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, 26 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 1.00 pm.

WATCHIRS, **DR HELEN**, Human Rights and Discrimination Commissioner
ROY, MR ALISDAIR, Children and Young People Commissioner
COSTELLO, MR SEAN, Senior Legal Officer, Human Rights Commission

THE CHAIR: Good afternoon and welcome to the third public hearing of the Standing Committee on Justice and Community Safety inquiry into sentencing. Today the committee will be hearing from the Commissioner for Human Rights and Discrimination, the Commissioner for Children and Young People, and later in the afternoon from Legal Aid ACT, Dr Lorana Bartels of the University of Canberra, and Mr Anthony Hopkins, a barrister. Today's proceedings will be recorded, transcribed and published. Can I just ask, for the record: have you read the privilege statement and are you familiar with it?

Dr Watchirs: Yes.

THE CHAIR: You have been here often enough. You probably know it by heart.

Dr Watchirs: Not quite.

THE CHAIR: Thank you for joining us this afternoon, Dr Watchirs and Mr Roy. Would you like to make an opening statement, Dr Watchirs?

Dr Watchirs: Yes, I would like to. Our submission focuses on two main human rights affected by sentencing. One is section 18(5), that is, people awaiting trial usually should not be detained as a general rule. And the other one is section 22(2)(c) about not being subject to unreasonable delay before trial.

The submission I wrote in October last year has now been updated with the ABS stats. We quoted Professor Biles that the ACT had a 34.7 per cent remandee rate. We now have 25.5, and the national average is 24. So we are only slightly above the national average.

Our position is that presumption against bail has been a problem in the ACT, and this was highlighted in the Islam case by Justice Penfold back in 2010 that some presumptions were incompatible. Her findings have not yet been implemented by the government in the ACT Bail Act. In New South Wales there was a Law Reform Commission report in 2010 and legislation last year, which makes bail simpler and focuses on risk management and without the presumption approach.

In terms of periodic detention, we have not made a huge submission on that. It was abolished in New South Wales in 2010 and is to be abolished in the ACT. We do have concerns about separating families and children by a detainee being able to work during the week and then serving time on the weekend. We are aware that some other jurisdictions, UK and Canada, but not New Zealand, do have periodic detention. As you would be aware, home detention was abolished a number of years ago, about nine or 10. Victoria abolished it in 2010, but we are aware that some other jurisdictions have community-based corrections, with restricted movement. I assume that is in

relation to electronic monitoring, which should be something that will be coming in the ACT, I would expect.

Some other concerns we have are about social disadvantage. The WA Supreme Court, in Bropho v Harrison, found, in relation to an Indigenous young woman who was convicted of an offence—they followed the Neave decision in the High Court—that you need to take into account the cultural background of people before you before sentencing them.

The other issue is people with disabilities who are in the criminal justice system. The former federal Disability Commissioner, Graham Innes, has made some reports about people being unfit to plead because of cognitive impairment and not being sufficiently diverted from the criminal justice system and the possibility of justice being delayed indefinitely because there is not appropriate accommodation. In the ACT I am hoping that will be addressed better by the secure unit that is to be built on the Quamby site.

In relation to indefinite life sentences, the European court, in Vintner v UK, in 2014 found that having a sentence without the possibility of parole is inhumane and degrading treatment, which is a provision in the ACT, section 10(1). There has been some litigation on this issue by Mr Eastman requesting a licence, and the Supreme Court cases there seem to show that the licensing system is reasonable and is an executive and not a judicial function. So there are a number of cases by Mr Eastman that actually have some information about that system in the ACT.

There was one case before Justice Refshauge, R v Lewis, in 2013 saying that it is not a judicial power to issue a licence; it really is an executive power. There was the UK case of the home secretary v Anderson in 2003, but that looked at the tariff of what a person's sentence was rather than the question of release, which is what the focus has been in the Eastman case. And it is quite distinguishable.

So there are human rights issues. Probably one of the biggest ones would be justice reinvestment, looking at the whole system. It was a recommendation in the review of the youth justice system that Commissioner Roy led, and there have been some movements on that in the ACT. Certainly we have attended some Indigenous research bodies that wanted to have a pilot in the ACT, and I think that is something very promising. The Attorney-General's review of the justice system at the moment in relation to adults, I would have thought, could have something very fruitful.

In relation to restorative justice, it is only available to young people, and I would hope that in future older people could have access to that. Particularly 18 to 25-year-olds in other jurisdictions tend to be the next group beyond young people who have restorative justice options.

THE CHAIR: Thank you for the opening statement, and we will probably be touching on a few of the issues you have touched on in perhaps a little more detail.

Dr Watchirs: Sure.

THE CHAIR: Your submission made reference to suspended sentences in the ACT, and you have again referred to it this morning. The committee has heard concerns that

in the ACT suspended sentences often do not have the sentence activated where there are breaches of conditions. What are your views on suspended sentences in the ACT and also on various aspects of it, such as breaches of conditions?

Dr Watchirs: We have not done a submission on that exact point. There certainly is a proposal at the moment that we have been looking at, and we have not made any final decision on that. I would be happy to give that on notice when we have made a submission in the next few weeks.

THE CHAIR: So you will have it in the next few weeks?

Dr Watchirs: We plan to.

THE CHAIR: Obviously we are happy to take further submissions if there are issues that crop up in the interim.

Dr Watchirs: Sure.

THE CHAIR: The inquiry will be going for a few months yet. Please feel free, if there is anything else that comes out of issues that we discuss here today and that you feel, with a bit of hindsight, you want to elaborate on, to put in another submission. We are happy to receive it. Mr Gentleman.

MR GENTLEMAN: Commissioner Watchirs, in your opening statement you talked about the New South Wales Bail Act and that it has its own risk management process. Could you give us a bit more detail about that and how you think that that might be applied in the ACT?

Dr Watchirs: I am afraid I do not have much more detail on that. I am not a criminologist or a criminal lawyer. It was more that we were looking at doing away with the presumption, and that seems to be what the process is, the risk management one. I think you will probably need a criminologist to have more expertise on that.

Mr Roy: Can I add something to that?

MR GENTLEMAN: Yes.

Mr Roy: With respect to bail for young people—and it may be relevant to your question—in our submission we noted a roundtable held about a year ago now, which looked primarily at the use of bail and young people. And one of the issues that come up a lot in discussions of bail for young people is making bail relevant to young people and just moving away from the assumption that, simply by having a court tell a young person that you should do or not do something, a young person would follow those directions—and that is not in any way to underscore the authority of the court—but to look at the evidence which suggests that young people frequently respond better to community supports or from supports from the networks they already have, including agencies in the community.

THE CHAIR: I should have asked whether you have an opening statement as well.

Mr Roy: No, I do not.

MR GENTLEMAN: I might continue on from Commissioner Roy's comment, though, and go to his submission. Again, just on bail—and you have talked about greater police discretion to unarrest a young person—would you like to go into a little more detail about how that could assist?

Mr Roy: It is a tricky legal issue. It came up in the bail forum, and it has been discussed in a range of other jurisdictions. If you look at the data in the ACT—and the data actually is contained in the evaluation of the after-hours bail support which CSD did—in there it looked at use of bail over a period of six months. During that six-month period, there were 112 total remand episodes, of which 97 were police initiated. Forty-four of those were for breach of bail only, that is, a young person being detained by the police and remanded because of breach of bail only, with no additional offence. They were not caught doing something else. They were just caught for breaching the bail. So that is just under 50 per cent.

Of those young people, 64 per cent were remanded. They went to court, they were released to their next court appearance, which is effectively a day or two later, with no additional bail conditions. So that is a fair number of young people being arrested, detained, remanded, back to court and back out again, with no additional conditions. So they were in exactly the same situation they were in the day before they were arrested.

We were looking at ways to minimise that, and the ways to do it include giving police the discretion not to arrest if they see a young person in the community who is in breach of a bail; to actually refer to those community supports we spoke about before; to allow police officers to unarrest if they have arrested a young person and taken them to the station and then found out that there are support services for those young people, and they can then unarrest them; and/or to re-bail those young people as well. So instead of having to detain and send a young person to Bimberi for a day or two, depending on when they have been arrested, on the weekend, and then have to go back to court and be re-bailed, the police themselves can re-bail, with the same conditions.

MR GENTLEMAN: So what would be the technical outcome of allowing a policeman to unarrest under that breach of bail condition?

Mr Roy: In this six-month period it would have meant that 62 young people probably would not have been remanded.

MR GENTLEMAN: What would we have to do to, for example, in the—

Mr Roy: Sort of how do you tweak the law?

MR GENTLEMAN: To amend the Bail Act or the AFP Act, to allow them to take that operational—

Mr Roy: To be honest, I do not know. I am going to cast my eye to Sean Costello, who may know the answer to that. I suspect it is in the Bail Act. Do you actually

know the answer to that?

Dr Watchirs: I think they would be assisted by the police having the discretion in the first place.

Mr Roy: Yes.

Mr Costello: I do not know the exact answer, but I can add that police do have some discretion to bail for arrest at the station, but I am not exactly sure how that interacts with arrest of young people, particularly for breaches of bail, and it might be that they need greater discretion in that area.

THE CHAIR: I have a supplementary on that. Are there any risks that you can identify in terms of according the police greater discretion? Are there risks associated with that?

Mr Roy: Yes, absolutely. The police may get it wrong; they may release a young person back into the community who then subsequently harms themself or someone else or commits additional offences: absolutely. However, we are detaining a fair number of young people on an annual basis simply for breach of bail conditions. I am not just saying that it is something you enter into lightly; you need to do an evaluation of it.

THE CHAIR: Have you any suggestions about any formal measures that can be put in place to ensure that everything goes according to Hoyle?

Mr Roy: You would presumably evaluate it, just as they did with the after-hours bail support. I would be interested to look at those young people who are, for example, found in Garema Place in the evening and are arrested by the police and go to the station. They find out that the young person has a youth worker, quite an active relationship with that youth worker, and they release the young person into the care of that youth worker. I would be interested to see whether the young person does not offend and over what period of time the young person subsequently complies with their bail conditions. Or did the young person the next day re-emerge back into the youth justice system for another offence? Some young people would; some young people would not.

MS BERRY: I have a question regarding mandatory sentencing. I wanted to seek your views on mandatory sentencing and whether you think it acts as a deterrent.

Dr Watchirs: I am certainly not in favour of mandatory sentencing. There has been international human rights criticism of the Northern Territory and WA governments for those mandatory sentences that have a disparate impact on Aboriginal and Torres Strait Islander young people. I am not sure if my colleague has similar views.

Mr Roy: One of the key things in our significant review of the youth justice system a few years ago was about looking at the evidence. On principle, I am not a big fan of mandatory sentencing. However, I would encourage that, whatever we do in the system, it needs to be based on evidence. We need to look at the evidence that what we are trying to do actually works and makes a difference, and that it has a

rehabilitative purpose. Just to say mandatory sentencing does or does not do something, strengthening bail does or does not do something or being tough on crime does or does not do something is not necessarily the answer. I think you need more of a sophisticated analysis of the evidence which guides this. That is not even going to the question.

MS BERRY: That is okay. One of the things that we have been talking about during these hearings is whether or not there are enough sentencing options. If there are not, are there any other things that you can think of that could be included, such as you have already mentioned earlier about extending restorative justice to 18 to 25-year-olds, for example.

Dr Watchirs: Certainly, the Law Reform Advisory Council report back in 2010 was on a fairly limited issue, but there was a kind of opening that more should be done in terms of having discretions and options available. Lorana Bartels did the writing in that report. I understand she is appearing this afternoon. She would probably have more expertise than I would.

MS BERRY: Thank you.

THE CHAIR: Just a supplementary on that. In principle, is it useful to have a broader or narrower range of sentencing options?

Mr Roy: For young people I would say broader. I think you need to look at the individual circumstances of the young person. Again, it goes back to having that high-level discussion about what are you trying to achieve here? What is the purpose of the youth justice system? Is it simply to remove people from the community so that they no longer offend? Is it also to assist to rehabilitate those people? Or is it a combination of both? I think we need to look at what we are trying to do here and what is the best way to do that.

Dr Watchirs: As a general principle in human rights terms, something that is blanket or narrow probably has a more arbitrary operation and is more likely to have a human rights problem. It is a bit like having presumptions against bail. You are only able to look at limited factors when, in fact, bail should involve the whole spectrum: is a person going to offend in the meantime, are they a flight risk—all of those general principles. I think broader is much better.

THE CHAIR: Do you have any opinions or ideas on sentencing options that could or should be considered?

Mr Roy: Again, it is a difficult question to answer. I sound like a broken record, but I would go back to the individual needs of the young person.

THE CHAIR: Sure.

Mr Roy: What will make a difference to this young person's life? Is there something that we can think of? A custody sentence may be the answer in some circumstances. It may be the worst thing we can do in other circumstances. The research is reasonably clear, not only from an ideological perspective but also from an effectiveness

perspective, that kids should be detained as a last resort. Locking up a kid frequently does more harm than good.

But obviously there are times when young people need to be contained, detained, and in some circumstances it actually does young people good. It assists with their rehabilitation. Other times it does not. I think it is about having a suite of options and getting to know the young person. What is happening in this young person's life that is leading them to behave in this way? What can we do? How can we engage this young person to assist them to do it differently?

Dr Watchirs: In the human rights audit of the Alexander Maconochie Centre, we made a recommendation in relation to mothers and babies. There is a policy to allow a mother to have a child, but the three applications that have been received in the past three or four years have all been unsuccessful. We made a recommendation that the government should look at possible residential programs for mothers who are having children or already have infants. They should be in a residential facility like Karralika where their needs can be better accommodated rather than having children in prison. Probably even worse is having a mother and child separated and possibly the child going into the care of the government.

Mr Roy: Can I just add one more thing to my previous answer?

THE CHAIR: Yes.

Mr Roy: Again, going back to the research, there seem to be two key factors which can assist in the rehabilitation of a young person and they are: having something to do—ideally something to do which leads to income—and having supportive functional relationships. It is very difficult for a court or, indeed, a justice system to actually say, "Here's a job, here's some income and here's a functional relationship." But it is something that the system does need to keep in mind.

THE CHAIR: There are no further supplementaries. Mrs Jones?

MRS JONES: I apologise for my lateness. Have we had a question already about aggravated offences?

THE CHAIR: No.

MRS JONES: I think this is aimed at Dr Watchirs. I believe some concerns have been expressed about the human rights implications of aggravated offences. Do you think aggravated offences have a useful place in statute or are there better ways of responding to more serious instances of particular offences?

Dr Watchirs: Certainly, I am cautious about aggravated offences. When you are having a limitation on human rights, it has to be proportionate and appropriate. By having narrow options and forcing a judge or magistrate to go a certain way can lead to problems. I am not saying they are incompatible with human rights. I know we had a submission about police being a special status of victim by having aggravated offences. I know there are existing offences for pregnant women when the child is hurt by an offender. That would be an aggravated provision. The pregnant mother, to

me, would have more preventative effect and remedial effect than having police in a special provision. We did a submission on that. I can supply that to the committee, but I do not have it with me now.

MRS JONES: Yes, please.

THE CHAIR: Dr Watchirs, your submission also expressed concern about irreducible life sentences, suggesting that ACT law could be clearer on this. How concerned should we be about this in the ACT?

Dr Watchirs: At the time we wrote this submission I had a concern, but there have been several cases involving Mr Eastman since where it seems like the licence system means that it would be human rights compatible and that he is not detained indefinitely for the rest of his life. There are several decisions now saying that the licence system is reasonable because there is hope for rehabilitation and release into the community, as opposed to some earlier European cases that I mentioned where it was found there was absolutely no chance of regaining freedom by the exercise of a discretion such as compassion by a prison or governor of another state.

That is not the situation here. "Indefinite" does not mean indefinite. It means after 10 years of serving a sentence you have the right to apply to the Attorney-General for release. I think the Sentence Administration Board makes a recommendation to the attorney. I know it is an executive decision, but he is given informed advice from a range of sources.

THE CHAIR: Any supplementaries? Mr Gentleman.

MR GENTLEMAN: Thank you, chair. In Commissioner Roy's submission you talked about the inquiry into the youth justice system and the 2011 Human Rights Commissioner's review of Bimberi. You said that of relevance to this inquiry is the need for decisions made by all stakeholders in the youth justice system to be evidence based. Would you like to add some comment to that? Is there a feel that perhaps all of the decisions are not evidence based?

Mr Roy: I would say a lot of the decisions are not evidence based. Human services and services for children and young people are frequently made by all stakeholders on what a particular individual thinks is a good idea at the time. It can be done for economic reasons, political reasons or community reasons—many reasons. There is a stack of reasons why we do things. What we were trying to say in the report is we get that, but it is really important to step back a bit and look at what is the data, both nationally and internationally, that says, "Will this idea actually work?" That is really all we are saying. All stakeholders have a role.

When we undertook the youth justice review we took a very broad view of what the youth justice system was. It is not just Bimberi, and it is not just youth justice workers. There is everyone that surrounds it. Youth justice has to be embedded in the community. This is about the community taking responsibility—mums and dads, the media, the politicians, the judges, the police, the DPP and legal aid. Everyone needs to have an idea. What are we trying to do here? Ideally, we do stuff that is based on evidence, and there is a lot of evidence out there.

MRS JONES: Can I ask a supplementary on that. I recently travelled overseas. I was in Sweden, and that jurisdiction seems to be happy to have evidence-based conversations about all varieties of policy areas. Do you have any suggestions for how that kind of conversation can start, instead of people being entrenched and having a position before they start? We should take these opportunities to say how we can have those kinds of conversations. Perhaps in some ways it has not been a part of our culture, frankly.

Mr Roy: It is a very good question. I think there are a couple of PhDs in there. Our political system is probably inherently adversarial. If one person says X, the other person says Y—that kind of thing.

MRS JONES: It is not just about political parties; as a community how do we have that kind of conversation about the evidence? Can you make some practical suggestions for us here in a sentencing inquiry about what kinds of things in that vein we can discuss?

Dr Watchirs: Statistics are useful. As I said in relation to detainees, we check the ABS data, and it has actually changed substantially. The evidence that we are detaining too many has changed quite dramatically in—

MRS JONES: There is a variety of views about that that we have heard before this committee.

Dr Watchirs: Yes. Sorry, did I interrupt?

Mr Roy: Certainly, there are statistics. Again, people tend to believe the data that reinforces their own perspectives.

MRS JONES: That is right; exactly.

Mr Roy: And then tend to shun the data that does not. During the review we tried as far as possible to engage with as many people in the community as possible, with all of those stakeholders, and have a conversation and say "Okay, where are you coming from and how do you see it?" That is difficult for the committee to do.

MRS JONES: But what actually works for young people in this space? What is your opinion then on what actually works in getting a person who can function more normally in society at the end of it? Do you have any practical advice about sentencing options, essentially?

Mr Roy: That is a very detailed question. It is a very good question. Can I ponder that and come back with some ideas?

MRS JONES: I am happy for you to come back to us, but I really would like to have that conversation.

Mr Roy: Okay. One story I know of—it was not my story—was something said during the review. Again, it goes back to the idea that we as a community tend to

allow a range of views on human services, or services for people, and we say, "Okay, that's a good idea." If someone in the community, a media person, a politician or whoever, said, "Okay, I now want open heart surgery to be done without gloves because we're going to save some money," people would be outraged, but we do things like that with children and young people in the youth justice system. We say, "Okay, we now want to do this to save money," and we think, "This isn't going to save you money."

MRS JONES: It is not always a conversation about money. Sometimes it is about doing things that have proven outcomes.

Mr Roy: Yes, and personal ideologies. Before you arrived we were talking about having a vision for the youth justice system: what are we trying to achieve? Is it simply to remove people from the community so that the community is safe?

MRS JONES: I think we are often trying to do multiple things, aren't we?

Mr Roy: I think you are quite right. We are also ideally trying to rehabilitate young people, or people in the justice system.

MRS JONES: Yes.

Mr Roy: Sometimes they have quite conflicting parameters around them.

Dr Watchirs: Can I answer part of that as well. When we did the human rights audit of the women's area, certainly one recommendation was to evaluate any programs that were there. Even with the most recent one on through-care for all women, whether they are on remand or sentenced, they have 12 months support post-release. That seems to be working very well, but we still said we wanted an evaluation included in that, for that evidence base. It seems to be working incredibly well, but without an evaluation.

MRS JONES: It could even work better, potentially.

Dr Watchirs: Exactly.

MRS JONES: And we are talking about a small number of women, generally, as well.

Dr Watchirs: It was 14, but I gather it is in the 20s. We went to see the women last week. There has been an increase in women detainees.

THE CHAIR: Ms Berry, a substantive question?

MS BERRY: Just on through-care, how would that work with young people? What sort of support is there for young people coming out of Bimberi? What sort of support are they getting to help them survive out in the community? Also, with drug and alcohol programs, are there enough and are they sufficient to deal with the issues that are coming up for young people?

Mr Roy: That is a tricky question. We are certainly doing much better, and I would

hope that it has something to do with the review into the youth justice system. Certainly, from my perspective, and I think that of others, Bimberi and the youth justice system overall are a much better place post-review. Certainly, the number of young people going into Bimberi is significantly down. Bimberi are having some really good results with their transition unit, Bendora. Young people there have more independence within the facility and they are actively supported. A lot of them go to external education programs, work experience et cetera. So they are reintegrated slowly into the community rather than just coming out cold. They are having some great successes. I certainly think programs like that should be continued.

It has to be done in a timely fashion. I know we are not saying anything that you have not thought of before. You have to do this way before the young person is released from custody. This is not something that is designed the day before. You need to stick with the young person and figure out where they are going to live, what they are going to do, who they are going to hang around with, where they will be in six weeks, six months or two years, and how we assist them to do that.

MS BERRY: One of the things about Canberra being small is that it can sometimes be an advantage but it can also sometimes be a disadvantage, having regard to moving people away from influences that are making them behave in a certain way. What do you think some of the advantages are of being a relatively small jurisdiction like the ACT, in giving young people a chance?

Mr Roy: One of the key advantages is the small numbers. We are talking about, with respect to children and young people, a very small number of young people coming in and out of Bimberi, and a larger number, but again small from a quantity perspective, of young people butting up against the youth justice system.

We can always do things better, but on balance we are quite blessed with a lot of the services we have in the ACT, and it would be a shame if we started to cut back on some of those services. A lot of people say, "If you can't do it here, you can't do it anywhere," and I think that is quite true. In the ACT, geographically we are small, we have some really great workers out there and we have some great services out there. It is just about getting everyone on the same page as to what the vision is, what we are doing, engaging with kids and looking at outcomes from an evidence-based perspective.

Dr Watchirs: Measuring outcomes.

MS BERRY: How do you think magistrates and judges deal with young people as opposed to older people? Do you think they need more support or are they doing it all right? What is your view?

Mr Roy: Magistrates often come to their positions with their own ideologies or mindset. I understand that, and that is fine; we all do. Again, it is about trying to encourage magistrates to look at the evidence in terms of there being a benefit to what they are doing.

MS BERRY: I am not trying to get you into trouble with anyone.

Mr Roy: I am not going to name a magistrate. It is a double-edged sword, because you can find magistrates who take the kind of substitute parent role and see the court as an opportunity to engage with the young person and have lengthy discussions about how we are going to fix this—and sometimes the problem is not fixable in the short term—or you can have magistrates who see this as purely a legal issue and their job is to read the legislation and make a decision. There are strengths in both of those models. Maybe looking at somewhere in the middle might help.

Dr Watchirs: There certainly have been some instances, when we did the audit, of possibly the judge or magistrate not having a full picture of what supported accommodation was available, and also presuming that certain rehabilitation courses could be done in the time available, when actually that program is full up and you are going to have to wait for a time. So there is a slight disconnect, I think, between what the services are and what the judiciary thinks is available and when, and that could be improved.

Mr Costello: That would be across adults and children, I think.

Mr Roy: I think that is quite true.

Mr Costello: As to that issue of magistrates and judges not always being familiar with what is possible perhaps now but also in three years time, if we are talking about some sort of rehabilitative program, there can be a disconnect where a program finishes during that time but it is mandated in a certain way. That is a problem across both the adult and youth justice systems.

Dr Watchirs: Certainly, we saw it in the human rights audit of women.

MRS JONES: Can you imagine having a systemisation of what has been asked for in the past in rehabilitation programs and those programs getting coded or something so that the judicial officers can apply a code to whatever the program is at the time? Has anything like that ever been mooted?

Mr Roy: I would not want to second-guess judicial officers, but another approach would be—

MRS JONES: No, but the ACT government could have a system that described our options.

Mr Roy: Sure. Another option would be to have broader outcome-based sentences. It is not so much about a specific program being undertaken; it is more about the outcome that a judicial officer might be wanting to achieve, and then there is some discretion as to what program the person might do.

Dr Watchirs: The impression we had from the audit was that if corrections had more discretion to fulfil what the judge was trying to establish, it would be useful.

MRS JONES: Or can you go back to a judge after a decision has been made for a revisiting? Is there a system for that at the moment, if things have changed during that period?

Mr Roy: You can and do with young people.

MRS JONES: Is that working?

Mr Roy: Again, with some people, yes; for some young people, probably not.

MRS JONES: I mean does the system work? Does the judicial officer then give you the flexibility that you need because a program that has been mandated is out of date or something like that?

Mr Roy: Again, in some circumstances, yes.

MRS JONES: Are you having some problems with the judiciary on that front? We need to understand these things or we cannot make recommendations.

Mr Roy: The judiciary is a key player in the youth justice system. During the review, we went as far as we thought we could go to encourage the judiciary to look at best practice and evidence. Different players in the judiciary had a different response to that approach. As to the separation of powers, I understand it, I get it; but, again, if you are a key player in the system and you think that by sending someone to Bimberi for three weeks and having a stern talk to them is going to make a significant change to their life, it probably is not.

MRS JONES: Without naming any names, can you give examples of when you have had success and when you have not had success in this area so that we can understand it?

Mr Roy: I would rather do that with some thought and afterwards, if that is possible.

MRS JONES: That would be great. I do not want to create any problems, but we need to understand.

THE CHAIR: Thank you. Mrs Jones, do you have a substantive question?

MRS JONES: Yes; thank you. Mr Roy, your submission noted recommendations made in your report on youth justice for better education programs for judicial officers, the police and the legal profession, among others, for young people. What would be the best way to ensure that they were fit for purpose? What kind of content would you like to see? How would you like to see them rolled out, and what would make them, I guess, cost effective?

Mr Roy: One of the things we suggested was that the National Judicial College develop and implement a training package which is rolled out on an annual basis. That is certainly a way to do it which is not actually saying to judicial officers, "Well, you need to go to training." We are saying that if you are going to be part of this clique then the people who administer that clique as such can put some requirements around you.

MRS JONES: I asked about content. Are we talking about the psychology of young

people, the psychology of young offenders, or is it just the type of thing that they need to be told or the typical outcomes of three weeks detention? Is this the type of thing you think they need to be more informed about or is it something completely different?

Mr Roy: That is the sort of thing. Certainly, most young people who enter the youth justice system have individual needs. So first it is recognising that one size usually does not fit all. It is also recognising that there is a fair amount of national and international evidence in this type of circumstance that a custodial sentence may be the best; it may be the worst. Court-imposed bail may be the best; it may be the worst. There are a whole range of things we can do to support young people from the very first moment they butt up against the youth justice system. It is really stepping back and saying, "What's the best thing we can do to encourage this young person not to offend again?" and assisting them in their rehabilitation. There are a range of answers to your very good question. That is why this report is so thick. We actually went to great lengths to look at all the national and international evidence.

MRS JONES: Does the National Judicial College or a body such as that have matrixes and things that can be used where, if an offender shows X, Y, Z characteristics, then maybe A, B, C might be the best way to deal with that? Is it completely left up to the judge to try and work out the psychology of the situation as well when they are trained as a judicial officer? Are there tools that they can use, and not just education programs? Can there be tools on the back of that developed for actual best outcomes?

Mr Roy: Youth justice have a range of tools. They use a range of inventories et cetera to try and provide as much information as possible to the court. It is a very good question. Maybe ask the judiciary, I suppose, in terms of where their thinking is coming from when they make decisions. I do not want to second-guess.

MRS JONES: I understand that. If the outcomes are going to change, I guess everybody has to try and find a solution.

Mr Roy: Yes.

Dr Watchirs: There has been some suggestion that it is more in the nature of an induction when you have a new judge or magistrate. If they are aware of those programs and what has been happening to date that would be a critical point of giving that information.

MRS JONES: Yes. Often there are very practical solutions to these philosophical problems.

Dr Watchirs: In some jurisdictions they call them bench books. You would have something that is kept updated.

MRS JONES: Yes.

Mr Roy: One thing we were thinking of looking at—but, again, it is potentially controversial—was sentencing by judicial officer. Are there patterns in practice, I

suppose, in terms of whether individual judicial officers take a particular approach when it comes to sentencing. That is something I would be interested in looking at.

MRS JONES: I guess people would have different life experiences that they bring to their jobs. That is what we all do.

Mr Roy: Of course; absolutely. That is not to criticise. People come from their own perspectives.

MRS JONES: Yes.

THE CHAIR: Commissioner Watchirs, I had a supplementary question regarding Commissioner Roy's recommendation about education programs for judicial officers, the police and the legal profession. Is there a sufficient education program for not-so-young people?

Dr Watchirs: I think what makes young people exceptional is that when you look at the trajectory a lot of them are not going to end up in AMC just because they have been in Bimberi.

THE CHAIR: Sure.

Dr Watchirs: It is such a small number. I think the education program would be useful, but I do not think it is quite as—

THE CHAIR: As required as—

Dr Watchirs: important as for young people.

THE CHAIR: Sure.

Dr Watchirs: We have that human rights principle that children should be detained as a last resort. That is why we are fulfilling those international obligations by having an absolutely comprehensive look at the youth justice system and keeping young people out of detention. Certainly with older people, particularly those who could be rehabilitated, and to prevent recidivism, that justice reinvestment approach is really important. The evidence is that the earlier you start that, the better.

The youth justice system is really where it is aimed, where you do not have intergenerational cycles of people offending and families where it is not usual for people to be in employment but to be on benefits. That is something that we can do in the community as well as through through-care and programs—diverting people from the criminal justice system, using the time in detention usefully and following up support by through-care.

THE CHAIR: Unfortunately, we have reached the end of our scheduled time. As mentioned at the beginning, if you have any updates that you would like to provide to us, we would be very happy to take them on board. Thank you for appearing before the committee today. The committee secretary will follow you up with a transcript and any questions taken on notice.

TAYLOR, MS LOUISE, Deputy Chief Executive Officer, Legal Aid Commission ACT
DAVIES, MR RICHARD, Head, Criminal Law Practice, Legal Aid Commission ACT

THE CHAIR: The committee now invites Ms Taylor and Mr Davies to join us. Dr Boersig cannot be here with us today.

Ms Taylor: I will start perhaps with an apology from Dr Boersig. Mr Davies contributed significantly to our submission. So he will be able to speak from a very important position to that effect.

THE CHAIR: Thank you very much. You are familiar with the privilege statement that is before you? Have you both had a chance to read that? If not, could you just have a look at it and make sure you are familiar with the content?

Ms Taylor: Thank you.

THE CHAIR: Ms Taylor, would you like to make an opening statement?

Ms Taylor: We thank you for the opportunity to appear before you and see this as an incredibly important avenue for this issue to be discussed and for recommendations, hopefully, to be made to make sentencing more effective in the ACT. As a criminal lawyer, having practised in the ACT for nearly 14 years, I think that the opportunity is ripe for us to think about how we might do things better, to improve both our incarceration rates and our impact in terms of community corrections and the engagement of offenders in rehabilitation if we agree as a community that that is something we all strive for and aim for in terms of making sure that people who do come before the court do not come before the court again.

We made the submission, noting that the terms of reference for this inquiry were broad and that there may be areas that we have not touched upon. The areas that we have touched upon are areas that we see as particularly important in terms of the criminal practice of the Legal Aid Commission and are issues that we see commonly arising in the course of our practice.

So if there are any particular issues that you would like us to speak to, we are happy to answer any questions about that. And if we do not know the answer, we are very happy to come back to the inquiry with any further information that might assist you to come to your conclusions and make your recommendations.

THE CHAIR: Thank you. There a number of questions that we will each be putting to both of you. Obviously if you cannot answer them at the moment we would appreciate any feedback. Any new information that comes to hand, we would certainly appreciate a further submission on that.

Ms Taylor: And I will certainly take that back to Dr Boersig as well.

THE CHAIR: Thank you. I will ask the first question. In your submission you

recommended that a drug court be created in the ACT. Could you contrast this with the present arrangements in the ACT and tell the committee the advantages it would bring?

Ms Taylor: It is funny you start with that. It was our discussion on the way over. It is as good a place as any to begin. It is perhaps useful for you to know that prior to beginning at Legal Aid, at the beginning of this year, I was a senior prosecutor with the DPP for about 13 years. It is my experience—and it will come as no surprise to any of you—that many of the people that we see come before the court, both sadly in the Children's Court jurisdiction and with adult offenders, have substance abuse issues. When it comes to sentencing those people, it is certainly our experience that the sentencing magistrate or judge tries very hard to tailor an outcome that is going to address the causes that bring a person before the court.

It seems to me that the investment and resourcing of a drug court could mean that there is the development of specialisation, from a prosecuting perspective, from a defence perspective and from a judicial perspective, in terms of exploring more broadly what a substance abuse problem brings to the table in terms of the need for sentencing options that cater to that, if you follow what I mean. At the moment the situation, as we see it, is that it is very much dependent on the sentencing magistrate or judge in terms of how much that problem features in the sentencing outcome as a target for rehabilitation.

Of course as a person returns to court again and again, that problem can become less of a target in sentencing because from their criminal history it can be seen, for instance, that they have been given a number of opportunities for rehabilitation and have not been successful or, in the eyes of the court, perhaps have not taken full advantage of those opportunities for residential rehabilitation, for instance. So the significance of that drug problem can diminish as a person racks up more and more appearances before a court. Did you want to say anything about that, Richard?

Mr Davies: No. That is my experience. The more appearances in court, the greater the degree of recidivism, if you like, the less significance the drug problem achieves in the sentencing process, because it gets to the point where the court says, as Louise said, "You have had your chances, you have been to rehab, you have failed, you do not want to deal with your drug problem. We are not going to help you. You are a menace to society. The only outcome for you is full-time custody."

Certainly there is the solaris program within the jail, but that is not necessarily the best way to deal with longstanding drug problems. If somebody gets to that stage, then it is a good opportunity to attempt to address the problem, but really the problem needs to be addressed before it gets to that stage where somebody is basically jailbait, an institutionalised offender. And we see so many people—and not necessarily very old people—but after a while you really get the sense that they are institutionalised. They cannot really function on the outside, and something within them tells them it is time to—

MRS JONES: Can I just ask a supplementary to that question?

THE CHAIR: Certainly.

MRS JONES: How would a drug court address the problems of a regular recidivist person who is effectively institutionalised?

Mr Davies: I think it is essentially a combination of a carrot-and-stick approach. The way it operates at the moment, there is a certain amount of stick involved but in that, if you attempt rehabilitation et cetera, then the sentence you receive might be less or it might be deferred or whatever; and if you succeed, then you will not go to jail, you will get a suspended sentence. The drug court is a much more intensive program, as I understand it. I should preface this by saying I have no experience of the New South Wales drug court. I practised for many years in western New South Wales, but the drug court never crossed the mountains. As I understand it, there is a greater amount of stick involved, and if you fail in certain basic tasks like keeping appointments and engaging in whatever programs are set for the offender, then all bets are off.

MRS JONES: You get the kick-in of the suspended sentence or something is actually activated?

Mr Davies: Yes.

Ms Taylor: You are excluded from the drug court program.

Mr Davies: The sorts of people that they address it at in New South Wales are people who are on the cusp of receiving full-time custody for their offending and their record et cetera.

MRS JONES: Is there analysis of the results of that court in operation that we can have?

Mr Davies: I think probably the New South Wales Bureau of Crime Statistics would have studied that program over time, because it has been going for 15 years or more.

Ms Taylor: Our submission at page 14 speaks to some of the statistics arising from the evaluations that have been done. But certainly my understanding of the way that it operates is that it is much more intensive. It is structured so that really the court is almost walking the offender through the process of rehabilitation. There is intensive monitoring of that person as they proceed through the drug court process, and their participation in that process is dependent on their engagement. Someone is charged, they are before the drug court and they are walked through that process.

In the ACT someone is charged, someone is sentenced and then the rehabilitation and the targeting of the dealing with the substance abuse problem comes here. And what it means is that if a person breaches or gives a dirty urine sample, for instance, or does not keep appointments, the trigger for coming back before the court is what we refer to as breach proceedings. That requires Corrective Services to start, effectively, criminal proceedings against the person alleging that they have breached their good behaviour order. And that can take some time to come back before the court.

Our experience would tell us that Corrective Services then do not let that person re-engage with them so that they are excluded from the regime of supervision that

they have been sentenced to, and they then have to wait before their matter comes back before the court. They give an explanation for why they have not engaged, and the court has a variety of options available to them. That takes times.

MRS JONES: So the drugs court essentially is a system within the current system which fast-tracks those who are not compliant with what they have been asked to do, in order to get the ultimate conviction fast?

Ms Taylor: I cannot speak directly to the fast-tracking part of it, but what I can say is it is walking—

MRS JONES: But those systems are fast?

Ms Taylor: That is right. And it is forcing engagement in a way that is more targeted and more intensive than I would suggest our current regime of post-sentence supervision is.

Mr Davies: It is really what you would call therapeutic justice. It is dealing with the problem when it presents itself to the court and not letting the offender out of the system until—

Ms Taylor: That has happened.

Mr Davies: —that has happened, until addressed.

MRS JONES: As in not let him out of the judicial system until it has happened?

Ms Taylor: That is right, whereas in our system, for want of a more elegant term, they are spat out by the justice system to the corrections system. And it is the corrections system that monitors. In the drug court, they are judicial.

MRS JONES: But you have got less carrot left at that point?

Ms Taylor: Precisely.

Mr Davies: It is really part of the punishment rather than part of the therapeutic—

Ms Taylor: Than part of the justice system, saying, "We want you to address this."

MS BERRY: And I understand with that drug court there is a lot of communication between the judicial officer within the drug court and police and housing and all the other services that are involved, and that person—I do not know what they are called, the judicial officer in the drug court, is that what they are called?

Mr Davies: It is a judge. They have the same standing as a District Court judge.

MS BERRY: So they have a pretty close relationship to the people that they are attempting to rehabilitate and keep back in the community?

Ms Taylor: Yes, that is so.

Mr Davies: It does not work unless you have all the agencies and the resources there to address all the problems, the holistic approach to the problem, because it is not just the drug use. Something may have been a catalyst for the person getting the drugs or having got into drugs. There are consequences in the way they live their lives, at least a chaotic lifestyle which also needs to be addressed. So unless you are addressing everything at the same time, then they will go back onto the street and—

Ms Taylor: And having all those services at the table means there is less wriggle room for an offender to say, "I could not do that because Housing did not answer my call." Housing say, "Yes, we did. You did not ring."

MRS JONES: So it brings all those people to the table?

Ms Taylor: Yes, whereas our system, when someone is in breach of a supervision order or a good behaviour order that has a component of supervision, that does not provide that holistic sort of information. So it is really much more about the offender's engagement with Corrections, as opposed to the offender's engagement with Housing or with Health or with the rehabilitation program that they were directed to go and attend.

So a lot of the information that we get around breach action is second-hand. It is Corrections saying, "We spoke to Joe Blow at Housing and they said X," and then the offender says, "No, that did not happen." So there is a lot lost, in our experience, I would suggest, in translation, whereas the drug court has people at the table who are directly attempting to engage with the offender. So the accountability is high.

MRS JONES: It could be a more efficient use of money as well?

Mr Davies: It would be someone from Housing, someone from TAFE, someone from Health. They are able to address all the issues as part of the step-by-step approach.

Ms Taylor: And to be frank, I think there is a real appetite for that from the judiciary here. There is just not the regime or the structures in place to do it. So it is the best attempt they can cobble together through Corrections that we currently see in the ACT.

Mr Davies: Our Chief Justice was the first judge of the New South Wales Drug Court, and if she has not spoken to you yet she would be an excellent person—

Ms Taylor: The ideal person.

Mr Davies: to tell you about her experiences establishing and running that court.

MR GENTLEMAN: Mr Davies and Ms Taylor, you have made a very detailed submission on restorative justice. That has been an interest of mine for some time. As you have said, RJ in the ACT is only for younger people, but it seems to have quite a deal of success for victims of crime and their families. You have talked here too about some RJ operations in other jurisdictions: in New South Wales, forum sentencing; and in Queensland, justice mediation. How do you think we might be able to go forward with that in the ACT?

Mr Davies: I think it is important that the program be expanded to include adults and a range of offences. I was not here at the time, so I do not know why it was never expanded to cover adults. My experience of restorative justice in that form is fairly limited, but I did practise in western New South Wales for an Aboriginal legal service for 10 years, and I had experience with the establishment of circle sentencing in Dubbo. That is similar, and the way the circle sentencing court operates here is very similar to the way it does in New South Wales.

I think it is important for both victims and the offender. Speaking from the offender's point of view, the way I see it is that it gives them ownership and responsibility for their offending behaviour, and an opportunity to make amends or at least express to others, including the victim, how they feel about what they have done. It also provides an opportunity, again, for problems peculiar to that particular offender to be identified and potentially addressed. I understand that happens in relation to restorative justice for children now.

I suppose it is a much overused term, but it is probably a form of therapeutic justice in that it seeks, as part of the process, to address and remedy the problems that led to the offending behaviour in the first place. Certainly, in my experience with Aboriginal offenders and circle sentencing, they had to speak for themselves. They had to say what they felt. They were grilled by their elders, which is a frightening experience for some. I have seen grown men cry as a result of a session of circle sentencing.

Perhaps the way we do things now does not do that, because if they have a lawyer, they hardly have to say a word throughout the whole process. The lawyer does all the talking for them. The lawyer expresses to the court how the offender feels et cetera, whereas the restorative justice process puts the offender in the box seat to accept ownership and responsibility for the offending behaviour and to demonstrate that they have some insight into the problem and how they might deal with it.

MRS JONES: Can I ask a supplementary on that?

MR GENTLEMAN: I would like to add a supplementary first. If the offender takes ownership and responsibility and the victim and their family perhaps feel less aggrieved, is there a bit of reparation there? Therefore is there an opportunity to have perhaps lesser custodial sentences?

Mr Davies: Firstly, the ameliorating of the damage or the injury to the victim is significant. From my own experience—it is anecdotal or from circle sentencing—I think victims do benefit. Perhaps it assists in achieving some closure, too. If you have a victim and an offender face to face, victims are saying how they felt as to what happened, the violation that happened to them, and the offender can hear that and express how he feels about what he has done to that person. If they did not have it before, it gives them some insight into the consequences of offending behaviour, and that in itself may operate as a deterrent. It is not going to happen every time, but they may think twice about doing it again.

Ms Taylor: From a sentencing court perspective, what it allows is to call, I suppose, an offender on their level of remorse, their willingness to confront their victim and

hear the effect of their crime. Having been involved in circle sentencing and a small amount of restorative justice, it is quite a powerful thing.

In the current system, victims have very limited opportunity to participate in a system that really is not designed for them. In my time prosecuting, I would often say to victims who would come along and ask what their role was, "Apart from a very limited role of potentially coming to give evidence about what happened to you, there really is no role for you. This system is not designed for you." Restorative justice can provide them, if they choose to participate, with a much larger role in the outcome for the person who has harmed them in whatever way.

I have seen the impact of that and the effect of that. As I say, it can be quite powerful. The current system allows them to make a statement at the end, if they so choose, and that statement can be in court, a prosecutor can read it aloud or it can simply be tendered to a magistrate or a judge to read.

My recollection of restorative justice in the ACT is that there was quite a lot of momentum around it when it was first introduced for young offenders, and for whatever reason that momentum fell away when it came to talking about adult offenders. I think there was some concern about the sorts of offences that it would be rolled out for. You can imagine that, for sexual offences or family violence, it could be highly problematic in the wrong circumstances with the wrong case.

Once floated, that concern perhaps led to a dampening of that momentum. I do not think it is completely impossible. With the right regime and scheme, burglary offences, for instance, are the sorts of offences that you see as perfect for the restorative justice forum, because people who are robbing other people's homes do not realise what the impact is when they take a little gold ring that might not have been worth a lot of money but is of huge sentimental value to a victim. Putting a voice to that can be quite powerful, in my experience.

With the right momentum, the right push and the right regime, you would see some of the criticism fall away, or the fear around what it might mean for offences like sexual offences or offences against a person, because the power dynamics that could come into play with family or sexual violence are very real, but with the right regime I think that would be achievable, while guarding against some of those concerns.

MR GENTLEMAN: On the victim's side, I have heard presentations to a committee when we were inquiring into RJ; burglary is a really good example where the person thought it was a personal attack on them, and the offender was really only trying to get some cash to go and do something.

Ms Taylor: And, for instance, has fears around that person coming back to their home or that they were particularly targeted for something. Absent a restorative justice program, that remains an unmet concern forever in our current system, if there is no way for the victim to be involved. To hear an offender say, "Look, the door was open; I didn't know you from a bar of soap; I still don't. You were one of 10 houses I robbed that day. I was off my face on heroin," or whatever, and for a person to get that small amount of comfort that they do not even remember where the house is, or they do not even remember what they took, as I said, it can be quite powerful in terms

of allaying people's fears around whether they could be a victim of this person into the future or whether there was a particular reason for them being targeted.

With the right offences and in the right circumstances there is no reason why it could not be as effective for adults and as powerful for adults as it is for young offenders—or can be for young offenders. I note that in New South Wales, for instance, the eligibility criteria are such that they target offenders between 18 and 24 who might be, you might think, more receptive to hearing about the impact of their crime than someone who is 44 and a career criminal and has committed 100 burglaries in their time. I think the targeting is important, and you will see our submission speaks to proper resourcing being really important as well.

Wearing my other hat, I am the convenor of the ACT Women's Legal Centre. I recall some of the fear around the sort of offences that it would be rolled out to. It was about what support there would be for victims who chose to participate in the process. It was about what sort of resources would be available to them, both in the lead-up, at the time when they participate, and afterwards in terms of counselling and support. With proper resourcing and the right regime, I think it could be an incredibly effective tool.

MRS JONES: I want to ask, because I am really learning in this field: RJ is basically an alternative to another form of sentencing; so it fits in the process pre-sentencing and it has—

Mr Davies: It is a sentencing outcome, obviously. I suppose there does have to be some incentive for the person to engage in the process, but it is addressing a different aspect of the offending and the causes of the offending, in that it is putting that offender face to face with their victim. It is also an opportunity, in the course of the sentencing process itself, to address the underlying causes of the criminal behaviour.

Ms Taylor: Any agreement that is reached in the course of the restorative justice session—

MRS JONES: Can be a part of the sentencing.

Ms Taylor: That is so—and, as I said, can speak quite legitimately and lend a lot of credibility to an offender's claim that they feel bad about what they did.

Mr Davies: It is still a sentencing outcome, though. It is not a matter of walking away at the end of the day.

MRS JONES: No, and there must be some method of balancing off what might have been the sentence if they had not been involved in this process versus what has been achieved?

Mr Davies: Yes. Looking at the way it is addressed in New South Wales, it seems—I have no experience of it—it is addressing those people who are at the point where they are at risk of embarking upon a life of crime, and where you might not want to send them out to Long Bay jail or Bathurst jail—

MRS JONES: Who makes the decision about who gets offered RJ if you have it as part of your regular system?

Ms Taylor: Do you mean now, in the ACT, or in other systems?

MRS JONES: No. In a system that you imagine we might roll out in the ACT, or in the New South Wales case, who decides who gets offered? Is it offered to everybody? Is it offered to everyone when the victim agrees? Is it offered in certain types of crime?

Ms Taylor: You would have to tailor a regime that targeted particular types of offences and particular types of offenders. Currently, with the system with young offenders in the ACT, the DPP has a right of veto. We make some comments about what we think about that. Our view is that if it were rolled out in the way that we suggest in terms of having particular offenders and particular offences, it would be on the application of the DPP, the offender or the court. They could look at a matter and decide that it might be appropriate for referral. A referral does not necessarily mean that it is going to become part of the restorative justice process. The referral might determine that it is not appropriate, a victim does not wish to participate or in fact an offender has no real understanding of what restorative justice is and, once they learn, says, "Actually, no, this isn't for me."

MRS JONES: Are there any systems where the victim can request RJ?

Ms Taylor: The victim, in our system, unfortunately, is never party to proceedings, so effectively—"represented" is the wrong word—through the Crown, who represents the community, the victim's interests are represented. So it would have to be the DPP that has a view about that, one would hope in consultation with the victim.

MS BERRY: But it is voluntary?

Ms Taylor: Yes.

MS BERRY: You cannot force it on a victim?

Ms Taylor: No.

MS BERRY: I note in your submission that you talk about the carrot in restorative justice, and that once that process of restorative justice is gone through, a person can have the charge dismissed once they have gone through the restorative justice process to the satisfaction of the court.

Ms Taylor: Yes.

MS BERRY: I suppose that would be particularly useful for young people.

Ms Taylor: Or first offenders.

Mr Davies: I think that bit was in the context of young offenders.

Ms Taylor: We would see that as particularly relevant for young offenders, because it is a huge carrot. Having that opportunity to have your matter effectively extinguished, for want of a better word, is an enormous incentive to become involved in that process. It is a fairly significant opportunity that the court is giving a person who has been charged with a criminal offence and admitted guilt in relation to it, or been found guilty in relation to it.

MRS JONES: So it is only offered to people who are clearly guilty?

Ms Taylor: Admitted guilt, yes.

THE CHAIR: Ms Berry, you have a substantive question.

MS BERRY: Yes. I was interested in your views on mandatory sentencing and whether you think it acts as a deterrent.

Ms Taylor: No, I do not. That is the short answer. I think mandatory sentencing is hugely problematic and usually impacts upon certain sectors of the community—Aboriginal and Torres Strait Islander people come immediately to mind—disproportionately. And I think it unnecessarily constrains the individual discretion of the sentencing judge or magistrate in a way that fetters their ability to take into account the subjective circumstances that bring a person before the court. I would be very concerned to see the ACT float the idea of introducing that sort of response. I think we can do better than that, frankly, particularly as a small jurisdiction. I think we are well served by the magistrates and judges that we have, such that our confidence in their ability to discharge their duties should be high enough that we can say mandatory sentencing is not a path that we need to consider.

Mr Davies: Like the presumptions against bail in certain instances, it targets the offence rather than the offender and rather flies in the face of the concept of individualised justice because each offender is an individual with their own background, their own circumstances, their own reasons for committing the offence. Every class of offence has a range of seriousness or aggravating circumstances. For example, you can commit a burglary—and I have had a case like this—if somebody is the subject of an exclusion notice from a shopping centre and therefore rendered a trespasser, if they go into a shop and pinch something, that is burglary.

Ms Taylor: Instead of a minor theft, for instance.

Mr Davies: Yes, which it should be, but—

Ms Taylor: So it is 14 years instead of two.

Mr Davies: The way the law is, that is a burglary, just as a home invasion in the middle of the night with balaclavas and baseball bats is also a burglary. That is an aggravated burglary. I picked a poor example there. But it is somebody breaking into a house in the middle of the night, committing another simple burglary, which has got to be at the far end of seriousness—occupants in the house, taking an heirloom et cetera—yet mandatory sentencing would say that the shoplifter and the home invader should be subject to the same mandatory sentence.

Ms Taylor: Might I also say that a perverse view of it means that your judicial officers do not have to work particularly hard to reach an outcome either. If you have got a formula, and the formula is in front of you as a judicial officer, and you do not have to consider anything outside that formula—A plus B equals C; you go out that door, not that door—not only are you constraining the options but nobody is having to turn their mind to what is in the best interests of the community and what is in the best interests of the offender. It would be my submission that we all benefit from a formula that takes those things into account and balances them in a fair way.

MR GENTLEMAN: So would mandatory sentencing in a sense fail the purposes of sentencing?

Ms Taylor: Yes, I think it does. It certainly does not allow the balancing. Sentencing, in my experience, is the task of judicial officers that I have never envied, I must say. It is like moving deck chairs around on the *Titanic* in many respects. It is like playing chess. I have always thought of it that way. You move the queen, then you move the little guy and you move the king, and you are still left with a picture that you have got to untangle. And mandatory sentencing provides for no variances in that regime. So there is nothing to be balanced, because the formula is clear and there is no way for you to go outside that formula, no matter how compelling the circumstances.

MRS JONES: Can I just ask a supplementary on that then? If you have a situation, which we may not be in in the ACT, or we may, where public expectations are not being met during sentencing, is that of no value?

Ms Taylor: I think the way that public expectations are injected into the sentencing process is through the appeals process.

MRS JONES: Through the DPP's work?

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

MRS JONES: It is just not always reported upon back to the public?

Ms Taylor: And to be frank with you, I think that reflects the complexity of sentencing. Part of the challenge—I am often frustrated, as are my colleagues, I am sure, and to be honest I felt that way as a prosecutor as well—is that the reporting that accompanies sentencing is often reflective of the misunderstanding of that very balancing act that you speak of.

MRS JONES: Because it is a fear?

Ms Taylor: Yes. And jail is not always the answer.

MRS JONES: But the fear cannot always be allayed, and that is a—

Ms Taylor: And often the harm cannot always be righted either. If you think about offences that result in a death, for instance, no sentence is—

MRS JONES: Or sexual abuse?

Ms Taylor: Indeed. The ability to put a victim back where they were is impossible with some crimes. And in the minds of some members of our community, no sentence will ever fit some of those crimes. But within the system that we have, in my view, it is by that balancing exercise that we see justice achieved. The way to inject community standards into those outcomes is via appeal.

Mr Davies: One other issue arising from this mandatory sentencing discussion is that one of the consequences of that is to operate as a major disincentive to anybody pleading guilty.

Ms Taylor: Yes, indeed.

Mr Davies: While judges might not be so busy in sentencing people, they will be a lot busier presiding over trials, because it does really remove the incentive to plead guilty. A good example of that in recent years was the prosecution of an Indonesian fisherman charged with people smuggling, the aggravated form of the offence, which carried a mandatory minimum sentence under the Commonwealth criminal code of 20 years, with a mandatory minimum non-parole period of three years. And that removed any—

Ms Taylor: Discretion.

Mr Davies: It was set way too high for really what judges around the country came to see as the criminality involved in the offence, but secondly it removed all incentive to plead guilty, until a former Attorney-General directed the Commonwealth DPP to charge the simple form of the offence, which carried a smaller maximum sentence. Suddenly there were a lot of pleas of guilty because a sentence could be imposed that adequately addressed the criminality.

Ms Taylor: An early plea.

THE CHAIR: I would like to ask a supplementary on what you just brought up. What impact would legislation to encourage early guilty pleas have in speeding up sentencing and reducing court time?

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

Not only is it a demonstration of remorse and contrition for the offender's behaviour, if there is, indeed, any evidence of that, it is perhaps more particularly for what they

call the utilitarian value of the plea in saving the court's hearing time and resources et cetera, and also facilitating the course of justice, in other words, not putting witnesses and victims through the trauma of giving evidence, getting an early result et cetera.

Ms Taylor: And the current regime requires sentencing magistrates and judges to articulate that discount. They have to put a figure on the discount for it—the particular section escapes me—but there is now an administration of justice discount as well for people who may not have pleaded guilty but who have, for instance, run their trial in a manner that has meant, instead of it taking two weeks, it has only taken one. So there have been reasonable concessions made by defence lawyers—we do make them now and then—and those concessions have, for instance, resulted in four police officers having to give evidence, not 14.

Mr Davies: So we say if this is only a question of law involved, we can tender the brief of evidence and we will make our submissions. I have often had to say, "We pleaded not guilty on my advice because I saw a question of law involved," and the magistrate has decided against me. But I have indicated that that was my advice to my client, that I saw a legal issue that was worth arguing.

THE CHAIR: So you feel the current arrangement is adequate? Is that what you are saying?

Ms Taylor: I think it provides enough incentive for people to plead guilty when they should, when there is evidence against them that is compelling and there is little utility in them fighting the charge against them because of the impact of a discount. That is particularly so, may I say, in relation to offenders that are looking at periods of imprisonment. Really if you are talking about a first or second offender who has committed a more minor offence, like a minor theft or something like that, it is difficult to say, "If you plead guilty, you are going to get a good behaviour order. If you plead not guilty, you are going to get a good behaviour order." Those are the areas where it is difficult to encourage early pleas, because in the result not a lot is going to hinge on that plea.

Where people might be looking at periods of imprisonment for more serious offences, I think that the current regime provides enough incentive for us, for instance, to be able to give advice to our clients about the sort of discount that they might expect if they were to enter a plea of guilty early.

MR GENTLEMAN: What is the benefit for the community there? There is a benefit in fewer resources in prosecuting the case, but there has to be a benefit, in the sentencing, for the community?

Ms Taylor: The benefit in matters where there are victims is that that victim does not have to come along and give evidence or the witnesses do not. In some matters, for instance, it is not unusual for whole teams of police officers to be required to give evidence. So they are coming and sitting in court for days on end, 11 or 12 of them, when they could be out on the street policing. So there are significant benefits, I would say, to the community in encouraging those early pleas. We put it potentially under the umbrella of cost, but it is more than that.

MR GENTLEMAN: Resources?

Ms Taylor: It is the logistics. It is the build-up, for instance, that victims and witnesses go through in order to come along and give evidence. That is a significant thing for people to have to come to do, particularly victims. And so I think that there is a real benefit to the community in the encouragement of those pleas.

THE CHAIR: Thank you. I think, Mrs Jones, you have the last question coming up.

MRS JONES: Thank you. You alluded before to concerns about the DPP's power of veto over diversions. I want to ask about that. You refer to diversions of offenders affected by mental health problems and section 334 of the Crimes Act. Can you tell the committee about the significance of the problem as you see it and possible solutions?

Ms Taylor: I am very pleased that we have the ability and opportunity to address that section. As our submission speaks to, section 334, as it is referred to in the shorthand, is a section that is available to people who are found to be mentally impaired. That definition is under the ACT Criminal Code. So on an outline of the statement of facts, the magistrate considers that it is appropriate that it is the sort of matter that should be dealt with under this diversionary umbrella. It is our experience, and our submission reflects this, that increasingly the application of that provision is becoming more and more adversarial.

MRS JONES: What do you mean by that? I am not quite following.

Ms Taylor: Section 334 is something that is raised either by a magistrate or by a defence lawyer. So an application is made to the court for consideration of the application of that provision. In matters that are indictable that can be heard summarily, the DPP obtains or remains with this power of veto. So in matters where offences that are in that category are in question, the DPP can say to the court, "No, we don't agree with you dealing with the matter that way," and that is the end of the matter; there is no right of reply.

MRS JONES: It is discretionary.

Mr Davies: It robs the court of its jurisdiction if the DPP, or the prosecutor, stands up at the bar table and says, "We are not consenting." That is the end of it. The court cannot say, "Hang on a minute."

MRS JONES: And that is happening more and more. Is that what you are saying?

Ms Taylor: Yes.

Mr Davies: It happens invariably.

Ms Taylor: I will be careful by saying "more and more", but it is certainly a common feature of the director's position when the offences involved are indictable offences that can be dealt with summarily.

MRS JONES: Can you just give me a quick understanding, as a non-lawyer, of a summary and an indictable—

Ms Taylor: Assault occasioning actual bodily harm is an indictable offence that can be dealt with summarily.

MRS JONES: Yes.

Mr Davies: Or breaching a protection order.

Ms Taylor: Breaching a protection order.

MRS JONES: So they are fairly serious offences.

Ms Taylor: I would not say fairly serious offences; I would say serious offences.

Mr Davies: We do not mind the DPP standing up and opposing the making of an order under section 334, which involves either dismissing the charge unconditionally or referring the matter to the tribunal for consideration of a mental health order of one form or another. I am happy for them to oppose it. It is just the veto operates to rob us and the court of any opportunity to have the particular circumstances of that particular offender aired.

MRS JONES: So you think the judicial officer should decide?

Mr Davies: That would be our position, yes.

Ms Taylor: Coming back to my point about the litigation around this section becoming more and more adversarial, even in matters where they are summary-only matters—so a minor theft or a common assault—the DPP, as party to proceedings, can still oppose, as Richard has just referred to, the application of the provision, and increasingly they do. What this means in practice is that for our clients who might potentially fall under the umbrella of that provision—for instance, if they have pleaded guilty, although that is not a prerequisite to the use of that section—we make that application, perhaps with a report from a psychologist, or a psychiatrist in most cases, with a diagnosis that will allow us to satisfy that umbrella definition under the Criminal Code.

The director increasingly is litigating that issue. They either oppose the diagnosis or they do not accept the diagnosis made by the medical practitioner and they require the person for cross-examination, or they make a submission to the effect—as in a matter I had more recently—that the diagnosis is such that it does not fit underneath the definition of "mental impairment" as it is required to do. That is most always absent their own expert evidence.

MRS JONES: Just to get to the heart of this: does this mean that the point of this provision is that if a decision had to be made about whose needs had to be taken more into account, the DPP, having this power, actually puts the victim's needs slightly higher than the offender's needs, and that is maybe a decision that historically has been made for a reason?

Ms Taylor: I would not put it as high as that. I would really hesitate to see it as a competition between victims and offenders.

MRS JONES: Because it is used in other areas in a different way.

Ms Taylor: If the director were here he would say that not every matter where a person is mentally impaired—I am not trying to verbal him in any way—is appropriate for a person not to have a conviction recorded or to be managed within that regime that we spoke of earlier of supervision, for instance, under the corrections environment. This diversion sees a person completely moved away from the criminal justice system and moved into the mental health regime.

MRS JONES: Yes.

Ms Taylor: The director's view that he is making a reasonable decision in matters where they oppose that diversion, based on an assessment that it is not appropriate for it to happen because the matter is too serious or the person has a long criminal history of violence, for instance—

MRS JONES: Or that the public really has an expectation—

Ms Taylor: or that the community has an interest in the diversion not occurring; that is so.

MRS JONES: that the seriousness of the offence will be dealt with, in their view, what you might term as "properly", and we are changing our view of how people with mental health concerns are dealt with by criminal justice. Maybe that is historically why it is there, but can you explain how that element of requirement of the community to be behind it could be addressed if you were going to move those more serious offences into a therapeutic environment?

Ms Taylor: The magistrate has to make an assessment of the appropriateness of the matter being dealt with. It is not like once the drawbridge is down you stroll through it. There is still the gatekeeping of the judicial officer turning their mind to whether on the facts of the matter, as alleged—and they are alleged by the director; they are the statement of facts as alleged by the director—it is appropriate for that diversionary mechanism to be invoked. We would say that that is where the gatekeeping is, with the judicial officer.

Part of the concern we have is what we see as an increasing instance of the director challenging the medical evidence or the medical diagnosis or the material that we seek to rely on that might reveal a long history of mental illness or impairment, and it is being challenged absent any expert evidence from the director.

MRS JONES: Is there also a system where you could see the DPP being presented with several psychiatrists' reports?

Ms Taylor: And that happens, yes.

MRS JONES: Right.

Ms Taylor: Our submission speaks to the idea that we would really like it to be seen as more of a court-driven inquiry in the way that fitness to plead is, as opposed to what I would say, from my time sitting on either side of the bar table, has become increasingly adversarial in the way that normal criminal justice litigation is. If you go back to the philosophy behind the provision—and there is some history given in our submission that I will not go into now that Justice Refshauge went through in a recent decision of his—that, in our view, speaks to what the philosophy of the provision should be, and that is an inquiry into the person's mental impairment and an inquiry into the appropriateness of whether or not they should be diverted. That decision, we see, rests appropriately with the judicial officer and the DPP having a say but not a starring role. At the moment they have a starring role.

THE CHAIR: Ms Taylor, I am afraid we have reached the end of our allotted time. In fact, we are five moments over.

Ms Taylor: I am sorry about that.

THE CHAIR: It is not your fault. Ms Taylor and Mr Davies, we would like to thank you for appearing here this afternoon. The committee secretary will follow up with you regarding transcripts and any further questions that may be taken on notice.

Ms Taylor: Certainly. We would be very pleased.

THE CHAIR: Also, if anything else comes out of what we have talked about so far this afternoon, such as what we have just been discussing, and you feel that you want to provide some further information, we would be happy to hear further information from you.

Ms Taylor: Thank you very much for the opportunity.

Mr Davies: Thank you for inviting us.

THE CHAIR: Thank you.

Meeting suspended from 2.34 to 2.46 pm.

BARTELS, DR LORANA, Associate Professor of Law, University of Canberra

THE CHAIR: Good afternoon, Dr Bartels. Welcome to our committee hearing, which is the third public hearing for the Standing Committee on Justice and Community Safety inquiry into sentencing. Today the committee has already heard from the Human Rights and Discrimination Commissioner, the Children and Young People Commissioner and Legal Aid ACT. We are now looking forward to your discussion with us, from the University of Canberra. Are you familiar with the privilege statement?

Dr Bartels: Yes.

THE CHAIR: Do you have an opening statement that you would like to make?

Dr Bartels: Yes, I do. Firstly, thank you for inviting me to give evidence here today. I welcome this inquiry. I think in some respects we are quite lucky here in the ACT in that traditionally we have fairly low crime rates and fairly low imprisonment rates—and I will speak to that a bit more in a moment.

One thing which really sets us apart, especially from New South Wales, is that we do not have the tyranny of distance. When we are thinking of access to the courts and access to treatment, you do not have people who are hundreds of kilometres from anything. On the other hand, I think we have some unique challenges. We have a small court, both physically—although that is going to change—and in terms of the number of judicial officers, and that obviously has implications in terms of delay.

Prison management is also complicated by the need to separate prisoners across the one facility, as we know, both sentenced and remand and women and men. There is also, as I understand it—I went on a visit with Ms Richardson recently—the challenge of separating prisoners who simply do not get on, and in a different jurisdiction you could have them in different facilities.

We do have the benefit of not having to deal with some of the ill-informed media debates clamouring for harsher sentences that we see in New South Wales and Victoria. Nevertheless the number of people being sent to prison has gone up in recent years, and I think we need to ensure that we are doing this in a responsible and sustainable way. The prison systems in New South Wales and Victoria are at breaking point, and I do not think it would benefit anyone—offenders, victims or the broader community—if we were to follow suit.

The corrections minister recently announced a $54 million extension to the AMC. This will obviously ease immediate pressures, but it is not a long-term solution, as the minister duly acknowledged. We simply cannot keep building new prison beds. So we need to ensure we are thinking intelligently and creatively about justice and sentencing. We need to make sure our focus is and remains on things that research shows us really do help to cut involvement in crime: drug and alcohol treatment, counselling and mental health, housing, education, employment and transport. In this context I welcome the Attorney-General's justice reform strategy. I also think in that context a therapeutic jurisprudential approach is, in addition to restorative justice, a

good way to go.

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

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

I have prepared a document for the committee. The first part sets out the figures to which Mr White referred, and I do not take issue with that. I have included in that the figures for 2013. The graph is a trajectory on a month by month basis, taking as the starting point April 2009, because the AMC started taking inmates from the end of March 2009. As you will see, it really has gone up fairly steadily.

I am not in any way disputing Mr White's statement that it was a low imprisonment rate at that point in time, but, to contextualise why I selected that, it was not to confect a problem but to contextualise the circumstances in which we now find ourselves. Obviously, the situation is that this committee needs to respond to the issues. We cannot go back to where it was in 2008 or 2007 and pretend that it never happened. There was a dip. Now it is going up, and now of course we need to address that.

One of the points in my submission was around the need for a sentencing council in the ACT. I have noted that some of the other submissions were also supportive of this. The research in Australia and overseas shows that the more people know about all the facts of the case and the more they understand about sentencing, the more supportive they are of judicial sentencing practices. I believe that a sentencing council could help bridge that gap between public perceptions, which may be informed by media reports which may or may not be accurate, and a better understanding of sentencing generally. Also, the sentencing council could, in a more permanent way, advise the government of the day on sentencing policy and practice.

The final thing I would like to refer to in my opening is in relation to the issue of public opinion. I know some of the evidence before this committee was about the work of Professor Kate Warner. I think there was some uncertainty when Mr Kukulies-Smith was here as to whether Professor Warner's study had been completed. The first study, which was the Tasmanian sentencing study, is complete. She is involved in two more—one in Victoria which is ongoing, and one which is a national

study involving sentencing for sex offenders. I am working with her on that. She was my PhD supervisor. I have worked with her for 10 years, so if anyone has any questions I am happy to address them. That project, which is just starting, has the support of the Attorney-General here, and it also has some financial support from the Victims of Crime Commissioner. I am happy to speak to that, if you should so desire.

In relation to public opinion research, there is another project which may not have come to your attention, which Professor Warner did not lead but she was part of the research team, which involved a national survey of 6,000 people. It was about public attitudes towards sentencing. The fascinating thing about that was that, in spite of the fact that there are obviously, as we all know, very different sentencing policies and practices around the country, the level of satisfaction was the same. So our response of "people are dissatisfied" is perhaps uncoupled from what is actually going on. Again I can provide references or provide a copy of those findings, should the committee so desire. Thank you. I am happy to answer any questions.

THE CHAIR: Thank you, Dr Bartels. Before I get to my opening question to you, I am not sure if I heard you correctly, so I would like to clarify something you said in your opening remarks.

Dr Bartels: Certainly.

THE CHAIR: Did you say that, with the impending opening of the Alexander Maconochie Centre, you felt people would be less likely to be sentenced?

Dr Bartels: No. My perception, and this was only a perception, was that judicial officers who might previously have experienced some reluctance to send offenders interstate to Goulburn might not feel that reluctance anymore when we have that—

THE CHAIR: They are more likely to sentence them; okay.

Dr Bartels: Yes. As I say, that was only a sense. I do not think any real empirical research has been done on that.

THE CHAIR: Dr Bartels, your submission recommended that a sentencing council be created, and you have just spoken about that in your opening statement. Can you elaborate for the committee's benefit on the significance of such a move and what benefits, in your view, it would bring to the ACT?

Dr Bartels: Sure. The first sentencing council in Australia was introduced in New South Wales in 2002, and was followed in 2004 by the Victorian Sentencing Advisory Council, which has been much more proactive, so I think it is regarded as the gold standard and I believe it has won awards and been highly regarded internationally. Some other jurisdictions have since followed suit. I think Queensland had one which has since been abolished, Tasmania has one and South Australia has one. So most jurisdictions now have some form of them, and they vary in their format.

As I understand it, basically the role of the sentencing council is twofold. It depends on the composition of the council and how it is constituted legally as to how much it does of each of these functions. Firstly, it can provide advice to the government of the

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

The other side of it—and this is something that the Victorian Sentencing Advisory Council has done much more proactively than the other ones, to my knowledge—is the public education function. In Victoria, it has manifested itself partly in the publication of sentencing papers—brief snapshots that will, for example, present sentencing patterns for driving while disqualified; they are up on the website and they are accessible to everybody. There are also much more comprehensive reports. They have also done—and I am mindful that we have a small jurisdiction and the budget would be small—a lot of community outreach. It is award winning; there are videos and vignettes. They go to schools and they have community forum events where they can engage with the public and teach them about sentencing and how it works. There is a little video which I think has an introduction perhaps from the chief judge—correct me if I am wrong—about what sentencing is, and what judges and magistrates do when they sentence.

I could get you figures after the fact of how many people have been on the website. It has been independently evaluated by a consultancy firm and has demonstrated that it meets all of its objectives in terms of communicating with the public about sentencing. I think a cut-down version of that might be appropriate for the ACT. I do not know that we can roll out the gold standard straightaway. The chair of that, Emeritus Professor Arie Freiberg, who is now also the chair of the Tasmanian Sentencing Advisory Council, has been in that role since it was set up in 2004. I know him well, and I am sure he would be happy to advise on what works better. I am sure that over the last decade there have been learnings from their experience.

It really is about taking something which we all know is complex, fascinating and controversial and trying to make it more accessible to the public and debunk some of those misconceptions that the public seem to have.

MS BERRY: I have a supplementary. With the sentencing councils in New South Wales and Victoria—you were talking about Victoria—have they done any research into whether or not it has made a difference to how victims feel, whether they understand more about justice not being delivered on a platter?

Dr Bartels: I do not believe there has been any research specifically about victims, no.

THE CHAIR: Mr Gentleman.

MR GENTLEMAN: I was really interested in your opening comments on public attitudes. There was a survey, I think you said, on the levels of satisfaction. Could you go into a bit more detail on that survey for us and where you think that may be able to be used to advise government here in the ACT?

Dr Bartels: I do not have the details of the study on me. One thing I do recall was—and this probably will not come as a surprise to any of the committee members—that members of the public were least satisfied with sentences for sex offences and that there was little difference, as I say, across the country. But I could not pick out for you the numbers now. I can forward to the committee the study on that.

MR GENTLEMAN: If you could.

Dr Bartels: As to the second part of the question, how is this relevant to the ACT, I guess it is instructive, because we have here in the ACT—and in my belief that is a good thing—a government which is much less likely to say, "All right, I heard on talkback radio this morning that people are dissatisfied. We had better pass a law about that." That study, to me, demonstrates the wisdom of that, because if you are going to continually legislate in response to a perceived attitude towards sentences, it may not result in any increased satisfaction anyhow. And if we take that study together with the other information—and it says that the more people understand that same sentencing, the more satisfied they become—I think we see it is a much more cost-effective thing to work on educating people than it is to just say, "All right." We could hypothetically double and treble the number of people we send to prison. It would not make people satisfied and I do not think it would be a particularly smart use of our resources in the ACT.

MRS JONES: If I may ask a supplementary to that.

THE CHAIR: Supplementary, yes.

MRS JONES: In your thought processes for this submission, have you considered the idea that perhaps it is not about the numbers of people who are sentenced necessarily but the types of sentences that they get? A key headline obviously is that sentences are either misrepresented or possibly actually are not as severe as the community expects. What would you recommend to deal with that? If you are talking about sex offences, they are a hot topic at the moment.

Dr Bartels: Absolutely.

MRS JONES: And I guess they are one of the reasons why we are engaging in this conversation. Given the long-term consequences of those acts, how would you address that, for the community's benefit? We are here to represent them.

Dr Bartels: Absolutely. In relation to media representation—obviously I do not work for any journalistic outlet—my understanding is that obviously journalists get things wrong. I do not think that that happens as much in the ACT as in other places I have been. Certainly whenever I am called up by journalists to speak to an issue, I find them to be genuinely interested in telling a fair story. Again, I think we are fairly lucky in that regard. But obviously journalistic ethics plays into it. It is outside my remit but ensuring that journalists are bound by those ethics is something which has come under fire at times.

MRS JONES: Or there is not a body to—

Dr Bartels: To regulate that, something like a sentencing council and engaging with journalists. I do not know whether they have already been provided access to the ACT sentencing database or training on that, but that might be something to ensure that what journalists are reporting is well informed. So I think that was the first part. There was a question between that and the sex offences, which I am happy to come to. What was the middle part?

MRS JONES: If public perception is what it is, if it is not media informed, if it is what people genuinely believe, and if we do hear that when we are out—and we spend an awful lot of time with everyday members of the community—then what would be your advice to us on balancing community concern? We do live in a democracy and we are here to represent those people and those concerns. I have mentioned before in this inquiry the distress that was raised by the Belconnen Library incident. And that is not unfounded.

Dr Bartels: I agree.

MRS JONES: I know that case was appealed, but I just wonder how you would allay a lot of those concerns.

Dr Bartels: In relation to that case, again as you go around your community, I suppose informing people that there is an appellate process. If we are all lawyers, we are familiar with that, but if they are not, maybe informing them about the process. And that needs to play itself out. The director does have a power to do so, and proceeding might be one way of allaying some of those concerns.

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

MRS JONES: Certainly, but my question is: if there is actually a disconnect between what society believes is reasonable for that person to do to have either some sort of recompense to the community or to make the community safe and what is actually happening in the courts, is there no value in the community's beliefs? If they look at the number—and they can clearly read in an accurate report what the number of years for doing that particular offence is—does that have no value?

Ms Taylor: It is not that it has no value, certainly not. It is about explaining to them how that was arrived at. For example, in the Tasmanian study—and I will speak to the sex offence part of it, the sex offence project, in a moment—what happened was: when jurors were provided with just the bald fact of the sentence, that was one thing. They were asked whether they thought that was appropriate or not appropriate. When they were provided with the judge's sentencing remarks and went through all of those things that we are familiar with, his terrible childhood, his attempts to overcome his

substance abuse, all those things, their approval for the sentence went up. The sentence did not change one iota, but their understanding of it did.

MRS JONES: And are sentencing remarks available to journalists in the ACT?

Ms Taylor: Yes. Whether they avail themselves of them is a different matter. And as you can imagine, the delay is often an issue. So I cannot tell you how quickly they go up online, but yes, they would be available to journalists, and the sentencing database has them more readily available. So again, one of the things the committee might like to consider is—I do not know whether you are speaking to anyone from the *Canberra Times*, the newspaper–whether they are aware of it, have been trained on it, know how to use it and are checking the sentencing remarks.

I will go to the sex offence part of it. Obviously it is a hot topic. You are absolutely right. But again there, I suspect that, as with generally, people are not well informed about, say, the proportion of offending that is violent. I suspect people are imagining the worst case scenario. So if you hear about a sex offence, I imagine members of the public would generally assume that it is a violent rape, that it involves—

MRS JONES: I do not know whether that is true or not.

Ms Taylor: No? Certainly the international—

THE CHAIR: I think the witness should be able to answer.

MRS JONES: Fair enough.

Dr Bartels: So I cannot foreshadow what our findings will be from the national sex sentencing study, but what we are doing there is looking at not only jurors who sit on sex offence matters but also looking at grievous bodily harm and wounding, because there seems to be something different about sex cases. I do not in any way mean to trivialise the experiences of victims in any case, but sometimes one would think, on the face of it, the grievous bodily harm matter could have more permanent physical damage. Yet we obviously know that sex assault victims experience, quite separate from their physical experiences, significant psychological damage, and I am not in any way trivialising that. So we will be looking at offences of violence involving sex and those that are not.

But the other thing that we will be looking at, which I think will be very interesting, is a control group of 1,200 people across the country who are summonsed for jury duty but not ultimately empanelled; so they are not actually sitting on the trial. And then we are going to present them with one of 10 vignettes based on an actual case. We have selected these very carefully to ensure that we are looking at a range of sex-type cases. Then we have also got a couple of grievous bodily harm cases in there too. But with sex cases, we are talking about everything from an indecent assault to a sexual assault within the context of a relationship through to a date rape, colloquially termed, sort of situation. And we are going to look at the public attitudes to these different sorts of offences and the sentences imposed.

As I say, I cannot foreshadow what we will find—we have not spoken to them yet—

but I think it will be quite interesting. Child pornography is another example. I suspect attitudes will differ significantly, and I suspect that the response we have in particular to offences involving children will be different to how we approach offences involving adult victims. Again, I am not trivialising the experiences of either group of victims. But again I suspect, although I do not know, that once the circumstances of the case and the offender are brought to bear, there will be a greater understanding of the complexities of sentencing.

I know the Attorney-General has spoken of his support for the study. I think that is very interesting, and it is a bit "watch this space" in the coming years.

THE CHAIR: Ms Berry, a substantive question?

MS BERRY: I was concentrating very much on the evidence you were providing then. It was very interesting. I was at a presentation last night around affirmative consent. They were talking about things like date rape and the community's perception on that, and whether or not a person is deserving of that treatment. They talked about sentences for rape, whether it is the rape of a child or whether it is the rape of an adult—whether they are the same—and how we manage that. One group that provided evidence to this committee talked about each individual's circumstances being based on evidence. What would you say about that? You have talked a bit about other forms of sentencing and more options for sentencing in your submission.

Dr Bartels: About the range of sentencing options or individualised justice?

MS BERRY: Both would be wonderful; thank you.

Dr Bartels: Sure. In relation to one sentencing the individual before one, absolutely. I am a strong advocate of that. I would be uncomfortable with the notion of going down the path that some jurisdictions have of adopting a mandatory sentencing approach. I do not think that that does justice to anybody, quite frankly. It is not in the interests of our system that judicial officers are precluded from taking the circumstances of the case before them into account. Should I elaborate?

MS BERRY: It would be wonderful if you could, thanks.

Dr Bartels: Obviously some jurisdictions have gone down that path—most recently New South Wales with its one-punch laws. I was in Wollongong last Thursday speaking to a judge and he was saying, "There's going to be a case that crosses my path very soon and I'm going to have to send a young guy who is responding to some kind of provocation away for eight years, and the community that has been wanting tougher sentences is going to be breathing down my neck saying, 'Here's this poor fellow who was in the wrong place at the wrong time.'" I think that is the concern that judicial officers have—that if they have their discretion removed, justice will not be served in some cases.

I know there was a submission to the inquiry advocating mandatory sentences for sex offences. I understand where that organisation is coming from, but I do not think that is the right thing for the ACT. I am pleased that the Attorney-General has made his position on that very clear.

In relation to sentencing options, I understand that the majority of submissions to this inquiry advocate for a broad range of sentencing options, and I am in that category as well. Obviously, a lot of the submissions were around periodic detention. That decision has now been taken. I think that is probably the right decision. I think that exploring intensive correction orders is certainly a good approach for the ACT to take. I look forward to being involved in the discussion about what form that should take. It is relatively early days for New South Wales. There are a bunch of different models in place in Victoria and Western Australia. I do not quite know exactly how it would play out here in the ACT, but I think we can certainly consider that.

In terms of other sentencing options, I believe we need to retain suspended sentences in this jurisdiction and generally have a broad range of options so that judicial officers can tailor the sentence to the circumstances of the offender they see before them.

MS BERRY: Thank you.

MRS JONES: If I might just ask a supplementary to that one?

THE CHAIR: Yes.

MRS JONES: Where do you see that suspended sentences fit in the ratios of most serious responses to most serious offences all the way down? We have had some evidence here that because it sits immediately beneath a sentence that it is nonetheless very serious, and we do not have an automatic operation if the other sentencing requirements have not been met. We do not have an automatic recall.

Dr Bartels: Activation on breach. That is right.

MRS JONES: Yes.

Dr Bartels: Yes. I wrote my PhD on suspended sentences in Tasmania. One of the findings from my PhD actually gave rise to Tasmania legislating to create a presumption of activation on breach. That leaves, obviously, the ACT on its own in that regard.

MRS JONES: We are the only jurisdiction.

Dr Bartels: Other than the commonwealth position. Recognisance release orders operate a little differently so I will not go into that. But, yes, the ACT is now the only jurisdiction. It is not about automatically activating it, but a presumption of activation on breach. As you can readily imagine, there could be some very good reason why there was a breach. If the condition of the suspended sentence was, for argument's sake, that you be home by 10 o'clock at night and you were asked to work late on your shift and you missed the bus and you got home at 10.30, I do not know that any of us would like to see a suspended sentence activated for that. That is the sort of thing that in New South Wales would be seen as a trivial breach and the suspended sentence could be continued.

But it may be the case that we have now reached a point where we say, "If we want to

have suspended sentences they do need to mean what they say." That means that if an offender breaches it, at least the presumption should be that it would be activated unless there was some good reason, as we can see, for them to have committed this breach, and taking into account what the nature of the breach was.

I know there was some evidence before the committee that changing that might make some judicial officers less likely to impose suspended sentences, and I do not necessarily think that would be a bad thing. Certainly, from my experience in Tasmania, where I interviewed all the judges and most of the magistrates, it emerged that although obviously it is formally a custodial sentence and that you are not to impose that sort of sentence until you have determined that no other sentence is appropriate, there were instances of judicial officers imposing them on first-time offenders and they really were not thinking, "This is a sentence of imprisonment." Instead, they were thinking, "This is a beefed up good behaviour order," or, "This is a strong message." They were not necessarily anticipating that, if they breached, these people would be going to prison.

I suspect that if we were to create a presumption of activation on breach, that would change the use of them somewhat. But I certainly think that there is a place for them and we need to retain them, including for serious offences. I know that some jurisdictions have removed them as an option for serious offences. South Australia is going in that direction as we speak. Again, I do not think that would be the right way to go.

In one of the ones I looked at a few years ago in a separate study, and I was quite surprised by this outcome—I was writing a paper on euthanasia at the time—I found that all but one case that had been prosecuted at that stage for, loosely termed, euthanasia, assisted suicide, resulted in a suspended sentence, and this was across Australia.

It was the sort of thing where generally you were talking about people who, if they did not need to do drug treatment, requiring them to pay a fine would not seem to be an appropriate thing. These were cases where judges were recognising that what these people had done was very serious. Often the offenders were themselves quite elderly and obviously very distressed, and they were imposing suspended sentences.

I do not imagine that we would have many cases, but if you were to create a blanket statement that says, "Any offence resulting in death shall not have a suspended sentence available," you would be precluding their use in those sorts of cases. Likewise, culpable driving causing death is the sort of matter where there are often strong mitigating factors in the offender's favour. You need to make a strong statement that says that a custodial sentence is warranted, but I think there are certainly circumstances where a suspended sentence is the appropriate outcome.

MRS JONES: Where there is, perhaps, less suspicion that it will be done again.

Dr Bartels: Sure.

THE CHAIR: Just before you go on to your substantive, do you mind if I ask a supplementary?

MRS JONES: Sure.

THE CHAIR: It is sort of related. You state in your submission that offenders in the ACT who are sentenced to imprisonment are more likely than in any other jurisdiction to have been previously imprisoned—71 per cent against the national average of 55 per cent—and you also said this may be linked to the ACT's comparatively lower rate of imprisonment. Is there any comparative data available that you are aware of that does a comparison of the length of sentences between jurisdictions and, I guess, their impact on recidivism?

Dr Bartels: If one looks at the Australian Bureau of Statistics data, one can break it down across jurisdictions by overall length of sentence and also by sentence, by offence type. As you can imagine in the ACT, sometimes there will be very small numbers, but that is something that is possible to do.

I am not aware, though, of any data that nationally breaks down your chance of reoffending for this kind of offence or this length of sentence. The New South Wales Bureau of Crime Statistics and Research certainly would be able to break it down for New South Wales. They have the most sophisticated dataset in the country; it is one of the best in the world. But, nationally, that level of detail would not be readily available. I believe that, if the committee is interested, one could commission that from the Australian Bureau of Statistics as a fee for service, but it is not currently publicly available.

THE CHAIR: Thank you. Mrs Jones, your substantive?

MRS JONES: Your submission indicated a dearth of jurisprudence in sentencing by ACT judicial officers. Is it difficult to gauge the basis of sentencing decisions in the ACT? Could you advise the committee about what is done in other jurisdictions which produces a more adequate strand of jurisprudence?

Dr Bartels: This observation emerged when I was writing the report on behalf of the Law Reform Advisory Council on the suspended sentence reference. I obtained sentencing decisions from the Supreme Court and was looking for a robust jurisprudence on what a suspended sentence is good for or is not good for. I found that there was not that much about it. It seemed to be much more the case in the ACT—and I think it is not an exaggeration to say I have read thousands of sentencing decisions from across the country and overseas—that it was a more "bang, bang, bang" practical process.

That is not necessarily a bad thing in terms of getting the outcome of "Mr or Ms Whoever, I sentence you to X months." But, as an academic and researcher, I was surprised, and I guess a little disappointed. Having said that, I would like to see a robust jurisprudence, I have to contextualise that by saying I am all too aware of the lengthy delays that we have here in the ACT. The last thing any of us would want would be to say, "Rather than taking six months to deliver a judgement, we're going to be ending up at 12 months because we want everyone to come up with these beautifully crafted, well-reasoned judgements." So I say that we need this body of jurisprudence with some caveats.

MRS JONES: Would you perhaps suggest that if there were more judicial officers available we would get a better opportunity to have more detailed writings about each case, and that could be a possible benefit of eventually going to an extra judge?

Dr Bartels: I do believe so. We are a jurisdiction with only four judges. One cannot say, "Judges, you must now write 500 words or 1,000 words." But the fewer judges there are, the more individual personalities obviously dictate the nature of the sentencing—the corpus of sentencing judgements that are made. Obviously, if one had a fifth judge, that would, I guess, mix it up a little bit. In New South Wales—

MRS JONES: We are not going to go to 12 judges!

Dr Bartels: Absolutely not, and that would be inappropriate: I absolutely say so. I do not think appointing a judge just to get more robust jurisprudence is worth while but, given our concerns about the delay, I am a supporter of appointing a fifth judge—or the hypothetical fifth judge.

MRS JONES: Thank you.

THE CHAIR: Dr Bartels, we have reached the end of our session. Thank you for appearing before the committee today. The committee secretary will follow up with you regarding the transcripts and any questions taken on notice. If there is anything else that comes to mind, since you put your submission in and the discussions that have been held here, we would appreciate any further information that you can provide us with.

Dr Bartels: Absolutely. Thank you very much.

HOPKINS, MR ANTHONY, Barrister

THE CHAIR: Good afternoon, Mr Hopkins. Welcome to the third public hearing of the Standing Committee on Justice and Community Safety inquiry into sentencing. Today the committee has already heard from the Human Rights and Discrimination Commissioner, the Children and Young People Commissioner, Legal Aid ACT, Dr Lorana Bartels from the University of Canberra, and we are pleased to welcome you here this afternoon.

Mr Hopkins: Thank you.

THE CHAIR: Have you seen the privilege statement that is on the table?

Mr Hopkins: I have, thank you. It was sent to me.

THE CHAIR: You are comfortable with the contents of that?

Mr Hopkins: Yes.

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

Mr Hopkins: Just briefly. The key points that I want to raise with the committee, and I think they have probably been raised by other people as well, is that in the ACT, not unlike other jurisdictions, we have serious over-representation when it comes to Indigenous populations in prison, and particularly in juvenile detention, and to really bring whatever insights I can in relation to that. In particular I want to draw from a Canadian approach, with the two focuses being informing the courts about reasons why Indigenous people come in greater numbers—not just generally but in the context of a specific individual, because it has to be acknowledged that sentencing must remain an individual process. That is one of the issues in this area, with people saying, "Are you just asking for some sort of race-based discount?" That is not what is being suggested. There needs to be a real focus on why it is that this Aboriginal and Torres Strait Islander person finds themselves in this situation. What is it about their experience that relates to their identity and experiences as an Indigenous person?

With respect to the two focuses, it is about wanting to ensure that over-representation is really understood as the serious problem that it is, question why that is, and then look in terms of practicality at how sentencing courts get informed about the circumstances of that particular offender. The most important issue has to be what rehabilitation pathways are open for Aboriginal and Torres Strait Islander offenders that will address their particular issues that have been identified, ideally through that court process.

THE CHAIR: Thank you. My first question relates to that part of your submission where you describe the role of the Gladue case in the Canadian justice system, which involves detailed reports on the role of aboriginality, as you have touched upon, in the offender's history. Can you elaborate on whether there should be a similar mechanism in ACT courts, in your opinion? What would it take to create one?

Mr Hopkins: There are two options that I detail. One would be a focus within the existing pre-sentence report structure. It would involve perhaps identifying an offender, if they identify themselves as Indigenous, giving them the option of having somebody write specifically on that aspect of their lives, and looking at what it is about their experience as an Indigenous person that has brought them there, and also if there are any Indigenous-specific pathways to assist them to rehabilitate and reform. That would be, if you like, the easiest model, which would be to develop the capacity within correctional services to really focus on those aspects.

My understanding, but I have not dealt with it, is that within the Galambany Circle Sentencing Court—I have been informed of this but I do not appear there; I appear more as a barrister in the Supreme Court in matters that are involved in that court—there may be two Indigenous report writers that get tasked to do reports within that court. They do not seem to be available elsewhere. When I have Aboriginal clients coming up for sentencing, by and large, it is just not considered. It is a matter of, "This person identifies as Aboriginal or has Aboriginal heritage," and that is about it.

The cheapest model, the simplest model, might be to try to put a bit of investment into the current pre-sentence report writing process. There would be the necessity to consider that it would be important to have Indigenous involvement and, to some extent, control in the writing process.

The Canadian model goes a step beyond that. It creates its own set of reports—the Gladue reports. As I understand it, it is not done through correctional services. It is controlled, or at least to some extent organised, through the aboriginal legal services there. It has aboriginal Canadian report writers. It has a set of specifics looking at the background and systemic factors that are present in an offender's life—again, looking at the group experience and seeing if the group experience is reflected in the individual experience, and then looking at possible pathways. There has been some evaluation done of those reports, and it is considered important that aboriginal Canadians are involved and in control to a significant extent in the writing of those.

Both options would create some significant value, and could be contrasted with the general experience in the ACT, where, even though we all acknowledge these statistics, looking through the juvenile statistics it seems to hover at about 30 per cent of the juvenile detention population, despite being 1.7 per cent of the population. We all acknowledge that we want to do something about it, but we then do not get the information that shows us how an individual relates to that group experience. We accept the group experience; we do not see the link between group and individual.

The biggest issue in Canada and everywhere is the next step: what can be done? Are there pathways? That ties into initiatives that have not quite come to fruition yet but may, like the Ngunnawal healing farm and so forth. I do not know if that answers your question.

THE CHAIR: It certainly gives us an insight. Thank you.

MR GENTLEMAN: Mr Hopkins, I am interested in the part of your submission regarding providing evidence of Indigenous experience and the need for formal reports. How would that assist in sentencing across the ACT?

Mr Hopkins: There are dual aspects. First of all, it is well acknowledged that, in terms of the sentencing process, when you are sentencing an individual you are looking for differences—reasons that might relate to why they have committed an offence. Those reasons generally derive out of background and experience.

If you want to get to what really matters, which is trying to prevent further offending, reduce recidivism and so on, you have to understand the reasons why people come there. If you take the statistics just on paper, they tell you something about a group, but they certainly do not tell you anything about that particular individual.

MR GENTLEMAN: Or how he has been influenced within the—

Mr Hopkins: Absolutely. The answer may well be that this person identifies as Aboriginal or Torres Strait Islander, but in terms of those things that get picked up through, say, the Royal Commission into Aboriginal Deaths in Custody—the familiar pathways, unfortunately, to offending and so forth—they may not be present. But if they are, that is really the base from which to work in terms of trying to reinvest in the justice system and keep this person from going around and around. I think it is particularly stark when you talk about the juvenile population, because that is really the starting point. If there is scope for change, you would hope that it is most present there. Doing something and investing at that point potentially has a big community benefit and huge impacts for those individuals.

With respect to the tangible benefit of informing the court of the reasons why a person has come there and how those reasons might relate to their experience as Aboriginal people, it is in the outcome. So unless you tie this in with potential outcomes and rehabilitation pathways, I think it is very limited. There is some mitigation in explaining to the court, "This person has got to where they are because of all these levels of disadvantage." That is a critical issue in sentencing, of course, but it is really just half of the picture, and it is not the half that we want to see. It is an essential part of the full picture, but we need to say, "Okay, how are we going to help this person change? How are we going to stop this person, this young child, going through detention again and again, then just going off to the AMC afterwards and being one of the statistics?"

MS BERRY: You were right when you said in your opening statement that submissions to this inquiry have said that the cultural background of Aboriginal and Torres Strait Islander offenders should be recognised as part of the court's sentencing. When the Aboriginal Legal Service appeared they talked about their through-care arrangements for people who are coming out of prison, who maybe have been there for a very long time and who are having trouble learning how to be on the outside again, even maybe in just catching a bus. They said that a big problem for Aboriginal people coming out is housing. Another thing that they also found challenging was that, because Canberra is such a small place, and because family and culture are so important for Aboriginal people as well, it is also a challenge in terms of managing not just that individual but their whole family circumstances.

Mr Hopkins: Yes, that is a very good point that they raise and that you bring up. With respect to solutions or positive programs, I was looking this morning at some of

the specific programs that I am aware of, such as one for young people in the Northern Territory that is run through the Balunu Foundation, that is referred to briefly in the submission, and that was assessed through a University of New South Wales report. In your case you were talking about someone who is more of an entrenched offender coming out and not knowing how to do the basics and support themselves, but it is about recognising that you cannot really heal that person or rehabilitate that person unless you look at the family context into which they fall.

That is right: it is holistic. I suppose part of the function of a report mechanism might be to also see that you have report writers that fully understand how this person fits within the Indigenous or Aboriginal and Torres Strait Islander community within the ACT, and what the different impacts and pressures are, because those are the things that will have to be addressed to provide support. I think that is a very valid submission.

MS BERRY: In your submission you talk about the example in the Northern Territory. Do you know if what they are doing is working up there? And if it is working, is it something that could work here?

Mr Hopkins: We all want this kind of hard evidence on this person. You can talk to people within any of these organisations. I should declare that I know something of it; I am aware of that through my wife, who is Aboriginal. So I am not trying to advocate for that program or anything like that.

Anecdotally, if you talk to people within the program, and they stay in touch with some of the kids that have gone through, you can see very significant differences. What we all want to see is this recidivism research. Lorana Bartels is someone who would be across it—and if she is not, she would be able to get across that in terms of what programs are working to reduce rates.

In general terms it is pretty well accepted that one of the benefits of programs run by Indigenous people or where they have really clear involvement in and control over the program is that you have people who know the experience. At one level or another, whether it is through family or other people, they have been over some of those hurdles that the offender is going over. They can identify, and they are also able to be role models.

The issue with not providing specific Indigenous rehabilitation pathways is that you effectively get a model that is not designed to deal with those issues that may be specific to Aboriginal and Torres Strait Islander people and their path to offending.

My understanding of those programs is that they have had some significant successes, but I have not seen any clear statistical evaluation of that. In Darwin, for example, with this program they take on young kids before they start committing crimes, with grandparents and elders saying, "This person has some problems, can they go out to this camp and refocus?" They go out for 10 days and sit down, and it is really about pride, identity and connecting back with positive role models within culture.

I definitely think there are things to be gained. That particular organisation, for example, also takes people from interstate, so there is potential to draw off other

programs and so on. I do think there would be some work to be done. I do not know what work has been done with the Ngunnawal healing farm and so on. I have tried to get information on it and have not really succeeded in that regard.

MS BERRY: With early intervention, if young folk have some issues in their lives, they are put into this program to hopefully give them some leadership and to stop them getting into trouble in the first place?

Mr Hopkins: That is right. It is about resilience, and even just taking the time. This one is only just across Darwin Harbour, but it is basically secluded; you cannot just go into town. You are there for 10 days and there are programs involved in that. There is also through-care, so there is connection back to the families.

Darwin obviously has a huge Indigenous population, yet even there, it is common within the Aboriginal population to have webs which are all pretty interlinked. So once you get locked into a web somewhere, you can then get all of this information about, "What are the actual pressures on Johnny over here? What is going on? Where is the breakdown?" It may be that it is something else that needs to be targeted.

I am very much in favour of those sorts of specific programs, and also ensuring that they are evaluated. It is about ensuring very much that government does not lose touch with outcomes, or just say, "It's your problem, you come up with a solution," or anything like that. There has to be a partnership. A partnership with the ACT Indigenous community would be an essential element of some kind of specific pathway for rehabilitation of Indigenous people.

MRS JONES: Mr Hopkins, can you imagine a similar regime being set up for other people from various cultural or socioeconomic backgrounds that are less than empowering? If we are going to make a recommendation to target a particular group that has over-representation, there could be other groups that are overly represented. Do you think that this is a process that could apply across the board?

Mr Hopkins: To some extent the answer has to be yes. If you are looking at cultural backgrounds of people that may have led them to offend and so on, there may be culturally specific things that need to be done. I am not speaking now from experience, but often refugees from the Horn of Africa are associated with crime, be that correct or not, statistically or otherwise. It may well be that there are experiences there that need to be dealt with and focused on.

The other side of it is that we do have in our face, and have had in our face for so long now, these overwhelming statistics of over-representation for our first Australians. We also have a lot of research, royal commissions and so on—we have all of this material, yet nobody across the country seems to be able to actually do anything. Obviously, it is about closing the gap in all sorts of ways—all these things then lead into the sentencing process and so on. We cannot just say it is criminal justice—

MRS JONES: And the sentencing process is almost at the end of a lot of other—

Mr Hopkins: Absolutely. It is almost at the end, but that is where we come back to juveniles, potentially, and to holistic solutions, because sometimes it is early criminal

justice responses that have an opportunity. They are tough opportunities, but they might be there. When we are talking about 34-year-olds, it gets pretty difficult to change.

I would answer it in two ways. Yes, it has to be right that there are many paths that bring people there, and if there are cultural facts and cultural experiences that have led to that, the courts and the law are very clear that they should be taken into account. And, yes, they may be invisible because those in the judiciary and lawyers may not understand those things, and that is part of the issue.

Given what we know, or at least should know, and the ongoing statistics of over-representation, I think it is imperative that we do something about Indigenous over-representation.

MRS JONES: There is the over-representation in our prisons, and programs aimed at people who have had difficulties with the law are dealing with mopping up something that is endemic—that is bigger in our community. From your perspective and experience, what would you recommend, when we go back earlier in the process into that person's life, about empowerment and changing a cultural structure which seems to at times have so many outcomes like this that we do not want to see? From a very practical perspective, often it is a practical thing that is going on. It is about examples or it is about experiences of life.

Mr Hopkins: Sure. If you go out to Bimberi and talk to an Aboriginal offender and say, "Where are your cousins and uncles?" many of them will have been in prison. So you have this modelling going on. There is also an acceptance that that is just the reality. The only way to change that is by way of a positive example coming out of the same community. And let us say there are lots of positives. AFL is a good example. I know it may not fit perfectly—

MRS JONES: In many cases it works, yes.

Mr Hopkins: That is right, but it is those role models that can say, "Hey, I identify with you; I too have cousins or uncles that have been locked up, and yes, I too feel oppressed sometimes," and so forth.

MRS JONES: "But I have been different."

Mr Hopkins: "Hey, we have to make choices. This is the choice that I've made. There is some support here. You've got to make a choice." I think I have to step back at that point and say that is not my level of expertise.

MRS JONES: No, I understand that.

Mr Hopkins: But I would say that fits even with my experience, having worked in Central Australia with Aboriginal legal aid.

THE CHAIR: Your submission recommended Indigenous-specific pathways for rehabilitation and reform following best practice programs in other Australian jurisdictions, and you have briefly touched on the Northern Territory. Can you tell the

committee more about other programs you may have in mind?

Mr Hopkins: I have not read any rigorous evaluations, certainly not in recent times. There was a social justice commissioner's report—and I think it may have been as far back as 2004—which identified what it said were key aspects that were central to those programs functioning. A lot of that was about importance of engaging with the Indigenous community in the set-up of the program and control of it.

Again—and I would actually defer to someone like Lorana Bartels, who really is a statistician on these things and is across that—I do not know of any evaluation, but I know that there has been a long-running one just outside Lismore, stepping away from the Northern Territory into more, I suppose, places that were dispossessed earlier, for a better way to explain, or more urbanised. There has been a long-running program there that has received evaluation. The most recent one I am aware of is an evaluation that was done by the University of New South Wales which I can certainly provide a copy of. This was only in relation to Balunu, but they did refer to other literature within it. I can either provide that by email or hand that over.

So there are experts working in the field. I would not profess to be one, but I think it is not necessarily an inordinately difficult task to learn the lessons from those other jurisdictions, with some targeted research there, and say what does and what does not work—and there are academics that focus on this—and then say, "We want to do something that works in the ACT, but we do not just want to throw money at something where we do not have a real belief in the outcome."

I suppose that comes back to what I think is a privileged position we have in the ACT. In total terms we are not talking about enormous numbers. I do not know whether any questions have been asked about this, but it may also be that that means that behind the scenes you are talking about, for example, not enormous numbers of families with a whole lot of related issues that are happening within them. It may well be that the ACT is just such a place where innovations can achieve success, with some of the mechanisms that have been set up already there within JACS or restorative justice and so on in terms of statistics gathering, to see something that really makes a difference. I apologise, I cannot assist you a great deal on that.

THE CHAIR: No, that is fine. Obviously we are not trying to compel you to give any other information, only what you know. But from what you just said there, because the ACT is small and advantaged, is it not incredible that here we have an even greater problem than elsewhere? That is part of problem, is it not?

Mr Hopkins: I think it is. The other thing that the ACT suffers from is, I think, our Aboriginal and Torres Strait Islander populations are often almost invisible to a lot of people, in the sense that if you walk around the Northern Territory you are aware of the issues. They are in your face. If you walk down the street in the top mall in Alice Springs, you know what is going on, whereas here I think you can carry on in Canberra without a real awareness of the presence of Aboriginal and Torres Strait Islanders and certainly without an awareness of the issues that they face and the fact that those issues are often common issues that are faced across the country. It may be that because of small numbers we do not have those programs or those capacities that are there; yet maybe in terms of real resources it would not require so much.

I think the other potential is to work it out, for example with juveniles, and say, "Is there a program that is working? If there is a program that is working, we will put some money into sending kids to that program." We are only talking about a number of children or a number of young people. Let us see if we can be innovative and draw off resources. It is not necessarily that the ACT would have to create the program, although I think that if the issues are localised and relate to local Indigenous issues, you want that involvement.

THE CHAIR: Thank you. Mr Gentleman.

MR GENTLEMAN: There have been some discussions and in some of the submissions to this inquiry we have seen a suggestion that we should extend the use of restorative justice beyond its current remit in the ACT. Do you have any views on that?

Mr Hopkins: Except to say that I think if the evidence is there that it is positive, and there are reductions in crime, then I am all in favour of alternatives. If the evidence is there that confronting the reality of what you have done in terms of an offence and having that sort of level of confidence, then yes, I think that it should be. And I would have thought, if the evidence is there, it is probably a cost-effective thing to do. But I cannot speak on this. I have not been involved in those conferences here or otherwise.

MR GENTLEMAN: And what about circle sentencing? You have been involved in that?

Mr Hopkins: I have only observed the circle here on one occasion. My basic view is that what that enables is a focus on the particular issues within the community. So I am very much in favour of that. But I think this is the problem with sentencing. If it is just a sentencing event you focus on, a court sentencing event, it has got to be limited, because what is said in there, even if there are real moments of understanding or realisation, they drift out with a lifetime of other experiences and formative experiences.

So it is what happens afterwards and perhaps the processes going into it that I think are important. To the extent that reports might inform the Galambany circle sentencing process, I think they should focus on particular issues. But there has got to be pathways out from there for the vulnerable. Juveniles are not covered currently, as I understand, but there are arguments that they should be within that circle process. And I think that would be an extension that would be very important.

THE CHAIR: Ms Berry.

MS BERRY: Just as a supplementary to that, circle sentencing is new for us, but for the first people it has been there all the time and it seemed to work.

Mr Hopkins: I do not know. These are not processes that are taken from first people's dispute resolution. They have elements of that and so forth, and there are certainly elements of control and involvement that are critically important. But that is a big ongoing debate, for example in the Northern Territory, about what is a

traditional justice mechanism and what is not. And I do not think we necessarily need that in the ACT either.

MS BERRY: I do not pretend to know anything about that. But with circle sentencing, you said you have—

Mr Hopkins: I have only observed it here, but I have done lots of reading about it.

MS BERRY: You have probably done more than any of us on the committee have.

Mr Hopkins: Yes, and I have read various evaluations and so forth.

MS BERRY: Take us through what you thought about that process.

Mr Hopkins: From looking at the process as an observer, it has got a reality about it that is often missing from sentencing proceedings. Often with sentencing proceedings you have the lawyer protecting the client. It is their obligation in terms of ensuring that certain amounts of information do and do not come out and so on. While it is a court, in the circle sentencing process there is a much more real and direct engagement, and you often see elders getting stuck into offenders and really are just not prepared to accept things. So you have these conversations that would not occur elsewhere. What you do have is people who can share an experience, and when they talk they are talking from a perspective of: "This is what I have gone through but, hey, violence is not okay within our community."

So you get a difference. It is not "us/them", it becomes "us". So you get that sort of strength that comes out of it. I think there are some enormous benefits, and I think you also get a magistrate that then starts to know, for example in the ACT, the different families that seem to be struggling and offenders that come forward. They see that and so forth, and there is a storehouse of knowledge there that has the potential to shape sentencing and shape real sentences. But again there is no pathway out. There are no opportunities to try to restore that. And then that gets difficult.

Again, I cannot say that I am expert in the ACT. The ALS would be much better in terms of what are the options, but it seems to me, certainly with the clients and the adult clients that I generally get through the Supreme Court, there really are a lot of options for sentence.

MRS JONES: What is the ALS?

Mr Hopkins: The Aboriginal Legal Service.

THE CHAIR: Thank you. Mrs Jones.

MRS JONES: No, I do not have any further questions.

THE CHAIR: I do not have any further questions. I presume the committee has no more questions. We would like to thank you for appearing before the committee today, and thank you for your submission. The committee secretary will follow up with you regarding transcripts and any questions that may be taken on notice.

I would like to thank again 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. The committee will hold a fourth public hearing for this inquiry in August, on a date yet to be determined. I now declare today's hearing closed.

The committee adjourned at 3.57 pm.