It does average out.

THE CHAIR: There are some terribly little ones, too, to get that figure, I would imagine. Are the majority of those 7,000-odd one contact?

Dr Watchirs: No. I would say the majority is education, but certainly inquiries are very high. I think we have the highest rate in the country per million of population.

THE CHAIR: That could be handled fairly simply, could it, by just directing someone somewhere or talking to them and then you have no further contact with the person?

Dr Watchirs: It depends on the facts of the case.

THE CHAIR: It is just that $125 seems a low figure. I have one further question in relation to the earlier point I made about the issues papers. Were they circulated to members of the Assembly?

Dr Watchirs: The issues papers are on our website. I would be happy to circulate them.

THE CHAIR: I am not too sure that I have them, so I would be very grateful to get them, thanks. At page 46, table 14, the Human Rights Office's original budget, amended budget and actual budget are listed. We are not talking huge dollars here. The operating result is basically a $20,000 deficit. Whilst that is not much money in the sum total of things, can you explain why there was a slight deficit in the operating budget?

Dr Watchirs: I must say that for every month, apart from the last month, June, we were on target with all our expenditure. In the last month, for some reason, there was an increase in recreation leave payments that we weren't expecting. We were expecting our rent to have doubled. We had cut back on a lot of expenditure on printing and on venues that cost rather than free ones within our department.

THE CHAIR: I note, in the current budget this year, the amount for the whole area of human rights, the new, larger office, goes from about $5 million to about $7 million. In terms of your own office, are you getting an increase in your own budget?

Dr Watchirs: I have no idea. That depends on the presidents and the other commissioners. They will make that decision as a whole commission.

MS MacDONALD: On page 11, the audit of Quamby was a significant part of your year and one of the most significant projects that you conducted throughout the year. I am aware that it goes to the Minister for Children, Youth and Family Support.

Dr Watchirs: Technically, under the act, it goes to the attorney. The Minister for Children, Youth and Family Support made the government response.

MS MacDONALD: The report from the audit made 52 recommendations, 25 of which were agreed to and 27 were agreed to in principle by the government. On page 12, you note that the report commended the majority of the staff on the way they went about their work at Quamby, but you have also noted that cultural change is necessary to enhance human rights in the centre. Obviously, cultural change is not an instant process. How do you envisage that the implementation of the recommendations will facilitate a process to begin to achieve the cultural change needed at Quamby?

Dr Watchirs: Certainly even before the audit we were requested to do discrimination training at Quamby. We now have booked training sessions under the Human Rights Act for staff. It is very much targeted to their interests in the welfare of children. It is a long, hard process, but the goodwill was there with the majority of the staff.

At a training session held by my legal adviser, Quamby staff who attended said that, in fact, a lot of the things in the audit were things that they felt intuitively they just didn't have a peg to hang those views on and the Human Rights Act provided that framework. Part of it was learning what is a human rights framework and how does it affect my daily practice of dealing with these young people.

MS MacDONALD: In that instance, because there has been criticism made of why the government would put this in place—and this might be a question that the attorney might like to answer rather than you because it is a bit of a political question—and given that response about the Human Rights Act providing a framework, does that not contradict the statements about why we would put in place a Human Rights Act when we are obviously in contravention of it in places such as Quamby? By providing the framework, we have got a goal to aim towards achieving, surely?

Dr Watchirs: Absolutely. I didn't find comprehensive breaches. Some of them were the layout of the centre that couldn't be fixed, short term. The new demountables will assist. There is the balancing proportionality test where, if there is only female person there, you would not put her in isolation. The Human Rights Act and the ICCPR provision they are based on say that there are exceptional circumstances. In particular, remandees and convicted young people would need to be housed together in their own best interests, but the ultimate test is the best interests of the young person.

Mr Stanhope: That is fair enough. Some of the commentary in relation to the breaches of human rights that have been revealed, for instance, through the audit of Quamby really reflects very much a philosophical position and simply, almost deliberately, misunderstands the nature of the legislation and the nature of the obligations that it imposes on decision-makers and government. Dr Watchirs has covered the point well. Some of the commentary has simply been mischievous and deliberately misunderstands and distorts the rationale and the operation of the Human Rights Act. But it is a fine debating point.

THE CHAIR: On page 22, table 3 deals with statistical information on complaints during the year and conciliation. This is in relation to the Discrimination Tribunal. We have: complaints closed within three months, 41 per cent; three to six months, 41 per cent; and some other figures. In terms of complaints unsuccessfully conciliated and closed, for the first three months there are none; but for the next lot there are two which weren't closed; within six to nine months you have seven; then you have another six. There are 15 complaints which were unsuccessfully conciliated and were closed. What is the reason for that and what do you mean by an unsuccessful conciliation?

Dr Watchirs: Unsuccessful we classify as a conciliation agreement that is not reached by the parties. Several cases had originated in the media. Our attempting to conciliate them was a risk, and they did fail and did go to the tribunal. In fact, at least one of them settled at the tribunal door, but that was beyond our control. It was still counted as an

unsuccessful conciliation.

THE CHAIR: If they are unsuccessful do they all go to the tribunal, or what happens?

Dr Watchirs: No, I don't refer cases; it is completely up to the complainant to request a referral. They can request it. Where I decline a decision at the outset, they can request it after conciliation if it is not successful.

THE CHAIR: You don't have any stats on how many would take the option of going to the tribunal or how many might remain unresolved and go away?

Dr Watchirs: If I could take that on notice, certainly.

THE CHAIR: Could you, please. That would be helpful.

Dr Watchirs: Of course both parties contribute to it being unsuccessful. There are complainants who have unreasonable expectations, particularly monetary, and there are respondents who see no wrong and offer no benefits. My attention has been drawn to page 21, about what has happened to complaints. Eleven cases were referred to the tribunal.

THE CHAIR: That is to the tribunal itself?

Dr Watchirs: But the overall conciliation rate is 64 per cent.

THE CHAIR: In terms of complaints and conciliation for the current financial year—and you may not be able to answer this directly—could you tell us how many complaints you have had, how many have been successfully conciliated and how many remain not conciliated?

Dr Watchirs: We received 103 complaints.

THE CHAIR: So far this financial year?

Dr Watchirs: Last financial year.

THE CHAIR: If you could take that on notice, that would be great.

Dr Watchirs: In the last several months, you are asking?

THE CHAIR: Yes, from 1 July to date; that is fine, to 10 November. Thank you for your attendance.

We will now move on to the ACT Electoral Commission and, in case people weren't here for the earlier warning, you should understand that these hearings are legal proceedings of the Legislative Assembly protected by parliamentary privilege. That gives you certain protections but also certain responsibilities. It means you are protected from certain legal actions, such as being sued for defamation, for what you say at this public hearing. It also means you have the responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a serious matter.

Thank you for the report. I note that the electoral commission has also recently made a number of recommendations, which have been tabled in the Assembly, in relation to the last Assembly election, which forms a significant part of your report here. Are those recommendations arrived at simply by the commission or are there any outside submissions made?

Ms Purvis: No. The commission sits down after the election, reviews the election and makes recommendations from the election. Two reports were tabled: one was the electronic voting and counting review and the other was the review of the Electoral Act. That's where we review the operation of the Electoral Act in relation to the election and make recommendations on how we might improve the operation of the election.

THE CHAIR: Thank you for that. I might ask you a question in relation to that but I'll just see how we go with time. On the report itself, page 26, starting with electoral enrolments, you refer to an Assembly motion in relation to people between 18 and 24 not on the electoral roll and steps being needed to improve that, and you indicate some steps that you've taken. Then you give some actual figures. As at 30 June this year, the end of the reporting period, it indicates that the proportion of 18-year-olds enrolled had declined to 66.1 per cent. It was at 84 per cent as at 17 September 2004. You say that's consistent with obvious trends that indicate that high portions of young people do not enrol unless an election is imminent. But, if you had 84 enrolled some nine months previously and we're down to 66 per cent, can you account for any reasons for that decline?

Mr Purvis: As stated in the report, we do find that young people tend to enrol when they need to do an action so that there is that pressure on them to enrol to vote. If that's not on them, they tend not to take up their enrolment. We do a variety of things in schools and colleges to try and get them to enrol, but the success of those again depends on how imminent an election is. We go out to schools every year with enrolment forms and seek them to be filled in. We pay a bounty to the schools for those filled-in enrolment forms—$2.50 a head—but we find that closer to the election we get more forms. That's just the way it works. So we are trying and we do try and keep that rate up.

THE CHAIR: Does the bounty system help?

Mr Purvis: We're not sure. We're dealing with teenagers and, if there's an imminent action that they need to take, we tend to get a good response. We are aware of it. It is a national trend. It's happening across the country. We try a variety of mechanisms to keep that number up. With our joint partners, the Australian Electoral Commission, who administer the roll with us, we do have a variety of data sources that we use to write to people and say; "We realise you've reached 18. We would like to invite you onto the roll." But again the take-up of that varies from time to time.

THE CHAIR: And I note that it very quickly goes up to about 97 per cent, and then you're in the 99 per cent for 50 up to about 70.

MS MacDONALD: They're the ones who are most aggrieved.

THE CHAIR: Why is that so? Why, when you get up to 35 through to 50, are they about 97.5; and the older ones, 70-plus, are about the same? It's not much of a

difference, but what is the explanation?

Ms Purvis: Over 70, we do find people start to come off the roll when they unfortunately go to nursing homes, or we get requests for them to come off the roll. So there is a downward trend in later years. As for the 35 to 39, again we're working on raising all those rates as much as we can.

MS MacDONALD: On page 2 you mention major issues, challenges and achievements for the reporting year. In the 2004 Legislative Assembly election, 28,000 Canberrans successfully lodged their votes electronically. What role is electronic voting planned to have for the next election and can you also add what advantages you see electronic voting having, and are there any disadvantages? How extensively used or widely implemented do you envisage electronic voting to be in the future?

Ms Purvis: Electronic voting is certainly becoming part and parcel of ACT elections. We expect that in 2008 it will be used again. The amount of electronic voting that we provide depends always on the cost of hardware and also the logistics of getting that hardware into polling places. As you're aware, most polling places are in schools. We don't get hold of the schools until after school finishes on Friday afternoon. So we only have between about 3 o'clock in the afternoon on Friday and 8.00 am on Saturday morning to get the system in to place and tested and working. It's a big ask, so we've been limited to a small number of polling places to provide electronic voting, partly for that reason but also because of the cost of the hardware. With technology advances, the cost of hardware is coming down, so we may by 2008 be able to offer it to more people in more places.

It also depends on the portability of the hardware. If we're using standard PCs, loading them into cardboard voting screens is actually quite an ask. But, if we can use the tablets that we piloted in Tuggeranong at the last election, which are very, very easy to move about, we'd be also able to provide it in more polling places. So again it depends on the advancement of technology, how small things become, and whether we need to test all those changes before we put them in place.

You asked about advantages and disadvantages; certainly, the advantages from the electoral commission's point of view are numerous. Firstly, the informality rate is quite low with people using computer voting. The number of mistakes that people make on their ballots is much reduced. When you're handwriting a ballot, it's easy to miss a number or duplicate a number. On the computer system you can't do that. So that's been a very big plus. The fact that blind and sight-impaired people can use the technology and vote in secret is an absolute joy to them. They enjoy using the system and we love being able to provide it to them. We have community languages available on the computer system; we can't do that with paper ballots. So the accessibility issues are very, very good.

MS MacDONALD: And we're pretty much at the forefront in provision of electronic voting, aren't we?

Ms Purvis: Yes, we are.

MS MacDONALD: And we're being watched fairly keenly.

Ms Purvis: We are being watched very keenly. The most recent joint standing committee report from the federal parliament has recommended that they introduce a limited trial of electronic voting at the next federal election, particularly because of the blind and sight impaired issue and about access. The Victorians are probably the next cab off the rank. They'll go. They've recommended also a trial for their next election, which will be next year. We get enquiries from across the world every day about the system—it's very well regarded—and we're certainly in touch with a diverse range of electoral authorities across the world, letting them know what we've done and how we've done it. Certainly, some people have taken up our model. So it has been an amazing exercise.

MS MacDONALD: Thank you.

THE CHAIR: I think you have given reasons why you made those decisions in those two other reports you have tabled. So, rather than going over that, thank you very much for your attendance here today.

We will now move to the legal aid commission. I note on pages 6 and 7 of the report, to start with, the president's message. You seem to have had some significant problems; in the past, members of the profession were comfortable doing legal aid and at least had their costs covered. Now, it seems, or at least on some occasions, it doesn't even quite do that. I note that, regardless of that, on page 7 you state:

> Recently the Legal Aid Commission resolved to increase legal aid fees significantly. Fees payable to barristers have risen, and fees payable to solicitors in family law and criminal matters have also gone up. In time it is hoped that legal aid will become, once again, part of the practice of most litigators. The legal aid clients will then have optimum service.

I'm just wondering whether you have increased the legal aid fees payable, as the president has indicated, and, given the limited budget—I think you got more from the commonwealth during this period, but that's always been a problem—how you managed to increase the legal aid fees? Perhaps you could tell us what the increases were.

Mr Staniforth: Yes, the fees were increased throughout the previous financial year. Perhaps I could go on to say that this financial year the commissioner has taken a decision to provide some flexibility so that appropriate cases can attract a higher fee than the increases. How this is done is very difficult, to be quite blunt. In a fixed supply driven budget, such as legal aid is throughout Australia, we must, or do, live within the money we're given.

We attempt to attract as many private practitioners as we can into legal aid by, I suppose, two main avenues. We try the very best we can as a commission to pay the most we can for the work that's done, and, as you've already foreshadowed, we acknowledge immediately that the payments received from the commission are not commercial rates; they're substantially below commercial rates. It's our estimation that all practitioners who do legal aid work will acknowledge that that by itself is okay, because you do legal aid work as part of your professional obligations to the community. But, like all business people, practitioners have to run businesses, and so there is the tolerance breaking point, which had been reached, I think, in previous years. I think I have reported to the Assembly on a number of occasions about that problem.

THE CHAIR: Yes.

Mr Staniforth: We do it, secondly, by attempting to isolate cases which demand certain types of expertise and which will be done better by experienced practitioners than, could I say, by the general practitioner. That allows us to perhaps spend more on an hourly rate but to incur a lesser charge because fewer hours are spent. It's a very difficult financial balancing act, especially because the profession understands that we are doing this with no recourse to flexibility should it all go wrong; we simply have to achieve the result for the money that is given to us. As the president's report indicates, this last financial year, I think, commissioners all saw as a far more optimistic one. There seemed to be a return to legal aid work, and that trend is increasing.

THE CHAIR: **C**ould you just give us some idea of what your rates are now and if there is a ballpark figure for the average commercial rate that would probably help the committee, and indeed perhaps the Assembly, in terms of just putting a figure on what we're talking about? For example, I know you have a rate for certain matters in the criminal law and a rate for civil matters; what would the average commercial rate be? Just a couple of examples would probably be sufficient.

Mr Staniforth: The easiest one in terms of the commercial comparison is in family law, where the commission pays $140 an hour. The commercial rate, if we were so unfortunate as to have to attend for some family law practitioner's advice, would be about $300 an hour. So, quite clearly, that's about 40 to 45 per cent of the commercial rate. In criminal matters it is much harder to give you accurate information. Fortunately, Canberra doesn't have a commercial criminal market where rich accused—how can I say—could perhaps skew a commercial rate. The commission also operates, very successfully, I think, a lump sum arrangement where practitioners are paid for the job done. The job for a hearing in the Magistrates Court averages out to about $720, which is an all-up amount; that's what you get for the hearing. For a plea it's about $600.

THE CHAIR: A hearing being a one-day hearing?

Mr Staniforth: Yes, by and large the $720 is usually it.

THE CHAIR: So, if it goes into two days, that $720 still applies?

Mr Staniforth: It gets a bit lean pickings. Historically, I've got to be frank and say that the commission has been keen to encourage both clients and practitioners not to consider the legal aid fund to be a useful mechanism to have 25-day hearings in the Magistrates Court. So there is a financial incentive to do the job quickly. Indeed, you will notice from what I have said that the pleas of guilty are weighted, effectively. You get more for a plea of guilty on an hourly rate than you would for a hearing.

THE CHAIR: How does that compare with private practice for, say, a day's hearing or a plea of guilty?

Mr Staniforth: One I saw recently had a day and a bit hearing in the Magistrates Court for $1,000. But that was conceded to be a bit of a cut rate. From my experience it is between $1,000 and $1,200 for a day and, as I say, we'd be giving about $720.

THE CHAIR: And for a plea?

Mr Staniforth: Not a lot of difference commercially. Practitioners tend to take the view that they're in court and that's it.

THE CHAIR: Yes. This committee heard in Tasmania, with their legal aid office, that they identify applications which are refused on funding grounds but if more funds were available would qualify for assistance—in other words, matters that you'd like to assist but you probably simply can't because of limited funding. Does the ACT legal aid office do that, and are there any plans in relation to that—matters where you think you'd really like to be able to assist but you can't because of funding, or do you manage to work it so that the matters that should really be funded are actually funded?

Mr Staniforth: There's almost a blunt pact amongst legal aid directors that we don't bag each other, so I won't say anything about the system that operates in Tasmania, other than to say that I think there's a certain dishonesty in spending money moderately freely for the first 16 days of a month and then telling everyone that you can't afford to fund them for the next 14 days. I think the better way of handling a supply side, a finance function like legal aid is, is to say we'll do our best to help as many as we can throughout the month.

THE CHAIR: I note on pages 8 and 9 of the report you received slightly more money from the law society's statutory interest account this year; that the year reported on was the last year of the funding agreement between the ACT and the commonwealth and that the new agreements on 4 April provide for a modest increase in annual funding. What percentage funding increase did you get from the commonwealth? How modest?

Mr Staniforth: It was very modest. It's very complicated because it's made up of little—

THE CHAIR: Sounds like CPI.

Mr Staniforth: Well, different CPIs for different things too. I could give you a very accurate answer, but it was in the ballpark of 2.5 to three per cent overall.

THE CHAIR: Okay, so very small. On page 9, your inhouse activity summary, the grants of aid were 1,258; the targets were 1,425. Indeed, the face-to-face advices are a bit down, as are the duty lawyer attendances, in terms of the targets, and the telephone advices. What is the reason for that? It seems that the targets were higher than the actual outcomes.

Mr Staniforth: I think politicians say, "Thank you for the question," don't they? This bears testament to the difficulty that not only the commission but, as I understand it, the ACT government had in negotiating this new funding agreement. It was made starkly clear to us all about mid-financial year that the commission would receive no guarantees of funding at all, or increased, if it didn't effectively advise government to sign an agreement before 31 March. That meant we had half a year when we were having to be prudent and say, "Look, we don't know what the financial position's going to be for the last quarter of the year. We will live within what we had last year and what we should

reasonably expect will be still made available." Of course, that meant putting the screws on the whole works. So, as the president says in his report, if you look through the differentials between commonwealth and territory work, we slowed right down on the commonwealth side, which meant that the overall figures went down—keeping in mind this is still a commission that does more commonwealth-funded work than territory work—and the territory side, because our funding was clear, showed some quite noticeable increases in activity. But the overall effect was to show, overall, a slight reduction in work.

THE CHAIR: I see.

Mr Staniforth: Add to it, though, I have to be honest and say we went in to the financial year with a view that we should really try to build on increases we'd made in productivity and we thought we could do more. Sadly, all of this business with the funding agreement brought that all to a quick stop.

THE CHAIR: I've got two more questions. On page 16, under "Who are our clients?" you've got figures for 2003-04 and for this year. This year the family and criminal areas were slightly down on what was received in the previous reporting period, yet general was actually up. What exactly is "general"? What areas of legal aid does that cover? What's the reason for that being up, if there is a reason, and for family and criminal law ones being down?

Mr Staniforth: I think a sensible reader would read "general" as all the rest, if it isn't family or criminal. So, in other words, it's such diverse things as any civil claims, of which, by the way, the commission funds very few, but, most importantly, child welfare matters—matters arising under the Children and Young Persons Act. I think it has been the subject of evidence by others that that's an area of marked increase across a number of areas.

THE CHAIR: Right. On page 34 total expenditure increased by $778,000 or 11 per cent compared to the prior year and $1,081,000 or 15 per cent compared with budget. There would appear to be a bit of blow-out of over $1m. How was that sort of rectified and what were the causes of that?

Mr Staniforth: I gag at agreeing about there being a blow-out. In fact, those expenses were incurred because of increased activity in particular matters.

THE CHAIR: I withdraw "blow-out"—I didn't mean that—but there's an extra $1 million in expenses.

Mr Staniforth: It gives the legal aid director a medical condition, that kind of language. I suppose there are two biggest factors. The first is that there was an expensive criminal case running throughout most of our financial year, funded by the commonwealth, in fairness, which required considerably greater expenses. There was a strong perception that some previously incurred reserves be properly spent on proper matters, and indeed that was shown up on the territory side of the ledger, and that led to the increased overestimation.

THE CHAIR: You were involved in the Eastman case, weren't you? Is that the

commonwealth case you referred to, or is that a different one?

Mr Staniforth: No. We were only tangentially involved with Mr Eastman.

THE CHAIR: Okay.

MS MacDONALD: Mr Staniforth, on page 21, under the family law section, I note that the ACT Legal Aid Commission has employed law students in the family law section, which is to be commended. I understand the use of law students in legal support positions is of enormous benefit to the students, the office and the legal community as a whole while they train to become fully-fledged lawyers. Can you inform the committee of what role the law students in the ACT play in the legal aid commission generally—the sorts of work that they would get involved in?

Mr Staniforth: Before I start answering that, I just want to slightly correct something. I said about Mr Eastman that we were tangentially involved. We were involved, but not throughout. Sorry—I didn't want to mislead.

Law students are vital to us. Not only are we statutorily required to involve students in our work; we see great benefits in doing it. These things are all balances. Training is a costly activity, so there's an expenditure side to them being there, but there's the magnificent benefit to us of energetic people, interested people, people who really do want to make a difference. We employ them throughout our main office, which includes our domestic violence work. The people to whom we refer on page 21, may I say, by the way, have now all graduated as lawyers. Two are working with us as legal practitioners, and one has got a very nice job with a private firm, doing rich people's property settlements. So it's very—

MS MacDONALD: I'm sure that's of great value to the community too.

Mr Staniforth: Well, it's certainly of great value to her. So there's a good feeling about people who have worked with you going on and doing well. It brings a corporate gain, which you really have trouble putting into dollars. The day-to-day value, of course, is varied. Someone who starts new with you usually can't do a real lot of work and you have got to build up their skill base. Some of our better students have basically prepared quite complex court documents. They are very good now at doing affidavits—all that stuff that makes a court work. The role is just the entire spectrum. I'm thinking of the way we work with ANU with First Stop, where the law students there do all the things from meeting the client when they come in, getting basic information that lawyers need to make things happen, down to basically giving supervised advice, going to see the solicitor and saying: "I'm thinking of answering A, B, C. Is that correct?" The solicitor may say yes. So it's the entire spectrum of work.

MS MacDONALD: Thank you. I have one more question and I'd like to preface it by saying that I have no problems with the format of the report. I think it looks very nice, but it has been suggested that it sticks out on the bookshelf because it's not A4 or—

Mr Staniforth: Legal aid likes to stick out on the bookshelf.

MS MacDONALD: As I said, I had no problems with it. I think it's a perfectly nice

report, Mr Staniforth.

THE CHAIR: That would be a wonderful way to conclude, but I have a further question. You obviously do a lot of criminal law as well a lot of family law and I note, in terms of the next report we're looking at, the DPP report, and also talking to a number of private practitioners, that there always seem to be problems in relation to the case management process. I think in the DPP report it refers to things like three pre-arraignment conferences. Obviously you are involved in some of those, or members of your office are: is that a very time-consuming activity and resource-intensive activity?

Mr Staniforth: Yes. I think in this territory we work magnificently well together to try to get this area of judicial administration right. As you know, I talk to Mr Refshauge quite often about these kind of things and we're always bandying ideas around about how we might help the system work better. We've become very concerned, and Mr Refshauge will speak far more eloquently about his views than I will, but I think I might say that he and I share a view that overly-structured process in court managing leads to inefficiency, because you become compliance based; you start to think, "I've got to go to the directions hearing" rather than thinking, "How is this case going to best be fixed up with least resource and financial expense?"

I do believe that we are in danger of becoming compliance based in the Supreme Court and I do think we need to give it back the flexibility that good practitioners give their cases when they're deep in thought about: can we negotiate this out into a plea to something else—those kind of things—or saying "Look, I just don't think you've got the evidence that will support that."

THE CHAIR: And that would save considerable time?

Mr Staniforth: Yes.

THE CHAIR: So what improvements would you like to see made? Obviously you don't want it to be compliance based, but what improvements would you suggest to the system?

Mr Staniforth: Inbuilt court incentives to talk, to have practitioners talk to prosecutors—all of the anecdotal and semisurvey work we do shows that you really aren't given a gold star for having talked and worked it through. It might, for example, be handy if you could say to any of the courts in the territory: "Look, great news. We've sorted this. Is there any chance of us both getting over there at half past 10 on Tuesday week to enter a plea of guilty to something?" So, in other words, there is both a financial and a systems incentive to get it done outside of the court structure and not have us somewhat mechanically roll up to be case managed.

THE CHAIR: Thank you for that, Mr Staniforth. Your report certainly does stand out if you put it this way, but maybe not if you put it that way. Well done.

We will now move on to the DPP. Mr Refshauge, I think you were here when I read out the usual warning to witnesses.

Mr Refshauge: I've heard it once or twice before.

THE CHAIR: So you are well aware of that.

Mr Refshauge: Yes.

THE CHAIR: I thank you for your appearance today and for the full and frank reporting in your usual inimitable style. I will start off on a point on which I asked a question of Mr Staniforth, that is, that in both the introduction to your report and on a number of occasions later you refer to the case management system and basic problems that it causes for you. In fact, I quoted from your report when I said to Mr Staniforth that most matters require about three pre-arraignment conferences. Whilst you see merit in the system, obviously it causes your office considerable concern in terms of resources and, it would seem, efficiency. I invite you to comment in relation to the problems that the system causes to your office. Please comment, too, in relation to anything Mr Staniforth said about improvements. If that system can be improved, how would you like to see that occur?

Mr Refshauge: You will be unsurprised to know that I agree generally with what Mr Staniforth says. He is quite correct that we talk frequently and that is the proper way for the criminal justice system to operate. The facts of life are that case management is now with us to stay and we have to do the best we can to try to make it work. The problem is that case management is so often event organised rather than directed towards achieving the best quality outcome, and that is because events are easier to measure than quality, so we get imperatives that are placed on all parts of the system which do not necessarily drive a better system.

So we have national benchmarking and the courts run scared of being shown up to be the courts that take the longest time to deal with cases, regardless of whether it is proper, just and fair to deal with the cases in that way and that the outcomes to the community are any better. So we get in this jurisdiction, regrettably, a tendency to have each part of the system look after its own interests rather than trying to cooperate. That is the first problem. That ties in very clearly with what Mr Staniforth said, namely, that the best outcomes are usually obtained when prosecutor and defence talk to each other, talk early, talk often and then come to a resolution which the court is prepared to facilitate.

The difficulty with that is that structures, legislation, rules and procedure can never actually force that to occur, because once you put structures, procedures and legislation in place you are directed towards the delivery of an outcome or an event, a tick a box, instead of actually a quality which can only be achieved by intelligent people meeting together and discussing intelligently the issue that is to be involved. The reality of life is that we will have case management systems, and that is not a bad thing. While there is a will and while there are resources—of course, I cannot speak for the legal aid office—I can say with absolute confidence that the legal aid office and the DPP will continue to do their best to achieve the appropriate outcomes which are imposed upon us and which we will willingly accept by talking, by preparing and by ensuring to the best that we can that we deliver the appropriate outcomes.

THE CHAIR: I have heard from some practitioners that they wonder whether we even need a case management system. From what you are saying, you do not seem to think it should be scrapped.

Mr Refshauge: No, I do not think it should be scrapped. There are two reasons for that. One is that I think you would fall into the trap that there would then be no process to keep those who do not have the commitment on the straight and narrow. The reality of life is that there is no court in Australia which does not have a case management system. So you have to have a case management system, but what you have to do is to work hard to ensure that the case management system is cooperative. I have been accused in public of wanting to co-opt defence lawyers onto my team. That is not what I am on about. What I am on about is to try to have a cooperative effort where everyone understands what their role is, accepts their role and accepts the role of the other parties, but is prepared to cooperate towards the achievement of the ultimate goal, which is justice, and justice will be the conviction of the guilty and the acquittal of the innocent.

THE CHAIR: You mention case management practice in your review. You end up by saying, "Jurisdictional certainty, however, is still an issue and it may be that legislative intervention to ensure that the Supreme Court can effectively decide preliminary issues without challenge may be needed." What do you mean by that?

Mr Refshauge: What I mean there is that there is a decision of the High Court, TKWJ, which says that discretionary decisions made prior to the commencement of the trial are not binding on the trial judge. There is still uncertainty about the precise point in time when the trial commences. While the general view of the law is that the arraignment—that is, the presentation of the indictment and the taking of the plea—is the commencement of the trial, there is still some uncertainty as to whether that is the commencement of the trial for the purpose of, for instance, one judge making a decision when another judge will be the trial judge. That is the difficulty.

There is a level of uncertainty and a number of the judges, quite properly and quite reasonably, take the view that they are not in a position to make a preliminary decision, particularly of a discretionary nature, unless they know that they are going to be the trial judge. Some judges take a more robust view. Both views are legitimate and it needs to be put beyond doubt in due course. We are moving along that path. We have done quite a lot with order 80, which is the Supreme Court rules provision now in relation to criminal trials and criminal proceedings in the Supreme Court. That has dealt with much of that, but there is still more to come.

THE CHAIR: I turn to another area of concern in your report. On page 5, you say, "We have not yet reached an acceptable level of convictions secured in the Supreme Court." You have a specific program to address these issues. You say, "Underresourcing is part of this but also there needs to be greater cooperation with the court system and a recognition that the resources of the prosecution are not limitless." Does that mean that the court does not appreciate the problems that you are faced with?

Mr Refshauge: I don't know. I assume they do appreciate them, but they have their own imperatives and they want to run their ship as they want to run their ship. I would appreciate greater receptiveness to the recognition that we have difficulties. The common mantra is the limitless resources of the Crown. So you can list a trial and it really does not matter whether there are going to be difficulties with the numbers of prosecutors who are available to do that trial because the Crown has limitless resources.

The reality of life is that the Crown does not have limitless resources. If a trial is listed because that is the first available date and if the prosecutor who on best practice should conduct that trial because, for example, it is a complex trial was the committal prosecutor, it would be nice if that were taken into account. That is not always taken into account. That can affect the outcome of the trial and that is a problem, but we are putting in place specific efforts to improve the preparation that we are able to undertake. I am pleased to say that the initial results for this year are substantially better in conviction rates. That in itself is a complicated factor.

THE CHAIR: I note that overall in the Supreme Court your conviction rate is, I think, 86 per cent.

Mr Refshauge: Something like that.

THE CHAIR: Obviously because most matters are sentences. Is the Australian rate about 50 per cent for a trial? I know that that used to be the ACT rate.

Mr Refshauge: Just for trials, I have not done an Australian average, and it varies between offence and offence and so on. It is very difficult. The Western Australian Director of Public Prosecutions has a key performance indicator that, I think, he deliver convictions in 55 per cent of trials. That is one measure. That is an overall base. But we would certainly want to deliver better than 50 per cent, otherwise you are doing no better than chance.

THE CHAIR: Were your figures 50 per cent several years ago?

Mr Refshauge: In relation to just jury trials, not sentences, our figures were about 30 per cent last year.

THE CHAIR: And the year before?

Mr Refshauge: I cannot remember.

THE CHAIR: Perhaps you can get them for the three years before that. Last year, 2003-04, it was 30 per cent. Perhaps you can provide them for 2002-03, 2001-02 and 2000-01. Turning to page 47, there were 34 trials, with 10 guilty verdicts, 21 not guilty verdicts,. and three others. How many of the not guilty verdicts were trials with jury and trials with a judge alone?

Mr Refshauge: I am not sure whether I have those statistics.

THE CHAIR: I am wondering whether the not guilty verdicts were more to do with juries or are a judge alone phenomenon.

Mr Refshauge: No,. I have not got that information at hand.

THE CHAIR: Perhaps you could get that.

Mr Refshauge: Yes.

THE CHAIR: The figure for "Other" is down from the previous year. There were three of those. Are those matters that the judge takes away from a jury?

Mr Refshauge: No. The others would be things like unfit to plead. That was probably the case for the three of them in that year. There were three unfit to plead cases that year; so that would be non-acquittal.

THE CHAIR: Could you also break up the 31 for this year into how many were trials before a jury and how many were trials before a judge alone?

Mr Refshauge: Yes.

THE CHAIR: And how many were cases that a judge took away from a jury.

Mr Refshauge: Directed verdicts.

THE CHAIR: Directed verdicts, yes. Is part of the issue just the quirks of the ACT as opposed to, say, other jurisdictions in relation to court attitudes?

Mr Refshauge: That is difficult to say. We have the smallest number of full-time judicial officers. That may be an issue. We have different processes for challenging decisions of judges. For instance, section 5F of the Criminal Appeals Act in New South Wales allows a decision by a judge to emasculate the prosecution case by, for example, refusing to admit essential evidence to be challenged in the Court of Appeal before the trial is concluded. That allows for decisions to be reviewed before the ultimate result of acquittal or guilt is determined. That changes the dynamic in New South Wales, for example. There are issues that make ours a somewhat different situation than those of other jurisdictions. Tasmania and Western Australia can review directed verdicts, for example. They are all differences between jurisdictions and they all go as to part of the mix that is the playing field on which we struggle to play.

THE CHAIR: I note that New South Wales indicated recently that it was going to bring in majority verdicts for juries of 11.

Mr Refshauge: Yes.

THE CHAIR: I understand that other states have to have 10 to agree. In the past there were sometimes one or two trials a year in the ACT where that would be of assistance to justice. Is that an issue currently?

Mr Refshauge: We don't have a lot of hung juries, quite frankly.

Ms Elizabeth Kelly: I am told that we have had two in the last four years, one fully hung and one hung on some charges.

Mr Refshauge: I think that that is probably right. The last trial I can think of where we had a hung jury was Gardner. We prosecuted him again and there was a hung jury again and we decided not to go further. It is not a real issue in this jurisdiction.

THE CHAIR: I have several more questions, Mr Refshauge. Firstly, a simple one. The

witness assistant program seems to work very well and I thank you for your full coverage of it. As part of that, do prosecutors refer people to the Victims of Crime Assistance League?

Mr Refshauge: They certainly do. Our witness assistant service is really directed towards the point of time when witnesses, and we are generally talking about vulnerable witnesses and in particular victims of crime, come into the system. Before they really come into the system, the victims liaison officer of the AFP looks after them, but then we take over that role to a large extent. But things like court support, continuing support beyond the trial period, assistance with non-criminal justice matters such as counselling and so on are dealt with by other agencies, and the Victims of Crime Assistance League is one of the few other agencies that we can refer to. So we would hand out pamphlets relating to VOCAL, the VSS and so on to all of those persons.

THE CHAIR: Flipping back to page 4 of your report, you state:

> The Office has taken a leading role in proceedings associated with the 2003 bushfires. Whilst the Coroners Act 1996 currently provides for the Coroner to appoint counsel assisting, on two occasions I have had to appear in the Supreme Court to intervene and uphold the decisions of the Coroner so that there was a proper contradictor in the proceedings. There is a governance gap that these arrangements have exposed and I hope that it will be resolved in the near future.

What do you mean by that and how would you like to see it resolved?

Mr Refshauge: My view has been that the position of counsel assisting is one that in this jurisdiction can properly be delivered by my office, and that would be put into a process with the usual structure of accountability and support that you would expect in those circumstances. In our jurisdiction, there has been a bit of a gap in that area and it is a gap that I think could easily be filled.

Mr Stanhope: I might just say that that is an issue that I am sympathetic to and it is my intention to ensure that we clarify the role of the Director of Public Prosecution as counsel assisting in the future in relation to coronial inquests. I think that is an area where there is potential for some confusion and it is a simple and easy issue for us to address by making it clear that the Director of Public Prosecutions will act as counsel assisting in coronial inquests.

THE CHAIR: Will you be working with the DPP in relation to that?

Mr Stanhope: Yes. I am not quite sure whether it is just an administrative matter.

Mr Refshauge: I think there is an legislative amendment in process, but it wasn't my place to say that.

THE CHAIR: I have just tallied up the number of prosecutors and I think that all up, including yourself, there are about 25. I note also that you say in your report that if there are three matters going on in the Supreme Court at once there are six people involved, the crown prosecutors plus the instructing officers. You say on page 1:

> The pressures on this Office to date have been managed but I believe that cracks are

> starting to show in its ability to continue to deliver services at the level which the Canberra community is entitled to expect.

The court's attitude does not seem to have changed over the decades concerning the unlimited resources of the Crown, which of course are never unlimited. Is that starting level down on last year or previous years?

Mr Refshauge: It is somewhat down. We are about two or three prosecutors less in 2004-05 than we had in 2003-04.

THE CHAIR: Do you have the resources to hire two or three more prosecutors? Is that an issue?

Mr Refshauge: We hire as many prosecutors as our budget will allow.

THE CHAIR: Are you able to get three more prosecutors currently?

Mr Refshauge: In 2005-06 we have employed three additional prosecutors, but we also have a number of staff on leave without pay, maternity leave and so on. So we are probably a little bit better off this financial year than we were last year.

THE CHAIR: Given the pressures you have in a number of areas and the change in laws that you have to be aware of, what would be a reasonable number of actual prosecutors in the office to cover the areas you are expected to cover at this stage?

Mr Refshauge: We think that we probably need, to deliver an appropriate service, at least another three prosecutors.

THE CHAIR: On top of the three you have hired.

Mr Refshauge: On top of the ones that we currently have.

THE CHAIR: That would take you to about 31.

Mr Refshauge: Yes.

THE CHAIR: Is remuneration a problem in terms of getting people to be prosecutors?

Mr Refshauge: It is not a problem at the lower levels, because what we provide is very valuable advocacy experience. We have become more stable over the past few years, although there is a rather regrettable instability creeping back into the system. The difficulty is that we have never been and we will never be competitive with the commercial market or the private sector, but we are competing in the market with the commonwealth and the commonwealth is more generous in its remuneration. There is a tension there. However, the commonwealth does not provide the advocacy opportunities, even in the commonwealth DPP, that we have. There are trade-offs that people make and on the whole me manage to attract junior prosecutors with no difficulty. We have some difficulty in attracting mid-level or senior prosecutors. It is quite difficult to attract very senior prosecutors. We tend to export rather than import. Middle level prosecutors we attract, but generally only if people are coming to Canberra for other reasons—for

instance, partner employment options and better facilities for children—but we do not have great difficulty in attracting staff generally, as long as we can grow them and keep them.

THE CHAIR: My final area of questioning concerns page 2 of your report. I note that you were privileged to be invited to a seminar at the ANU —I might have read your speech and some others—to reflect on the effect of the Human Rights Act after its first year of operation under the criminal justice system. You summarised your views as follows:

> The last twelve months have shown a significant increased awareness of the Human Rights Act 2004 and what the rights are that are specified in it, but has made limited progress in defining the content of those rights and how they may be exercised or constrained in the ACT democracy. The danger is that without greater attention to these issues the Act will be used to produce merely a catchcry for the predilection of those asserting its protection instead of a real jurisprudence and, more importantly, the desired culture of human rights for the ACT.

You go on to say:

> … the key concepts, such as the presumption of innocence and the right to a fair trial are hardly new to the Australian criminal law but the Act has brought an increased awareness of how these concepts can be extended and applied more creatively to current situations.

I am interested in and a bit concerned about the use of the words "creatively to current situations" and "catchcry for the predilection of those asserting its protection". How has the act affected your office—obviously, it is another area which is resource intensive—in terms of those warning signs, I suppose, about people merely using it to assert its protection, rather than the second part of what you are saying?

Mr Refshauge: It is very easy to say that everyone has the right to a fair trial, and that is something that has been embedded in Australian jurisprudence for many years. The assertion of that right in the Human Rights Act is uncontroversial, appropriate and without difficulty at that level. The difficulty comes not so much in that recognition, which is, as I have said, appropriate, but in the day-to-day working out of what that actually means. It is all very well to say that you have a right to a fair trial, but in the cut and thrust of what happens in the actual trial the question of whether some event is consistent or inconsistent with the right to a fair trial is the real issue when you are actually prosecuting a case or defending a case.

We need to guard against the view that the right to a fair trial content is simply the view of, for example, the judicial officer as to what is fair as opposed to what the content is in terms of the jurisprudence of the right. That is what is difficult, because it is very easy to say that the trial must be fair and therefore, for example, does a piece of evidence that may be highly inculpatory but obtained in circumstances which might raise other issues, such as whether it was improperly obtained as opposed to illegally obtained, infringe the right to a fair trial or not? A judicial officer may feel that that is unfair, but that is not necessarily the test of whether the trial has been unfair. So you need to drill down to understand what the content of the right is, as opposed to simply the impression of those who assert that there is a right to a fair trial.

THE CHAIR: What you are saying is that, because of the Human Rights Act, that affects the right to a fair trial, and that would be a fairly superficial view say if it was—not improperly obtained, but what was the first one?

Mr Refshauge: Illegally obtained.

THE CHAIR: Illegally may be another thing, but something that was improperly obtained but not illegally obtained that was highly pertinent. Someone might misinterpret what the act really was meant to do and say that that was not a fair trial and that would not be a fair result at the end. Am I correct in that?

Mr Refshauge: Absolutely; that is the kind of thing.

THE CHAIR: Has it affected the operations of a court itself? I have heard—admittedly, mostly anecdotally—that there have been at least two bail applications which have been successful in the Supreme Court when the act has been mentioned, whereas that would not have occurred had there not been the Human Rights Act. I am unaware of how it has affected trials as such, but are you seeing any problems that the act causes which simply were not there before?

Mr Refshauge: I don't think so. The issue for us of the Human Rights Act is to be clear about the jurisprudence that underpins it because, as I say, the right to a fair trial is an important right and is a right that is enshrined but was enshrined in the common law. The content of that right is more problematic and involves an understanding of jurisprudence. We are very lucky that we have a large body of jurisprudence coming in, particularly from the UK but also from Canada and New Zealand, which assists us to understand what the content is.

That, however, is new law for most practitioners. Most new practitioners in the ACT have probably gone through law school when the reliance on UK jurisprudence was slipping away. You can actually these days talk to a law student about Lord Denning and they will ask you who you are talking about, forgetting the problems that we had when you learnt something in tort and two days later a Denning judgment came out and overturned it.

That is the issue, but in terms of decisions being made that suddenly would never have been made prior to the Human Rights Act, I guess there have been some, and that is a good thing, but I do not think there has been a huge number because in this area the Australian jurisprudence had been moving very consistently with what the Human Rights Act has now enacted in any event. There may have been a couple of bail applications. I can think of one where the Human Rights Act was mentioned and bail was refused, but there may well have been others. I am not aware of them and I try to keep ahead of that so that we can feed the material into the ANU project.

THE CHAIR: There was one in particular where there seemed to be a lot of angst by the victim and the victim's family. I think it was a rape one.

Mr Refshauge: Bail decisions are always difficult decisions to make. At one level, if you take a purist view, then it would be very rare that you would refuse bail because bail

is there to ensure that someone attends to take their trial and most people attend to take their trial, particularly where serious offences are involved, because they believe that they are not guilty and want to vindicate their position.

Mr Stanhope: Mr Stefaniak, I am sure that at heart you are on exactly the same wave length as Mr Refshauge. I cannot speak for him, but certainly for myself. What Mr Refshauge's comments indicate and the message they provide for me is that we need perhaps to look at introducing into the Human Rights Act a personal right of action to generate a little bit of jurisprudence.

THE CHAIR: I do not know that he is saying that. You can speak for yourself, attorney.

Mr Stanhope: It is not exactly what Mr Refshauge said, but at the heart of his comment is that, in fact, we need a few cases. It is a big message to the profession to get off their horse and understand how the Human Rights Act operates and what human rights are, to get stuck in there and drag a bit of case law out of Terry Higgins and the other judges. If the profession won't take the strong message that Mr Refshauge is sending, I am inclined to introduce a personal right of action into the legislation just to gee them up a bit.

Mr Refshauge: I don't want to be responsible for a personal right of action, but that is right. There is this act there, and who is using it? The prosecutor and the judge and no-one else.

Mr Stanhope: I have taken it on board. I am glad you drew attention to it today, chair; you have motivated me.

THE CHAIR: Thank you very much, Mr Refshauge, for your appearance here today. I thank the other witnesses as well. Further questions can be put on notice and members have until close of business on Monday to put questions on notice.

The committee adjourned at 12.33 pm.