LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Inquiry into sentencing)

Members:

MR S DOSZPOT (Chair)
MR M GENTLEMAN (Deputy Chair)
MRS G JONES
MS Y BERRY

TRANSCRIPT OF EVIDENCE

CANBERRA

MONDAY, 19 MAY 2014

Secretary to the committee:
Dr B Lloyd (Ph: 620 50137)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 12.29 pm.

WHITE, MR JON, Director of Public Prosecutions, Justice and Community Safety Directorate

THE CHAIR: Good afternoon. I would like to welcome everyone to the second public hearing of the Standing Committee on Justice and Community Safety's inquiry into sentencing. Today the committee will be hearing from the Director of Public Prosecutions, the ACT Bar Association, the ACT Law Society, the Aboriginal Legal Service and the Australian Lawyers Alliance. Today's proceedings will be recorded, transcribed and published.

We will start this hearing with the ACT Office of the Director of Public Prosecutions. I would like to welcome Mr White. I presume that you are familiar with the privilege statement that is before you?

Mr White: Yes.

THE CHAIR: You have read that?

Mr White: Yes.

THE CHAIR: Would you like to make an opening statement?

Mr White: Yes, I will. I would like to thank the committee for the invitation to appear today. As I have indicated in my fairly brief submission, the Director of Public Prosecutions tries to stay away from matters of controversy in law reform, for the simple reason that we have to enforce the law as it is passed by the Assembly and it is inappropriate if our views are seen to intrude upon that. So when we make submissions on matters of law reform, which we do from time to time, they tend to be of a practical nature in terms of perceived weaknesses, loopholes and so on in legislation rather than in terms of matters of principle and matters of policy. That is why I have stayed away from expressing views on the matters that are the subject of the terms of reference other than to raise a few matters with you. I will go to some matters without wishing to express a particular opinion on them.

I have had the benefit of reading the submissions that have been made to the committee. I must say it is very pleasing to see the level of interest in sentencing in the ACT. Sentencing is always a controversial area in the criminal law, and it is always a very difficult area. As I was saying to the secretary before the committee convened, sometimes you feel that sentencing is an area where everyone walks away from court dissatisfied with the outcome, and there is probably no way around that. I do have some insight into the difficulty that judicial officers have in sentencing a real person who is in front of them, which is a factor which is often overlooked when these matters come to be reviewed in other forums and so on.

Having made those general remarks, I will go to the issue of the rate of imprisonment in the ACT, because I note that a couple of submissions talked about what was said to be the increasing trajectory in the rate of imprisonment. I am afraid I must take some issue with those observations. The Australian Bureau of Statistics publishes statistics

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

My calculation regarding the long-term average over the 11 years from 2002 to 2012 is that the rate of imprisonment, which is expressed per 100,000 head of population, in the ACT is about 98 per 100,000. And that has been fairly consistent across that period of time.

The reason for the low rate of imprisonment will certainly have a lot to do with the socioeconomic status of the community in the ACT. We know that we are a prosperous and stable community and one would expect in such a community that the rate of imprisonment might be lower than in some other areas. That is just a reflection of what is well known in criminal law—that socioeconomic factors have a great influence on imprisonment rates. There may be other factors, but that would certainly be a factor.

So I have to take issue with the suggestion that there has been an increase in the trajectory of imprisonment in the ACT. What has happened is that we have now caught up on the backlog in the Supreme Court. Due to a lot of very hard work within the courts, within my office and within the legal profession generally, we are now pretty much up to date with the Supreme Court backlog. Of course, people who take their trial to the Supreme Court are much more likely to be sentenced to significant periods of imprisonment than other offenders.

When I was appointed as the DPP, which was in late 2008, there was a real issue with the number of trials that were being had in the Supreme Court. In fact—and I have talked about this in my annual report—we have now essentially doubled the rate of trials, the long-term average of trials, that are taking place in the ACT. Of course, that has had the effect of bringing people to sentence. So the clearing up of the backlog, as one would expect, is reflected in an increase in the number of people imprisoned. I suspect that is the main indicator for the imprisonment rate at the moment.

I have to, with great respect, take some issue with the submission made by Assistant Professor Bartels. In her submission she stated that the imprisonment rate had risen very sharply in recent years, increasing by 43 per cent between 2009 and 2012. If one selects those two years, that is right. However, 2009 was the lowest year on the trajectory, and that is made very clear in the ABS statistics. The rate for that year, which was 74.8, is simply not indicative of the long-term average, which, as I said, is over 98. Therefore it seems that by selecting that lowest point, one can confect a situation that there has been a great increase. In fact, long term, I would respectfully suggest that there has not been a significant increase. So that is one issue that possibly should be taken account of.

There are a couple of other matters that I should mention. I do not want to trespass too long on my time, because I do not want to cut into the time for questions that you may have. I certainly agree with some of the issues raised in the submissions to the committee. One of those is in relation to sentencing appeals from the Magistrates Court. At the moment sentencing appeals from the Magistrates Court to the Supreme

Court are done on an error-of-law basis. So it is necessary for an error to be found in what the magistrate has done before the appeal can be taken.

That has the effect that a great deal of time is taken up in the Supreme Court by judges learnedly going through Magistrates Court decisions, finding an error of law and then producing learned judgements, which are very learned—and when I say that I am not attempting to express sarcasm. But they are obviously very time consuming in terms of the writing of the judgements and the researching of the judgements. There is also an effect in the Magistrates Court because the magistrates tend to try to appeal-proof their decisions by taking extra time over them. So that adds to the time in the Magistrates Court as well.

There are a number of submissions to the committee to the effect that the situation in New South Wales of de novo appeals would be a model that is well worth looking at, and I would endorse that. A de novo appeal is simply a right of appeal without establishing a legal error. If this is done properly—and I will not go into great detail; the detail is with you—the magistrates can simply deal quickly, efficiently and justly with matters in their court and the Supreme Court can then deal expeditiously with matters which in New South Wales are generally done on the papers. So there is no necessity for further evidence to be called; the Supreme Court judge simply looks at the material and then decides whether or not to allow the appeal—and, in most instances, can come to pretty much an instant decision. That has much to commend it, and there are many people in the legal community in the ACT who would support that movement. So that is one thing I wanted to mention.

I should mention the very thorny issue of mandatory sentencing. This is a very difficult issue. There are a number of jurisdictions in Australia where there is mandatory sentencing of one type or another in different areas. For example, in New South Wales there are standard non-parole periods. They may be departed from, but there has to be good cause shown. So there is effectively a starting point, which is a form of mandatory sentencing.

Another form of mandatory sentencing is, for example, in the Northern Territory where there is mandatory life imprisonment for murder. I have to say from a general principle point of view—and I may be bold to say the directors of public prosecutions around Australia would agree with this—generally mandatory sentencing is not a favoured outcome from a criminal law point of view, particularly sentences, for example, such as mandatory life for certain offences. The reason for that is very simple: it discourages people from pleading guilty because there is no benefit to be gained from a plea of guilty being entered.

Having said that, as someone who struggles all the time with sentences that are handed down and has also appealed quite frequently against what we claim to be the inadequacy of sentences handed down in both the Magistrates Court and the Supreme Court, I do see the angst that is felt, for example, by victims, and indeed by members of the public, when inadequate sentences are handed down. It is very natural that there be some pressure for some form of mandatory sentencing. It is really a matter for the courts to bear in mind that they must keep general issues of deterrence and retribution in mind when they are sentencing offenders and not simply look at the offender's side of the ledger, so to speak. That is what I will say about mandatory sentencing.

The government, as I understand it, has announced that periodic detention as a sentencing option will be discontinued. This is an opportunity—in fact probably a requirement now—for the whole scheme of sentencing in the ACT to be looked at. One of the practical reasons for this is that we do have in the ACT combination sentences, and periodic detention was a key part of those combination sentences. If periodic detention is taken away from those then there will need to be a re-evaluation of whether combination sentences continue or whether there is some alternative that can be put in the space previously occupied by periodic detention.

I have heard very positive reports about the intensive corrections orders that are in various forms in both Victoria and New South Wales, and probably in other jurisdictions. The benefit I see from these sorts of orders is that there is much more direct supervision of an offender. A good behaviour order tends to be, "Sign a piece of paper, go away and sin no more, and if you keep out of trouble for a particular period of time, that will suffice." For many offenders, that is totally appropriate, but there are certainly offenders who require much more supervision to ensure their rehabilitation and that they have applied themselves as appropriate. That is where the intensive corrections orders can be useful, in meeting that need.

That is no doubt something the committee will consider, and I note that, again, there is general support in the legal community for those provisions. It has to be pointed out that they are resource intensive from the point of view of corrections. However, the issue that they are directed to is recidivism. I think members of the committee will be aware that the recidivism rate in the ACT is worrying. We have to look at, I would suggest, ways of tackling that recidivism rate. I have to say, now that it has gone or is slated for removal, I was no great fan of periodic detention, and I think recidivism has not been improved. But there will need to be some alternative that is put into the space. I will not say anything more about that. You have before you the various models from other jurisdictions about that.

I want to mention lastly—and I have trespassed greatly on my time—the issue of suspended sentences. There was an inquiry by the Law Reform Advisory Council into suspended sentences which, unfortunately, did not really provide any firm recommendations to government and really left the issue to be further debated. I have found that suspended sentences are one of the most controversial and worrying aspects of the sentencing process. When I say "worrying", in terms of the result from the point of view of victims and so on, they really do wonder about the worth of suspended sentences.

It is fair to say that in the ACT there has been a history of suspended sentences being imposed but when they have been breached the offender has not been sent to serve the sentence of imprisonment that was suspended. There are many judicial pronouncements which say that that has a tendency to bring suspended sentences into disrepute. So this is an area that the committee may well wish to look at. I note that Victoria are in the process of abolishing suspended sentences. I think they have already accomplished that in relation to sentences imposed by superior courts and I think they are looking at it in relation to summary courts. That approach has much to commend it.

Victoria has recently introduced a concept of community corrections orders. That is an omnibus description of a whole series of orders, including, I think, something akin to the old intensive corrections order in Victoria. It is a suite of available measures, if you like, to deal with matters. They are proceeding on the basis that they do not need within that suite suspended sentences at all.

Those are the things that I wanted to raise. I would be very happy to assist with any input that I can.

THE CHAIR: Thank you, Mr White. Your comments are very much appreciated. Should there be other things that, on reflection, you would like to have made a submission on, we are still happy to accept submissions from you, if anything else occurs to you.

Mr White: Yes, thank you.

THE CHAIR: My first question relates to your last point. In your submission you advise the committee that suspended sentences were often not activated in the ACT where there had been a breach of conditions and that the ACT was one of the few Australian jurisdictions where there was no formal presumption that sentences should be activated on breach. Could you perhaps expand on this to the committee, something about the scale of this problem, and what is the best way that we could work towards resolving this?

Mr White: Yes. I think it may now be that the ACT is alone in not having activation on breach. Just to explain that term, the concept of activation on breach is that, if a suspended sentence is imposed and then a breach of that suspended sentence is shown, there will be effectively a presumption that the person will serve the term that was otherwise suspended. That is the way it operates in most other, if not all other, Australian jurisdictions now. So in other words, there is a presumption that once the breach is shown, then the original sentence will be carried out. In the ACT—I have not got any very recent statistics—certainly all of the statistics that were available at the time that the Law Reform Commission did its work indicated that the level of suspended sentences was higher in the ACT than anywhere else, I think far higher than most other jurisdictions.

Also, we did a project where we tried to identify matters in the Supreme Court over a particular area as to what had happened to people who came before the court on a breach of a suspended sentence, and we found that in over 50 per cent of those cases the person was simply resentenced to another suspended sentence. In a number of cases, no action was taken. So in something like three-quarters of all of the cases the person was either resentenced with a suspended sentence or no action was taken.

So the issue that is really raised by that is twofold. First of all, in a hierarchy of sentences, suspended sentences rank just below the sentence of imprisonment. A judicial officer may not impose a suspended sentence on somebody, clearly, unless they have come to the view that that person should serve imprisonment as distinct from any other punishment. I have to say that there is a truth-in-sentencing issue here. One does suspect sometimes that a suspended sentence is imposed when it is really an attempt to make the sentence appear more severe than it really is and there really is no

intention other than to give a good behaviour bond but a suspended sentence sounds like a more severe sentence. That is the issue. There is a truth-in-sentencing aspect.

The other aspect is that if a suspended sentence is wrongly imposed for that reason and breached, then it is possible that the person can fall into the net of having the term of imprisonment imposed upon them when that term of imprisonment was not appropriate in the first place.

So there are two aspects of this—and these have been remarked on in other jurisdictions—and this is, no doubt, one of the reasons behind Victoria's push to get rid of them. So if suspended sentences were kept, we certainly would suggest that there be a presumption of activation on breach. And that may have some effect on the number of suspended sentences imposed in the first place.

MR GENTLEMAN: Just on this question, do you think that is why perhaps that when a breach occurs there is no effective move to incarceration, because they are worried about the original decision?

Mr White: In some instances, that may be so. In other words, there was not a properly considered decision in the first place to impose the suspended sentence, and then, when the judicial officer comes to consider what sentencing outcome they want, they pull back from the concept of imprisonment. In that situation, a suspended sentence should not have been given, because a suspended sentence is a sentence of imprisonment where the judicial officer has determined that the person must go to jail. And obviously under our sentencing legislation, imprisonment is a last resort. So all alternatives to imprisonment should be explored before there is an easy resort to suspended sentence.

MR GENTLEMAN: And would that decision not to incarcerate be a determination from the type of breach that has occurred?

Mr White: In some instances, it can be. But generally in the study that we did we found most of the breaches were for people who reoffended. So this is not someone who does not comply with the bail condition or something like that or some minor breach; this is some form of reoffending. That is generally why the person is brought before the court. If it were appropriate to provide a suspended sentence in the first place, one would think that further offending would indicate that the time had come to move on to full-time imprisonment. But that has not tended to be the way that it has worked.

MS BERRY: Can I ask a supplementary on that?

THE CHAIR: Yes.

MS BERRY: You have talked about a couple of things that you would do if suspended sentences stay and that is the system we are going to have. Are there any other reforms that you could suggest for a suspended sentence perhaps as a less serious consequence, or would you change the way suspended sentences are implemented altogether?

Mr White: That is why I put up, in this area, the issue of, for example, intensive corrections orders and so on. From the point of view of the aims of sentencing, clearly rehabilitation will be an important one. A suspended sentence is usually an indication by the court that they want the offender to rehabilitate themselves and they are effectively on their last chance. That is, routinely, of course, said by magistrates and judges when they impose suspended sentences. But the point is: would it be better to move directly to rehabilitation in an intensive way if that is what the aim of the exercise is, particularly in view of recidivism rates?

THE CHAIR: Any other supplementaries on this question. No. Mr Gentleman, your substantive question.

MR GENTLEMAN: In your submission you have talked about—I am just trying to find it, my apologies—sentencing outcomes for particular offence types, and you touched on, of course, periodic detention. But you have suggested here that that would be inappropriate for cases like sexual offences where those offenders then cannot get the educational programs. Would you like to touch on that a bit further, and then I want to move to the RJ aspect of it?

Mr White: Yes. That was a limitation of periodic detention. Most of the programs for sex offenders are only available to full-time prisoners, and they are quite long-term programs, I think six months full time, for prisoners who are in full-time custody, accessing it five days a week or whatever. So that sort of program is just not possible to be delivered on periodic detention. It may be possible, however, to ensure compliance with something like that with an intensive corrections order. So that is the difficulty that we saw.

The sex offenders are sometimes otherwise middle-class offenders without a prior record. They are possibly in other respects the sorts of offenders, sometimes, who one would expect periodic detention to be extended to. So that is the difficulty. There were consequences in giving such offenders that outcome when it did not really meet the issue of reformation and rehabilitation because of the unavailability of programs.

MR GENTLEMAN: And you have said a similar thing for restorative justice. There is no opportunity there to do those educational programs either. It appears that restorative justice seems to work very well. Is there any way you could introduce those educational programs into that process?

Mr White: In terms of restorative justice, not directly, but it would be possible to have running alongside restorative justice those kinds of programs. But I have to say in relation to restorative justice—and this is a very controversial area; we obviously see the matter from the standpoint of victims, particularly the victims of domestic violence and sexual offences—there is no great appetite amongst those victims for participation in restorative justice in relation to those crime types, for a very simple reason. They are generally crimes about an imbalance of power. And restorative justice does not necessarily overcome that issue of an imbalance of power.

So it is all very well for a young offender who has committed an act of vandalism to be confronted by the householder. And that is excellent. Everyone who has had anything to do with those sorts of outcomes knows that sometimes there are

wonderful outcomes that can be gained by restorative justice. But there does need to be an appreciation that there are certain crime types, particularly those relating to an imbalance of power, where that imbalance of power can distort what would otherwise be a restorative process, because the restorative process is based on the principle that the victim who participates is doing so voluntarily with a view to themselves reaching an outcome which is satisfactory to them. So I think hopefully that explains the concerns.

THE CHAIR: Ms Berry, your substantive question.

MS BERRY: You were talking earlier, in your opening statement, about the other submitters to the inquiry saying that the numbers in the AMC had increased and you do not agree with that because ABS figures show differently. Do you think that there is a rise in custodial sentencing in the ACT but not a rise in the severity of the crime over the past years? And can you tell us a bit more about that?

Mr White: Yes. This is very difficult because everyone who ventures an opinion in this area is generally doing so on an impressionistic basis rather than a statistical basis. I do not have any statistics available that really would allow me to answer that on a proper basis. I do not believe there has been an increase in severity of sentences across the board in the ACT. There are some areas where we have made—"we", the DPP—some impact in increasing sentences, and that is particularly in the area of sexual offences. And we have done that by taking appeals against inadequacy of sentence. So I think it is fair to say in that crime type there has been an increase in the length of custodial sentences that have been imposed. And that is because we have targeted that area.

Apart from that, I am not aware of any evidence to suggest that there is an increase in the severity of custodial sentences. We remain, as I said before, the jurisdiction with the lowest rate of imprisonment. I do not think it is any secret that our judges are generally viewed to be amongst the more lenient in Australia.

MS BERRY: Do you think that there has been an increase in the actual severity of the crimes that have been committed or do you think there are a whole lot more people being put in? You talked, in your opening submission, about the socio impact. And I guess the other question I wanted to ask was: do you think that there has been an increase because it has been easier to put people into AMC because there is less of an impact on them as far as their family and relationships are concerned because it is in Canberra rather than going to Goulburn, and is that a policy decision, do you think? Sorry, I have asked about five questions in that one sentence.

Mr White: Yes, but I think I understand what you are putting. The statistics do not seem to bear out that there has been an increase in imprisonment rates since the opening of the AMC. But clearly, everyone concerned in criminal justice must welcome the fact that we have our own jail, that we are now responsible for imprisoning our own prisoners and rehabilitating our own prisoners. I think anecdotally it is fair to say that judges and magistrates would be much more willing to send prisoners to the AMC than to commit them to the rather uncertain wiles of the New South Wales system, as previously operated. So I think that is a component of what you are putting.

In terms of crime types, that is very difficult to answer. As I say, a large number of the serious matters that we prosecute are sexual offences. There does seem to be an increase in the reporting rates of those offences. And accordingly, there are more of those going to trial. That does not mean there is an increase in the commission of the offences. There are reasons sometimes why particular offences become more reported. It is quite well known why that would be the case in relation to sexual offences. Probably crimes of domestic violence fall into the same category. And obviously in both respects it is a thoroughly good thing if these matters are now reported and prosecuted.

But that does not mean that there is an increase in the underlying criminal behaviour; it simply means that in some crime types they are more likely to be reported and more likely to be prosecuted. So it is very difficult to extrapolate from that what the underlying trends are.

I do from time to time see reports of a drop in particular crime types and so on, and I do wonder when that is going to impact upon my office, because there really does seem to be just an increasing level of work that comes my way. So we certainly have not noticed any drop-off in that regard.

THE CHAIR: Mrs Jones.

MRS JONES: My question is in two parts. The first one is: recently when overseas I was informed that in another jurisdiction, a completely different jurisdiction, effectively the DPP work with police when collecting data on certain crimes and, as a result, once arrests are made they have a very good rate of fast and effective court proceedings with a lot of convictions. So I am just wondering what your thoughts are about the flexibility of that type of arrangement within our legal system, whether that is possible at all. Also I want to ask about mandatory sentencing and obviously your views on that, but also the minimum mandatory, which is another trend which at least gives, as you say, a starting point, and what your thoughts are on that.

Mr White: In relation to the relations with the police, we feel we have a very good working relationship with the police. But it is a relationship which, from time to time, will be put under pressure because of the different roles that we have. Under the model that we have in this country—we have independent prosecutors—it sometimes seems that our job is to ensure that nobody is happy, and that sometimes includes the police. Having said that, what is important is that we have very good working relationships with them and they can tell us when they are unhappy, and they do, and we can tell them if we are unhappy.

MRS JONES: But I meant more in the case of a crime that is considered serious. Say you are talking about sexual offences or paedophilia with children or something and we as a community or as an Assembly decided that this was of such high importance to members of the community that we wanted the police to have their investigations so accurately performed so that when we actually do raise one of these issues—we spend public money and make arrests and so on—we are absolutely certain that the correct evidence has been gathered or that the thing is framed in a way that will work through the courts. That is the kind of interest that I have. Is there any flexibility in

our system to advise the police so that when they are investigating, they actually get—I hesitate to say "better outcomes", because, like you say, nobody ends up happy in any of this—more satisfaction in the community?

Mr White: I understand where you are coming from. The short answer is: there is some flexibility at the moment. We do work with police in some matters prior to arrest or immediately after arrest and there is a lot of toing and froing between my office and the police, particularly on major matters, whereby we might suggest more evidence should be gathered and so on and so forth.

In terms of involvement of prosecutors in the investigation stage, I am afraid I am rather old-fashioned about that. The model in the ACT and Australia is definitely that the investigators investigate, police investigate, and prosecutors are separate and independent from that, and both bodies are at arm's length. I do think that is a better system. We have to expect that the police will exercise their discretions and so on. But having said that, I can see absolutely where you are coming from, because it can be very frustrating if a prosecution falls over because a wrong decision was made at some point way back. It is very difficult for prosecutors to become involved at that stage and perform the same role that we perform, which is dispassionately looking at the evidence and being an independent prosecuting agency and not becoming too close to the police.

MRS JONES: And just on that as well, is it possible—I am just thinking about exploring different ideas—to perhaps have people who cycle through the police so that they are not working on the same case when it comes to the DPP, but in the phase of collecting information that expertise is there?

Mr White: We do it the other way around. We do have police embedded—if that is the right expression—in the DPP. That does not completely meet the issue that you are raising, but it does at least assist in the degree of cooperation. In terms of the DPP being involved in the investigative process, as I say, on a case-by-case basis there is no reason it cannot be done, and in some cases it is done. It tends to be done only on really big matters like murders and so on and so forth. But certainly our expertise and our advice are available at any time for police, and they do avail themselves of that from time to time.

MRS JONES: I did also ask in my question about minimum mandatory sentences.

Mr White: Sorry, I apologise. I suppose minimum mandatory sentencing is just another form of mandatory sentencing.

MRS JONES: But it may affect that issue you were talking about, the problem with pleading guilty and you get the maximum anyway and then that is a problem.

Mr White: Yes, it is still a disincentive for people to plead guilty. And generally it ends up with most of the models having an out clause, so to speak, for the judicial officer to depart from a standard position in special circumstances. So all of the effort comes when departing from the standard position. As I say, I can well understand why people advocate mandatory sentencing and really, if I might say so, the judiciary has to accept responsibility if they are imposing sentences which are not regarded in the

community as appropriate. They have to expect that parliament may become involved in the process on behalf of the community. And that is really what is happening in a number of jurisdictions. I have to say that my experience and what my colleagues in other jurisdictions tell me disposes me against mandatory sentencing, for the reasons that I have indicated. But I can well understand the push for it.

I have made submissions to the Court of Appeal along the lines of what I have pretty much said. There was a recent case, without going into details of the case, of a crime of fairly extreme violence and there was a fairly lengthy head sentence but a very low non-parole period was set. And we appealed against the inadequacy of the non-parole period, and we were successful in that appeal. And in running that appeal I did submit to the court that even though one could not expect percentages to be imposed and so on and so forth, the court did have to have in mind that the sentence that was imposed should have a transparency about it so that if a high head sentence is imposed, there has to be a good reason for the setting of the non-parole period, which is obviously the time the person actually serves in prison. We had a successful outcome in that matter in that the minimum term of the non-parole period was increased. So the courts have their role to play in this issue.

THE CHAIR: Mr White, thank you for appearing before the committee today. There are quite a number of other questions that we have got, and we will send these to you, if you do not mind.

Mr White: Absolutely, yes. Thank you very much for the opportunity.

THE CHAIR: The committee secretary will follow up with you regarding transcripts and any other questions that we will be forwarding on. Thank you once again for appearing.

Mr White: Thank you very much.

STRETTON, MR GREG SC, President, ACT Bar Association
GILL, MR SHANE, Vice-President, ACT Bar Association
ARCHER, MR KEN, Bar Council Member, and Chair, ACT Bar Association Criminal Committee

THE CHAIR: Good afternoon, and welcome to the second public hearing of the Standing Committee on Justice and Community Safety's inquiry into sentencing. Today the committee has already heard from the Director of Public Prosecutions, and we now welcome the ACT Bar Association. Mr Stretton, would you like to make an opening statement?

Mr Stretton: Yes, thank you. I will make a brief introductory statement. Mr Archer, who is one of the most experienced criminal barristers in the ACT, will follow, and Mr Gill, who is the Vice-President of the Bar Association and also a very experienced criminal barrister, will follow him.

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

Amongst the statistics there is an absolute disgrace in relation to Aboriginal and Torres Strait Islander prisoners, who are over-represented in the jail population by approximately 10—that is, approximately 10 times their proportion of the general community are incarcerated. That is a true blight on our system of looking after the disadvantaged people in our society.

I will now hand over, if I may—unless there are any specific questions on what I have said—to Mr Archer, who will be the next speaker.

Mr Archer: Building on what Greg has just said, I think the Assembly is advantaged in the exercise that you are undertaking in the ready availability of important statistical information. The ACT criminal justice statistical profile is a document that is tendered before the Assembly and is available. We would urge this committee to use the information that is available to inform judgements and decisions made in the context of the committee's deliberations.

It is quite an interesting profile that is presented. Greg has talked about the raw figures indicating a huge increase in the number of people who are in custody. But, interestingly, over a period of time—and the stats work back retrospectively continuously on a five-year period—the stats show that in relation to just about every offence category—and I think Jon White talked about sexual assault perhaps being an exception for the reasons he explained—there is a trend downwards rather than upwards. Although sometimes public perception might be that there is an avalanche of crime that the courts are dealing with—or, as Mr White would have it, not dealing

with—in fact the reality is to the contrary, and there is a general trend downwards in relation to most offence categories.

It therefore becomes a very interesting and important question to ask why that is so—that, despite that trend downwards in offences, the number of people who are being incarcerated is increasing. And why is it that it seems that the trend is increasingly towards longer and longer sentences? Again, you have available the annual reports of the Justice and Community Safety Directorate. Their annual reports are quite useful in detailing the raw numbers in relation to those who are in custody. Also, there was some interesting information in last year's annual report about the length of sentences being imposed. One can see quite drastic increases in the length of terms that have been imposed.

The other thing I would observe by way of an opening is that the JACS report also talked about the relatively high rates of recidivism that are apparent. I am not sure if the explanation given in the JACS report is particularly persuasive, but it does indicate that, for those who are serving terms of imprisonment, a substantial proportion of them are returning to custody after being released from jail. The answer in relation to that can, I think, be traced to the absence or the under-resourcing of post-release programs.

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

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

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

One of the more useful ways, we think, of looking at it is to examine what the position was shortly after the Maconochie centre opened. The Maconochie centre followed a history whereby our prisoners were sent to serve their time in New South Wales and remandees were generally kept in the ACT, although an overflow were sent to New South Wales.

The Maconochie centre, we think, was fairly much fully online by the end of 2009. After it opened there was a transfer process where there was an overlap of prisoners between New South Wales and the territory. But by the time we get to the end of 2009, we have a pretty clear picture of the rates of incarceration at the point of opening of the AMC.

If we look at the end of 2009, we see that there were a total of 184 territory prisoners. 107 of those were sentenced prisoners, which tells you, of course, the rate of prisoners on remand that had not been finally dealt with. So over that quarter, the October-November-December quarter, the prison population was 165 in October, 178 in November and 184 in December. As Greg has outlined, the rate of incarceration of Aboriginal and Torres Strait Islanders was roughly tenfold their representation within the general territory population.

If we fast-forward to the most recent report—that is a report for March this year—the pattern that we find across January, February and March is that in January the total prisoner population was 343, in February it was 330 and in March it was 319. So it was relatively stable at that level. Sentenced prisoners were 263, 242 and 241. With respect to the marked disparity between those two sets of figures, where we go from 107 sentenced prisoners in December 2009 to 241 in March this year, the difference there is, we say, quite stark and it leads us to ask the question: what is happening? Why is it that we have come to this particular point?

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

The impact that it has on recidivism does not throw forward a justification. As Ken has outlined, there is a very high rate of recidivism. It is above 40 per cent of returnees to jail within two years. Clearly, there is something in the incarceration and in the post-incarceration treatment of prisoners which is not coming together. The high recidivism rate should tell against a high incarceration rate. One of the greatest interests our community can have in offenders is having offenders who, when they come to liberty or remain at liberty, do not commit further offences—that is, offenders who are rehabilitated in some practical sense. If the community has such a strong interest in that, yet we are having such a high recidivism rate after incarceration, again, the question has to be asked: what is it that we are doing?

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

Until a point in the 1990s, the ACT legislation stipulated a priority towards

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

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

At the end of the criminal justice system, we see that cocktail being worked out. There is the question of how you go about unscrambling that egg so as to effectively deal with rehabilitation for serious offenders who so often come from that background. Clearly, they have to bear responsibility for their actions, but work has to be put into place to protect the community by giving those people the tools and resources to try and deal with the mess that was generally made at a point in time when they were too young to responsibly make decisions and which has damaged them into adulthood. We see that a move towards rehabilitation and perhaps intensive supervision orders is a positive move.

THE CHAIR: Thank you. Mr Stretton, we will address our questions to you and perhaps you can direct them to your colleagues as you see fit. First of all, the Bar Association submission lends its support to the creation of a sentencing council or similar. In your view, how much difference would such a body make to sentencing in the ACT, what effects would it have and on whom?

Mr Stretton: I will ask Mr Archer to address that question.

Mr Archer: We would support, as we have said in our submission, the funding of such a body. As I said in my opening, statistics and information are important. The analysis of trends is important so that an appropriate response can be made, both administratively and through the Assembly. At the moment the criminal justice system is dependent on the crude statistical profile that is provided to the Assembly, which talks about some raw numbers. But an important role of the sentencing council would be to analyse those, to give information to this committee and to the Assembly about proposals for change, to identify trends and to allow things to be addressed before they become entrenched. It is a body that requires funds. We have offered up assistance to the council, and there will certainly be volunteers from the bar who would be prepared to assist the council in its work.

MR GENTLEMAN: Mr Stretton, could I bring you to your opening comments in regard to the statistical approach to those going into AMC and the contrast between that and, as you mentioned, what the DPP said. I am trying to find the reality here. The DPP said that it is a low rate of incarceration—in fact he said 98 persons per 100,000—but it has been constant. He said one of the reasons for the recent rise is that they have caught up with the backlog in the Supreme Court. Do you agree with those comments?

Mr Stretton: No, I do not think they are correct. The statistics really speak for themselves. If you are talking about numbers per thousand of population, you would have to have Mr White explain whether the population increased between December 2009 and March 2014—whether it more than doubled. I think we all know that it did not. So we do not agree with his statistics.

MR GENTLEMAN: On the recent March quarter stats, as you indicated in your opening, too, it shows that most of the crime stats have reduced except for dangerous or negligent acts endangering persons. They have risen, from 2009 to the current quarter, from 27 to 99, with a peak in 2012 of 114. Would those particular stats have an effect on sentencing into AMC as well?

Mr Archer: In relation to the particular category that you identified there, I suspect—I do not know—that the raw numbers of the negligent act category would be quite low. They would catch culpable driving, for example. The numbers would be quite low. So that would reflect some sort of statistical glitch there. Otherwise, we say that the statistics are quite clear in relation to establishing trends—that the rate of imprisonment has clearly risen, and not only that, but it is the sentencing range that has increased. What is happening is that there is a bigger warehousing effect, if I could call it that. So people are being put in for longer. Although, if you look at what they call the admissions—that is, sentenced prisoners and remandees going into jail—you could just about draw a flat line through that over a number of years, the rates at which people are being kept in custody are increasing because you are getting people sentenced to jail more often and for longer periods of time.

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

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

Mr Archer: The rate of increase of incarceration pre-dates—I assume Mr White was talking about the blitz period last year. The rise started well before that. So it is not clear what the cause of this increase is.

THE CHAIR: I have a supplementary on that. What is your impression of why this backlog is occurring?

Mr Gill: The backlog for the court lists?

THE CHAIR: Yes.

Mr Gill: It is difficult to tell what any single cause might be. The allocation of

judicial resources between the Magistrates Court and the Supreme Court may well have been a reason, but it is difficult to pinpoint any single reason for why there is a backlog.

THE CHAIR: Ms Berry, your substantive question.

MS BERRY: I have a question about the size of the AMC. You are saying that there has been an increase in the number of people and the terms that they have been given as clients out there, but there has been a decrease in the number of crimes that are being committed. In addition to that, you are talking about resources being put into other sentencing options like intensive corrective orders and restorative justice. Is the AMC big enough?

Mr Stretton: No, it is not. Already we have plans—I think Mr Archer has more detail—to expand it; within the confines of where it is but to expand the buildings for the purposes of housing prisoners. Ken, did you want to add to that?

Mr Archer: No, not really. I do not know what the dollar cost of that is, but there are plans that you are aware of, I am sure, to expand the AMC to cope with increased numbers.

Could I add another thing? In relation to the efficacy of the AMC as an institution, the theories of sentencing are that you are sentenced to jail for a number of reasons. One is to punish you. The other is to deter others from the commission of crime and the other is that it is intended that the term of imprisonment rehabilitates you.

In relation to deterrence as a principle of sentencing, I will hand to the committee at the end of the proceedings a recent paper just to illustrate the point that there is no evidence to suggest that deterrence is an effective principle of sentencing. All the evidence is to the contrary.

In relation to rehabilitation, the evidence, so far as it relates to recidivism, is not necessarily a pretty picture either. That says something about post-release programs, but it also may say something about the capacity of the prison to deliver programs within it that will make a difference.

The committee may be aware, for example, of the Solaris program, which is a drug therapeutic community within the prison. The bar has no problems with that program. It is a worthwhile attempt at addressing what is obviously a central issue to offending, and that is, drug taking. But unless it is effectively integrated to pre-incarceration services and post-incarceration services, it is not going to have its best effect. Unofficially, we have been informed that it has been assessed and the effectiveness of the Solaris program has batted at an almost 100 per cent failure rate because, we say, it has not been effectively integrated into post-release programs.

If you want a story about what our clients tell us, those who have been in the system—perhaps they are not the ones to talk to, in a way; ACT prisoners going to New South Wales and those who have now been sentenced to the ACT—they say that the programs in New South Wales jails are better. We do not advocate for going back to the old system by any means, but the reality is that the economies of scale that are

available to the New South Wales authorities in the sorts of programs they can offer to New South Wales prisoners are not available locally. Therefore, the types of programs and the intensiveness of the programs that are offered here may not match what is available in New South Wales. But that is just anecdotal feedback from some of the people I talk to who have experienced both sides of the equation.

MS BERRY: You were talking before about putting more into not just the programs within the jail but also once people are released, whether or not jail should be the first option for people and these intensive correction orders might be the better way to go—you put the resources into that and it would be cheaper than having people in jail in the long run. You are also saying that for crime the trajectory is going down. How does it fit with needing more space in the AMC?

MRS JONES: And more programs.

Mr Gill: How does it fit with needing more space?

MS BERRY: You were saying that crime is going down but we need more.

Mr Gill: It does not fit. The only need for expansion of the AMC is that it has become full, and the principal question is: how has that happened? We do not understand how it has happened. Looking at the AMC, one would say it is big enough for the territory. It ought to have had excess capacity on older sentencing patterns. We do not understand why, when there is a decrease in crime, it has been filled so dramatically. I think there are two answers to the question: yes, it does need to be made bigger because it is now too small, but we do not understand how it can have that need.

MS BERRY: How it became full, given that crime is reducing.

Mr Gill: It is a contradictory answer, but there are two answers to that question.

Mr Archer: I would add just quickly that the recidivism rate, when you match it up with those other stats, says that those who are going into jail are being taught to commit more offences. That is what it tells you.

MS BERRY: Just before Mrs Jones gets to her question, I just wanted to raise that in your submission you talk about having restorative justice extended to domestic violence. Can you talk a bit more about that? Mr White talked about it in his submission, that when domestic violence occurs it is usually around an imbalance in power.

Mr Archer: It is a suggestion that has got to be sensitively approached. Restorative justice programs are not always indicated and in respect of domestic violence there can be that imbalance of power that needs to be respected. We are saying that it should be an option that is open. It is not mandated. It is not compulsory. It is respectful of the very issue that you talked about, but, nevertheless, we say it is another adjunct to a sentencing outcome.

Mr Stretton: You might not be able to change the imbalance of a relationship, but you may be able to change the understanding of those in the relationship as to what

has happened and why it has happened and, therefore, have a positive effect upon it.

THE CHAIR: Mrs Jones.

MRS JONES: My question is about stats on deterrence. Are the stats that you have used AFP stats of arrests? Is that the basis upon which you state that there is less crime? How do you think deterrence can be achieved in a prison system?

Mr Archer: The stats we relied upon for our submission, I think at the time the submission was made, were for the December quarter that was available in the ACT criminal justice statistical profiles. That document there is the document that we have relied upon for those stats. But consistently over a long period—and these stats are produced on a five-year trend basis—the stats indicate that crime levels are generally trending down.

MRS JONES: I am assuming that is then based on ACT Policing.

Mr Archer: They must be.

Mr Gill: Yes, it is produced out of ACT Policing tables as part of that report. That is where the trend comes from. But the second part of your question was about deterrence. There are two sorts of deterrence that are spoken of in sentencing. One is called specific deterrence. That is where you punish a person so that they will not want to do it again. But also there is something called general deterrence, which is that you punish somebody so that other people will not do that particular thing. I support what Mr Archer has said about the inefficacy of general deterrence. What appears to be the case is that—

MRS JONES: Yes, but my question is about specific deterrence, because the claim that has been made is that it does not work.

Mr Gill: I think the primary claim is as to general deterrence not working. So if I can address both of them, on the question of general deterrence, what appears to have a much greater practical effect is a person's consideration of the risk of being detected as an offender. So the fact of catching people and the likelihood of being caught has a much greater deterrent effect than somebody else having been sent to prison for the case. So that is general deterrence.

On the question of specific deterrence, again we say that the fact of any sort of sentence operates to deter people from commission of further offences. Going through the whole court process does that. How effective it is to the individual depends a lot upon the individual and, again, that is why we say that the rehabilitation needs to be tailored to meet the individual's needs. If a person can be brought to the point where they do not wish to commit further offences—because they do not want to be caught, they do not want to come to court, they do not want to have to deal with the criminal justice system and the process they have gone through is such that there is a better way—then we say that that is effective in dealing with the ideas that we bring specific deterrence to the table on.

MRS JONES: That does not really answer my question, because my question was: is

specific deterrence able, in your view, to be delivered in a prison environment?

Mr Gill: The fact of being in prison is supposed to be a specific deterrent. So the way the deterrent is supposed to operate—I am trying to answer your question and I hope I am answering it—is: you have been punished, you will not want to do this again, you have gone to jail, you will not want to do it again. So that is supposed to be how specific deterrence works.

MRS JONES: Simply incarceration?

Mr Gill: Yes, so—

MRS JONES: But your argument is that we have a high level of recidivism, 40 per cent, and I am assuming that the joining piece of information is that the AMC does not work in specific deterrence?

Mr Gill: If specific deterrence is the thing that is going to stop recidivism, I think your question is a really good one. It does not appear to be working. If you have got such a high recidivism rate, that means that two things do not appear to be working. One of those is specific deterrence. So I think your observation is a good one.

MRS JONES: And does the Bar Association have any suggestions as to how specific deterrence can be achieved through a prison system or how it is elsewhere?

Mr Gill: No. What we would say is that the likelihood of being apprehended will work as a more effective deterrent than being in jail. And secondly, if there are two prongs to dealing with recidivism and one is specific deterrence and that seems to be ineffective, then an effective means of removing recidivism has to be met. And we say that that is through rehabilitation.

MRS JONES: And just one point of clarification on that: if the studies show that your likelihood of being caught, which is a deterrent, is not backed up by reasonable sentences, then does that deterrent decrease, and do we even know?

Mr Gill: We will take you to the studies. So I will defer to Mr Archer, and he can refer to the study which deals with that particular matter.

Mr Archer: There is an element—I think that is what you are getting at—when you are sent to jail, you are out of the system. So if you are a person who has got a raging heroin habit and you have been breaking into people's houses to subsidise your habit, your being taken out of the system by being locked up will have an effect on crime rates. So specific deterrence is said to be a part of that. It will teach that person to not offend in the future.

The studies seem to suggest that that does not quite work that way. It does not work that way. And what works more effectively is rehabilitation outside the custodial sentence, but the person being convinced that there is an effective police force who will catch them is an important thing in deterring people from crime, not necessarily the—

MRS JONES: But a police force that is presumably backed up by sentences?

Mr Archer: I do not know. To take it—

MRS JONES: Are you suggesting that if a police force was out on the street and there were no sentences and no prison, that would be effective?

Mr Archer: That is not the only purpose of sentencing. People who commit crimes are punished.

MRS JONES: That is not the question I am asking.

Mr Archer: I know, but the reality is that those who commit crime are punished. And the statistics seem to indicate that the punishment does not necessarily deter. That is the issue. They are punished for what they have done, but the recidivism rates here and elsewhere suggest that significantly they do not learn from the experience in that one-to-one sense that deterrence is said to operate in.

MRS JONES: Differently in the ACT to other places?

Mr Archer: No, much the same. Last year's JACS report said that our rate was a bit high. It was 46 and in other jurisdictions it was in the 30s, I think. And an explanation was given in the JACS report about why that might be so. And that was that because we release people at a greater rate on supervised orders, therefore they are being watched more closely. That was the explanation after analysis that was offered up by the department of justice in their annual report last year to explain that.

But in relation to the issue generally, there have been a number of studies—and I will hand to the committee a copy of the Victorian Sentencing Advisory Council report from April 2011 called *Does imprisonment deter? A review of the evidence*. I will leave that to the committee to read, but it is wide ranging, and it finds across jurisdictions and beyond national borders that there is not much evidence to suggest that specific deterrence, even in America where we sentence prisoners to biblical terms, does work.

THE CHAIR: Mr Stretton, concern was also expressed in your submission about the inability of ACT courts to take forfeiture of property into account while deliberating upon sentence. Would you elaborate on those concerns and also give the committee an idea about the scope of this problem?

Mr Stretton: Mr Archer, again, will deal with that.

Mr Archer: At the moment there are provisions that allow confiscation of property in the context of prosecution action or even independent of prosecution action. It may be, for example, that somebody has stolen from an employer over a period. The consequence of their offending behaviour might be that the house that they own is taken from them, notwithstanding that it might belong jointly to their husband or wife and their children. But that at the moment cannot be taken into account as a matter that would be factored into the overall disposition of the criminal offence. So the fact that they lose their house, notwithstanding they may not have in a one-to-one sense

derived the benefit to the house, cannot be taken into account. We say that that seems to be a counterintuitive outcome, that the sentencing as a whole, the consequence of offending behaviour, should be taken into account in determining what the appropriate outcome is.

THE CHAIR: Mr Gentleman.

MR GENTLEMAN: I do not have any more questions.

THE CHAIR: Are there any other questions from the committee?

MS BERRY: I am right. I will put mine in writing, if that is okay.

THE CHAIR: Mrs Jones.

MRS JONES: You mentioned in your opening remarks a proportion of children accessing drugs and that this is somehow either unusually high in the ACT or a larger part of the reason why people are offending or reoffending. What statistical basis have you made that statement on?

Mr Gill: I did not put that it is unusually high in the territory. I said that the representation made to the committee is that it is anecdotally based. I do not think that there is a statistic kept about it. It is an almost universal pattern in serious offending to see that juvenile acquisition of drugs. So that is the basis on which it is put. So that ought to be reflected in sentencing remarks that are seen. But it seems to be an almost universal feature of serious offending, not completely universal. There are clearly exceptions to that, but it is all too frequent.

THE CHAIR: That about takes up the time we had allocated to this session. I would like to thank you for appearing before the committee today. The committee secretary will follow up with you regarding transcripts and, as I think indicated, there will be a number of supplementary questions coming from the committee to you. Thank you once again.

Mr Stretton: Thank you very much.

HOCKRIDGE, MR MARTIN, President, Criminal Law Committee, ACT Law Society
KUKULIES-SMITH, MR MICHAEL, Chair, Criminal Law Committee, ACT Law Society

THE CHAIR: The committee will now invite the Law Society to join us. Welcome to the second hearing of the Standing Committee on Justice and Community Safety's inquiry into sentencing. Today the committee has heard from the Director of Public Prosecutions and the ACT Bar Association and now we welcome the ACT Law Society. Mr Hockridge and Mr Kukulies-Smith, welcome. Just before we start, are you familiar with the privilege statement that is on the table before you?

Mr Hockridge: Yes, I am.

Mr Kukulies-Smith: Yes, I am.

THE CHAIR: Thank you very much. Mr Hockridge, would you like to make an opening statement?

Mr Hockridge: Thank you. In the view of the Law Society, the main issue in regards to sentencing in the ACT is the need to maintain and perhaps even, if possible, increase the number of options that are available to the courts when it comes to sentencing. The society has expressed its disappointment that the periodic detention option is being phased out. We understand that it is predominantly due to cost reasons, although, of course, the ACT was the last jurisdiction where PD remained.

We are concerned about the prison rates in the ACT, particularly the Indigenous prison rates. As a subset of that, we are particularly concerned about the high number of people on remand and the amount of time that people in Canberra are spending on remand before being sentenced.

Following on from that, the issue is resourcing of rehabilitation or resourcing of courses aimed at trying to reduce the recidivism rate in the ACT once people are released and, indeed, for people who are not sentenced to imprisonment, to make sure that they have the support put in place so that they do not go on offending in a way that inevitably they are going to end up in prison, with all of the antisocial issues that we are well aware of.

To that end, the society would very much support the introduction of intensive supervision orders in the ACT. We understand from the minister for corrective services, as well as the Attorney-General, that that is what is seriously being contemplated to replace periodic detention.

I should make it clear that the position of the Law Society is that we are against mandatory minimum sentencing in the ACT. The reasons generally are as have been enunciated by the attorney on several occasions, and I am sure you have also heard from the Bar Association and others. It is the importance of maintaining discretion in sentencing, the importance of maintaining the independence of the judiciary from the legislative arm of government. It is also important, although I would place it further

down the list of importance, in regards to encouraging pleas of guilty in appropriate cases. If somebody is faced with an inevitable sentence then they are more likely to defend.

We would certainly support the expansion of restorative justice initiatives in the ACT and would particularly welcome that being extended to adults.

We have indicated in our written submission our concern in regards to the process for appealing sentencing decisions in the ACT. I am sure the inquiry has had the opportunity to see what we have suggested. We would recommend that we go to a de novo-type appeal arrangement based probably on the system that operates in New South Wales.

We are also concerned about mental health issues. Again, that comes back to resourcing of appropriate and targeted programs. People with mental health issues require, in our submission, targeted programs because of the particular problems that they face. In that regard, we certainly welcome that a mental health facility is going to be built in the territory. The sooner that can be up and running, the better, in our view.

With regard to a number of other submissions that have been made, I note that the DPP has made some recommendations with regard to suspended sentences. On the basis that the society really is of the view that the more options available, the better, we do not necessarily agree that suspended sentences should disappear. But I do take the point that the director makes from time to time that breaches do not automatically result in the activation of the sentence. In our view, there are a whole range of reasons for that, and it is really important that the discretion of the sentencing court be retained for decisions about whether or not it should be activated.

We also agree—again, it comes back to rehabilitation efforts and the development of courses—that a better transitional release from prison arrangement in the territory would be welcomed. At the end of the day, we want to set people up to succeed rather than set people up to fail. In many cases where there has been a conditional release of a person, the good behaviour orders include a whole range of conditions that are difficult for people from lower socioeconomic backgrounds to fully comply with.

In regards to an advisory board, the society has not especially recommended that, but we certainly would not oppose it. It may well be a good way to keep courts and the government up to date with trends in other jurisdictions and to give advice generally. Those are the opening statements that I wanted to make.

THE CHAIR: Thank you very much. We will address our questions to you and perhaps you can indicate which of you may want to answer them.

Mr Hockridge: Yes.

THE CHAIR: Mr Hockridge, you have mentioned a number of aspects of your submission and your concerns. I want to touch upon one in particular in your submission. You expressed concern about what is called a recent upper trajectory in the rate of imprisonment in the ACT, as did the submission by the Bar Association. Could you tell the committee about your concerns and the scale of this as a problem?

Mr Hockridge: I will answer that to start with and then Mr Kukulies-Smith might have something to add. The situation is that the jail has filled up to the point where it is overcrowding and the government has now committed to expanding the jail. Our concern is that, unless something is done in relation to why people are being sent to jail and we try to prevent people being sent to jail, the expanded jail will simply fill up in the same fashion.

It is certainly the case, in my estimation, looking at the Australian Bureau of Statistics' figures, that there has been a significant increase in the rate of imprisonment in the ACT. When you look at the JACS figures, it is perhaps not surprising, in a jurisdiction of our size, that the figures go up and down quite a lot. You can then find yourself with what appears to be a lower trajectory but, at the end of the day, as I indicated to start with, the jail is full. So clearly, people are being sent to jail and people are being kept in jail. That is of concern to me. Michael, do you want to add to that?

Mr Kukulies-Smith: I think one of the issues that sometimes mask that statistic on the increase in incarceration is that often people are serving their time on remand—that is, they have not yet been sentenced, but their bail has been refused and they are in custody pending the resolution of their matter. The society has particular concerns about that because in a custodial setting in the ACT very few of the rehabilitative courses that are offered within the AMC are able to be undertaken by those who are on remand. They are simply deemed ineligible for the courses because they are not yet sentenced prisoners.

If they serve too great a portion of the overall sentence on remand, the situation then becomes somewhat ridiculous in that they are ultimately sentenced but they might not have long because the sentence is backdated to take account of the period of remand. They do not have long left in custody after they are actually sentenced and they then become ineligible for the courses because their prison sentence is not going to be long enough to enable them to complete the course, even though, had they been eligible from the start, they would have had more than enough time to complete the course—and, in fact, probably complete subsequent courses as well. Ultimately, the aim ought to be releasing people back into the community with the best chance possible of not seeing them in the criminal justice system again. That must be best served by allowing them to complete as many courses as possible. That is a particular concern that the society have that is related to that.

As Martin has indicated, our statistics go up and down, when one looks at the report on government services over time. It looks at the statistics in terms of incarceration. They fluctuate because we are a relatively small jurisdiction. In looking at that fluctuation, it is important to look also at the number of people who are there not as sentenced prisoners but as remandees. Clearly, that the number must be rising is evidenced by the fact that the jail is now effectively overcrowded in terms of what it was designed to do. That is leading to a whole range of issues in terms of increased lockdowns and the merging of sentenced and non-sentenced prisoners, all of which are, in a general sense, non-desirable things.

THE CHAIR: I have a supplementary on that. It is slightly to left field of the

question, but I am interested in your answer on this. Most Australian jurisdictions, including New South Wales and Victoria, embody in legislation a presumption that where a suspended sentence is breached then the underlying sentence will be activated. The ACT is one of the few Australian jurisdictions where there is no presumption of activation of the sentence on breach. When we take that into consideration, obviously it would have a further impact if there was any change to that.

Mr Kukulies-Smith: It would have an impact. If any legislative reform were looked at in that area, it would have to be a complete reform of suspended sentences. It could not focus simply on the activation question because there is one key difference between a suspended sentence of imprisonment in New South Wales and one in the ACT—that is, in New South Wales, if a prisoner is sentenced to three months imprisonment and that is wholly suspended, that sentence only hangs over that prisoner's head for the three months of the sentence. The good behaviour order upon which he or she is released cannot be longer than the term of imprisonment imposed by the magistrate or judge.

In the ACT, that is not the case. Routinely we see relatively short, three-month or six-month, periods of imprisonment wholly suspended, but the prisoner is placed on a good behaviour order for a period of two or even three years. That would definitely, in my submission to the committee, affect whether or not there ought to be activation. Obviously a situation where someone has gone two months and two weeks and then commits a further offence is very different to someone who has gone 23 months until they commit a further offence.

For that reason it would be necessary in the ACT, if there was to be any revisiting of this, to consider that very different fact; otherwise the situation in the ACT will be far more oppressive than in any other jurisdiction in Australia where they have, similar to New South Wales, restrictions related to the length of imprisonment and, therefore, the seriousness of the offence that actually saw the sentence imposed.

THE CHAIR: Thank you. I think Mr Gentleman has a supplementary as well.

MR GENTLEMAN: Yes. I just wanted to come back to your comments on courses for remandees—rehabilitation opportunities for remandees—and your discussion about why they do not occur. What would be the concerns for AMC, for example, in providing courses for remandees? Is it that they would be mixed with sentenced—

Mr Kukulies-Smith: Yes, historically that was the concern—the mixing. There is a goal that they not be mixed. It is seen, indeed, as a human right that remandees not be mixed with sentenced prisoners. But the reality now, the way the prison is run, is that happens every day of the week in any event. It seems now quite out of step with the reality of the situation within the prison. On the one hand we are saying we cannot offer courses to these people because that will result in mixing and yet the rest of the time they may be sharing a cell or at least mixing in a yard where there are both sentenced and remandees. Historically you are right; that is my understanding of the reason that has been the case.

MR DOSZPOT: Any other supplementaries?

Mr Hockridge: If I could just add to that: of course, the issues around human rights could be dealt with by making it voluntary on the part of the remandees to take part in those extended programs.

MR DOSZPOT: Mr Gentleman, your substantive question.

MR GENTLEMAN: We have had a couple of different submissions in regard to the numbers per head of population at AMC compared to other jurisdictions. The DPP said that we were a low number—98 per 100,000 end up as prisoners in the territory. I had a quick look at an international site which showed rates in countries. It showed that Australia has a rate of 130 prisoners per head of population in general terms.

MRS JONES: Per 100,000.

MR GENTLEMAN: Per 100,000. The US is somewhere near 700 per 100,000. Do you have any comment on those levels of people imprisoned in the ACT compared to per head of population?

Mr Hockridge: I did have a look at the Australian Bureau of Statistics' June 2013 figures. In the graphs that I was particularly looking at they did not have the individual numbers, as far as I could tell. The graphs have certainly indicated that if you leave out the Northern Territory, which had some astronomical amount of sentencing, the differences between the other states and territories were not really very great. If you just looked across the line at where the top of the graph was for each, there was not a significant difference.

I think in the past the ACT has had a reputation for having a very low imprisonment rate compared to the rest of the population. I think that has changed, and changed particularly since the opening of the AMC. There are a lot of good reasons why people were not sent to prison in New South Wales in previous times. Certainly, that was the best form of figures that I could find in relation to how we compared interstate. I was just looking at that graph. I would perhaps suggest that that is a good starting point. As I indicated, my assessment of that, without seeing the actual figures, was that it was fairly even across the board, leaving out one that was particularly high.

MRS JONES: I have a supplementary on that. Is it the impression that you have that sentencing has increased because we now have our own facility, potentially?

Mr Hockridge: I think that is right. Michael is at the coalface more than I. Michael, do you have a comment?

Mr Kukulies-Smith: That is probably right. Certainly, in terms of there being more shorter sentences of imprisonment, so more in the range of three to maybe six months, anecdotally, I would say I see more of that in court now than, say, five to 10 years ago.

MS BERRY: In your submission you talk about circle sentencing and restorative justice. We have also had other submissions around intensive correction orders, in trying to reduce the number of people going to prison in the first place and also in their rehabilitation once they leave. Do you have any other ideas, or do you want to talk a bit more about those, about other options for sentencing people rather than just

sending them away?

Mr Hockridge: I certainly think it is critical that the effort is put in with respect to individual tailored orders for people upon their release from prison—and, indeed, whilst they are still in prison as much as possible—in order to address the underlying problems. If you just release somebody into the community, if you make it perhaps a condition that they report to their parole officer once a month and the parole officer is overworked and does not have the opportunity to go into any depth with that particular person, the problems that have got the person into the trouble that resulted in their going to jail in the first place are still there, unaddressed. And given another couple of months or years, it is likely to bubble up again, with the result that further offending is going to be committed.

Of course, once a person has been to jail on the first occasion, the sentencing principles say that they are going to be less and less entitled to any leniency the next time they come around. That is how you then create that vicious cycle. If there is no intervention aimed at helping the person to get over the problems that caused them to offend in the first place then they are just going to keep offending.

In my submission, and in the submission of the society, it really is very important to have those tailored supervision orders as much as we possibly can. It is accepted that that involves a lot of resourcing. But in the long term, if you put the resources in at that stage, you might save quite a lot in terms of the recidivism rate and the cost of then locking people up later on.

Circle sentencing is probably in a slightly different category because it is very much culturally based. I am a great supporter of circle sentencing. I noticed—I do not recall which submission it was—a suggestion that there be some legislative amendment to recognise the cultural differences of the Galambany circle court compared to other options. That is probably worth having a look at and supporting.

Restorative justice certainly does have a lot going for it in terms of making the accused person, the offender, face up to what they have done that is wrong, especially if they have the victim and the victim's family grilling them at the time. But it does need to be in conjunction with some real effort being made to address the problems when they have their light globe moment and they realise what it is that they are doing.

Restorative justice also has a benefit, of course. There are often complaints made, whether justifiably or not, that victims do not have sufficient input into the sentencing process. Of course, they have a much higher ability to have involvement in a restorative justice process. So we are very much in favour of restorative justice options as well.

MR GENTLEMAN: On the restorative justice position that you have discussed, and in your submission as well, we heard earlier today that there appears to be, especially in domestic violence cases and some sexual offences, a power issue whereby the victim feels powerless in front of the perpetrator; therefore the RJ program does not work very well because they do not feel that they have enough strength to go through the process with that perpetrator. Do you have any comments on that?

Mr Hockridge: If the restorative justice program is set up properly, there will be a proper assessment of what cases go through the RJ process and what cases do not. You would anticipate, with respect to the people who are setting up the meetings and whatever else is involved in that particular RJ, that a proper assessment would be made about that power imbalance and there would be questions asked about whether the victim in fact did want to participate or not. I am a great believer in asking people what they think rather than imposing on them what other people think generally about it.

I note that the Victims of Crime Commissioner has made a submission. I am not sure what he has said about extending restorative justice to domestic violence cases. Certainly, in my view, it is something that should not be precluded. Steps should be taken to protect the victims in those cases, just to make sure that there is a rigorous process in place that ensures that you do not get a situation where somebody is going to be ill at ease or taken advantage of during the process. I certainly think that restorative justice should be extended beyond where it is at the moment. It should be available to adults.

MRS JONES: My question has a couple of parts. The first part is about the Law Society's view on community expectations. One of the reasons we are having this sentencing inquiry now is because of a perceived imbalance in some ways between community expectations on sentencing and the reality. That obviously tends to be based on a few high-profile cases; nonetheless that is the perception of members of some parts of our democracy. What does the Law Society say about it if there are low sentences occurring and what responsibility does the law fraternity have to take for that perception?

Mr Kukulies-Smith: I would question the extent to which that is in fact the perception. The only comprehensive study in Australia on that issue is Kate Warner's study in Tasmania, where jurors were extensively polled or interviewed about their expectations about cases, both in the abstract of hearing about a fact scenario and what they thought a sentence should be, and then actually in sitting through a trial and at the end of that trial, they having been the jurors who determined the person's guilt, being asked about what they thought the sentence ought to be. Nearly universally, in that study Kate Warner found that the jurors who heard the case and actually understood all the facts in the case would have imposed, had they had the power to impose a sentence, a lighter sentence than the judge sitting on the matter did impose.

That raises a very real question. When you talk about the community expectations of sentence, they are, of course, informed by the community's understanding of individual cases. The individual representation of cases that one reads in the *Canberra Times* is not necessarily the case that is going on before the court. They can be two radically different things, even though they are talking about the same event. A community expectation based on what is sometimes a caricature of the actual case that is going on is not a valid basis to conclude or suggest that sentencing is inadequate in some way. Certainly, there needs to be something more rigorous than that before one can jump to that conclusion.

MRS JONES: Mr Kukulies-Smith, if I may, I am not suggesting that I have jumped to any particular conclusion, but what I am telling you about is community concerns

that we hear every day on the doorstops, such as at the shopping centres, when we are out in public, and, indeed, at a reasonably sized gathering of mothers here recently about a particular paedophile case that concerned the Belconnen library. So they are not necessarily completely perfectly informed, but they are also not completely ignorant of the facts of situations of concern regarding certain people, such as vulnerable groups in the community.

I have another question—because obviously there is no particular appetite for a direct answer about community concern. With respect to the aspects of suspended sentences that you referred to in your opening remarks that are difficult for people in low socioeconomic situations to adhere to, what is it that they are not able to adhere to in the current system?

Mr Hockridge: There is a range of things. Obviously, the most important is the reporting. The circumstances are that often you will have people who live quite a long way away from where they are expected to report, so there is always difficulty around getting transport to, in fact, meet their obligations of reporting to their parole officer. Whether it is the case that they simply do not have a motor vehicle or whether it is the case that they cannot afford the bus fare at the time, it is those sorts of minor issues that I was particularly talking about.

Mr Kukulies-Smith: There is also, related to that, the issue that if you are in a lower socioeconomic group and you are confronted with a choice of meeting a reporting obligation, meeting with a parole officer or someone from Corrective Services, versus a day's employment, that decision is much harder than it is for someone who is employed in stable employment and can simply get a couple of hours off from their job and it does not affect their income; they can make up the time later. So there are impacts like that. Coming from a position of stable employment it would not be an issue, whereas coming from a position of very ad hoc, perhaps completely infrequent employment, that decision is a very confronting and very real dilemma. For others who have stable employment the dilemma would not arise because they would be able to either make up the hours with their employer or simply take leave from that stable employment.

MRS JONES: Are you just talking about nine to five reporting being the problem?

Mr Kukulies-Smith: I am saying it is a problem.

Mr Hockridge: It is not only that. It is the fact that they do not have very much money. Often they have mental health issues or other health issues that make it difficult for them to comply with particular orders. I am not wanting to raise the issue as being too big an issue, because I know that in respect of breach orders often it is because further offences have been committed, for example. But it is often the case that people find themselves on a downward spiral, mainly because they simply do not have the wherewithal within themselves to be able to comply with fairly simple directions as far as the rest of us are concerned. For somebody who has a mental health issue or a health issue or has not got any money or has no self-esteem, it is difficult to comply with even the very small things that they are asked to do.

Mr Kukulies-Smith: There is also an issue at the sentencing stage as to how much

information is before a court as to that ability to comply. Although there is a lot of focus in pre-sentence reports on ability to complete, for example, community service and a specific assessment is made as to that fact, there is less focus, and therefore less information before a judge or magistrate, on those issues. It may be the case that conditions are imposed which, with the benefit of hindsight, are unrealistic. Leaving some discretion in the court allows the court to acknowledge that fact, whereas if there is not that discretion, there cannot be such an acknowledgement. If there were to be no discretion, it would put more pressure on Corrective Services to make a more detailed assessment of those issues up-front to avoid that.

MRS JONES: I will return to the first part of my question, because I have had an opportunity to think about it. Are you effectively saying that because you do not believe there has been enough rigorous study of public perception of sentencing there is most likely not a problem with sentencing in the ACT—that it might just be a perception of some newspapers?

Mr Hockridge: Often, of course, as you indicated at the start of the initial question, you are talking about one or two cases that cause the public disquiet. It is really difficult to mount an argument, in my reading of the situation, to change the whole law based on those one or two difficult cases. Often the situation is that perhaps we as a profession could do better at getting the message out to the public about there being a whole range of other reasons that the judge needed to take into account that perhaps have not been recorded in the *Canberra Times* or whatever.

It is often very easy for a journalist or somebody else to say, "Well, judges are out of touch." But if you look particularly in Canberra at the background of the people who are on our bench, you would certainly quickly realise that it is not the case that they have come from ivory towers and been parachuted in. It is perhaps the case that there needs to be more education in the community generally about what sentencing involves across the board and not just in particular issues.

In particular, with the matter you mentioned in regard to the child sex offence at the library, the reaction happened before the DPP had even considered their position in regard to an appeal. The situation is that in our system there is the opportunity to appeal a bad decision, or what is perceived to be a bad decision. So there is an opportunity to correct anything that has miscarried.

It is a difficult question. It is certainly not the case that, as President of the Law Society, I am trying to deflect comment on that. But it is certainly valid for Michael to be pointing out that when studies are actually made, when people are made fully aware of all the circumstances that have been involved in a particular case, they may well change their view. Often it is the case that they change their view to such an extent that they would impose a more lenient sentence than the sentence that was imposed by the judge.

Mr Kukulies-Smith: The point that I would make is that even if it is seen as a bad decision, before we say there is a need for change to the whole system, we have to be satisfied that there is more than one bad decision before we rewrite all the legislation around an issue. The question is: is there systemic failure rather than one bad decision? The reality is that, throughout the entire law—all aspects, whether it be civil

law or criminal law—over time and through history there have been individual cases which people would regard as miscarriages of justice. Not every one of those justifies a wholesale change to the law to which it relates. Some do; but not every one. It does not automatically follow. It may be the case that there are one or two dud decisions. There are remedies, as Martin has said, in the case where it is seen that a sentence is too lenient. The director does have a power to appeal and seek remedy from the Court of Appeal or the Supreme Court, depending on where the original sentence was.

MS BERRY: Just on the Kate Warner study, that is not complete, is it? Is that still going? I thought it was still going.

Mr Kukulies-Smith: I have read parts of it in journal articles or seen references to it.

MS BERRY: Maybe it has been completed. We might grab a copy of that, just for interest.

Mr Kukulies-Smith: I can follow that up.

MRS JONES: Please.

MS BERRY: And secondly on that, you were talking about how the society, lawyers and judges or that whole part of our community could do better in educating people around expectations with regards to sentencing and how that might help people understand it. I think I read in one of the submissions that, particularly for victims, their expectation of a head on a platter is not something that is actually going to be delivered, that often when it comes to justice it is not actually a delivery of justice, it is a delivery of law at the time. If people, at the start or while going through that process, knew that they were going to be quite hysterical, how could the law community somehow provide information on people's expectations—both sides, I guess, for the victim and for the perpetrator? Have you got any ideas, I suppose is my question.

Mr Hockridge: It is something that has troubled us for quite a long time.

MS BERRY: Yes, I bet.

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

MS BERRY: And I do not think there would ever be, but I just—

Mr Hockridge: The other point that I would want to make about that is that it is

really interesting, from where I sit sometimes, to see the different reactions of different victims in very similar cases. Some victims will say, "Throw away the key," and others will hug the defendant outside court and say, "It could happen to anybody. I hope things work out for you." So it is difficult.

MS BERRY: They are very individual and personal experiences, yes.

THE CHAIR: I think we have time for one more question. Your submission expresses a significant level of concern over sentence appeals in the ACT stating that they were in the Law Society's view highly technical in comparison with the process employed in the New South Wales District Court. Could you perhaps elaborate for the committee on this and comment on the practicalities of implementing a similar approach here in the ACT?

Mr Kukulies-Smith: In respect of sentence appeals in the ACT, we are first of all required to demonstrate to the Supreme Court an error of law. So we are talking here of appeals from the Magistrates Court to the Supreme Court. We have to demonstrate error of law before the Supreme Court is actually seized of jurisdiction and can intervene in the sentence. When one reads the sentencing appeal decisions of the Supreme Court, invariably 70, 80 per cent of the judgements are taken up with the issue of what the error actually was by the magistrate before they get to the issue, which is often only a few paragraphs at the end as to what the result ought to have been.

The New South Wales approach has been to put appeal as a right, that is, it is an entitlement of any accused sentenced in the Local Court to have that sentence reviewed by the District Court. Therefore, you do not need to show error. It is true that means there are more appeals that are probably taking place as a number, but for each individual appeal, 70 per cent, as I have indicated—and that is an estimation on my part—of the work that the Supreme Court is doing on those appeals does not exist because they simply have the right to intervene with the sentence and impose the sentence which they think appropriate.

If that is administered in the same way it is in New South Wales, that means that instead of a typical sentencing appeal being a half day of court hearing time and then resulting in a 30 or 40-paragraph judgement some time thereafter, which must be taking significant judicial resources to draft, most District Court sentencing appeals take between 15 and 30 minutes, certainly no more than 30 minutes. They would routinely, for example, in the Queanbeyan sittings of the District Court hear a sentencing appeal at 9 am, 9.30, start a trial at 10, run their trial till 4 and do another sentence appeal between 4 and 4.30 at the end of the day.

So the efficiency benefits of that over the current system are great and would, in the society's opinion, actually reduce the overall workload on a Supreme Court in relation to those appeals and get to the nuts and bolts of the question, which is whether the right sentence has been imposed by the magistrate or not, rather than actually jumping through a series of hoops to demonstrate legal error and debating all the law behind those conclusions before getting to that end question.

MRS JONES: Just as a supplementary to that, is there any push back from legal

practitioners or judicial officers in the Magistrates Court that all their decisions are then able to be appealed?

Mr Kukulies-Smith: I am not aware of the view of the magistrates. But to be frank, it would seem to me that there would not be a reason to oppose it in this. At the moment, in order for a judge to overturn a magistrate, they have to find the magistrate got it wrong as a matter of law and therefore inherently the judgements are critical. A system of de novo review does not actually require any specific finding that the magistrate did not apply certain law or did not apply certain rules. In many ways it is less critical of the previous judicial officer. So I would say that would be something they might consider.

THE CHAIR: I have a supplementary on Mrs Jones's supplementary. In your submission you suggest that legislation be enacted specifying that appeals are to be lodged within 28 days of the date of sentence. Would that conform to legislation in other states?

Mr Kukulies-Smith: Yes, in terms of the—

THE CHAIR: Timing.

Mr Kukulies-Smith: Yes. That is a fairly typical timing. I think you are referring to the issue created by Queen v Meyboom.

THE CHAIR: Yes.

Mr Kukulies-Smith: We would prefer it be in relation to sentence, and that is in relation to the conviction as well. If a person is found guilty and then later sentenced, as it stands following the decision in Meyboom, if you are acting for an accused, you really need to file the appeal even before you know what the sentence is. That is the appeal about conviction as well. That has a number of consequences for the justice system. One is that there are probably appeals by people who are appealing because they are concerned the worst case is going to eventuate. It may in fact be, once they know what the sentence is, that has not eventuated, but by then they have lodged an appeal which, inevitably, has prejudiced the sentence that was imposed because the lodging of that appeal will be referred to no doubt by the judicial officer as a demonstration of a lack of remorse. So the system is, in fact, enforcing that to be the case, whereas in other jurisdictions, they simply allow it to be.

Indeed, it was assumed prior to the decision in Meyboom that that was the case in the ACT. But post that decision, we believe there is need for legislative intervention to restore essentially what everyone assumed had been the position and what is the position in the other jurisdictions in Australia.

THE CHAIR: Thank you. We have reached the point where we have run out of time. We would like to thank you both, Mr Hockridge and Mr Kukulies-Smith, for coming in and for your points of view. It is very much appreciated.

Mr Hockridge: Thank you for the opportunity.

THE CHAIR: There will be some supplementary questions coming to you as well that we have not had a chance to cover. I now adjourn this hearing for a 15-minute break, and the hearing will resume at 3 pm.

Meeting suspended from 2.46 to 3.02 pm.

LALOR, MR MICHAEL, Solicitor, Aboriginal Legal Service
ROSE, MR PETER, Manager, Prisoner Throughcare, Aboriginal Legal Service
BRAZIL, MR RAYMOND, Lawyer, Aboriginal Legal Service

THE CHAIR: Welcome to the second public hearing for the Standing Committee on Justice and Community Safety's inquiry into sentencing. Today the committee has already heard from the Director of Public Prosecutions, the ACT Bar Association and the ACT Law Society and now we welcome the Aboriginal Legal Service. Welcome, Mr Lalor, Mr Brazil and Mr Rose. If you could just have a look at the information before you there. There should be a privilege statement. Are you all familiar with that?

Mr Lalor: Yes.

THE CHAIR: Okay. Mr Lalor, would you like to make an opening statement?

Mr Lalor: I will just make a brief opening statement. In 1991 the Royal Commission into Aboriginal Deaths in Custody published its findings after extensive hearings and investigation into "the underlying social, cultural and legal issues behind Aboriginal deaths in custody". Crucial amongst those findings of the commission was the need to reduce rates of Indigenous custody and imprisonment as a means of addressing the large numbers of Indigenous deaths in custody.

In the wake of the commission releasing its findings, a commitment was given by representatives of all Australian states and territories to address and ultimately reduce the overrepresentation of Indigenous people within the prison system. Recent studies into this overrepresentation establish that the problem must be viewed in a holistic fashion with consideration being given to a range of social and environmental factors concerning Indigenous defendants. The sentencing of Indigenous offenders does not and cannot occur in a vacuum.

While it is outside the ambit of this submission, the ALS recognises the real, practical and innovative steps taken by ACT law makers in developing social policy aimed at reversing recognised Indigenous disadvantage in areas such as housing, education and health, amongst others. The ALS also recognises that ACT lawmakers have frequently formulated these policies in consultation with representatives of the Indigenous community within the ACT.

Similarly, the ALS acknowledges that ACT sentencing law differs in important respects from corresponding law in other jurisdictions. For example, section 33(1)(m) of the Crimes (Sentencing) Act is an important legislative acknowledgement that the sentencing of all offenders must take account of the unique cultural background applicable to those offenders.

The legislative recognition of the Galambany Circle Sentencing Court is also an important and innovative reform to sentencing practice in the ACT, fostering not only appropriate sentencing outcomes for Indigenous defendants but also inclusion within the justice system for Indigenous people and also for victims of crime.

The ALS submits that if the steadily climbing rates of Indigenous over-incarceration are finally to be arrested and reversed then it is this demonstrated willingness to trial and adopt new practical and innovative approaches to sentencing that will ultimately achieve that aim. The proposals contained within the ALS submission before the inquiry seek to build not only upon already established and important legislative foundations controlling sentencing procedure in the ACT but also upon the legislative will behind those foundations.

THE CHAIR: Thank you. Mr Lalor, I will address questions to you and perhaps you can direct them to whoever is most appropriate to answer. The Aboriginal Legal Service submission commented on the higher rates of imprisonment, as you have as well, for Indigenous offenders both in Australia and the ACT in particular.

Mr Lalor: Yes.

THE CHAIR: The submission suggests that this may stem from a higher Indigenous population in the ACT and an increase in the capacity to detain offenders in the ACT. Do you have any further observations to make about the rates of detention for Indigenous people in the ACT and whether there would be other drivers or contextual information that would help the committee to understand the situation better?

Mr Lalor: Yes. Thank you for your questions. Recent studies suggest, as I alluded to in my opening statement, that over-incarceration really has to be seen in the context of larger social environmental factors. Recent studies and recent literature available suggest that there are four main indicators, or four main triggers, to Aboriginal offending. These are, broadly speaking: family factors, employment and education factors, drug and alcohol abuse and overrepresentation before the courts.

The ALS position is that, while the solution to this problem requires systemic change and broad-ranging social policies to address these four broad planks—and I pause to note that these four indicators really affect certain families within the Aboriginal community; it is not that we suggest that all Aboriginal people are affected by these indicators—what we are suggesting in our sentencing submission is that the courts, by sentencing, have a role to play in addressing one of these indicators, or planks, if you like. By suggesting the law reform proposals that we have we are asking the legislature to arm the courts, or give an indication of legislative intent to the courts, to enable them to deal as they can with that problem.

THE CHAIR: Thank you. In your opening statement you mentioned deaths in custody.

Mr Lalor: Yes.

THE CHAIR: Is this an issue in the ACT as well?

Mr Lalor: I will throw that to Mr Brazil.

Mr Brazil: Thank you for bringing up a critical issue for Aboriginal and Torres Strait Islander legal services and Aboriginal communities. In the aftermath of the commission into Aboriginal deaths in custody and, of course, deaths of non-

Aboriginal people in custody, it is a particularly tender and sensitive issue.

Apart from an increase a few years ago in deaths in custody, we are glad to say that the deaths in custody have actually decreased. What our concern is in this context is the near deaths in custody which do not get reported. In a nutshell, deaths in custody are still a vital issue and are always going to be a pressing issue, but there is not the same statistical pressure that there may have been 10 or 20 years ago. But it is the concern for Aboriginal people who are in custody and may be exposed to the near deaths, which, sadly, do not get reported, at least officially.

THE CHAIR: Mr Gentleman.

MR GENTLEMAN: Thank you, chair. Mr Lalor and others, in your submission you have talked about community-based sentencing orders and Corrective Services.

Mr Lalor: Yes.

MR GENTLEMAN: You have indicated there that perhaps subtle remedies rather than a process through criminal law could be a better answer than imprisonment. Would you just like to go through that for the committee and tell us some of these subtle remedies that you think might work?

Mr Lalor: Yes. As to the overrepresentation of Aboriginals both in custody and before the courts—to borrow the words in Stanley Fernando's case (1992) 76 ACR 58—Justice Wood, as he was then, set out a range of propositions for consideration by courts in sentencing Aboriginal offenders. Amongst other recommendations is that, at paragraph (c) of his Honour's judgement, and I quote:

> It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand with Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

It is these subtle remedies that essentially we are asking the legislature to arm the courts with, again, in order to tackle the real and practical problems being faced by a lot of members of the Aboriginal community. While measures such as the Galambany Circle Sentencing Court are essential, we say, in tackling the problem, the range of sentencing options available to a court are quite narrow within the terms of a good behaviour bond and other supervision available to offenders through Corrective Services.

What we say is that, in order to formulate more effective sentencing options, the Aboriginal community itself should be consulted in formulating those options. As a general proposition, we believe that more effective casework, which itself would be facilitated by involvement of the Aboriginal community, is essential to diversionary sentencing options from imprisonment. I will just consult with my colleagues, if you do not mind.

THE CHAIR: Yes.

Mr Lalor: I would just draw the committee's attention to our submission regarding the circle sentencing court. At the moment it is recognised legislatively in the Magistrates Court Act of the ACT, which gives it some measure of permanence, if you like. What we are seeking to do by our submission, again, is to give the court the power to reverse and arrest the over-incarceration which I referred to in my opening statement by effectively enshrining the principles behind the circle sentencing court in legislation.

The circle sentencing court is itself an exercise in restorative justice. What we believe is necessary is legislative recognition of those restorative justice principles, similarly, as is the case with restorative justice itself, to allow that court to not only continue in the work that it is doing but also develop its own unique jurisprudence, if you like.

Mr Rose is the manager of our prisoner throughcare unit, which has a big part to play with supervision of offenders, both on bonds and on parole, and he has also worked within Corrective Services. If you would care to make any comment, Peter. I do not know if you have anything to say about case management?

Mr Rose: In our unit within Aboriginal Legal Service, the prisoner throughcare unit, there is me and another staff here in Canberra. We cover AMC. We go into the jail and work with them six months pre-release and then continue to work with them six months post-release, just to re-engage them back in the community, back into life. We try and break the cycle of what keeps getting them back into trouble and into custody.

One of the main things we find difficulty with is trying to find housing for our clients. They are relying on family and friends. Then they end up going back into the same routine and getting mixed up with the same crowd; whereas we are trying to divert them away. That is probably the main part that really blocks a lot of people. It is just making the change and having a little bit of independence with their own house.

There are a lot of services out there, which is great. We are like a referral service. We refer them to the appropriate areas that they need to address, whether they are on a parole order or whatever. They have certain areas they have to fulfil. We provide cultural support as well for them. If, for example, a parole officer says, "You need to go and do drug and alcohol mainstream" and they are dead against it then we may be able to advocate on behalf of our client to try and find an alternative just so that they do not go off over this and give up. We try and work with them. That is the important part about us trying to build up a rapport six months pre-release so that they have trust in us and we can mentor them once they are released.

Mr Lalor: I think the point is well made, and we certainly support more intensive casework within the corrective services portfolio. That intensive casework really ties in with our submission that the sentencing act itself could be amended to take into account a range of social and environmental factors in the crafting of the sentences themselves.

MR GENTLEMAN: Regarding your recommendation to change the sentencing act, if we look at the purposes for sentencing under the sentencing act, it talks about the things you normally see as purposes—rehabilitation, making the offender accountable for their actions, denouncing conduct et cetera.

Mr Lalor: Yes.

MR GENTLEMAN: There is not much about reparation in this sentencing act. I understand that in circle sentencing there is a lot of work around reparation.

Mr Lalor: Yes. One of the guiding principles of circle sentencing is that there is a role for victims to play and that an offender confronts their victim. In a real sense, the lawyers play quite a minimal role in circle sentencing in that offenders are encouraged to speak for themselves. They speak to a panel of elders of their local Aboriginal community. In my experience, it is a very powerful process and there are outcomes that are perhaps unlikely, if you like, to come out of traditional court processes because of the unique character of the circle court.

With regard to our submission, we say that—as I alluded to in my opening statement—there are a number of triggers to offending for Aboriginal offenders. What we do not say is that an offender should get a break in sentencing because he or she is Aboriginal. We say that these triggers to offending, which are recognised by current literature on sentencing, are now present to such high degrees within some sections of the Aboriginal community as to be endemic. No doubt the solutions to these problems require political solutions, but the court also, we say, has a role to play in their solution.

We are not asking the parliament to incorporate a different sentencing regime for people of different ethnic backgrounds. We are simply asking the legislature to build on this notion of cultural background, which is already contained in the sentencing act, to give some further acknowledgement to that principle, if you like, but with particular regard to Aboriginal offenders.

In that regard, we think that the ACT really leads Australia. I note that the New South Wales Law Reform Commission have recommended adopting a similar provision as the ACT provision as it stands as a means of furthering their own sentencing regime. We are lucky enough that that is an entrenched principle in law here, but we think that the position could be advanced by further amendment.

Mr Brazil: Mr Lalor has raised a very important point regarding the sentencing legislation for the ACT. If we could talk further to that, but before we do, if I could just add a little bit of information to Mr Gentleman's point or question about reparation or the reparative aspects of restorative justice.

Restorative justice is a very powerful tool, a very powerful mechanism, for Aboriginal and non-Aboriginal people, both young people and adults. It is shown in a range of schemes across Australia supported by legislation. The reparative aspects of restorative justice are not necessarily financial; they can repair the harm done to the victim, to the victim's family—sorry, "victim" is probably the wrong word, but the person who experienced the crime or the offence. It can repair the community in a range of ways. It takes ownership of the offence to the community back to the community and allows the person who experienced the crime, or the people in their lives, a voice in what that reparative process can be.

What we would be saying is that the restorative justice legislation at the moment is in many ways a model of its kind, but there is a gap between the restorative justice act and the recognition of particular processes, such as the Galambany court. We are proposing that if that gap could be filled and recognition given under the restorative justice legislation to restorative justice processes, including the Galambany court, that would make the hard work of particularly busy courts much easier. When there are these gaps in the legislation, many of the courts, particularly the local court, which is a very busy court, feel constrained in what they are able to do and not do.

In terms of legislative change, we would be proposing that the restorative justice process could be even further advanced under ACT legislation to better equip ACT courts and, as I said, particularly the busy courts. I just wanted to add that about the reparative aspects.

MRS JONES: Can I clarify something. I do not necessarily fully grasp the current situation with Galambany. Is it that you want them to have an ability to make their own full suite of decisions that are separate from the rest of the courts; is that correct? So they could take a case from beginning to end, including sentencing options?

Mr Brazil: My understanding of the Magistrates Court and the section that deals with Galambany court is that it is fully legislated for, but there is a gap between that legislation and the restorative justice legislation. The restorative justice legislation does not outline what a restorative justice conference is and what it can take into account.

MRS JONES: It is a loose definition; is that what you are saying?

Mr Brazil: Yes. There needs to be a link between the restorative justice legislation of the ACT and any other legislation, such as for the Galambany court. I am sure there are other restorative processes for non-Aboriginal people. But there is that absence of a link, as it were, that recognises what a court can take into account and what it cannot.

In addition to that, as Mr Lalor said, there is also probably the need to have the objects and the purposes of the Galambany court set out in a list of objects and principles. What we have found in a range of legislative instruments is that when these objects and principles are actually laid out in legislative form, as Mr Lalor said, they show the intention of the legislature: "This is what we perceive to be the purpose, the reason, that these processes are carried out."

Mr Lalor: I could perhaps give a practical example for the member. As the matter stands, circle sentencing and the deliberations on appropriate penalty for people coming before the circle are really undertaken by community panel members themselves—guided, of course, by the circle sentencing magistrate. Those decisions, in the absence of any legislative guidance on principle and what matters can be taken into account, are capable of being appealed and overturned. We think there is a danger, in that, by comparing the process of the circle sentencing court to traditional sentencing courts, you thereby take away the unique aspect of circle sentencing. From the various pronouncements by the attorney and the steering committee, the circle is there as an intervention program, as an alternative to traditional sentencing means. What we seek, in enshrining a principle in legislation, is really nothing more than has

been said in public by, for instance, the attorney in commenting on the circle sentencing process.

MRS JONES: Are there often overturns of decisions made or is it just a rare occurrence?

Mr Lalor: There are currently appeals under review. There is a matter pending in the ACT Supreme Court.

MRS JONES: I do not know how many people go through circle sentencing. Are we talking about a small fraction of those who go through whose decisions get overturned or appealed or is it pretty commonplace?

Mr Lalor: No, it is a small amount. The danger is, as I say, that the standards of a normal sentencing court will be applied to the circle court. I do not mean—

MRS JONES: It is the meeting of two worlds, in a way.

Mr Lalor: Yes, that is well put.

MRS JONES: We were also discussing earlier in this committee the appeals that can go on between the magistrates and supreme courts. Our system has a lot of appeals mechanisms, and there are reasons as well for that.

Mr Lalor: Yes. This issue really came to prominence when we were preparing an appeal and we could not find any legislative guidance of a kind that Mr Gentleman referred to when mentioning the purposes of sentencing. We suggested something along the lines of purposes of sentencing for the Galambany circle court which would not be inconsistent with the current purposes of sentencing.

MS BERRY: I have a supplementary question for Mr Rose and the submission around the work that you do with throughcare. You have identified housing as one of the main issues that people face when they leave the AMC. Having talked to people about intensive correction orders as another sentencing option rather than sending people to the AMC, with the throughcare work that you are doing, do you know about the correction orders that I am talking about?

Mr Rose: Is that like New South Wales ICOs? Home detention?

MS BERRY: Yes, but it is more than that. It is more personalised supervision rather than just monthly parole visits to the police. It is really giving people a hand, for people who have never really lived in our community well from the moment they were born. So they are learning everything from that moment in time again.

Mr Rose: At the start, when they first get out, depending on where they are at in their life when they come out, and because we also deal with New South Wales, when some people come out there may be simple things like the self-serve counters in Woolies. They may have never seen them. So we design our casework on an individual basis. It is voluntary for people to participate and for us to assist them. So every individual case plan is individualised to suit our clients' needs. We do the

intensive stuff, so that if someone is straight out, we can pick them up and drive them to their first office appointment, get them to know the staff, where they are going and who they will be working with. Gradually, as time goes on, we make them more accountable, leave it up to them and give them a bit more of an incentive. When they first get out we can really assist them a lot, by picking them up and taking them to appointments.

MS BERRY: You talked about some of the challenges because Canberra is so small. But because Canberra is so small, there must be advantages in keeping family together as well, even though sometimes that family might be the cause of some of the problems.

Mr Rose: Yes.

MS BERRY: That is an important part of the work that you are doing, isn't it?

Mr Rose: That is right. It is all about keeping family and the whole community together. As you say, Canberra is small, so it is a lot easier for us to find support services out there and it is easier for people to get around this area and to get the support they need.

MS BERRY: Are there other services within the AMC, given that the demographic of Aboriginal clients in the AMC is quite high? Are there any other programs that they could be offering that could be better or more targeted to the needs of Aboriginal people, or should there be more of the same? Have you got any ideas?

Mr Rose: It is a big question.

MS BERRY: Yes, I know.

Mr Rose: A lot of services have access to and go into the AMC at the moment. So far, it seems to be working. There is enough support for people when they are in there. I do not think it is just Aboriginal people, but, for them, sometimes they do not have enough time to complete a course while they are in there. Quite a few people have said to me, "I can't do any courses in here because I'm not here for long enough," or they do not meet the criteria that they need to meet.

MRS JONES: Is that the help services or is that the educational ones?

Mr Rose: The educational stuff.

MRS JONES: Certificate courses, yes.

Mr Rose: Yes, cog skills and stuff like that. I cannot remember exactly what cog skills courses they run in there. They can take up to nine months to complete. So if someone is in there for six months or even nine months, they cannot really get started.

Mr Lalor: One of the advantages of working in a small jurisdiction like the ACT is that organisations such as ours are able to form partnerships with other community organisations. A big part of what Peter does is to form those partnerships. Another

advantage perhaps is that there is an opportunity to show real progress within the jurisdiction as well, because it is smaller than other jurisdictions.

MS BERRY: I was interested in all of your recommendations in your submission, but particularly recommendation 4, which follows on from recommendation 3. They all interlink. Recommendation 4 talks about a pre-sentencing report. Could you talk to us a bit about that?

Mr Lalor: Yes, of course. It goes really to the existing law to take into account the cultural background of an offender. We say that it must have reference to a particular offender's social and environmental background. It is common—and I want to be careful that I am not rubbishing Corrective Services, because I understand that they have funding constraints—to have a pre-sentence report where, in the opening sentence, there will be a heading "Subjective features" or something of that nature, and then it will say, "The offender is a 32-year-old Aboriginal man." And that is it. We say that the court, under 33(1)(m), must take into account cultural background matters as are known. We say that the court could be better informed by pre-sentence report writers and that that information could be best served by Aboriginal or Torres Strait Islander people having input into the pre-sentence report-writing process themselves.

We recommend that the legislation concerning the writing of pre-sentence reports also be amended to have pre-sentence reports take into account the offender's social history and background, including cultural background. Our proposed amendment, again, is with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders. That really mirrors our recommendation for the amendment of the sentencing act. It is focused on addressing those matters which have been recognised as triggers to offending and which are unfortunately so prevalent within some sections of the Aboriginal community.

While I am on the topic, I should say that, as the law stands in the ACT, as it has fallen from the ACT Supreme Court, where a defendant seeks to rely on matters in his or her background that tend to mitigate culpability for an offence, the connection between those matters must be proven by evidence. We say that a lot of times, unless the defendant is able to or unless there is funding for specialised reports, it is the role of pre-sentence reports to address that. That itself is a matter of cultural background which is relevant to the sentencing exercise. We are looking to the legislature to give particular guidance to the courts by making the proposed amendments which we have suggested in our submission. I hope that answers your question.

MS BERRY: Yes, thank you.

MR GENTLEMAN: I have a supplementary. If these changes were to come about in pre-sentencing reports, what outcomes do you think you might see?

Mr Lalor: Returning to that statement in Stanley Fernando's case, the New South Wales CCA case, we hope that it would empower the courts to use more subtle remedies than imprisonment. In the end what we are asking for is a greater focus on rehabilitation. Unfortunately, Aboriginal offenders fall to be sentenced on their record, which we say, in the absence of better information to the courts under pre-sentence

reports and in the absence of perhaps legislative guidance, fails to provide an accurate representation of an Aboriginal offender's cultural background.

Mr Brazil: In terms of the pre-sentence reports, what we are proposing in essence is that, with what appears to be, with respect, the spirit of the legislation—that the courts are informed of these matters, of an individual offender's background—there needs to be a little bit more detail and clarity about how the court is informed and, in the case of Aboriginal offenders, to make sure that they are sufficiently informed of that background, and in a way that is effective, that adequately and culturally appropriately takes into account that offender's background.

THE CHAIR: Ms Berry, have you asked your substantive question already?

MS BERRY: That was my substantive.

THE CHAIR: Mrs Jones.

MRS JONES: First of all, if I could just clarify on that previous comment, can you imagine a way which is completely culturally sensitive and yet gives enough information? From my conversations with some Aboriginal members of the community, there are always concerns about the things that can and cannot be talked about. I am not in a position to know that. I guess you are coming to us with the best possible scenario, that is, you want more information in there. But will that be formulaic information, or what kinds of things can you imagine being put in those reports which are effective enough to be real information for judicial officers and yet sensitive as well? I wonder how much information will really be able to be given.

Mr Lalor: We say it is essential to have an involvement of the Aboriginal and Torres Strait Islander community in the preparation of these reports. It matters particularly to the cultural background and the particular circumstances of Aboriginal offenders. Unfortunately, a lot of instances are simply beyond the knowledge or understanding of the mainstream judicial process. That is why we think it is essential to have the involvement of the Aboriginal community.

MRS JONES: Is that someone who then possibly sits within police who are preparing the reports?

Mr Lalor: Yes. That is a good question. We have been discussing it on our way here. In Canada they have the preparation of what are known as Gladue reports with just that purpose. We understand that the report writers are somehow auspiced by the local aboriginal legal services within Canada. Mr Brazil, Mr Rose and I were talking about what questions that raises for impartiality and conflicts within the Australian context.

MRS JONES: It is difficult but it does not mean it should not be attempted, that is for sure?

Mr Lalor: Yes.

MRS JONES: So my substantive question is about reporting of the health of Aboriginal people if you are talking about near deaths. Have you got any specific

suggestions, either Mr Lalor or Mr Brazil, of what statistics you would like to have collected, what kinds of presentations within the jail population you think should be reported on for Aboriginal people? If the concern is that near deaths are not being reported on, have you got any concrete suggestions of how that could be improved?

Mr Lalor: This is going from experience at the coalface. I would encourage there to be consideration given to more investigations as to mental health and, in particular, if there is one concern that keeps coming back to us it is that—and this holds true for people supervised by Corrective Services outside the AMC environment—where relationships are formed, very often those relationships, where workers leave or are reassigned to different matters, will break down and then it is a matter of re-establishing another relationship. As far as possible, I think continuity of care, particularly in mental health areas within the AMC but also within Corrective Services, should try to be achieved. That is simply off the top of my head.

Mr Rose: I would just like to add that I agree with Mr Lalor that it is the mental health aspect of prisoners that is most vulnerable and acute. And if services within corrections were improved, it would benefit not just Aboriginal prisoners but also non-Aboriginal prisoners.

MRS JONES: We all want to move in that direction.

Mr Lalor: Yes.

MRS JONES: Just on that comment finally, would you recommend a compulsory mental health screening? At the moment we only have a voluntary one when people are admitted into the prison system. And the trouble that we have is that, sometimes, obviously people have a preference not to be screened.

Mr Lalor: Yes, of course.

Mr Rose: Again, the issue of compulsory screening is a very sensitive issue for Aboriginal and non-Aboriginal people. Mental health has a great deal of stigma attached to it. The Aboriginal Legal Service would be favouring, rather than talking about compulsory screening, perhaps framing it more in the sense of a higher responsibility for corrections to monitor the health and wellbeing—physical, mental and emotional—of prisoners, trying to address the issue of stigma in mental health but maintaining an awareness that the vulnerability of prisoners, regardless of their background, in respect of mental health can make them very vulnerable. Perhaps just increasing the supports while they are in custody on behalf of corrections could improve that.

MRS JONES: It does also then make it hard to have accurate statistics as well and to address what could be a ballooning problem that is very hard to pinpoint?

Mr Rose: Certainly. Again, if I could come back to Ms Berry's point that, given the smaller extent of the ACT jurisdiction, there are real opportunities to put into action these sorts of proposals and reforms to see what demands they are on resources, how they can be made effective and evaluations and so forth so that there is that real opportunity in a jurisdiction such as the ACT.

THE CHAIR: Thank you. I am afraid we have come to the end of time for this session. Could we thank you, Mr Lalor, Mr Rose and Mr Brazil, for joining us here this afternoon and giving evidence to the committee. The committee secretary will follow up with you regarding transcripts. There may be some further questions coming to you, supplementary questions.

Mr Lalor: Could I say that if we can assist further in the inquiry, we are only too happy to do so, if there are any other matters.-

THE CHAIR: If there are any other issues that occur to you that, with hindsight, you think should have been in your submission, we would gladly accept any further information that you care to put before us.

Mr Lalor: Thank you for the opportunity to speak today, on behalf of my colleagues.

WHYBROW, MR STEVEN, Barrister, Australian Lawyers Alliance

THE CHAIR: Mr Whybrow, good afternoon and welcome to the second public hearing of the Standing Committee on Justice and Community Safety inquiry into sentencing. We have already heard from a number of organisations today. We welcome you as the Australian Lawyers Alliance representative. Do you have an opening statement that you would like to make?

Mr Whybrow: I have perused a lot of the submissions that are publicly available. There seems to be a general theme that if it ain't broke don't fix it. But there are some things that could usefully be addressed. I would, as you would see in the submission—

THE CHAIR: Mr Whybrow, I apologise; I should have mentioned to you at the outset the privilege statement. Are you aware of that?

Mr Whybrow: I acknowledge that I have received that and signed that, yes.

THE CHAIR: I just wanted to make sure you were aware of that.

Mr Whybrow: I have read those and, as I indicated, there seems to be a general theme. Some organisations, such as Bravehearts et cetera, are advocating particular views.

I am a member of the Australian Lawyers Alliance. It is becoming a more active and vocal organisation of lawyers. It started off as a plaintiff lawyers association, but the number of issues affecting the community on which lawyers were in a good position to give informed information was such that it has effectively transformed itself into an organisation covering all aspects that deal with legal issues.

I have been a member for many years. Obviously I was asked to contribute to this on the basis that I have been a prosecutor in the territory for 12 years and now a member of the independent bar for 12 years. Whilst not jumping ship, so to speak, to the dark side, as some might put it, I have maintained a quite reasonably strong practice in criminal matters. So I have some long experience in the area.

I am not sure what is the best way to proceed in terms of value-adding to the committee's deliberation and considerations. I have noted a few issues that seem to have cropped up, in addition to the matters that I have referred to in the ALA submission, that I might make some comments on.

THE CHAIR: The way we operate generally is that we will ask you some questions. You have given a submission and you have an opportunity to talk about any issues that you may want to put before us before we ask any questions.

Mr Whybrow: Specifically, what has occurred since the provision of this submission is that there has been discussion of phasing out periodic detention as a sentencing option in the territory. You will have seen references to the intensive correction orders in New South Wales. The ACT, as I understand it, is the only jurisdiction left that

retains periodic detention. As much as I and the ALA believe that the entire ACT sentencing structure is one based on flexibility of approach—the maximum flexibility that it provides for the maximum capacity for individualised justice, which flows into increasing opportunities for rehabilitation and reducing recidivism—periodic detention seems to have proved itself to be a fairly blunt instrument over the years. Increasingly, I would be urging the committee to look closely at New South Wales. I do not often say that New South Wales have all the good ideas—some of them are terrible, and standard non-parole periods is one—but the way they have approached changes to the Bail Act and the intensive correction orders, in my submission, has a lot of merit.

Having done a few New South Wales matters recently, one of the difficulties is, of course, perception versus reality. The perception of an intensive correction order is not that it is a soft option but that it is difficult. It involves community service; it involves significant intervention. And it is for persons who might otherwise be sentenced to a period of imprisonment.

There are issues raised before this committee about the increasing prevalence of shorter sentences. In many respects the current sentencing regime in the ACT effectively provides powers equivalent to intensive correction orders because the current act allows, under the good behaviour order system, for very specific and directed directions to be given to offenders who are on good behaviour orders. But, in many respects, it has no good PR out there. A good behaviour order is seen as a soft option which just means, "Don't commit any offences." In reality, the core conditions and the other conditions that are available provide significant capacity for Corrective Services to positively affect an offender's ongoing rehabilitation prospects. In some respects I would be advocating for bringing in intensive correction orders not because we do not actually have them but because it provides a—

MRS JONES: Rebranding.

Mr Whybrow: branding of something that can get out there as, "This isn't a soft option." For many offenders, I am sure it is not a fun place to be but the AMC is far and away a better place than many of the other institutions around this country and, indeed, the world. For some people, unfortunately, they would see six months in AMC as a lot less hard work than six months on an intensive correction order where they are required to jump through hoops, undertake courses and follow directions. It may mean that they breach them and they go into jail, but one of the things that we need to address in the territory is recidivism and the fact that people are going into jail increasingly here when the statistics do not represent that.

I do not see anything sinister in that. I just see that as the rebalancing that one would normally get when we finally have our own jail and the reluctance of judicial officers regarding, in effect, transportation. It has just amounted to a rebalancing. You will see in our submission that while we may have been seen as lenient before, that was a very relevant part to it, and we have evened the keel a bit. That explains, in my view, why it would appear that the ACT's rates of imprisonment have increased while others have come down. We have got ourselves back to a more even keel in terms of sentencing people appropriately.

The only other thing I would say at the outset is that the Crimes (Sentencing) Act is predicated on the notion of individualised justice. There is no suggestion, that I am aware of, of any aspects of standard non-parole periods, mandatory minimum sentences or things of that nature. I would certainly like to say a lot about those if they were even in anybody's contemplation, but rather than have a rant about those sorts of things, I will leave that as something that is of concern to me, mainly because it does not work.

The other main aspect in my submission goes to Corrective Services resourcing. From everything I am aware of, this committee inquiry is not about some way of slowly increasing the tariffs but of improving sentencing options and outcomes for the community. One of those is reducing recidivism, and that does come down to resourcing of Corrective Services, especially if a rebranding, as Mrs Jones quite appropriately put it, would be a way of getting it out that there is a punitive aspect to it. But it really does improve, for a number of people, their chances of avoiding having to go back, feeling that it is an easy option or just committing crimes when they have been given some skills and some capacity to make different choices, which generally does not happen in the jail setting, certainly as much in New South Wales and other jurisdictions as it does here. We have made a good start. I know it costs a fortune but it does everywhere. I believe Corrective Services funding is one of those where you put $2 in and save $3 later.

THE CHAIR: Thank you very much for your comments. Obviously, we appreciate your submission as well. I will ask the first question. In your submission on behalf of the alliance you put the view that the ACT should have a fifth judge in the Supreme Court. It supports this by suggesting that there has in fact been a de facto additional judge over the last 18 months and that without this additional judicial capacity time lines would have been significantly adversely affected. What are your views on the administrative changes that have been made in the courts, such as the docket system, and do you think that these have the capacity to make a fifth judge for the Supreme Court unnecessary?

Mr Whybrow: At the end of the day—and I did run my personal views past some of the executive members of the ALA—the matter of whether there should be a fifth judge or not is obviously one for the executive. From my perspective, in at least the last two years we have been receiving additional resources in terms of blitzes, in terms of visiting judges, in terms of increased capacity in civil and criminal from these visiting judges, that, as has been put there, is effectively a de facto fifth judge.

It is effectively extra resources that have been put into the judicial system. I do not see the numbers in terms of dollars and cents, and it may well be a lot cheaper to bring visiting judges in without having to provide for tenure, superannuation, tipstaffs and all those sorts of things. But the waiting lists, the number of cases and things of that nature have not dramatically disappeared with two years of effectively everyone putting their noses to the grindstone.

In my submission, that is indicative that the workload is there. Whether that workload is taken up by the current administrative systems or whether it is by way of a fifth judge, I do not believe it is for us to say. We have four judges and we have at the moment good working relationships with federal and interstate courts whereby we get

good, competent visiting judicial officers to provide some assistance. But it seems to be an ongoing thing which, if it went away, in my submission would mean we would very quickly go back to being in an even more dire situation. There is a lot more efficiency, there is lot more time not being wasted, but it still has not just been a panacea. The workload is there.

THE CHAIR: Without trying to put words in your mouth—obviously you are a lot closer to the legal action than we are—the observation of a number of us is that we would not need some of the remedies that we are currently putting in place on a periodic basis if you had a fifth judge. You are right: the executive has to make the decision. I guess part of the process of this committee is to try and have a look at sentencing. If there are elements of that that will be helped by having a fifth judge, I think it is within our charter to make observations on that.

Mr Whybrow: One of them that comes up in a lot of the submissions from all colours of the spectrum is the delays for various reasons, from Corrective Services needing time to victims of crime statements needing to be prepared to the way our sentencing system operates, and delays with judges—without personalities et cetera—just sometimes being slow. That cannot be hurt by having extra judicial officers there.

Since Justice Burns has been appointed as a judge, he rarely does less than about five matters a day. His lists are incredibly long. He does matter after matter after matter. In a way, having a 20-year history in the Magistrates Court has been a good thing for him. He administers justice expeditiously and, in my view, very competently. I am not saying that the others do not, but he has come in and has picked up a heavy workload, and has been doing it consistently, including lots of sentences, lots of resentences and civil matters.

Another judge who had the same work ethic coming in and doing that would only improve the outcomes. One of the concerns is that you appoint a judge and they have security of tenure. You cannot just decide, if your workload has gone down, "We don't need you anymore." That must be a concern to the territory and to those that need to make these decisions. In my submission, the workload is there. It is not going to go away. It will make things such as being in court every day—if you are not in court, it does not mean you are not doing anything. You can be preparing your sentences, you can be providing judgements in a more timely fashion and those sorts of things. Sometimes it is very hard for people to appreciate those things. If you do not see the judge at work, you do not think they are working. I know a lot of them get themselves into trouble.

MRS JONES: It is a similar perspective with politicians when we are not in the chamber.

Mr Whybrow: Absolutely; it is all PR. The fact that, "Parliament hasn't sat or the Legislative Assembly hasn't sat for so long," does not mean that you are all on holidays and doing nothing.

MRS JONES: That is right. Today is showing that.

Mr Whybrow: Absolutely.

THE CHAIR: We might stick to sentencing issues.

MS BERRY: I have a supplementary. You talked about a fifth judge or some changes in the work environment or the way the work is done is making a difference right now. Are there other changes that could be implemented—without wanting to get yourself into the hot seat with the judges or magistrates—about the way the work is conducted that would make a difference?

Mr Whybrow: The thing that—

MS BERRY: Or perhaps even more sentencing options.

Mr Whybrow: I believe that we have an excellent range of sentencing options. I am the first to criticise a lot of ACT legislation, and that is not just when I am being paid to do so. The Crimes (Sentencing) Act really does have a lot of options which I do not think people have fully appreciated. I was in a Court of Appeal hearing last week with the director and it was not really appreciated how broad the behaviour orders and probation orders were in terms of providing effectively intensive correction orders.

The structure is already there. For example, if you were to suggest—and it is obviously a matter for the Chief Justice—"Right, I'm going to dedicate a judge just to criminal sentences for a period," and I believe that already happens to some extent, that can get through a lot of sentences there. But they have got to be there. They have got to be ready. They have to have gone through Corrective Services, they have to have had the DPP and the police finish the statement of facts. So it is not just at the court level that you can make a change; as I indicated, the resourcing at the level where it is at the moment is a minimum to maintain the status quo for where we are. How that is managed is not a matter for me to say. But if it went away, with what we have had in the last couple of years, we would be in dire straits, in my view.

THE CHAIR: Mr Gentleman.

MR GENTLEMAN: We had the Aboriginal Legal Service in just before you. They talked about the success of circle sentencing within that community group. I asked them how that would fit within the current Crimes (Sentencing) Act in regard to the purposes for sentencing. I guess there is rehabilitation for the purposes of sentencing at the moment but there is no reparation. Do you have any comment on that?

Mr Whybrow: The objects of the act—I think I might have even included them at the start of the submission—are recognised in other aspects of the act but are not in the objects, such things as recognising the effect of crime on the victims of crime. In terms of rehabilitation, punishment and maximising the opportunities for imposing sentences that are constructively adapted, that could well, at (c), encompass, in my view, the specific way of constructively adapting a sentencing process for Aboriginal offenders who would benefit in terms of their rehabilitation and bring home to them the effect of their offending on persons.

There are not just circle sentencing but restorative justice programs which have been—I cannot swear that I know that it is 100 per cent right—limited to child

offenders largely. There have been a number of people and, just because you turn 18, it does not mean that you do not need a wake-up call or will not benefit from seeing the person whose house you burgled and the effect of losing those possessions and the consequence of that and hearing that. For a lot of people, it is just white noise until they are actually faced with that.

I cannot see any detriment, when it is a voluntary system and there are checks and balances in place, in it being limited just to young offenders. Offenders of any age who commit particular offences fall within it. And it has had an effect on people who want to participate and say, "Look what's happened." Just because you are 25 or 35 or 45 does not mean you will not benefit from that and benefit in terms of appreciating the consequence of your offending, providing a victim an opportunity to feel like they have had some input into the system and potentially getting somebody to have a close, hard look at themselves more than any time in jail or any community service order would ever impose on them. So in my view, that could be usefully extended beyond 18-year-olds.

Again, it all comes down to funding Corrective Services and things like that. But that is one that seems to be an arbitrary cut-off at the moment. I probably did not answer the question at all there.

MR GENTLEMAN: No, I think you did.

THE CHAIR: Ms Berry.

MS BERRY: You made some statements in your submission about your position on mandatory minimums and standard non-parole periods. Did you want to elaborate on that a bit more?

Mr Whybrow: Those types of concepts are, in my view, anathema to individualised sentencing and, indeed, to justice in every sense. I notice the Bravehearts' submission says that there should be mandatory sentences and it will improve pleas of guilty. It does not do that. In New South Wales there were mandatory non-parole periods for a range of sentences and the effect of it was that people would not plead guilty to those offences if they had ever been charged with them because, irrespective of their circumstances, they will go to jail for four years or seven years or whatever. Prosecutors could not get pleas of guilty on even strong cases.

Offenders would be advised, "You might as well roll the dice. You've got a one in 10 chance of getting out of this, but you're going to jail for seven years and your plea of guilty will count for nothing." And prosecutors and defence would, in effect, try to find other offences of seriousness which reflect the criminality but did not have a mandatory non-parole period attached to it. That really is bastardising the system.

The High Court, in a case called Muldrock a couple of years ago, effectively found a legal way around that in New South Wales so that you did not have to start from the position of the seven years. And there has been, in my perception, a collective sigh of relief by all criminal practitioners in New South Wales that we have got around that and we go back to sentencing offenders for the offence that they faced. Mandatory sentences are similar things.

This is something that flows all the way through the system. The only way they become effective as a deterrence, if that is the way they are, is if they are publicised. And you publicise one-punch laws. Everyone who does a one-punch offence and somebody dies, you will get eight years minimum. It does not matter what the circumstances are, you will run your self-defence. All the circumstances of the offence will come out.

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

The community takes it into their hands and you do not get a just result. A just result would be, "We reject self-defence. We have got confidence in the judicial process. We will take into account the extenuating circumstance and this kid's rehabilitation and all the things that he has done since then." He does not get eight years. He might get two years or he might get an intensive correctional order or he might get something that is relevant to his circumstances. One size fits all is anathema to justice.

We in this jurisdiction have long avoided the need to go down law and order paths. Maybe we do not have enough shock jocks, I do not know, or maybe it is the fact that the community is a lot more aware that there is more than a six-second side to a story, and a lot of the population here proportionately have turned up in juries and have become involved in sentencing proceedings. So they have a better understanding that there is more to it than a four-line statement of facts. But one size fits all, in so many ways I have personally seen, leads to people trying to get around it—from the lawyers to the judges to the community—and you are better off dealing with the case.

If it is a bad case and serious offending, then if the sentence is inadequate, there are appeal mechanisms in place to deal with that. And if the appeal mechanism does not solve anything, then the attorney has got the capacity to say, "We'll have to look into this," and potentially raise the penalty, like with culpable driving recently. Culpable driving sentences were increased to bring them in line with other states. They were seven years, I think, for culpable driving causing death and now they are 14. I was personally involved in that Monfries matter, for the appellant, not that long ago. It was an extraordinarily serious offending, and he was sentenced to effectively 12 years.

THE CHAIR: Just as a supplementary on your last point, do you feel that the appeals process is working effectively in these cases?

Mr Whybrow: In the last five years, I have got to say, I have become more and more aware—I am not saying I did not have any confidence in it—of it seeming to be much more rigorous and getting it right, if it is appropriate for me to have the vibe. But I have seen a few Court of Appeal matters recently and the way they were approached. We have three judicial officers who are not coming in necessarily together—and there had been a bit of it in the past—but A and B are hearing an appeal on C. Then the next case is B and C hearing an appeal on A. Human nature comes into play a lot in those

situations. "You look after me, I'll look after you." I am not saying that happens, but there is human nature involved and just a perception. There seems to be less of that.

Certainly in the last few sittings the Chief Justice either consciously or unconsciously has constructed courts which do not seem to be bringing that up. The judges are, certainly from standing in front of them, coming in with different views and asking different questions from different perspectives and then giving decisions which collectively seem to reflect an appropriate community expectation.

MS BERRY: Just as a supplementary to that, Mr Gentleman pointed out to one of the other witnesses that were here earlier the differences between the number of people per 100,000 that are imprisoned here and in America where it is 707 per 100,000 who are imprisoned. A lot of that could probably be attributed to mandatory sentencing, although I know that a lot of states in America are now moving away from mandatory sentencing and that it is reducing their incarceration rates. Did you have anything that is not—

Mr Whybrow: I suspect that it is the ultimate law and order jurisdiction versus we have got no money left because everyone is in jail for relatively minor offending. Beyond those numbers, when you compare Australia's average, which I think is 168 and they are into the 700s, I feel that we are all trying to bring that down. As to the overrepresentation of Indigenous people, whether there should be other options that are constructive as well as provide punishment, 700 just shows how out of step that country is in terms of dealing with the problem. "Let's lock them up, throw away the key and never look at them." That is my personal view.

Mandatory sentencing is an example. Years and years ago we had the three strikes and you are out in the Northern Territory, and it led to kids in their 20s, on their third shoplifting, getting 10 years or things of that nature. There is always an extreme case that comes up very quickly to show how inappropriate these laws are. Generally, they have come in in the first place because of an extreme case. Individual cases make bad law. That is a well-respected saying, and the High Court always tries to avoid the really bizarre cases because if they try to make principles on an unusual case, they generally will be taken out of context.

THE CHAIR: Mrs Jones?

MRS JONES: Yes. I really appreciate your honesty and also your experience in the field, and I understand your position on the mandatory stuff. I just wonder, if you have the opportunity to speak to parents who are afraid, what the message is. We have had this high-profile paedophile case, for example, in the Belconnen library, and there is genuine fear out there. I am coming up against it when I am out at shopping centres. If our appeals process is working, and obviously that case was advertised before the DPP had decided whether to take it to an appeals process—

Mr Whybrow: I believe it has been appealed.

MRS JONES: Right.

Mr Whybrow: It certainly has been appealed.

MRS JONES: I have been out of the country.

Mr Whybrow: No, that was appealed quite quickly. Jon will be able to confirm that, I am sure.

MRS JONES: Good. What is the message? How can it be explained to people who have no idea how the court system works? There are all sorts of nuances that you are aware of like people pleading guilty and what effect that has. That does not mean anything to most people. The vast majority of people have no experience of the day-to-day—

Mr Whybrow: I do not know all the facts of that case, but from what little I know this is a case where you would be thinking you are going to be starting with a higher sentence. There is very little going for the offender in terms of rehabilitation. There have been placed increased restrictions in terms of sex offender registration. This is an example of somebody who, as I understand it, decided to offend on their way to reporting.

MRS JONES: Yes.

Mr Whybrow: With all those sorts of things, one would hope and expect that the court of appeal is going to rebalance the ledger. You may have had a particularly persuasive advocate indicating that in the context of this person these features should be taken into account. That is what the appeal process is for. The only answer is: we do not know, because we were not there, how it came to happen. Let us see what happens in the court of appeal. I have got to say that I was shocked when I saw the sentence for that matter.

MRS JONES: Well, that is good to know.

Mr Whybrow: Absolutely.

MRS JONES: When we went to an information session at the uni to do with sentencing—

THE CHAIR: Seminar.

MRS JONES: It was a seminar to do with judicial officers. The statement was made that in the Australian legal system no regard can be given in general terms to a previous offence. You are meant to look at the offence that we are dealing with today, this case in and of itself, separately. But there are other legal systems internationally where you are allowed to take a cumulative look at what is going on. I know that, for example, with traffic offences there is a cumulative effect of what you have done because eventually you lose your licence.

Mr Whybrow: You lose your licence because of the earlier ones.

MRS JONES: Do you have any thoughts, with your expertise, on our system and how perhaps it could be improved to give people more understanding and reassurance

that if someone is going to be a persistent reoffender with no interest or ability to change their behaviour or reform or be deterred that there should be the capacity for some sort of escalation?

Mr Whybrow: Sentencing, as you will have come to work out in looking at the legislation and the factors, is the most contradictory process. You take into account something on the one hand that you cannot on the other. On one side you get a discount and on the other side it is an aggravating feature. Prior offending is, as I understand the law, not strictly that you do not take into account the prior offending; it is relevant. But the principle, effectively, is: if I have committed offence X, maximum penalty five years and objective seriousness is middle of the road—I do not say "middle of the road" like that, but a moderately serious offence of which 2½ to three years is appropriate—then you cannot turn that into four or five because you have done it 100 times before. Otherwise the punishment does not fit the crime. You need to be punished for the crime.

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

There was the case last week of Mr Monfries. He had an appalling record of previous crazy driving through the streets of Canberra without having killed anyone, until his latest offence was taken into account. He is not entitled to any leniency, and it remained as a worst case offending. You have probably come across the name Veen in sentencing. You cannot give somebody more than they would have got for it otherwise, but sometimes you need to give them as much as you can because of their past. Sometimes, if the mental health condition is one that is going to cause them to be a problem then, whilst they personally are not a good person to send a message to the community—because this person had so many things wrong with him that it is not a good vehicle—you cannot give him any less, because he is a danger to the entire community.

MRS JONES: Is it a matter of range then? Is it a matter of us, as legislators, considering the options of giving a greater range of options for sentences, as in a greater length, so that for the same—

Mr Whybrow: You find—

MRS JONES: perpetration, for the same issues, you can—

Mr Whybrow: the same basic facts. One thing I think we have been developing over the last few years is this evening of the keel. When I started at the DPP in the 1990s, literally there were cases that I prosecuted of people who came to Canberra to commit their offences and their robberies because—

MRS JONES: They knew they would get—

Mr Whybrow: they would get a much lighter sentence.

MRS JONES: Unfortunately, the public perception lags, even if there has been a change.

Mr Whybrow: It does. But that is, to some extent, I believe, going to be ameliorated by the fact that we are hearing that we filled the jail in three years and that we are the only jurisdiction that is increasing the rates of imprisonment when the rates of crime are dropping. So there are opportunities for the message to go out and to say, "Hang on, we're not the soft option anymore." No doubt in a couple of weeks when the court of appeal hands down this sentence in Monfries they will see that he has been given a serious sentence.

A lot of that case determined sentencing practice. We did not have any because the Legislative Assembly had just changed the maximum penalty and brought it into line with New South Wales and Victoria. So we looked at all their cases to see what the practice was. The sentence imposed by the sentencing judge was the highest anyone had ever got. It was more akin to manslaughter than culpable driving. I do not believe that the court of appeal will say that it is not that serious. They might allow the appeal on the basis that a plea of guilty happened a lot earlier than the judge said, but in terms of the seriousness of the offence and where it ranks, I do not believe we are now out of step in terms of objective sentencing. I think we have a better capacity to make rehabilitation meaningful so it is not a word and so that we try and take advantage of that a bit more, which looks like a softer option, if somebody is doing community service or doing something else.

MRS JONES: Well, it depends what the outcome is.

Mr Whybrow: It depends what the outcome is, and obviously it is an outcome where they do not reoffend, they get a job and they are not on social security. There are domestic violence matters as well where you have tried to treat people and give them education programs. I cannot speak with any authority as to how successful they are. I have got to say that if I was ever on the sentencing side they would have to have some pretty good facts going their way before I showed them much leniency but, anyway, that is a personal position.

It is a difficult thing. That is a great example of an extraordinarily unusually bad case where you have got a sex offender on their way to report—all the things that the media would be able to whip up, not because it is not bad but because it is just, "Oh, my God, this could have been me. We're at the library. Where can we ever be safe?"

MRS JONES: I think it just touched on fears.

Mr Whybrow: Absolutely.

MRS JONES: Fears that people have; they are still real.

Mr Whybrow: They are. For hundreds of years the level of bad things happening to people has gone down, but the capacity to let everybody know every single bad thing that ever does happen has gone up. That is part of it.

THE CHAIR: Mr Whybrow, we have got time for just one more question. In your opening remarks and also in your submission you put the view that the sentencing regime in the territory does not need any major overhaul. You also state that the present rates of appeals to the ACT Supreme Court are not indicative of a broken system but simply reflect the fact that sentencing is an inexact science. As an organisation with a national focus, could you comment on how the ACT compares with other jurisdictions where your members are active?

Mr Whybrow: The ALA is interested in the ACT because in many respects—not just sentencing; civil law wrongs and human rights—it is perceived to be a leader in terms of an enlightened approach or resistant to what might be seen to be outside influences trying to push it one way or another. The Crimes (Sentencing) Act in the ACT is a comprehensive, well thought out, quite complex document, but when you follow it through, the options are there. It provides a degree of flexibility consistent with other jurisdictions. It appears to have been designed taking into account what works in other jurisdictions and what does not.

This committee is obviously reviewing it by comparing certain aspects—periodic detention, for example—with other jurisdictions. The ACT is of interest to the ALA because in a lot of jurisdictions—I will not say that there is no hope, but you cannot really turn up to a sentencing committee in Western Australia and suggest that there needs to be greater focus on this, that or the other because of certain aspects that are expected in that jurisdiction where law and order are going to get you votes ahead of anything else. Thankfully, it is a bit more of a broader church here and our sentencing reflects a realistic approach—not so much a common-sense approach—that human behaviour is multifaceted. People do all sorts of things for all sorts of reasons, and whoever has got to determine the consequence of that behaviour needs to have all sorts of options to deal with it.

THE CHAIR: Mr Whybrow, we have come to the end of our time. We really want to thank you very much for your submission and for your comments here this afternoon. It is very much appreciated.

Mr Whybrow: I thank you, after a very long afternoon, that you were all so attentive and awake.

THE CHAIR: The committee secretary will follow up with you regarding the transcript and any questions that we may forward on to you. Likewise, if there are any other observations that you may want to make after having thought about the topic in more detail, we would be very pleased to receive any further evidence from you.

Mr Whybrow: Thank you all for your time.

THE CHAIR: I would like to thank all the witnesses who appeared today. The committee values all the contributions to the inquiry and, as noted, the committee secretary will be in touch with all witnesses who appeared here this afternoon.

Next week, on Monday, 26 May 2014, the committee will hold its third public hearing for this inquiry starting at 1 pm. The ACT Human Right Commission, Legal Aid ACT and Dr Lorana Bartels of the University of Canberra will be appearing then. I now declare today's hearing closed.

The committee adjourned at 4.31 pm.