REPORT OF PROCEEDINGS BEFORE

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

INQUIRY INTO SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

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At Sydney on Monday 28 April 2014

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The Committee met at 9.00 a.m.

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PRESENT

The Hon. Mr T. Grant (Chair)

Legislative Council	**Legislative Assembly**
Reverend The Hon. F. J. Nile	Mr C. Casuscelli
The Hon. M. J. Pavey (Deputy Chair)	Ms M. R. Gibbons
The Hon. H. Westwood	Mr P. G. Lynch

CHAIR: Good morning and thank you for attending this public hearing of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders. The public hearings being held today and on Wednesday are exploring a range of issues relating to this highly charged and confronting area of the law. The inquiry is examining whether current sentencing options for child sexual assault offenders remain effective and how best to engender improved public confidence in the way justice is dispensed. As part of the inquiry the Committee is examining the consistency of sentences handed down, the adequacy and appropriateness of the sentencing regime and alternative sentencing options such as minimum mandatory sentences and the use of anti-androgenic medication. I remind everyone to switch off their mobile phones as they can interfere with the Hansard recording equipment. I welcome the witnesses from New South Wales government agencies who are appearing before the Committee this morning. Thank you for appearing before the Committee today.

JAYSON WARE, Director, Offender Services and Programs, Corrective Services NSW,

PENELOPE MARY MUSGRAVE, Director, Criminal Law Review, Department of Police and Justice,

JACQUELINE MAREE WALK, Chief Executive, Community Services, Department of Family and Community Services, and

KATHERINE SUSAN ALEXANDER, Executive Director, Office of the Senior Practitioner, Department of Family and Community Services, affirmed and examined:

CHAIR: I draw your attention to the fact that your evidence is given under parliamentary privilege and you are protected from legal or administrative action that might otherwise result in relation to the information you provide. I should also point out that any deliberate misleading of the Committee may constitute a contempt of the Parliament and an offence under the Parliamentary Evidence Act 1901. As time is limited today the Committee may wish to send you some additional questions in writing the replies to which will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions?

Mr WARE: Yes, I would.

Ms MUSGRAVE: Yes.

Ms WALK: Absolutely.

Ms ALEXANDER: Yes.

CHAIR: Before we proceed to questions would you like to make a brief opening statement of not more than five minutes?

Ms MUSGRAVE: No.

Mr WARE: No.

Ms WALK: I have a brief statement that I would like to give. Family and Community Services statistics involved in child sexual assault are outlined in the Government's submission. However, we think it is worthwhile reiterating that we consider child sexual assault is an extremely serious form of criminal behaviour. The consequences of child sexual assault are devastating not only for the victims but for society as a whole. We view our work with child victims through the framework of safety, justice and recovery. Family and Community Services workers are primarily concerned with safety and Police and Health with justice and recovery but, as our work in the joint investigative response team shows, it is critical that all three agencies are aligned to achieve this together.

Safety for children means trusting relationships with adults in order to disclose abuse. We can see from the royal commission that many children take decades to disclose and hence many offenders have dozens or hundreds of victims. Safety means that caseworkers need to be responsive when children tell, working with non-offending parents to support children during the investigation to achieve their own recovery. Particular concerns around child sexual assault also extend to their adult lives. Much of our child protection work around families where drug and alcohol, mental health and domestic violence are issues are women who themselves were sexually abused in their own childhood so, as we know, the impact of child sexual assault can echo throughout

families for generations. With our framework around children's safety, we urge the inquiry to approach this issue with children's victims needs in mind. Thank you.

CHAIR: Ms Alexander, any opening remarks?

Ms ALEXANDER: No.

CHAIR: Ms Walk, is there inconsistency in the sentencing of offenders for child sexual assault?

Ms WALK: There are inconsistencies and for us the issue often begins around the actual taking of children's statements, so starting from where the victim starts and moving from there. In a number of the submissions it highlights the whole court process right from when children first disclose, who they disclose to, that process will often be mirrored or amplified right through to the very end. I do not know if Ms Alexander wants to talk about the experience of our clients, from the moment of disclosure to the last part of it, the sentencing?

Ms ALEXANDER: Not so much on the subject of inconsistency but like Ms Walk says, I certainly agree when reading the other submissions that there are often inconsistencies in sentences handed down to offenders. Our focus is really on victims and supporting child victims through the processes of disclosure. The bit that is so important for people to understand is the way children disclose sexual abuse is best thought of as a process not an event. It is rare that children just talk once and then will stay with the same story. It is much more common that more information will come to light. Sometimes it takes months or years for children to disclose more.

It is very common for children to disclose and later retract their disclosure. They may do that because they have seen the impact of what they have described; it has caused so much distress and upset for other people and it is unbearable for them so their preference will be to say, "I made that up; it didn't happen". We know that if those children are well supported they are likely to retell their story but understanding that is a process that is very common for children is really the work of our front line and our efforts to support them, to stick alongside children throughout that process.

As to the impact of court and giving evidence for children, it is incredibly important that police interviews and medical processes be done in as sensitive and patient a manner as possible by people who understand and have a very good knowledge and compassion as to what the disclosure process is like for children and what it is like for the people around children. Sometimes mothers of children may take time and need support to believe what has happened themselves and their early responses to what their children have to say can have a long impact if they are not well supported.

CHAIR: A lot of the evidence you have just provided can potentially lead to a conviction. Do the actual sentencing outcomes during the supporting process play a role in their ability to give evidence and whether they believe it is worthwhile to give evidence because they may not get an outcome?

Ms ALEXANDER: It is difficult. I have certainly known of children where for them the process of giving evidence was a positive experience. For other children the process has been horrible; feeling they have to prove it can be very intimidating. Obviously we support any efforts for children to use closed-circuit television to give evidence but for some children cross-examination and being questioned can be incredibly traumatic. For other children the process of being heard in court, being listened to and feeling they are believed can be powerful. It very much depends on individual children and the support they are provided throughout the process and ultimately who the offender was and how close they may have been to their family.

Some children and adults have told us that they have been put off the process of going through because they have been worried there will be no outcome, there will be no what they would see as a punishment and no-one will be held accountable. They are concerned that all the pressure will be on them to have to prove that something happened; it will be their word against his, many years ago and that can deter many victims who think this experience is going to be too traumatic for little outcome, in their view.

The Hon. MELINDA PAVEY: Do you think that has improved? In the past there was an obligation to prove it but do you think modern-day systems are better than what they were if the child is supported properly?

Ms ALEXANDER: Certainly I do and Ms Walk spoke about our joint investigative response, the process of children being interviewed right from the beginning with caseworkers, police and health professionals that cuts down the amount of interviews children have to go through, closed-circuit television, support processes that take children into courtrooms and help them understand—certainly we have improved around those processes. Does that mean that there would still be victims that would not be worried about the potential outcome that may deter them from going ahead? I am not sure we are there yet.

The Hon. MELINDA PAVEY: Does government need to improve any processes to have children give evidence or is it about supporting the children and their families through that process?

Ms ALEXANDER: It is both. The process of supporting children and their families throughout the whole process is incredibly important and that responsibility lies with us, with Police, with Health, with non-government agencies charged with that responsibility. The process for the Government about the whole sentencing, court and criminal arena around this is incredibly important, and as Ms Walk said in the beginning, to think about any impact that may have on victims. For instance, you cannot underestimate the impact of someone who confesses and what that can mean for children. Child victims have often been led to believe that no-one will believe them if they talk. It is often part of a grooming process to continually tell children, "If you tell someone this happened they are not going to believe you anyway."

Children will often lose their self-esteem and do not believe anyone is going to listen. They may feel it is their fault and they may feel they deserved what happened to them and the feeling of having to prove themselves is an enormous burden for children. If an offender confesses, you cannot underestimate the importance of that for children because what they are saying is, "We believe you and you no longer have to prove it." It can often do a lot to take away children's self blame. It is one responsible act an offender can do for a child. It is an adult saying that it did happen. With regard to the court process, anything that aids, encourages and provides an incentive for people to confess benefits victims.

Mr CHARLES CASUSCELLI: I refer to your comment about inconsistency from the moment of disclosure all the way through the process. What is the nature of the inconsistency? Is it that we do not have a rigorous, comprehensive process that is well understood by all agencies? Do we have one but is it poorly executed, or is it all of the above? What contributes to the inconsistency in this process? Would an answer to that inconsistency be that someone should manage the end-to-end process? I know that many government departments are involved. It is much like managing a traffic incident in that there are half a dozen specialised government agencies dealing with segments of the process. It appears that there is no-one managing the whole process; there is no-one with an overview ensuring things are happening in the right order to the right degree.

Ms ALEXANDER: I can talk about one aspect of that; that is, the inconsistency that relates to where children who have been assaulted live. In the more remote western communities access to medical treatment is very varied. Children who may disclose in the city would have access to a level six child protection hospital within an hour and the collection of forensic evidence means much more for them than it does for a child in western New South Wales who may have to travel for many hours to get to a sexual assault service to be dealt with by a properly trained paediatrician who can take the medical evidence. The first inconsistency starts with where you live in the State, then where you have been abused and access to good medical treatment.

Again, we cannot underestimate forensic evidence and the benefit of someone telling a child they believe them because they have seen evidence. Rapid access to medical treatment for children is incredibly important, even if the children say that they do not ever want to go to court. The impact of having a doctor say, "You are going to be okay. I can see that something has happened to you", is very powerful for children in the recovery process. For that to be useful, the medical treatment must happen as quickly as possible after an assault has taken place. We have heard of assaulted children travelling in cars for hours in the clothes they were assaulted in. It is traumatic and it is not useful from an evidence perspective.

Mr CHARLES CASUSCELLI: The inconsistency is our ability to respond to those factors. For example, if someone is out in the bush rather than in an urban environment the system does not address those two variables. You are saying that the process is deficient.

Ms ALEXANDER: Geography means that access to good services out there is deficient.

The Hon. HELEN WESTWOOD: You have answered my question in part—I was going to ask about the impact on victims of a guilty plea. However, I would like to know about the long-term consequences for

victims of child sexual assault. If there is a guilty plea is there less manifestation of the consequences of child sexual assault in adulthood, such as addiction, depression and so on? Do we know whether those issues are diminished for adult survivors?

Ms ALEXANDER: I am not aware of any study that has isolated the impact of a guilty plea or tested to see whether that has led to better rehabilitation in the long term as opposed to the result after a not guilty plea. Common sense and experience would lead me to speculate that it would be more likely to lead to positive rehabilitation for victims because of the sense being believed. Obviously it is only one factor, but it is a very important factor.

Ms MUSGRAVE: I suspect that there is some academic research on that issue. I am aware that it was raised in the context of discussions about Cedar Cottage when the regulation lapsed for that program. Jane Goodman-Delahunty made a submission to the inquiry and she may be a useful person to address that question. I am not answering the question, but I am confident that there is some material on the issue in the academic world.

CHAIR: Is there any inconsistency in the sentencing of offenders in child sexual assault cases?

Ms MUSGRAVE: There is no simple yes/no answer to that question. It is interesting that it is being asked because we are clearly dealing with a perception of inconsistency. To a degree it is unnecessary to answer whether there is inconsistency if there is a perception of it. In that case we need to look at why there is that perception. The critical thing is to check and to ensure that we have a system that is capable of addressing inconsistency in the sense that we have the ability to track it and that our data collection is appropriate. There have been discussions in this area about the fact that some offending against children is hidden because the sentence can be under the general offence in section 61J and not under the child-specific offence. That skews the results and public understanding about what is happening because we lose sight of the more serious offending where it can be shown that there was no consent.

The other aspect we need to look at is whether we have a system where any inconsistency can be corrected. We have an appellate system in New South Wales that is capable of addressing inconsistencies in sentencing because that is what it is there for. It looks at whether the sentence is inconsistent with others and it would be a ground for appeal to say that a sentence is manifestly inadequate or excessive. The important thing is whether those sentences are understood. Obviously it is important that the public understands it and has confidence in the system. The Sentencing Council has done some work around that and the recent Law Reform Commission report about guideline judgments and the potential role of the Sentencing Council is particularly useful in that area. I note that the Director of Public Prosecutions provided some information about the United Kingdom sentencing guideline model.

Mr PAUL LYNCH: Would you support a development in that direction?

Ms MUSGRAVE: I could not say whether I support a development in that direction. The Government is still considering the Law Reform Commission's report. However, it is an example of an international model. One of the terms of reference of this Committee is to look at what is happening overseas.

Mr PAUL LYNCH: The Director of Public Prosecutions' proposal endorses the Law Reform Commission's proposal about the role of the Sentencing Council.

Ms MUSGRAVE: That is correct.

Mr PAUL LYNCH: And expanding it.

Ms MUSGRAVE: Yes.

Mr PAUL LYNCH: My reading of both of those reports suggests that the actual role of the Sentencing Council or the Council's equivalent in England and New Zealand is broader than that being proposed by the Director of Public Prosecutions in that the English sentencing council itself prepares a guideline rather than going to the Court of Appeal. Do you see any obvious disadvantages in doing that?

Ms MUSGRAVE: I will not say that I have identified any disadvantages. The Law Reform Commission does discuss the adoption of the United Kingdom model in New South Wales and identifies some

constitutional issues because judicial officers sit on the guideline body in the United Kingdom. It has formulated a way it could be constituted in New South Wales without those constitutional risks. However, it retains the elements of going to the community, surveying public opinion, pulling that in and developing a much richer piece of information to put up to the court.

The Hon. HELEN WESTWOOD: I refer back to the discussion about the guilty plea and how that diminishes the impact on victims and the perception of a guilty plea and sentencing inconsistencies. Do any of you have a view about that? If it is seen as having value for victims, how do we sell that to the community?

Ms WALK: My point is not so much about that but a related issue; that is, victim control. A guilty plea involves a bit more control. When I say "victim", I mean the child and the non-offending parent. Some of the research done by the royal commission suggests that those people who felt they had more control over the process had better outcomes, right through the process from disclosure. They might not so much determine that but they feel they have some say or input into the plea. I suspect there might some relationship there, and I know some research is being done for the Royal Commission on that issue.

Ms MUSGRAVE: I would like to add something in respect of that point. It is a really good example in this space of how the legal framework is quite justifiable and has been. It applies across the board. There are very good reasons to provide an incentive for a plea of guilty. You get certainty of conviction and avoid the victim having to give evidence again. It is so much about the engagement of the parties and confidence in and understanding of that result. What cannot be underplayed is the fact that we are still in a relatively new place when it comes to engaging victims in the criminal justice process.

A decade ago this did not happen. We are still learning how to properly engage them to give them that confidence because they do not know how bad it would have been or what would have happened if a guilty plea did not happen. From an individual's perspective we need to do some work around that to engage them, to support them and to help them understand. However, the legal framework applies across the entirety of the criminal justice system and it has a very solid rationale behind it.

Mr WARE: From a very different angle, the other question for us is what stops the perpetrators taking some responsibility. Some research looks at categorical denial—that is, those sex offenders who simply say that they were not there and did not do it. The research suggests that the reason they deny it is not that they necessarily want to continue offending but the consequences for their own family. I have often thought that perhaps we could engage the perpetrator's family and to support them to support the offender to take responsibility. They are also a hidden consequence of the perpetrator's offending. It is a different angle but one that has not been considered.

CHAIR: They are secondary victims.

Reverend the Hon. FRED NILE: I want to ask about the current Child Protection Register. How are offenders monitored and supervised after their discharge from custody? How do you deal with them moving between States? Is there some way of tracking them interstate? Which department has responsibility for that?

Ms MUSGRAVE: The NSW Police Force is responsible for monitoring registered offenders. I understand that there is a national register that is underpinned by interstate agreements. A witness from the Police Force will be appearing before the Committee and that person would be in a much better position to provide details. Significant work has been done to ensure a national response to people who offend and who are registered within the State.

CHAIR: Detective Inspector Yeomans will be appearing next. He will be able to assist with that.

Ms MUSGRAVE: The NSW Police Force is the responsible agency.

Reverend the Hon. FRED NILE: Is that register available to parents to identify offenders in their street?

Ms MUSGRAVE: No, there are limits with regard to the publication of details about someone on the register. It is available to the Police Force to monitor offenders in the community.

Reverend the Hon. FRED NILE: Do you think it should be available to the public?

Ms MUSGRAVE: Western Australia has a more public register and there are complexities associated with that. There have also been public registers in the United States for some time and Western Australia has most recently adopted that approach in this country. I can provide the Committee with some of the pros and cons of that register. I also note that the statutory framework that allows some of the details to be made public also contains provisions about people not taking the law in their own hands and about the way they use that information. It is not an easy thing to do.

Reverend the Hon. FRED NILE: Do you have a policy on adopting the West Australian model?

Ms MUSGRAVE: No, the department does not have a policy on it.

Reverend the Hon. FRED NILE: Has the department considered it?

Ms MUSGRAVE: We have previously had to advise on it, but the department does not have a policy on it.

Reverend the Hon. FRED NILE: You have been advising not to extend?

Ms MUSGRAVE: I am not in a position to answer that question, Mr Nile.

Reverend the Hon. FRED NILE: You have not adopted a position?

Ms MUSGRAVE: I am here as a government representative and there are limits on what I can and cannot say, I am here to provide information to the Committee.

The Hon. MELINDA PAVEY: It is up to Government to provide the policy?

Ms MUSGRAVE: Yes.

Mr CHARLES CASUSCELLI: I will return to a question I asked earlier that was not answered. In terms of the entire process, at the moment is a single person or agency responsible for managing the end-to-end process as opposed to coming in and responding to different issues such as health and legal? If there is who is that and if there is not is there an advantage to some entity being appointed as the end-to-end manager of the entire process? Could that person or agency have a role of child advocate in doing so?

Ms WALK: When child sexual assault was first being reported in the 70s and 80s and police, child protection agencies and statutory agencies were first doing investigations we often had gaping holes between where one finished and the other one started and it was in response to that in the mid-90s, led by the police in New South Wales, we tested out what was originally called the joint investigation team on the Central Coast. That was to bring both the investigative skills of police and the relationship and protective role of the child protection agencies together. They have, some years later, after the special inquiry, brought health right into the initial focus. I have to say I think in Australia that is the best model that we have. It enables children to have one interview.

I do not know if you have gone to see one of the joint investigation teams, it is a good thing to have a look at. You can see how children are interviewed through video interviews that enable a lot of skill to be brought to bear. Investigative interviewing is very hard with very young children; it is a very difficult process. I am quite confident that the process from disclosure is as good as we can make it. We know children do not put their hand up and decide one day that they will disclose sexual abuse, they often give lots of clues or hints in their behaviours and as adults we do not listen closely enough to behaviours as opposed to words. Obviously we want more services out in the bush and we would like more responsiveness.

Most recently there has been a report looking into how well the joint investigation response team are going and their workload and they found a highly responsive workforce. A workforce that comes in on their days off and cancels their leave because they are incredibly committed to the outcome of the children and achieving the right thing for offenders. I am not saying please let us change that system, I think we have that system as right as we can. We need to have a little more in the bush and need to do more for the young offenders. The Ombudsman's submission also asks what do we do with the 16 to 25-year-olds who are offending

and how can the system serve them well and have rehabilitation so we do not have them offending when they are 40, 50 and 60.

Mr CHARLES CASUSCELLI: At the moment through the entire process from investigation through health support services and appearing in court there is not a single person or single entity that could be roughly termed the child advocate?

CHAIR: There is the child advocate watch team that was established in 2004. That collective would go some way to answering that question.

The Hon. MELINDA PAVEY: I have a series of questions that will help to understand the Joint Investigation Response Team [JIRT] process. There were 15,000 incidents of sexual abuse of children from March 2012 to March 2013 that came to the attention of the child protection helpline. Were they 15,335 individual cases or could there have been people ringing on behalf of a child on a couple of occasions?

Ms WALK: Generally, when we use the helpline status we are talking about incidents and then later you will see that we separate incidents from children.

The Hon. MELINDA PAVEY: I have not got that in the Government submission and that is what I am interested to know. There have been 15,335 Risk of Significant Harm [ROSH] reports. How many of those reports then followed a joint investigation response team out to the children?

Ms WALK: We can make certain that we get for you the amount of—

The Hon. MELINDA PAVEY: Ballpark?

Ms WALK: —sexual abuse of between 15 per cent to 20 per cent of our overall risk of significant harm reports.

The Hon. MELINDA PAVEY: That is what the submission states.

Ms WALK: That has actually gone up.

The Hon. MELINDA PAVEY: The submission reads 15,000 child abuse reports, which is 15 per cent of the total Risk of Significant Harm [ROSH] reports you gave to Government. I am wondering how many JIRT reports there were from those 15,335 from March 2012 to March 2013?

Ms WALK: I do not have those figures with me, we will get them to you straight away. They go from the helpline.

The Hon. MELINDA PAVEY: I understand that.

Ms WALK: Then they go to the joint referral unit, which is the three agencies literally sitting around a table, not unlike this, all three go into their data bases and make certain that they can get as much information as possible.

The Hon. MELINDA PAVEY: How many JIRT teams are there throughout the State?

Ms WALK: There are about 13.

The Hon. MELINDA PAVEY: A call comes through to the help line?

Ms WALK: Yes, and then goes through to the Joint Referral Unit.

The Hon. MELINDA PAVEY: That is one unit above the 13?

Ms WALK: That is one unit and they will make a decision within two hours about our response to them. Sometimes the response may well be we do not know the offender, we do not know the child, sometimes it might be somebody saw something and they were worried about it, such as a child on the bus. Sometimes the response will be like that and they will go to the joint referral team and they will do whatever they can in terms

of retrieving information from any of the systems to identify it. It is a telephone centre. They will then send it from there to their local JIRT, which may be in Bankstown, Liverpool or wherever.

The Hon. MELINDA PAVEY: We are lacking some in the bush?

Ms WALK: Yes. The JIRTs are Police and Community Services as well as Health. They will do a plan. The whole point is the first interview needs to be very well planned. It does not necessarily need to be immediate. It might be hours, days or weeks before they see the offender again so they have some time to plan, or you might not. They will do that plan. In terms of the amount of reports that come through from cases that you do the interview and investigation there are obviously some that fall away because you might not have enough information.

CHAIR: We are going down the investigative side and support of the child victims before the outcome at court. Bringing all that together the importance of the preparedness and support of the children that leads to an outcome at the court, whether a conviction or a plea of guilty. A plea of guilty may attract a lesser sentence and add to the perception of inconsistency or lower sentences. There is obviously more we can do, particularly remotely, to make sure the evidence trail, support of victims is enhanced and the preparedness and support around the victims to be prepared to give evidence if necessary?

Ms WALK: Yes.

CHAIR: Convictions by way of a guilty plea is advantageous to the victims but often lead to a lesser sentence because of the sentencing regime, would that be a fair summary?

Ms WALK: Yes.

CHAIR: Mr Ware, to what extent are treatment and rehabilitation programs for child sexual assault offenders factored into sentencing and/or parole at present?

Mr WARE: Corrective Services provide psychologists to assist all our community corrections workers to provide presentence reports for the magistrate or judge. If the magistrate or judge considering sentencing wants to understand more about the offender they ask for a presentence report. As part of that one of our psychologists will do a risk assessment. Risk assessments track back a little bit. Anecdotally one of the things we have found is that the risk of reoffending that we assess a sex offender to be at does not necessarily equate to the length of their sentence in the community or custody. There might be an inconsistency in terms of the risk of their reoffending from the sentence they are given, that is something I am not sure there is research about.

What our psychologists will do is assess, using a variety of tools and clinical methods, what the long-term risk of recidivism is for an individual and as part of that they will assess what treatment needs that person may have. What we will then recommend, on the basis of that risk, the treatment options that we would suggest. That might be a high intensity treatment and for us in New South Wales we have the Custody-Based Intensive Treatment [CUBIT] program. We recommend to the judge or magistrate that this man is high risk and we think to reduce that risk will require this level of treatment and that treatment is available in custody only and that will require a 12-month sentence in order for him to start and finish the program. In the first instance that is the advice we provide to the magistrate or judge. If the person receives a custodial sentence we have a suite of custodial-based programs that the sex offender can be referred to. It is important to note that the offender has to voluntarily refer to that treatment program, they are not mandated to do the treatment program, which is an issue.

CHAIR: What is your recommendation in that regard?

Mr WARE: Ethically, as a psychologist, we always have to seek someone's voluntary consent to participate in a treatment program. What we need to do and what we currently do is to identify those individuals early in their sentence and provide all the options we can to motivate and assist them to come to the program such as dispelling myths about the program, help with literacy and numeracy issues and even, if necessary, contact the family to get the family to suggest that the treatment would be of benefit.

CHAIR: I would imagine the community would say, given the nature of the offences, why cannot we compel them?

Mr WARE: If we look at our data the vast majority of sex offenders approaching the non-parole period, if they have an early release date, will ultimately put up their hand for treatment. The difficulty for us is that they put their hand up at the last minute, which means there is a great rush trying to get these people into treatment programs prior to the nonparole period. That said, it does not matter to us whether they are interested in coming to the treatment program purely to get parole or are genuinely interested in reducing their risk. our belief, and there is evidence to suggest, that once you get them in the program and keep them in the program you can have some benefits with those individuals irrespective of the reason why they came not program in the first place.

CHAIR: To paraphrase you from an earlier briefing, you said, "The longer we have them there the more successful the outcome"?

Mr WARE: Yes, that's right. The other important issue with treatment is that there is plenty of international evidence that suggests that for sex offenders the risk of reoffending is an important issue in planning the treatment. The higher risk they are, which tends to mean they have a history of sexual molestation, drug or alcohol issues, personality disorders or mental health issues, logically means it will take longer to assist that person to not reoffend in the future. The evidence suggests that high risk offenders do need quite a lot of extensive intensive treatment which means a significant resource issue for Government to keep these people in a treatment program for an extended period of time in order to get the benefits.

CHAIR: Can I ask you to comment on that? What are the sentencing options outside the custodial sentence for mandatory treatment and conditional probation and parole?

Ms MUSGRAVE: Could you repeat that? Looking at the mandated treatment or the capacity?

CHAIR: A compulsion to be part of a mandatory extended period of time outside of a custodial sentence, a parole period or probation?

Ms MUSGRAVE: I will focus on the framework that currently exists and conditions that can be imposed on someone when they go on to parole. I am looking at Mr Ware at the moment because I am going to ask him a question. At the moment the response from Corrective Services is that they don't mandate certain therapies but there is the capacity in the Parole Board to shape conditions depending on the circumstances of the offender, so that is a possibility. Also in New South Wales we have got extended supervision and continuing detention orders, both of which have the capacity for conditions that encourage participation or could require participation if the court chose to impose that condition.

The objects of the extended supervision regime are to protect the community and promote rehabilitation. The introduction of the extended supervision order regime did I think—and again I will look to Mr Ware to correct me—increase the participation of serious high-risk offenders in CUBIT towards the end of their sentence because they saw it as a way of at least going on to an extended supervision as opposed to a continuing detention order. There are those two frameworks in place in New South Wales that have the capacity for conditions to be made as part of that order.

The Hon. MELINDA PAVEY: Mr Ware, in the Government's submission it is noted that there is currently no state-wide Corrective Services policy or procedure for referring inmates for assessment in relation to antilibidinal medication. Do you think it would be useful for such a policy to be developed?

Mr WARE: Yes. The complexity around our submission with that particular issue is that we need to refer to an appropriately qualified Justice Health or general practitioner. Justice Health's advice to us has consistently been that in terms of general practitioners in the community they would not be seen as sufficiently qualified to actually administer and prescribe that medication; therefore, we have relied upon Justice Health in terms of our referral mechanism. They are based primarily in the Sydney metropolitan area. In fact, about three years ago they—

The Hon. MELINDA PAVEY: So at this point Justice Health physicians are the only ones prescribing the antilibidinal medication in New South Wales?

Mr WARE: To the best of my knowledge that is right. If a general practitioner is prescribing that in the community to a sex offender that may not necessarily have been at the request of a Corrective Services

officer that an offender see a general practitioner or that the general practitioner consider the suitability of antilibidinal medication.

The Hon. MELINDA PAVEY: Are you saying that people could be going independently to their general practitioner for antilibidinal medication but the Government would not know about that?

Mr WARE: That is right or they could go for an antidepressant medication which has a side effect of lowering libido. So a sex offender could go to his general practitioner and say, "I need to lower my libido." They could prescribe, without necessarily having those higher qualifications, antidepressant medication that might have a side effect to lower their libido.

The Hon. MELINDA PAVEY: We have no information on that.

Mr WARE: No.

Reverend the Hon. FRED NILE: I have a general question about the Cedar Cottage program administered by your department.

Mr WARE: It is actually administered by Health, not Corrective Services.

Reverend the Hon. FRED NILE: Do you have any involvement with it at all?

Mr WARE: No.

Reverend the Hon. FRED NILE: Who has information about it?

Ms MUSGRAVE: The legislation is within the Attorney General's portfolio but the program itself is funded and administered by Health, so the Department of Health would be best placed to give you current numbers as to who remains on the program. No new people are being taken into that program now; it has closed.

Reverend the Hon. FRED NILE: So the Department of Health would have the information?

Ms MUSGRAVE: Yes.

Reverend the Hon. FRED NILE: Do you have a view about it? You are not involved with it in any way at all?

Ms MUSGRAVE: No. The regulation has lapsed and the program has closed.

The Hon. HELEN WESTWOOD: I turn now to young offenders. In the Government's submission it is noted that 4,037 young people have entered custody, either on remand or control, for child sexual assault offences. How does that number compare with the overall number of adult child sexual assault offenders?

Ms MUSGRAVE: Can I take that question on notice and get back to you with an answer?

The Hon. HELEN WESTWOOD: Yes. The figure in the submission is for 2009-10 and I would like an understanding of the proportion we are talking about. I would also like to know what proportion of those are historic compared with adult offenders, as well as the age of the victims and what proportion of those offenders have an intellectual disability.

Mr PAUL LYNCH: Mr Ware, you mentioned resource constraints in relation to the treatment of sex offenders in custody earlier in your evidence. Have you got enough psychologists?

Mr WARE: At the moment, yes. That is a very good question because it takes a reasonably bold psychologist to want to work with sexual offenders. Firstly, attracting people to be recruited or employed with us is the first challenge and, secondly, retaining psychologists to work in this area is a separate challenge. I have been working for the department since 2005 and there are very few sex offender psychologists still working with us who were working back then. We lose experience quite quickly. The challenge then is getting new, often fresh graduates from university who have very little life experience to then work in a group of 10 sex offenders who have been predatory of children for a long period of time or adults for that matter—it is a very big ask.

One of the additional resource constraints for us is to make sure that we do lots of training. We supervise and do integrity monitoring and quality assurance of our sex-offender programs. So even though on paper it looks like a very sort of resource-intensive practice it is because we need to ensure the quality of the work that we do. It is very difficult to work with 10 sex offenders in a group about those issues that they are reluctant to talk about, particularly if you are a young female psychologist. One of the other challenges with psychologists is that they are predominantly female; there are very few male psychologists. It is an attraction issue for us and it is a retention issue also.

Mr PAUL LYNCH: And presumably harder in some parts of New South Wales than others?

Mr WARE: That is correct and that is partly why most of our treatment programs are based in the metropolitan Sydney area. Even though the perpetrators are often committing crimes out in the regions, to attract and retain psychologists we then have our treatment programs in Sydney. That is a difficulty for us because when we have looked at some of the reasons why sex offenders have chosen not to come to our treatment programs, it is often that they have been way out in the regions. They have chosen to spend the 12 months being close to their families rather than coming to Sydney and being away from their families for the treatment program. In an ideal world we would take our treatment practice to them and that would take away that issue.

Ms MUSGRAVE: Can I add to that? This was identified as quite a critical issue internationally. I think in chapter three of the earlier Sentencing Council report on sexual offences there is a comparative review of work done elsewhere in relation to serious sex offenders. I have got a recollection that at that time Scotland had a case management process where they assessed the offender when they came into custody and followed the offender all the way through. One of the reasons that program subsequently broke down was the occupational health and safety issues for the counsellors who were attached one on one to those offenders. So it is actually a critical issue in maintaining the programs that you identify as useful, having that pool of people who can support it. We are not alone.

Mr PAUL LYNCH: I infer from what you have said that it is harder to get psychologists to work in this area with sex offenders than it is with non-sex offenders?

Mr WARE: Yes.

The Hon. HELEN WESTWOOD: Do we have any evidence of what sort of support programs or resourcing of psychologists working with child sexual assault offenders is effective? Are we at the point where Corrective Services has put in place some programs and a lower rate of attrition been seen with those psychologists?

Mr WARE: In short, yes, I think we have got a number of recruitment strategies that ensure that we get the right people into the positions. We have got training activities to ensure that they receive the content training—the content of the work they are doing—but also the process of how to interact in a group situation. For example, each of our psychologists in this area would be expected to do 12 days of group-work training in the first 12 months. That is just training on how to interact in a group, which is far above what other jurisdictions would expect of their psychologists. In fact one of the issues for us is that the retention rates are not necessarily about the difficulty in working with the clients but these people become particularly skilled and are then attracted to other agencies. In fact most of the private psychologists in this State who work with sex offenders have come through Corrective Services and have left and are writing lots of those reports for magistrates and judges.

The Hon. HELEN WESTWOOD: Is that because it is better pay?

Mr WARE: Yes.

The Hon. HELEN WESTWOOD: Or is it easier work or a combination of the two?

Mr WARE: Private is a lucrative practice if you are writing reports for courts.

Reverend the Hon. FRED NILE: Ms Alexander, how do you handle mothers who believe their daughters have been sexually abused and who try to collect evidence such as videos and interview their own children?

Ms WALK: Particularly around the Family Court?

Reverend the Hon. FRED NILE: Usually the Family Court. I have had some mothers tell me that the evidence they collect is totally disregarded.

Ms ALEXANDER: Not that it is disregarded but we would do everything we can to work with those families to help the mother understand the role we would like her to play with her child, which is a support role, and to discourage her wherever we can from leading questions and from what could be seen as coaching. Certainly in Family Court matters or other matters we have had concerns about parents—maybe parents have had their own experiences—who do seem very intent on pushing information that the child may not have told us about and that can be really difficult. The bottom line with all of this is that it requires very skilful people working on the front line to unpack what is happening for that family.

It may be that the child is comfortable to tell her mother things but then when she is front of an investigator, a police officer or child protection worker she is going to say something very different because she suddenly gets frightened. So it may be that the mother is absolutely on the right track with what she is pursuing and it may be in the rare case that for whatever reason the parent is putting more weight on something the child is not saying, and that can be awful for those children. Those children need as much help as children who are legitimately talking about sex abuse actually. So our efforts to work with parents through mediation, counselling and support for that mother and helping her see her child and her child's story and what a child needs is really important, but again it takes skilled workers and people who have got the time and curiosity to understand what is happening for that family.

CHAIR: Do you think there would be a role for a specialised child sexual assault court or a specialised division within the existing court system?

Mr WARE: That might be better directed to Ms Musgrave actually.

CHAIR: Given that Corrective Services would be involved in that I would like to hear from you. We have drug courts where there are multiple agencies.

Mr WARE: Certainly the expertise could be pulled together in terms of the risk assessments we provide for magistrates and judges. They would then be much more knowledgeable around the risk and how we assess that and the limitations of that risk. They would also be much more consistently knowledgeable around the programs and the extent of supervision monitoring that Corrective Services could provide. So there would be some merits in terms of the ability of those judges and magistrates to understand exactly what could be done with a sex offender.

Ms MUSGRAVE: Specialist courts can be involved in two stages of the process. Often when people have talked about specialist courts in the past it has been a court where you would prosecute all allegations of child sexual assault. A drug court on the other hand is really a specialised court that administers a sentence and more just decides that that cohort can go in for the administration of that sentence.

CHAIR: With a varied range of sentencing options.

Ms MUSGRAVE: Yes, so they are sort of specialised in two quite different ways and I think the considerations are quite different. When you are looking at a specialised court that is prosecuting those offenders, you would have to explore things around the burnout of that court—it becoming immune to the horror of what it is seeing today—and also you need to take into consideration the fact that what we are really talking about is ensuring that we have an adequate skills set and a proper conversation going with the agencies that are going to be looking after these people—for example, Corrective Services—so when they are making decisions in that court it is a well-informed decision.

CHAIR: We have a situation now of a cooperative arrangement rather than a consolidated arrangement?

Ms MUSGRAVE: Or perhaps not a formal arrangement. I know a lot of work is being done to make sure that those lines of communication are open and there are different ways of doing it. We can do it through the Judicial Commission through bench books, the DPPs, there is the officer of the court to inform the court and assist them in the process, Corrections actually runs education campaigns and judicial officers actually are able to go into any Corrective Services facility and have a look at it. I think that is right.

Mr WARE: That is right.

Ms MUSGRAVE: They do take up that opportunity. The Sentencing Council has a role as well; its education role generally should be informing people. But as I said, that is quite different to the administration of a sentence for a sex offender. That would really be part and parcel of a new form of sentence with an ongoing involvement of a judicial officer monitoring it and some sort of carrot and stick incentive-type set-up. There are some precedents: for example, New York does that. One of the issues in New South Wales again would be the regional availability; just having it out there. I mean, the Drug Court at the moment is very small geographic regions.

Mr CHARLES CASUSCELLI: Would it be possible to get a copy, just an overview, of the process that describes which government agencies are engaged and at what points in the process, from a victim-centric view?

CHAIR: Like a flowchart type of thing?

Mr CHARLES CASUSCELLI: Yes, I just want to understand the different joint teams when agencies come into play because I think that has an impact on the final result in sentencing.

Ms MUSGRAVE: Yes, I think we can work together on that and get something to you.

Ms WALK: Yes.

CHAIR: Thank you. Thank you for appearing before the Committee today, for the evidence you have garnered and the submissions that have been provided. We have a wealth of material on hand in addition to the verbal testimony today, for which I thank you on behalf of the Committee. If you assist the Committee with any further questions it may direct to you specifically to help further inform its deliberations, it would be appreciated.

Ms MUSGRAVE: Of course.

Ms WALK: We will provide the information around the referrals to the JIRT.

CHAIR: Yes, as indicated already in evidence.

The Hon. MELINDA PAVEY: That was simply in the context of support to the families, which is very important in this whole process.

CHAIR: Thank you for your attendance today.

Ms MUSGRAVE: Thank you.

Ms WALK: Thank you.

(The witnesses withdrew)

HUGH DONNELLY, Director, Research and Sentencing, Judicial Commission of New South Wales, Level 5, 301 George Street, Sydney,

ERNEST JOHN SCHMATT, Chief Executive, Judicial Commission of New South Wales, Level 5, 301 George Street, Sydney,

ANTHONY GERARD WHEALY QC, Deputy Chair, New South Wales Sentencing Council, 10 Spring Street, Sydney,

ANTHONY TRICHTER, Chief Superintendent, Commander, Police Prosecutions Command, NSW Police Force, Level 1 Charles Street, Parramatta,

PETER YEOMANS, Detective Inspector, Child Abuse Squad, NSW Police Force 1 Charles Street, Parramatta, and

DAVID ALLAN BENNETT, Detective Senior Sergeant, NSW Police Force, 1 Charles Street, Parramatta, sworn and examined:

CHAIR: I draw your attention to the fact that your evidence is given under parliamentary privilege and you are protected from legal or administrative action that might otherwise result in relation to the information you provide. I point out also that any deliberate misleading of the Committee may constitute a contempt of the Parliament and an offence under the Parliamentary Evidence Act 1901. As time is limited today, the Committee may wish to send some additional questions in writing, the replies to which will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions?

Mr SCHMATT: Yes we will.

Mr WHEALY: Of course.

Mr TRICHTER: Yes.

Mr YEOMANS: Yes.

Mr BENNETT: Yes.

CHAIR: Before we proceed with any questions, would any of you like to make a brief opening statement of no more than five minutes?

Mr DONNELLY: No, thank you.

Mr SCHMATT: No, I do not think so.

Mr WHEALY: I just want to make a very brief statement but, first, I note that I did not provide my full designation. I am a retired judge of the New South Wales Court of Appeal and Court of Criminal Appeal. Currently, I am the Deputy Chair of the New South Wales Sentencing Council and a Commissioner of the Law Reform Commission operating out of 10 Spring Street, Sydney. We have provided a report to the Attorney, which, as I understand, is not yet public. This may have been raised at least with officers of the Committee. I am just not sure what position that puts us in in relation to matters that are in the report.

But I think I can say in general terms that the report looked at those sexual offences involving children where there are standard non-parole periods, examined what it perceived to be the right criteria for selecting offences which ought to have a standard non-parole period, came to the conclusion that those offences currently designated in that way should remain so, suggested a number of other sexual offences against children which ought to have a standard non-parole period and, finally, looked at the way in which we could most openly, transparently and consistently select the term of the standard non-parole period. I would commend those matters to you but just remind the Committee that the report is not yet in the public domain, as far as I know.

Mr TRICHTER: Likewise, I think I also omitted to state my current position, which is Commander Police Prosecutions. The NSW Police Force report was forwarded through our chain of command and, as I understand, incorporated into the whole-of-government submission. I just wanted to put that on the record to

explain to everyone that that is why there is not a stand-alone NSW Police Force report on the record. I simply want to state also the position of the NSW Police Force. We believe that sentences generally for child sexual assault offences are inadequate. Perhaps, rather than elaborate now on the rationale for our view on that, we will await appropriate questions if asked.

Mr YEOMANS: Nothing further.

Mr BENNETT: No thank you.

CHAIR: I will go straight to you, Superintendent Trichter. You have just made the statement, in general terms, that New South Wales Police believe that the sentences are inadequate. What is the rationale for forming that view?

Mr TRICHTER: As I understand, there is quite a lot of information and data before the Committee already in terms of the maximum sentences available at law and the average sentences given for the various child sexual assault offences available under the Crimes Act. What I would like to state and urge the Committee to consider in particular is that when the Police Force says that sentences currently are inadequate, it is not for the mere fact of the community expectation that the Police Force puts forward that position but, more so, for the utilitarian value in a higher sentence for these particular kinds of offences. The Police Force is of the opinion that child sexual assault offences are unique offences for very particular reasons—primarily because of the view that is taken towards the offences by many offenders and also in the minds of victims.

The Police Force is of the view that penalties and sentences for these offences need to be such as to do two things. First of all, in relation to victims, they need to give victims confidence that if a victim makes the very difficult decision to come forward with a complaint about a child sexual assault offence that they are encouraged to come forward by virtue of the knowledge that they have that they will achieve an appropriate outcome for coming forward in what is a very difficult ordeal for victims. My operational counterparts to my left no doubt will be able to elaborate further on that. The second reason is in relation to the defendants themselves. It is experience that tells us that defendants often are encouraged to act upon their urges and commit child sexual assault offences on the basis, at least in part and perhaps to a substantial part, that the risk of being arrested, tried and convicted of a child sexual offence is minimal because of the first aspect that I referred to.

That is, victims generally will be reluctant to come forward. They are in a vulnerable position. They are generally the sole witness to the crime and the case rests usually entirely or almost entirely on their shoulders. With the additional incentive of more significant penalties, not only is the victim perhaps more inclined, more motivated, more confident in the system to come forward, but also for those very same reasons the defendant may be less inclined to commit the offence in the knowledge that the victim is less inclined to keep it a secret to their grave. I make one final point. When one looks at section 21A of the Crimes (Sentencing Procedure) Act, which lists mitigating factors in subsection 2, whilst child sexual assault offenders are mentioned they are not mentioned in the context of the factors that I have just presented and that is that there be some legislative provision that obligates a court, when sentencing a person for a child sexual assault offence, to take into account the need to provide in the penalty encouragement for other victims to come forward.

CHAIR: Thank you. Mr Whealy, this is a question to you—and by all means respond to Superintendent Trichter. In the material provided regarding standard non-parole periods—and please correct me if I am wrong—section 66A subsection 1, child sexual assault of a child under 10 carries a standard non-parole period of 15 years.

Mr WHEALY: Yes.

CHAIR: We have had significant briefings as to the average sentence for that offence and the implications of Muldrock, the improvement of that average, and the factors contributing to historical matters and sentencing factors also contribute to a lower average. The average, as I understand it, is four years prior to Muldrock, which has then since increased to five or eight years. I am happy to be corrected but in general terms the standard non-parole period of 15 years, there are recommendations to expand that to other offences. My question is: What is the point?

Mr WHEALY: It is impossible to tell from that statistic. On its face it looks rather alarming. I do not think anyone could deny that. Unless you conduct a proper analysis of all of these charges and see just what is really behind these sentences, it really is quite difficult to draw a simple conclusion. I am agreeing, I think, as

the Sentencing Council would agree, that these figures are very much lower than the standard non-parole period and very much lower than the maximum penalty, but we simply do not know why unless we can conduct that detailed analysis. It may be that the courts are simply not doing their job. On the other hand, I am trying to look at it anecdotally from my own part—the Sentencing Council has not done this—knowing that this Committee would be meeting and assuming that question would be asked. I am not sure I can really answer it effectively, but I had a look at the Court of Criminal Appeal decisions for the past 12 months in relation to serious sexual offences against children, and I was quite surprised by the number of successful appeals revealing an inadequacy of sentence.

On the other hand, the consequence of those appeals was that the sentences were uplifted by a considerable degree in most cases. They were certainly much closer to the standard non-parole period, so I was heartened by that. It made me believe that unless you do that type of analysis, both by looking at the original court decisions and saying, well, why is this sentence so low, and then checking whether there have been appeals, and then checking if there has not been an appeal, why there has not been an appeal, you are not really in a position to make as clear a conclusion as you otherwise might do. I add one other thing. With standard non-parole periods, you have to bear in mind that they are not all they seem to be by their very nature because the standard non-parole period is a hypothetical figure that represents an offence in the mid-range of seriousness but it does not take into account any subjective circumstances of the offender and it does not really take into account very many of the circumstances of the offence.

CHAIR: On that point, sir, if you can address that, what do we need within that in order to address the concern raised by Superintendent Trichter in relation to section 21A subsection 2 of the Crimes (Sentencing Procedure) Act?

Mr WHEALY: The Sentencing Council has never been in favour of mandatory sentencing; that is all I can say about that. We have not considered it in the report we have done, but historically the Sentencing Council has not been in favour of it. Personally I am not in favour of it because it seems to me to be too inflexible a system and it would fill our jails with people. It would do more than fill our jails; we would have to build about 10 more. We have to do something, obviously, to answer the worries and the concerns of the police. They are genuine worries and concerns and they no doubt reflect the views of a lot of members of the community. We have to do this study that has not been done to see why these sentences are as low as they are. That is the first step because we cannot do anything about it until we do. We have to see why the offences are so far below. I am not surprised that they are below, but why are they so far below the standard non-parole period?

CHAIR: My final question is to the Judicial Commission of New South Wales before I open up to the other Committee members. It has provided this Committee with outstanding material to help us understand and I thank you very much for that. Could please tell me the proper name of the database system?

Mr SCHMATT: It is the Judicial Information Research System [JIRS]. That system provides not only judges and magistrates with information that will help them make more consistent sentencing decisions, but it also provides the same information to all the other players in the justice system.

CHAIR: Can I just stop you on that point. I was extraordinarily impressed with that system, its ease of use and the information contained within it. Could you provide any comment that if we have a pattern of low sentences that that information essentially compounds the continuation of low sentences and how can we address that? If they are learning off each other and being guided by sentences that are inadequate or inconsistently low, is that not a compounding problem we need to address?

Mr SCHMATT: Simplistically, you could say that.

CHAIR: I am not that smart a guy so I am asking a simplistic question on behalf of the Committee.

Mr SCHMATT: That is not really the answer. JIRS provides statistical and legal information to achieve more consistency in approach to sentencing. It is not trying to correct or achieve consistency per se, but consistency in the approach to sentencing. I noticed earlier there was a reference to an average sentence of four years. I think it was for an offence under 66A. According to the information we provided earlier—and in reporting our research studies we do not use averages or means, we use medians—you might recall that we mentioned on the last occasion that we had undertaken some research, particularly in relation to standard non-parole periods and we published the results of that in May 2010.

The results were quite interesting because what it found was that both the severity of penalties imposed and the duration of sentences have increased since standard non-parole periods were introduced in 2003 and that sentences had become both more consistent and the guilty plea rate for standard non-parole period offences had increased. One of the particular offences that we looked at in that study was in relation to child sexual assault and particularly 66A. What we found was that for the offence of sexual intercourse with a child under the age of 10 with a median full-term—and I refer to the median full-term— sentencing increased by 60 per cent from five years to eight years and the median non-parole period increased by 42 per cent from three years to four years and three months for offenders who pleaded guilty. We use the median full-term. That is a truer reflection of the sentence that was imposed because that was the sentence imposed by the court. Certainly there is a non-parole period. Using averages can quite often distort the picture.

CHAIR: On your definition, five to eight is still halfway to 15?

Mr SCHMATT: It is, but they are the sentences as a result of the detailed research that was undertaken. My colleague Mr Donnelly might want to add to that.

Mr DONNELLY: In respect of sentencing statistics, one point that needs to be emphasised is that it is a process whereby we are excising or taking one sentence out of a process and then deriving a macro figure, if you like. The problem with that is that it does not actually tell you what the offender is actually serving. In other words, it is not an overall sentence. All these figures are based on offences. That is the focus and of course for transparency purposes you would need to have an idea of what a person is getting for a particular offence. In respect of reflecting what is actually happening in a particular case, it can underestimate.

In the area of sexual assault, we know it is common for people to commit multiple offences. That means the principle of totality is in play. Totality is a principle that hovers over the exercise whereby the judge has to come up with an overall result. Any analysis of sentences would need to look at totality, not just individual offences. We were asked by the Sentencing Council to supply data for the purpose of reviewing the standard non-parole period scheme. We did that by offence. We have not seen their report or the analysis of the data but we have come here, of course, and helped the Committee as best we can. I think it is important that when we talk about sentencing we talk about the overall exercise and that is what is sometimes lost.

Even in the area of 66A, Parliament in 2009 increased the maximum penalty for the aggravated form of the offence to life imprisonment. What it means is that when you look at those figures, it is necessary to divide the various statutory regimes: before the standard non-parole period; the standard non-parole period and then the life sentence. So you have this problem of actually trying to reason with lots of legislative activity. In the area of child sexual assault at the time, 15 years was considered a very high figure, not for any personal opinion but because relative to murder and other offences it was very high. For that reason alone, compared to what sentences existed before then, there would have to be a very sizeable shift in sentencing patterns.

CHAIR: I totally accept what you say and, as I alluded to earlier, I am grateful for the work you have provided to help us understand that. Specific to the evidence given by Superintendent Trichter in relation to the victim's confidence, the deterrence factor for the offender, and the inability within section 21A of the Sentencing Act, how can this Committee make recommendations to address the concerns of the NSW Police Force?

Mr DONNELLY: Section 3A of the Crimes (Sentencing Procedure) Act makes reference to the victim in terms of the purpose of the sentencing exercise so there is a direct reference to victims in the section of the Act on purposes. I am not sure whether that is enough, but it certainly is something which is in the legislation at the moment, but not in 21A, which comes later.

CHAIR: Ultimately, the standard non-parole period is there by way of legislation, 3A is there. Why is it not being enacted or realised to the level that gives the public the confidence or what is the reason they have a lack of confidence?

Mr DONNELLY: Well, one issue which needs to be faced is the case of Muldrock which was a 66A offence and the High Court of Australia gave directions to New South Wales judges as to how to apply the legislation. So if you are asking why 66A sentencing levels have not reflected the standard non-parole period, I think part of the answer is because the High Court itself said the New South Wales Court of Criminal Appeal was putting too much store, or too much emphasis, on the standard non-parole period figure in the exercise. So Muldrock itself has an effect on sentencing method. Given it was the High Court of Australia, judges do not have a choice but to follow the decision and that might be part of the answer. In October last year, the New

South Wales Parliament passed an Act in relation to standard non-parole periods which effectively legislated Muldrock. I can make reference to that if you like. The name of the Act is the Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013.

Mr WHEALY: On reflection, we should add something that is in the report for the Committee's consideration. That is that the general view we came to is that the figure of 15 years was too high as a standard non-parole period for this particular offence. Why did we say that? Because the standard non-parole period is meant to reflect a mid-range offence. If the maximum penalty is 25 years it would seem to be logical that the mid-range offence would be 12 and a half years. You could have made it 18 years and then everybody here would be even more horrified by the results we have been looking at.

I think there is an argument to say that the standard non-parole period in that particular offence was, for whatever reason, a bit out of kilter to what it should have been. It is important because, if a judge is trying to work out whether an offence is what might be called in the middle of the range—whatever that means, it is difficult to know—but if he is convinced it is, then he is looking at a standard non-parole period that, on its face, appears to be much more severe than that would demand. That is before he even looks at the circumstances of the offender and the general circumstances of the offence. It may be that is a factor as well, we do not know.

Mr PAUL LYNCH: Mr Whealy, I am wondering whether you have a view about the desirability of a specialist sexual offences court.

Mr WHEALY: The Sentencing Council in other reports it has done and the Law Reform Commission, in its reports, recognise that in some cases a specialist court is a very good idea. The Drug Court comes immediately to mind because it is chiefly designed to rehabilitate young offenders and to keep them out of prison, if that can be done, whilst at the same time protecting the community. Here, we are dealing with a range of offences that—to almost every member of the community—would be regarded as abhorrent. It is not a question of rehabilitation. The rehabilitation that happens in the prisons was designed to be protective of the community. It is not the same as one gets in the Drug Court.

It seems to me that there is no parallel and that, at least in theory, the community would demand high penalties for these types of offences. Therefore, I think that creating a specialist court might tend to have the opposite effect because specialist courts tend to become more protective of their own specialization. It would not necessarily impose more substantial penalties; it might impose less. I have my doubts, personally about whether it is a good idea. It seems to me that it would be better, by guideline judgements and the selection of appropriate standard non-parole periods, to educate the Judiciary and to have a very good appellate system to correct them if they are wrong. That seems to me to be a better way to go, to spread it across the whole range.

Mr PAUL LYNCH: Picking up on something you said, you talked about guideline judgments. There is, of course, the Law Reform Commission recommendation about expanding the role of the Sentencing Council in relation to guideline judgements. One of the things they talked about is effectively involving the public or the community more in the submissions that the Sentencing Council might make to the Court of Appeal on guideline judgements. Could you speak a little on that and what that would involve?

Mr WHEALY: The constitution of the Sentencing Council at the moment is pretty broad. We have four community members. It is possible you could have more, you could expand it if you wished. I think that seems to me to be a better way than simply having, as it were, a telephone hook-up with the community saying: What do you think? I think you would get some very unreliable opinions being expressed if you were to do it that way.

My personal opinion is that the way it is structured now is good—subject perhaps to a variation in the constitution of the Committee. The Committee has representatives of the Police, the Director of Public Prosecutions, the defence, Corrective Services, an academic representative and a retired judge—even though his faculties might not be what they once were. We also have four very experienced community members and as we sit in these meetings, they are powerful and forceful in the views they express. I think it is pretty good.

CHAIR: Superintendent Trichter—Mr Lynch's first question?

Mr TRICHTER: The Police Force would support some further discussion and exploration of a specialist court. There are definitely some advantages but there are also some pitfalls, as Mr Whealy has said. It is important that those issues be addressed. They could be overcome. There are multiple advantages of a

specialist court, one of which is that it has a greater capacity to bring together all of the specialists that are required in the process. I think that the Drug Court is a very good example of that. It has achieved a great deal of success by bringing together, in a collaborative approach, Legal Aid, the Director of Public Prosecutions [DPP], the NSW Police Force and all of the support services that contribute to the management of an offender through the judicial process and the sentencing process.

The other advantage of a specialist court is, it not only enables the court itself to specialise but also the players within it. So that the prosecutor, from whichever agency that prosecutor may come—which would invariably be the DPP I would imagine, in the case of child sexual assault matters—can acquire a greater level of skill and sophistication in the prosecution of child sexual assault matters. I use that as an example of the level of skill and capacity that the various players in the process may be able to achieve.

The final issue about specialist courts—and this is an issue that may well be addressed, as Mr Whealy has said, by addressing this fact through other means, is with regard to an issue that was raised earlier in this discussion and that is the number of occasions in which the appellate courts have corrected a sentence and increased it. It may be that a specialist court can have the capacity to address that, in providing the appropriate sentence the first time, rather than having to correct it down the track in an appeal.

Mr PAUL LYNCH: You are likely to get more consistent results, in other words?

Mr TRICHTER: Yes.

The Hon. HELEN WESTWOOD: Following on from that question, I would be interested to hear of your view as to how a specialist child sexual assault court might improve the experience for victims. We have heard quite a bit from others about the impact of the process on victims, so I just would like to know whether you think that that would actually improve the experience, if that is possible, for victims?

Mr YEOMANS: I can answer that, if you like. We have spoken a lot about sentencing and such things but realistically, this matter is about the victims—looking after the victims and looking after our society. First and foremost it is important to address anything we can do to assist the victims in going to court in a timely manner. Children sometimes wait more than 12 months to go to court to be heard. They are thinking: Am I disbelieved? They do not think like adults and it raises a lot of issues. Of course, some evidence is also lost because of the time delay. So anything we can do to assist victims in going to court in a quicker and more effective manner is good. It is also about the welfare of the victim and the counselling aspect of the victim leading up to court and after the court process. It is about getting those kids to court and getting the best evidence they can give and it is also a matter of fairness to the accused.

Anything we can do in relation to the victim getting to court in a more timely and effective manner will assist in getting the appropriate evidence before the court so that a determination can be made as to the guilt or innocence of the accused person. It will also assist in having the victim move forward with their lives. Other family members will also be able to move on and sometimes the offence impacts upon them more than the child. We have to sit with the families when there are court delays for various reasons. If the accused is in custody, obviously the matter is heard and determined sooner but if not, then the matter drags on, sometimes for years. Then when a trial is to finally go ahead and start on a Monday, we have the kids ready to go, but the matter will be put off again. If you have a specified court, I would think that you would have matters heard and determined a lot quicker; people would have more knowledge in the way the courts run and in the way that victims give evidence and those types of things.

We can sit here talking about judgements and that sort of thing but in the end it is well and truly about the victims and their immediate families. When we talk about these matters we are not here for homicides, armed robberies or things like that. I heard the word "abhorrent" used—it is a most abhorrent crime. The reporting is phenomenal, more than any other major crime type. Our squad took in over 5,000 jobs in the last 12 months and of those, we arrested more than 800 offenders—more than two per day. The police are looking after these victims all the time. Anything we can do to assist them in giving their evidence once and once only, and then to move on with their lives, is just gold.

Reverend the Hon. FRED NILE: Chief Superintendent, you were critical of the low sentences. Would you consider minimum mandatory sentences for certain child assault offences?

Mr TRICHTER: I would defer to Government on the point of mandatory minimum sentences. They do come with some other problems. I am not convinced that mandatory minimum sentences would necessarily address the issue. If the mandatory minimum sentence was adequate to bring the sentences generally up to what we would regard as an appropriate level, there may be some utility in that. That is all I have to say about that.

Reverend the Hon. FRED NILE: Is there a problem too as to where you start the case, what level of court? There have been some reports that the Magistrates Court is limited to two years, so why do we go to the Magistrates Court and not the District Court?

Mr TRICHTER: I read with interest page 3 of the *Daily Telegraph* yesterday on that point, which appeared to have been extracted from the submission to this Committee by the Chief Magistrate. That is an issue. As we know, standard non-parole periods do not apply at all in the Local Court. It is true that cases can be disposed of far more efficiently in the Local Court than the District Court. It certainly reduces delay and it certainly reduces cost. Reduced delay is, as Mr Yeomans has said, a very good thing for victims. The Police Force has made submissions previously of a general nature, not purely in relation to child sexual assault matters, but it is time for the sentencing scope of the Local Court to be increased. I would agree with the Chief Magistrate that an increase in the sentencing scope for individual offences in the Local Court ought to be increased from two to five years.

CHAIR: Could we have an answer on Reverend Nile's question from Mr Donnelly?

Mr DONNELLY: On the mandatory sentencing?

CHAIR: No, on the Local Court?

Mr DONNELLY: It is true that the jurisdictional limit in the Local Court is two years when the magistrate sentences for one offence. That is actually legally correct.

CHAIR: Is that appropriate in your view or is it contributing to the medium results we are getting?

Mr DONNELLY: The Local Court sentences are not included in the figures that we supplied because standard non-parole figures do not apply in the Local Court.

The Hon. MELINDA PAVEY: But is it an issue within the Judicial Commission about the sentencing coming out of the Local Court?

Mr DONNELLY: In relation to child sexual assault offences?

The Hon. MELINDA PAVEY: Yes?

Reverend the Hon. FRED NILE: Who makes the decision to go to the Local Court?

Mr DONNELLY: It is the prosecution.

Reverend the Hon. FRED NILE: The Director of Public Prosecutions does that?

Mr DONNELLY: That is correct.

Reverend the Hon. FRED NILE: They are trying to save money?

Mr DONNELLY: It is a matter for the prosecution authorities which forum they choose, given the offences they have.

CHAIR: We will hear that evidence later; I just wanted your viewpoint.

Mr WHEALY: Chair, I did not read the *Telegraph* yesterday so I cannot add anything to what has been said.

Ms MELANIE GIBBONS: Reverend Nile and I both have the same question about mandatory minimums but leading on from there, are our current sentencing options effective—and I am mainly talking about interfamilial, young offenders and those with mental illness?

Mr WHEALY: I am prepared to say that the Sentencing Council, although this does not appear in the report in any great detail, was very concerned about the offences and the way they are structured. There are a lot of anomalies and I think there could be some good work done on restructuring all of the sexual offences, rewriting them, rethinking about them, assigning importance to some that are more serious where culpability is likely to be higher than others. I think they have grown a bit like topsy and they have not been reviewed for a long while. Whilst we have not done that, we see great scope for it being done.

Mr TRICHTER: I agree. There is a great deal of variation amongst child sex offences and they can be committed from time to time in circumstances that do not warrant the kinds of penalties we have been talking about today and that we expect and it is because of that very significant range of relative seriousness, objective seriousness of the offences themselves that I would agree with Mr Whealy that there would be some advantage in reviewing the structure of child sexual assault offences.

Mr YEOMANS: From an operational point of view, there are matters that carry life imprisonment and matters that carry 20 years and 10 years. We as police, like the vast number in the community, see a person who has committed an act against a child under 10—indeed any child—as deplorable. However, you have to look at each matter individually and that child under 10 might have been abused by a sibling who is 13 years of age so you cannot sentence that person to life imprisonment. I am happy with most of the sentences but we have to come up a little bit quite obviously, but we also have to look at the circumstances surrounding each matter and we have to look at pre-sentence reports from the victim themselves, victims impact statements and also the people committing these offences—I have heard of the two-strikes policy in relation to these types of offences also. There are a whole lot of things we have to look at. People think that as police we get them and we like to lock them up and throw away the key. We would like to do that with some but the majority of the sentences are reflective of the offences themselves. However, we have to look at individual cases; I think that is a must.

Mr CHARLES CASUSCELLI: I think Mr Yeomans has answered most of this but I will ask this question of the other members here today; it represents the views of the community I represent. It would be fair to say that my community—and I am sure the rest of New South Wales—sees detention as being a form of punishment and for the protection of the community first and foremost. I would suggest that the community has expectations around those two key concepts but it appears to me that the court process gives undue attention to the mitigating factors that come into play, which is at odds with the community's expectation of punishment and protection.

There are two dynamics at play that work against one another and the end result is that the community believes that our court system is failing it and victims because the legal process spends so much time on mitigating factors. Are we going to have to live with that or is there a way of dealing with it because right now the community is saying to me, "Charles, if someone is convicted of the worst type of offence, how can there be any mitigating factors?" Yet there must be because we see maximum sentences and standard non-parole periods nowhere near being met. How would you answer the community?

Mr WHEALY: You are right; some offences are so horrendous that they warrant the severest penalties and mitigating circumstances would have little role to play in a really horrendous crime. You have only got to think of some of the terrible crimes that have happened in New South Wales, whether they involve children or not, to realise that that is so. The Sentencing Act requires that all these matters be taken into account so the courts have to look, in general terms, at mitigating factors; they cannot ignore them. They would be failing in their duty if they did. They would not be obeying the statute; they would be disobeying the statute and their decision could be corrected, except as I say in that rare category of cases which are the worst possible offences.

As has been said by my colleagues on the left, you have to look at the range of circumstances in any case. If my son committed an offence while under the influence of drugs and mixed with people who were drug taking and then committed an offence but was otherwise a nice young fellow of 16 or 17 years of age, why would it not be appropriate to take into account his prospects of rehabilitation, his remorse, the fact that he is unlikely to offend again, the fact that he has learnt his lesson and he did not actually harm anyone in a physical way. I am just giving you that as an example. The circumstances then become so important and if you fail to take those into account in such a case you would be seen by the community, even the people you represent, as heartless, I think, and failing in your duty.

Mr BENNETT: You also have to look at the age of the sentence. From 1997 when I first started in the Child Protection Enforcement Agency until now with the Child Abuse Squad, offenders are actually becoming younger. In the event you have what we term as peer sexual assault or consensual sexual intercourse any person who is under 16 years of age commits an offence regardless of whether consent is provided. If you have a minimum sentencing period these people will be captured by that and they are going to be sentenced to a minimum period of imprisonment as a result. You do need to take into consideration mitigating factors. Our offenders are getting younger and our victims are getting younger as well so they need to be taken into consideration. I do not believe that a mandatory period of imprisonment is an appropriate penalty to be imposed.

The Hon. HELEN WESTWOOD: The Government submission states that 4,037 young people last year were remanded in custody for child sexual assault. Do we know what proportion of those would be under by the similar age offence where it is consensual sex but is still child sexual assault?

Mr YEOMANS: A lot of those, I would say the majority, without grabbing a figure, of what we know as peer consent.

The Hon. MELINDA PAVEY: Could someone get those figures?

Mr YEOMANS: Yes. But what I am saying is that the peer consent matters do not usually go to court because the victim, the majority of the time, does not want to take action and they are dealt with in other ways, including counselling. To arrest and charge people like that—not always because you cannot use a paintbrush—does not achieve anything. People have to be taught about sexualised behaviour in those sorts of things because we are talking about a 14-year-old and a 16-year-old. Those matters do not proceed to court, and I am talking about the vast majority. I cannot think of too many where we have actually charged within the Child Abuse Squad.

The Hon. HELEN WESTWOOD: Do you know whether those cases are included in this figure of 4,037 for last year?

Mr BENNETT: There would be a much larger amount of sexual assault that does occur that does not proceed to court as well. The JIRT Referral Unit was set up in 2008 and until now there have been about 37,000 reports that have actually been made through that unit. We have noticed an increase in the number of peer sexual assault offences—I cannot provide a figure at the moment but I can get that figure for you but there has been an increase in those types of matters reported to us.

The Hon. HELEN WESTWOOD: Would that include things like sexting as well?

Mr BENNETT: No. What we are looking at is indecent assault offences, sexual assault offences and acts of indecency offences but not sexting or pornography or any of those types of matters.

Mr YEOMANS: The up-to-date figures I can give for the preceding 12 months to date is that there were 5,034 jobs received within the Child Abuse Squad, bearing in mind we take matters of sexual assault of children under 16 with serious physical injury and then out of that there were 719 arrests. When you look at those two figures you think they are way apart but in a lot of those matters the victim does not want to go to court and the matter is dealt with in other ways.

That is why we have a joint partnership with the Department of Community Services and Health. Sexual assault of a child or an adult is probably the only crime I can think of whereby it is up to the victim whether or not the matter proceeds; it is not up to the police because they have to go through so much in relation to their lives, the trauma of court and all those circumstances. It is a matter for the victims and it is a big step for them to do that and so the matter is dealt with in other ways. The proportion of arrests is still very high. The Police Association put out figures for 2010 in relation to the conviction rate. The conviction rate is exceptionally high in relation to child sexual assault; it is up around the 80 per cent mark, which is very high for major crime.

The Hon. MELINDA PAVEY: The submission from the Department of Public Prosecutions expressed the view that it would be difficult to see, from a legal and practical perspective, how anti-androgenic medication could be incorporated as an option into this sentencing process. Do you think the use of anti-androgenic medication could be factored into sentencing?

Mr WHEALY: Our Council did not consider that question.

Mr TRICHTER: No, I do not think we are in a position to answer that either. There has been some research conducted into its use in other jurisdictions and I think—excuse the pun—it seems as though the jury is still out on whether it has a significant impact. From my reading, I understand that the data on reoffending is largely based, in regards to the studies that have been conducted, on the effect on admissions from participants in the scheme as to whether or not they have reoffended more so than actual further crimes that have been detected and subsequent prosecutions. I think from our perspective there is probably not enough known about its use to make a determination on its utility but of course the Police Force comes from the perspective that we want to see less offending and if there is a prospect that the use of that as a sentencing option will reduce reoffending or offending in general or recidivism generally, we would certainly be prepared to support some further discussion and research into that issue.

CHAIR: Detective Inspector Yeomans, what is your attitude to that?

Mr YEOMANS: I know what the victims would be saying about things like this and community expectations. As Mr Trichter said, from the police point of view we want to lessen these horrific incidents. From the victims' point of view, they would be pro this with regard to certain offenders. I am talking about only certain offenders. But they would have to be the worst of the worst. What is the worst when you are talking about child sexual assault? It is a very difficult area. It would have to be 100 per cent about the recidivist paedophiles in our community for this to work. It is a big step.

Reverend the Hon. FRED NILE: I refer to the child protection register. Do the police support expanding that based on the Western Australian model?

Mr TRICHTER: I am not aware of that model.

Reverend the Hon. FRED NILE: I am talking about public access.

CHAIR: As happens in Western Australia.

Mr YEOMANS: I would be against that, or there could be very limited access. Things have happened in the United States involving vigilantes. That is a real problem. On the other side, we have had situations in the past where people on the register are near schools and those sorts of things. Having it monitored by the local area commands should be sufficient to ensure that that does not happen. We would be going into unknown territory if we were to start publishing the register.

CHAIR: There may very well be less offending.

Mr CHARLES CASUSCELLI: I direct my question to the Police Force. Is there sufficient advocacy on behalf of the child victim in the lead-up to and during the court process? Could it be better? Is the system deficient?

Mr YEOMANS: It could always be better.

Mr CHARLES CASUSCELLI: I should not have said that.

Mr YEOMANS: I spoke before about presentencing reports and hearing from victims in victim impact statements. We are doing our best in relation to how evidence is given, for example, by video. A lot of evidence is given by video link. We are doing our best with regard to the counselling side of things and taking the child through the court process. It is a difficult area and we are doing our best, as is the court system. Speaking as a member of the community and as a police officer, we have to be fair to both sides. How we treat children in the court process is probably as good as we can get it. It is difficult because children must be cross-examined about their evidence. We talk about going only a certain way, but is that fair to the accused? It is very difficult.

Mr WHEALY: It is a lot better than it was 15 years ago.

Mr YEOMANS: Yes. In relation to the police side of things, in the past the child had to make a statement on numerous occasions before it was given to a senior detective. That is different with the Child Abuse Squad. It works with the Department of Community Services and NSW Health. It is usually done once

and it is videoed and that evidence is given as evidence-in-chief. That is much better than it was in the past. I am there with the mums and dads while their children are giving evidence and it is just as difficult for them as it is for the children.

Mr CHARLES CASUSCELLI: The Police Force is providing child advocacy in the court and arguing on behalf of the child. Is it the appropriate agency to do that or should it be done by someone else?

Mr YEOMANS: The Director of Public Prosecutions does that.

Mr CHARLES CASUSCELLI: Given that we are talking about children, is the Office of the Director of Public Prosecutions the best agency to provide that service?

Mr WHEALY: It has support people who look after witnesses.

Mr YEOMANS: It has a specific area that deals with these matters.

CHAIR: I imagine that we could ask questions for much longer. The Committee has had briefings from the Judicial Commission and that is much appreciated. That information will be considered in the deliberations. Is there anything else that you would like to add?

Mr DONNELLY: In terms of sentencing levels, it is very important to focus on the total sentence and not only the non-parole period. That is not when the person gets out of prison. When the sentence is more than three years there is no right to be released.

Mr SCHMATT: I endorse that. Quite often I hear average sentences quoted and I know that they are not accurate because they refer to non-parole periods and not the full term. It is very important to refer to the full term and not the non-parole period. As Mr Donnelly said, often the person will not be released on parole at the end of the non-parole period.

CHAIR: Thank you for putting that information on the record.

Mr TRICHTER: I reiterate that emphasis needs to be placed on the purpose of the sentence. In saying that, the purpose cannot be simply limited or even priority given to the sense of justice that the community wants to feel—that is, the community expectation. It is about the utility of the sentence in terms of the deterrent to offenders generally, to the particular defendant and victims generally.

Mr BENNETT: Mandatory sentencing is not the key. Consideration should be given to specialist courts with specialised training provided to people within those courts. There should be a review of the standard non-parole periods, what should be included and the period stipulated. Guideline judgements should also be considered and there should be an assessment of the rationale behind matters that have been before the courts that have not met the standard non-parole period.

CHAIR: On behalf of the Committee I thank you for your outstanding contribution. If the Committee has further questions they will be provided to you and a response would be appreciated.

The Hon. MELINDA PAVEY: Thank you for the work you are doing at Parramatta.

(The witnesses withdrew)

(Short adjournment)

LLOYD BABB SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, sworn and examined:

CHAIR: Welcome, Mr Babb, thank you for appearing before the Committee today. I draw your attention to the fact that your evidence is given under parliamentary privilege and you are protected from legal or administrative action that might otherwise result in relation to the information you provide. I should also point out that any deliberate misleading of the Committee may constitute a contempt of the Parliament and an offence under the Parliamentary Evidence Act 1901. As time is limited today the Committee may wish to send

you some additional questions in writing, the replies to which will form part of your evidence and be made public. Are you happy to provide a written reply to any further questions?

Mr BABB: I would.

CHAIR: Before the Committee proceeds with questions would you like to commence with a brief opening statement?

Mr BABB: Certainly. I am the Director of Public Prosecutions, so it is my office and those I delegate power to, that prosecute all serious child sexual assault offences in this State in the local, district and supreme courts. I have been a solicitor at that office and a Crown Prosecutor at that office. I worked in the Penrith office as a Crown and the Gosford office as a Crown. I have prosecuted many child sexual assault offences myself and in my role as the Director the one trial I have run in the three years I have been there was a child sexual assault trial. I have been the Director of the Criminal Law Review Division at a time that an inquiry and committee met to report on better ways to deal with child sexual assault offences and a publication resulted from that committee.

CHAIR: In the submission you advocate the use of sentencing guidelines as a better way to provide consistency in sentencing and agree with recommendation 18.2 contained within the New South Wales Law Reform Commission sentencing report concerning guideline judgements. How would a guideline judgement for child sexual assault offenders assist judges in sentencing?

Mr BABB: It would assist in the same way as it has in relation to those offences where there has been a guideline judgement. For example, driving in a manner dangerous occasioning death, the Jurisic and White guideline judgements, and in relation to armed robbery, the Henry guideline judgement. It brings a consistency of approach in that those guideline judgements have highlighted factors that are aggravating and that should lead to a particular sentence being imposed. In my submission it would lead to a greater consistency in sentencing.

CHAIR: Do you have a view in relation to the use of a specialised court in relation to child sexual assault?

Mr BABB: I think there is merit in the idea. I think it is a specialised area of prosecution, defence and judicial handling. I think you need people who are sensitive to the needs of complainants and a specialist court can develop an expertise in dealing with matters. One of the down sides of specialisation is that it is a very emotionally draining area and for my staff, for example, there would be concerns in having people for lengthy periods of time specializing solely in the area because of the emotional toll it can take on people. There is definitely vicarious trauma that you get through dealing with complainants and hearing their stories. There are arguments for and against a specialist court.

CHAIR: What are the arguments against a guideline judgement, what is the opposition to a recommendation along those lines?

Mr BABB: You need to be able to point to factors that are consistent amongst offending and perhaps drive manner dangerous and armed robbery have a greater degree of factors that can be pinpointed as being the single things that would aggravate the offence. Whereas, in my experience the seriousness is sometimes is hard to predict with child sexual offending: It can be the abuse of trust, it can be the type of offending or it could be the impact it has had on the particular complainant or victim. That might be an argument against it. It would be perhaps harder to pinpoint what makes one type of offending more serious than another. The Court of Criminal Appeal have had some debate about whether you can have a degree of seriousness in child sexual offending and whether, excuse the frankness of the language, penile penetration is more serious than digital penetration. It is perhaps offensive to suggest that in relation to children there is a scale of seriousness that, really, it is all serious offending and that it would be hard to pinpoint those factors that would militate for a more serious sentence.

CHAIR: We have previously heard from the NSW Police Force regarding the impacts of section 21A subsection 2 of the Crimes (Sentencing Procedure) Act regarding the mitigating factors in relation to this type of offence. Do you have a view in relation to the application of that Act and section?

Mr BABB: I was present for part of the previous evidence but I did not hear what Mr Trichter and Mr Yeomans had to say about section 21A of the Crimes (Sentencing Procedure) Act. I am not a big fan of section 21A. I think it has brought in some anomalies in that when it was introduced it was almost a mirror—there were

aggravating features and then mitigating features that mirrored each other—and that is not always the case. Some of those features warp the sentencing process and from memory the Law Reform Commission recommended the abolition of section 21A in their report on sentencing and I would support the abolition of it. As I was saying in relation to pinpointing factors, when you pinpoint them sometimes you incorrectly pinpoint them as mitigating when maybe they are not mitigating features.

CHAIR: Further to that point, what are your views in relation to section 3A?

Mr BABB: Was there any suggestion that section 3A was negative?

CHAIR: No, there are considerations under section 21A and section 3A.

Mr BABB: Section 3A is fine.

CHAIR: Is it utilised enough?

Mr BABB: I think so. It is the overriding setting out of the principles that apply in sentencing. I think it is fine and that it sums up the very difficult balancing exercise that sentencing is.

Mr PAUL LYNCH: The submission from the Local Court by Graeme Henson got a bit of publicity yesterday. It suggests that your office is having matters disposed of summarily to save money rather than proceeding to the District Court: What is your response?

Mr BABB: We absolutely do not approach matters in that way. We approach them according to my guidelines and we do it in a principled way. We are doing our best to ensure that those matters that can properly be dealt with in the local court because of the jurisdictional limit are dealt with there. There are some good reasons for that: It is a much quicker result for the complainant and from experience timeliness is really important. It is a difficult decision for a lot of complainants to come forward and talk about what has happened. A lot of times it is intrafamilial or a family friend and it is quite a mountain for them to get over.

The delay between charging and a final determination in the District Court is much lengthier than the delay between charging and a determination in the Local Court because there are two court processes that are gone through before you get to it plus there are quite lengthy delays at present in the District Court. So where a matter can be dealt with in the Local Court jurisdictional limit it should be. A lot of historical sexual offending is subject to the penalty that was in place historically and the sentencing range is limited by the penalty that could and should have been imposed had the complaint been made at the time that that section was in place. So we take those factors into account.

Sometimes the maximum penalty does not exceed the jurisdictional limit of the Local Court or even if it does we try in a very principled way to deal with it in the right jurisdiction. I think we do that very well. One of the tests is—and I am constantly reviewing this—what are the penalties being imposed by the Local Court? Were it the case that I was incorrectly keeping matters down in the Local Court that should be dealt with in the higher courts one would expect that the jurisdictional limit of the Local Court would be reached in a large proportion of matters, and it is not. So taking, for example, aggravated indecent assault, of the 108 matters that were dealt with in the Local Court only eight received a two-year sentence—so less than 7 per cent of matters—and the large majority of matters did not receive a custodial sentence at all. So that just indicated to me in looking at them—which I constantly do—that we have chosen the jurisdiction correctly.

The other thing I would expect is that I would be getting feedback from the court to say, "This matter should not have been dealt with in this jurisdiction because I feel hamstrung." I do not get that feedback. However, I do get feedback from the courts in a number of ways—either from heads of jurisdiction or from remarks on sentence where a judicial officer specifically says, "I ask that these remarks be taken out and forwarded to the Director of Public Prosecutions so that he can understand that there was a problem with this matter." I have not had those sorts of remarks sent to me nor had the issue raised with me, so I think we are making the right decisions in most cases. There is a good reason for it—namely, it is a more informal jurisdiction and it can be better for the complainant in a number of ways. You are dealt with quickly. You do not have wigged and gowned people cross-examining you. You do not have a jury—that can put pressure on to use jury time and keep the matter running. If a complaint gets very upset in the Local Court it is much easier to take an adjournment and come back to it later in the day or on another day than it is with a jury waiting.

Reverend the Hon. FRED NILE: Would you support giving the option to the court to increase the two-year limit to five years?

Mr BABB: That is very much a policy decision and there are arguments for and against it. I was not on the Sentencing Council when they last recommended against increasing the jurisdictional limit but they had a report looking at the arguments for and against. In a way I think we are getting the decisions right and having them dealt with in the right sort of jurisdiction. I think the majority of child sex offending needs really condign sentences of imprisonment and they are usually dealt with in the District Court. I think that is appropriate. They should be dealt with seriously and should have serious penalties available.

Mr PAUL LYNCH: The Local Court has been running a campaign to increase its jurisdiction since time immemorial.

CHAIR: Could the specialised court operate without the wigs and formalities but carry the sentencing capacity of a District Court?

Mr BABB: Why not? Really I heard the last panel say that we were doing everything we can: we are not doing everything we can. We have got to find ways of making it easier for people to give evidence and making it quicker. Yes, the conviction rates are good but the drop-out rates are too high. It is an ordeal and people will very often indicate that they cannot go through with it. Anything we can do to make it less formal and less of a trauma we should be doing.

Ms MELANIE GIBBONS: As you well know, several pieces of legislation deal with child sexual offences. Should they be rolled into one that encompasses all or is it best that they are left separate?

Mr BABB: It is an interesting question. Some jurisdictions do not break things down into the aggravating features that we do. I must say, particularly when I was in that policy job as Director, Criminal Law Review, I can see the attraction in that it stops things being ad hoc—in a particular case we create a particular offence that gets used very infrequently—and we do not develop a real body of case law and sentencing statistics. Again it is a policy decision. My job is to work within the laws as we have them and I am very happy to do that but it is worth exploring. Again there would be arguments for and against it. It might hide inconsistency because you only have one offence and there is going to be a greater variety of offending within the offence but it might also stop some of the plea negotiations.

The reality of child sexual offending is that sometimes because of the trauma and the reluctance of the complaint to go forward they are asking that a matter not proceed and we might be negotiating for a plea knowing that if a plea is not forthcoming there will be no prosecution at all, so the facts may get watered down in order to accommodate a plea to get a result. If we had a single offence we may not have what they call the case of De Simoni, which is you cannot charge the less serious offence and yet keep the elements of the more serious. So what we have at the moment in plea negotiations is the defence wanting to move into the less serious offence—for example, some of the aggravating features are threats of violence—and negotiating in a way hamstrings what facts can go in. There may be more flexibility if there were a more narrow number of charges.

The Hon. MELINDA PAVEY: From your policy work do you have a view as to which Australian jurisdictions do this well?

Mr BABB: There are particular things that different jurisdictions do well. Queensland and Tasmania have a law in place that says that offending against multiple victims will be heard in the one trial and that the possibility of concoction is a question for the jury. I think that is an excellent provision because we separate trials on the possibility of concoction and then we knock off multiple offending one by one, so you end up getting sentenced for the one offence where there were three other complaints. I think juries are well capable of assessing the possibility of concoction and in many instances I think we are having separate trials where they should be joint trials. So I think Queensland and Tasmania do that better than New South Wales.

Victoria and Western Australia pre-record the evidence of vulnerable witnesses so there is no waiting around. At the moment part of the ordeal is the waiting around and the uncertainty of when you are going to be giving your evidence. We have tried to push for defence pre-trial disclosure and early resolution of issues with some real success but we still have not got to the stage where a young child can be told with confidence, "You will be giving your evidence on Monday and it will be over on Monday." They might be waiting around for a court and for pre-trial rulings till the Monday of the next week, which to me is completely unacceptable. They

are vulnerable, they are nervous and it puts pressure on them to say, "I can't go through with this". I think that is an idea that is worth considering from Western Australia and Victoria.

But there are other means short of that—namely, have your pre-trial arguments before the day that the trial is listed. Get your video evidence—that is one of the great advances because we have half done the complaint's evidence. We have video recorded their statement and that goes in as the evidence in chief. That is good but the one downside with it is that sometimes because it is an interview and you have not heard the story before it is not presented in the best possible chronological order. So sometimes you miss some of the effect that can be got through taking evidence in chief. In Western Australia and Victoria they don't put in the recorded statement, they just do the in chief and the cross-examination pre-record and then give the expert child sexual assault prosecutor the ability to really interact with the witness having read or watched their video presented to the best effect. To me whatever we can do to make it just as fast and informal I am for it.

Reverend the Hon. FRED NILE: What is the percentage of people who do pull out under this pressure? Is it 1:10 or 1:20?

Mr BABB: I will take that question on notice. There is a multitude of reasons but it is not uncommon.

Mr CHARLES CASUSCELLI: In terms of potentially moving sentencing outcomes closer to community expectations, do you think there is a case to be made for legislating what is allowable or permissible as mitigating factors when one is convicted of some of the worst of these offences? Along the same lines, what should or should not be allowed as aggravating factors when determining sentences?

Mr BABB: What did you have in mind?

Mr CHARLES CASUSCELLI: For example, someone is convicted of a section 66A offence and once convicted the judge considers mitigating factors. Some community members would say that just because someone may have had an unhappy or violent childhood that is not something that should be considered in discounting the perpetrator's sentence. Is there a case that says, "For this type of offence these are the sorts of mitigating factors that a judge should take into consideration and while these sorts of things might be applicable for other offences they are not to be allowed as mitigating factors for this particular offence"? The same situation would equally apply to aggravating factors. Given the nature of the offence would you actually allow some in, some out?

Mr BABB: My personal view is that individualised justice is the best where you can take into account the features and balance them. I am strongly of the view that where you have serious objective criminality that no mitigating factors should be given a disproportionate weight. As you say, a deprived childhood, a childhood where you have been sexually abused, for example, is that a mitigating or aggravating feature? In one sense it has affected your upbringing but in another you are well aware of how much of an impact that has on a young person for the rest of their life. Generally, I think that judges do a good job in not letting mitigating factors outweigh the objective criminality of the offending whilst still leaving some scope for taking into account individual justice and those personal factors that could be taken into account in sentencing.

The Hon. HELEN WESTWOOD: Returning to your previous answers about the outcome for victims, is there something we have not touched on that you think we could look at or perhaps even recommend that addresses that question of victims' experience and the outcomes?

Mr BABB: No. I think I have been through those things. I do not think so. I think I have covered those things but, really, you know, it is trying to deal with the matters promptly and, if we can, in a way that is not increasing anxiety.

The Hon. HELEN WESTWOOD: What about the process of putting the case together where the evidence is taken from the child and where there then needs to be the collection of forensic evidence: do you or your officers have any views of ways in which that process can be improved?

Mr BABB: I am not sure. My experience of child sexual offending is that the forensic evidence features less highly because quite often there is no immediate complaint. Quite often there is grooming, step by step, in order to break down defences and overcome the child's objections, and it is a person in a position of authority in relation to them. Quite often the complaint comes well after the event at a time when forensic evidence is not going to be available. Generally, doctors and police officers who work in this area are very

sensitive to complainants' needs and deal with them in a wholly appropriate way. I think they do a pretty good job and I cannot think of something in the forensic area that could be done better. One thing that concerns me is that some doctors are concerned about giving statements because of the impact it has on their practice with having to come to court. That is a real concern.

CHAIR: It is a very big regional concern.

Mr BABB: It is a very big regional concern. They feel an obligation to their patients and they know that a lot of time can be wasted. So we are looking at things that can be done there—maybe a simple video link. Why can we not be using the desktop computer for a doctor to give evidence in an appropriate case? We really need to not have practitioners concerned about getting involved in these cases because of concern about giving evidence later. That is something I am aware of and the department is aware of. We are looking at ways of improving it, but that is a concern. It does not really apply to specialist sexual assault doctors, police officers and people whose job it is to do and then to give evidence.

Mr PAUL LYNCH: In your submission you talk about the recommendation from the Law Reform Commission about expanding the role of the Sentencing Council?

Mr BABB: Yes.

Mr PAUL LYNCH: A couple of things about that interest me. One is that the Law Reform Commission talks, essentially, about getting the Sentencing Council to consult with the public a lot more to get their views about sentencing to inform the Sentencing Council's submission to the Court of Appeal. What forms of consultation submission might you be thinking of? How far does that go?

Mr BABB: That is a very live question. It is a difficult thing to consult well and factor in. It comes partly through representation on the council—having members of the public represented. But I think that is a real question: How do you consult well and how do you accurately reflect public opinions?

Mr PAUL LYNCH: At the very least I guess you would call for public submissions to the Sentencing Council, ask for people's opinions on the community jury concept and things? Of course, people need to be properly informed and given all the material?

Mr BABB: Yes.

Mr PAUL LYNCH: I guess it would encompass those sorts of things?

Mr BABB: I think so. I think there are a number of ways you could do it. A community jury sounds like an interesting idea because, really, you have to take into account all the facts. That is where we fall down sometimes in that what is being conveyed is only part of the facts and part of the case. On the whole, a lot of jurors come back for sentencing. It might happen after the event, but they will scan the papers in order to work out when it is on and come back. Some studies suggest that where they are in possession of all the facts, they think the judges get it pretty right.

CHAIR: Tasmania is one example.

Mr BABB: Yes, Kate Warners' work.

CHAIR: What is the point of standard non-parole periods for child sexual offences?

Mr BABB: It certainly is not what it was before the Muldrock case. It really was a bit of a bright line pre the High Court decision in Muldrock. It is now a guide post. Whether it is adding on it, I think it probably is. The Law Reform Commission in its review recommended retention.

CHAIR: And expansion.

Mr BABB: And the extension. I think the Sentencing Council has looked at the inconsistency of it. It needs to be approached in a more realistic way. It was hard to work out how the numbers were arrived at initially. That lack of clarity in the thinking has added at times to it being not as effective a guide post as it could be.

CHAIR: Do you think it certainly added to the community's lack of confidence in the judicial system?

Mr BABB: Yes, I think so. I think you are able to point to many instances where a sentence is well below the standard non-parole period. Then again, some of those standard non-parole periods were unrealistic in that that non-parole period would mean that you must impose the maximum sentence once you added on a parole period.

CHAIR: Section 66A is an example.

Mr BABB: Yes, and section 61M I think was eight years for a 10-year offence. It was a shame because an unrealistic expectation had been set.

Mr PAUL LYNCH: I think it is the case that those figures were adopted by the government of the day without any particular consultation with the Sentencing Council or anybody else?

Mr BABB: I was not a member of the Sentencing Council at the time, but it seems to me that that is very likely.

Mr PAUL LYNCH: Returning to the Sentencing Council and submissions on guideline judgements, the Law Reform Commission recommendation, which you endorse, has a fairly restricted role for the Sentencing Council—an increased role but giving advice to the Attorney if he is making an application or making submissions to the Court of Appeal if they are doing the right motion review. Do you think it might be able to be expanded? Perhaps the Sentencing Council could make an application to the Court of Appeal without doing it through the Attorney? As I understand, there are constitutional problems with us doing the same here as is done in England and New Zealand, but do you think perhaps there is greater scope for the Sentencing Council?

Mr BABB: I think there is, and it is a question of policy as to how those things should be triggered. I am a supporter of some increased role. It could be as limited as the Law Reform Commission suggestion as an evidence-gathering aid or something broader—the ability to initiate.

Reverend the Hon. FRED NILE: To clarify your position on minimum mandatory sentencing, what are the reasons for your objections? I understand your policy is opposing it?

Mr BABB: Yes, individualised justice. Mandatory sentencing treats every case the same whereas the general view within my office—I consult with a large number of staff and senior officers—is that individual approaches to cases is the preferable way to go.

Reverend the Hon. FRED NILE: They still could be a fairly low minimum sentence?

Mr BABB: That is a policy option that is available to government, there is no doubt.

CHAIR: Do you have a view on the potential sentencing option of using anti-androgenic medication?

Mr BABB: Yes. I would see it as something difficult to implement at the initial sentencing stage. When I was the Crown Advocate I ran the first five or so crime serious sex offender applications in the Supreme Court. Anti-androgen medication was part of the orders for some people, but only where they consented to it, and some medical practitioners strongly held the view that they needed consent in order to administer it. I am not sure what their view would be if it were able to be mandatorily imposed by a sentencing judge. It would seem to me that it is not particularly needed whilst they are serving what should be a lengthy period in custody. So it is something that gets considered for when they are in the community. Perhaps it does fit best with the crime serious sex offender provisions, which really are aimed at the people who present as a future risk after a current judicial assessment—that is, within six months prior to release they are at serious risk of future offending.

Reverend the Hon. FRED NILE: I understand the Cedar Cottage program has now been closed?

Mr BABB: Yes.

Reverend the Hon. FRED NILE: Did it have some value? Should it be recommenced?

Mr BABB: That is a policy decision. It has been closed down and is no longer available. I work within the laws as they are. I do not have a view about it.

Reverend the Hon. FRED NILE: You never recommended that it should be closed down?

Mr BABB: No. I did not make a recommendation one way or the other.

Ms MELANIE GIBBONS: I wanted your views on young offenders of child sexual assault. What is best for them? Is full-time incarceration appropriate?

Mr BABB: It is a really difficult area. They are matters that come across my desk quite often for consideration of how we should deal with them. The way that the juvenile offenders legislation works is that some matters are serious crimes that have to be dealt with in the district court as at law. Sometimes I have to consider whether we should decide to deal with some offending by juveniles other than these really serious criminal offences and keep them in the juvenile court where a young person can be dealt with with some more flexibility. Sometimes they are difficult balances about whether someone of a really tender age who has committed a serious sexual offence should be dealt with at law in a way that is not the way that we deal with children generally, or dealt with in a special way that we deal with children more generally. I am acknowledging their greater potential for rehabilitation and change, so I must say I find it a really difficult area.

Ms MELANIE GIBBONS: And bringing in community expectation as well.

Mr BABB: Yes. There are different things. For example, proximity of age—a 15-year-old boy and his 14-year-old girlfriend—makes what can be a really serious sexual offence not as serious. It is still criminal and so it should be, but we need to take that into account and have some flexibility in how to deal with it. Sometimes dealing with it in the juvenile courts with their greater informality and their greater scope for alternatives to full-time custody is desirable.

CHAIR: Thank you, director. Your evidence today has been extraordinarily helpful and informative for the Committee. Thank you for appearing today and providing the information. If you would indulge the Committee, if we have further questions in writing, your answers will be considered as part of your evidence. Thank you for appearing today.

Mr BABB: It is my pleasure. Thank you.

(The witness withdrew)

JESSICA PRATLEY, Executive Committee Member, Australia and New Zealand Association for the Treatment of Sexual Abuse, affirmed and examined:

CHAIR: Good afternoon, Ms Pratley. Thank you for appearing before the Committee today. I draw your attention to the fact that your evidence is given under parliamentary privilege. You are protected from legal or administrative action that might otherwise result in relation to the information you provide. I should also point out that any deliberate or misleading of the Committee may constitute a contempt of the Parliament and an offence under the Parliamentary Evidence Act 1901. As time is limited today, the Committee may wish to send you some additional questions in writing, the replies to which will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions?

Ms PRATLEY: That would be fine.

CHAIR: Before we proceed with questions, would you like to make a brief opening statement?

Ms PRATLEY: I would. First, I want to check that everyone has received the updated or the amended copy of our written submission. We noticed an error in that last night.

CHAIR: That would be contained within paragraph 5 under the heading of "Public Education"?

Ms PRATLEY: Yes, in relation to recidivism rates.

CHAIR: Yes. "Furthermore, most sexual offenders will re-offend at a rate of less than 7.7 to 19.1 per cent over five years." That is referenced. We are in possession of that. Please continue.

Ms PRATLEY: First, on behalf of the Australia and New Zealand Association for the Treatment of Sexual Abuse, I thank the Committee today for the invitation to contribute to this inquiry, both through our written submission and also for today's hearing process. In relation to sentencing of child sex offenders, our position is that it is not so much the length of the sentence that is important it is what happens during that sentence. In other words, sentencing needs to focus on rehabilitation and thus the prevention of future offending. This means that if a person is sentenced to a period of incarceration, this should include adequate time to participate in treatment while in custody, alongside effective planning for their return to the community and ongoing support when in the community—community-based sentences, treatment within the community as well as access to such treatment.

The key message here is that restrictions, surveillance and sanctions alone do not reduce recidivism. It is the combination of supervision and treatment that reduces recidivism and thus enhances public safety, which is what we are all aiming for. In order for treatment to be effective, it needs to be grounded in the right model and it needs to be focusing on the right issues. This means that it targets factors that are related to recidivism, but it also means taking a holistic approach that considers an offenders wide range of needs, even those that are not necessarily linked to recidivism. For example, when working with intra-familial offenders we need to be able to take a different approach in terms of treatment, particularly in relation to interpersonal connections. It might be different to the way we worked with offenders who offended outside the family.

For treatment to be effective it also has to be provided in the right amount to the right offenders. That is that high-risk offenders need a high level of intervention, whereas low risk offenders generally need a lower level of intervention. Again, this may vary when taking into account an offender's broad range of needs. Finally, treatment must be delivered in a respectful way by providers who have expertise in the area. Thorough assessment is necessary in order to determine the most appropriate intervention for each offender. Assessment of sexual offending and sexual risk is far from straightforward. Our position is that such assessments and treatment should only be conducted by professionals with expertise in the area. As well as being aimed at an individual's level of risk, treatment of child sex offenders needs to allow for a supported return to the community to fully support this stability, which in turn helps to reduce the risk of recidivism.

Offenders benefit from lengthy periods of supported supervision by agencies such as probation and parole. This transition from a custodial setting to the community is sometimes referred to as through care. Such through care also requires the capacity for Government and non-government agencies to work together and to be able to have open communication. This includes agencies that primarily provide support and intervention for offenders as well as agencies that provide support for those working with victims. Our position is that the victim's best interests should be paramount within the whole process. That leads me to briefly outline our key recommendations. The first is that the victim's best interests need to be taken into account. This is not about placing responsibility with victims to make decisions about what happens, but it is about relying on evidence-based outcomes and doing all that is possible to minimise the trauma of a trial process for survivors of child sexual assault. This may include offering incentives for those offenders who enter guilty pleas. Our second recommendation is that sentencing should be based on risk and treatment should be a key aspect of all sentencing decisions as incarceration alone does not reduce the risk of recidivism.

Our third recommendation is that extended periods of community-based supervision and therapeutic management should be employed in order to obtain the best outcomes for offenders and provide protection for the community. Our fourth recommendation is that the child protection register should remain protected to maximise its utility. Our fifth recommendation relates to young people. Young people who engage in sexually harmful behaviours reach that point in different ways to adults who sexually offend. There is evidence identifying diversion to community-based therapeutic services as providing the safest and most cost effective strategy for young people who engage in sexually harmful behaviours. Management of these young people is deserving of its own parliamentary review process. They should not be treated as miniature adults.

Our sixth recommendation is that the variability and unique needs that each child sex offender presents with highlights the importance of the judiciary being able to exercise discretion when making sentencing decisions. As such, we oppose the implementation of minimum mandatory sentencing periods. Our seventh and final recommendation is that there is a need for public education regarding the research and realities of sexual offending, particularly against children. Much of what is reported in the media focuses on high profile cases

which are not representative of most of the sexual abuse that occurs within our community. Greater public education would in turn reduce pressure on governments and the judicial system to apply reactive and hastily developed public policy.

CHAIR: Your comment in your submission and your opening remarks is that some of the best outcomes for survivors of child sexual assault is where offenders are encouraged to plead guilty at an early stage and you use incentives to do that. What type of incentives would you consider appropriate?

Ms PRATLEY: I should make the Committee aware, I was previously employed as the senior clinician at the New South Wales pre-trial diversion of offenders program, also known as a Cedar Cottage. That was a pre-trial diversion program that was implemented—you are nodding so I think you are familiar with it—where an incentive was offered to parents who had sexually abused a child or children within their care. The incentive was that if the parents entered a guilty plea and acknowledged the full extent of their offending that rather than being sentenced to a custodial sentence, they would enter into the court mandated treatment program.

CHAIR: Was that with the victim's consent?

Ms PRATLEY: The victim's best interests were taken into account.

CHAIR: That was not my question.

Ms PRATLEY: I am going to answer it.

CHAIR: Was it the victim or someone else who chose what the victim's best interests were?

Ms PRATLEY: That was a decision made based on consultation with mothers primarily about the victim's best interests, but also based on evidence. Again, it was about the point I raised earlier, not placing pressure on victims, particularly victims who had been sexually abused by a parent—and typically it is fathers—to be making a decision about what happens to their father.

CHAIR: To achieve the seven recommendations, do you think that could be best achieved through our current court system or a specialised court system?

Ms PRATLEY: I think specialised court systems definitely have a role to play. I know they have been introduced in some countries, but off the top of my head I cannot recall which ones. I definitely think there is a role for specialised systems.

CHAIR: Some countries for child sexual assault?

Ms PRATLEY: Yes.

The Hon. HELEN WESTWOOD: Do you think that the model of the Cedar Cottage program could be used effectively with incarceration? So perhaps looking at discounting of sentences for pleading guilty with part of that sentence being incarceration and such a program?

Ms PRATLEY: It is a question that gets asked a lot. Typically I think it would be very difficult to do that. As one of the barriers for children disclosing—often for children who are sexually abused by a family member, a parent—is the consequences of that disclosure. If a father who sexually abuses spends a period of time in custody, he loses his employment, which has financial implications for the family. The other issue is around immediacy and the need for children to receive that intervention as soon as possible. So with a custodial sentence, there would be a delay in that being able to take place.

The other aspect of the program such as Cedar Cottage is that focus on restorative justice. Again that requires the close communication between the people providing support to the victims and people working with the offenders. The system, as it is currently set up, does not allow for that communication. If this were to be considered, there would need to be something put in place so that people working in that custodial setting providing treatment were able to liaise openly with people providing treatment to the victims.

The Hon. HELEN WESTWOOD: Is there any way that we can protect children from the consequences of their disclosure? I have heard quite a bit today and it reminds me of decades ago when

I worked in the domestic violence area where we make the victim responsible for any detrimental impacts on the family for disclosing that they are being abused. It seems to me we are doing the same thing to children these days. I guess it is a question for us about whether or not we do the same thing with domestic violence, that it is mandatory reporting. Can we protect children from that? Why do children have to know that, "Oh if dad goes to jail and doesn't have a job, it is actually your fault". Is there some way in the process that we can protect children from feeling responsible for the consequences of disclosing the abuse perpetrated upon them?

Ms PRATLEY: There is. The way that we do that is by supporting the offenders to stand up and take responsibility. Kids are pretty savvy. I heard the previous witness talking about the process of grooming. Often part of that grooming process includes messages given to the child that, "If you tell anyone, I will go to jail"; "If you tell anyone, the family will split up and mum will be angry". These are the kinds of messages a child is receiving well before disclosure and which often prevent disclosure.

At the point of disclosure, if those things then happen, kids naturally make that assumption, even if they are receiving messages from non-offending parents and other family members that, "It is not your fault; it is dad's fault", or whoever, kids still struggle to internalise that message. But when offenders stand up and take responsibility and are able to send a clear message to the child that, "This was not your fault; this is my responsibility and all these consequences are because of what I did" then that is the most effective way of getting that message across to kids. Unfortunately, the system as it stands at the moment is one that encourages an offender to deny.

The Hon. HELEN WESTWOOD: Is there no way that, through the professional support of the child victim, we can counter those messages? I would have thought the role of the psychologist and the support people that are working with young people and child victims is to counter those messages. We know the framework. Does that not happen or is it not effective?

Ms PRATLEY: It happens and in some cases it is effective but not in all cases. I can certainly speak to my own personal experience of having sat with many victims of intra-familial sexual abuse and of consistently delivering a message: It was not your fault. And of their mother consistently delivering a message of: It was not your fault. We can do that over and over again. I am speaking anecdotally here, but often the turning point is when the father sends that message: This was not your fault, it is my responsibility, these are the ways I set these things up and trapped you and all the consequences that have followed are my responsibility. That is when we see kids take that on board.

Ms MELANIE GIBBONS: You mentioned that the system is set up to encourage denial. What needs to change to assist offenders in admitting their guilt? Is there a way of changing that framework?

Ms PRATLEY: I think if we were able to introduce the idea of specialist sexual assault courts and if there was a focus on rehabilitation and treatment—and that includes supervision, surveillance and sanctions, those things need to be a part of that, alongside treatment—if those two principles were offered together, maybe that would affect that.

Ms MELANIE GIBBONS: So rather than saying, "You are going to be punished", to also say, "You are also going to be treated"?

Ms PRATLEY: Yes.

Mr PAUL LYNCH: Are the participants in the Cedar Cottage program all adults?

Ms PRATLEY: Yes.

Mr PAUL LYNCH: There is some material we have been given in a closed session that there is support in some parts of New South Wales for community-based treatment for young offenders. Do the principles learnt from Cedar Cottage have some relevance for those sorts of programs?

Ms PRATLEY: Absolutely and certainly from the Cedar Cottage program, the New Street Adolescent Programs were developed. They started in Sydney and have now expanded across New South Wales.

Mr PAUL LYNCH: I do not know if they have expanded quite that far.

Ms PRATLEY: Yes.

Mr PAUL LYNCH: I thought it was just to New England. Is it broader than that?

Ms PRATLEY: I believe that they are expanding further.

Mr PAUL LYNCH: That is good news.

Ms PRATLEY: Yes. There is certainly evidence for the effectiveness of that program and my understanding is that Victoria is currently implementing a similar way of dealing with young people who are engaged in sexually harmful behaviours, removing that from the traditional justice system and diverting it into rehabilitation programs.

Mr PAUL LYNCH: On an entirely different topic: What is your view of the effectiveness and utility of the treatment programs in Corrective Services at the moment for those who are incarcerated?

Ms PRATLEY: I have not worked in Corrective Services so I do not have intimate knowledge of that but my understanding—from working in private practice with offenders who may or may not have access to those programs—is that Corrective Services offers treatment to offenders who are assessed as high risk through the NSW Custody Based Intensive Treatment [CUBIT] program. What we know is that most sexual offenders will not be assessed as high risk, which means many do not get access to that treatment program while they are in custody. It also requires an appropriate length of time on their sentence to be eligible to participate. There can be issues with the waiting list for that program as well. There is also the CUBIT Outreach [CORE], CORE Moderate program that is offered to offenders who are assessed as a moderate risk. The most recent conversation I had with a person in Probation and Parole is that that program is not currently being offered, due to funding issues. I do not know whether that is accurate. It should probably be checked with Corrective Services.

Mr PAUL LYNCH: We will check that.

Ms PRATLEY: The issue is that it can be very difficult for child sex offenders to access the treatment that they need through the Corrective Services programs and certainly community-based treatment. As a private practitioner working in Sydney, I can say that we often receive referrals from people saying that, "My Probation and Parole officer says that I have to have treatment and they have said that I have to come to you". We say, "Okay, these are the fees for treatment" and they say, "I cannot pay that". So we have an issue where there are people who need to have access to treatment but there is no funding available for that. This is happening in Sydney but I cannot imagine what is happening in regional centres where people need to access specialised treatment.

Reverend the Hon. FRED NILE: Thank you for coming in. I am following up your recommendation about the Child Protection Register. You recommend that it should be protected.

Ms PRATLEY: Yes.

Reverend the Hon. FRED NILE: The Child Protection Register is there to protect children, isn't it?

Ms PRATLEY: Yes.

Reverend the Hon. FRED NILE: So why do you want the Register protected?

Ms PRATLEY: By "protected", we mean keeping it closed and not accessible by members of the public. The reason that we recommend that is based on experience in other countries where they have systems such as community notification or registers that are searchable by the public. What we see in those communities is a decrease in compliance, with people who are registrable persons not reporting to the police as they need to. Whereas the system in New South Wales, based on our contact with the police who manage the Child Protection Register, is that they have a very high level of compliance with that register. The rate of compliance is that 95 to 99 per cent of people supposed to be registered are registered. That rate drops if the register is accessible by the public.

Reverend the Hon. FRED NILE: How do you balance it up with the rights of mothers to know that there is a child abuser in their street or, as happened recently, a man next door to a mother who abused a child where she had no idea that there was a sexual assault offender living next door.

Ms PRATLEY: The issues are, how does one balance those needs, between knowing about those sexual offenders who have been caught and convicted, against those that we do not know about? As you know, many sexual offences are not reported, so there are issues in relation to the benefits of being able to identify someone. There are also issues in relation to the risk of recidivism and research shows that treatment is effective. What we also see, with the issues around community notification, is that it can actually increase the level of risk for these offenders. We know that to reduce the risk of recidivism for child sex offenders, we need to provide them with a level of stability in the community, that is, stability in terms of accommodation, employment and connections to people within the community. These are things that help reduce the level of risk.

When this type of offender is subject to public shaming, when they cannot maintain stable accommodation or hold down a job because of issues related to people knowing about their offences, it increases their level of risk. My position would be that the mother with her child is actually safest when the police are aware that such a person is living next door to her and the police are keeping an eye on things. The mother is safest where the offender is in stable employment and has positive connections with family and friends.

Mr CHARLES CASUSCELLI: Can I get your perspective on an issue I have been harping on all morning? What has been described to me this morning is a process that involves many government agencies that come into play to produce an outcome. We have heard about the impacts of each of the agencies on different parts of that process. It strikes me that in that process there are multiple touch points where the child, or someone on behalf of the child, is asked to make decisions. From your perspective, do you think there is adequate advocacy on behalf of the child at those points of decision? For example, you raised one scenario that interested me, that if there is abuse that involves family members, how much weight does one give to the people within the family unit relative to the weight one gives to the child in terms of the allegations or the disclosure? Who ultimately makes the decision on behalf of the child which is in the interests of the child? Is there adequate advocacy for the child at these different touch points in the process?

Ms PRATLEY: That is a really difficult question to answer. In terms of making decisions about the best interests of the child, our position would be that that needs to be done by people who have knowledge about that child such as supportive and appropriate family members. However, it needs to be done in consultation with experts in the field who have knowledge about the research and what we know about what produces the best outcomes in the long-term for children who experience sexual abuse. It is difficult, in terms of the court process, or the charging process, because it is one in which children are further disempowered. I do not know how you get that balance between taking children's best interests into account while, at the same time, not placing that responsibility with them that we were talking about earlier. It is a fine balance.

Mr CHARLES CASUSCELLI: I think what I am seeing is that, throughout the process there is a number of people advocating on behalf of the child but it seems to be a fragmented advocacy. It is not as if there is a case manager that, from the moment of disclosure, manages the process from the victim's perspective all the way through to get the best outcome. I am seeing specialists coming in and out of the process but at the end of the day, a child is a child and not an adult. That is the reason for my question.

Ms PRATLEY: I believe that the Witness Assistance Service offers something along those lines but we are coming back to that issue in terms of, this is an area of specialisation and that that best level of support is going to be provided by, for instance, people working within NSW Health Sexual Assault Services who have that specialised knowledge around children who are sexually abused.

The Hon. MELINDA PAVEY: What is your knowledge of the anti-androgenic medications and what are your thoughts about those medications as a rehabilitation and preventative measure?

Ms PRATLEY: Most people who commit child sexual offences do not present with levels of hyper-sexuality. Certainly, it is a feature for some but it is not for all. So while medication can be effective for some people, it is not effective as a blanket approach.

The Hon. MELINDA PAVEY: When you were running Cedar Cottage, was that part of the rehabilitation process for some?

Ms PRATLEY: It was not because, in my time there, there was not anyone who actually presented as requiring that, in terms of hyper-sexuality.

The Hon. MELINDA PAVEY: Is there an identified percentage of paedophiles with hyper-sexuality?

Ms PRATLEY: We need to make a distinction between paedophiles and child sex offenders because not all child sex offenders are paedophiles. A paedophile is a person who has a preferential and deviant sexual interest in children. We can think about sexual interest on a spectrum ranging from children to adults. Some people who perpetrate sexual offences would meet diagnostic criteria for paedophilia having that preferential sexual interest in children but most people who perpetrate sexual offences fall across that spectrum and actually do not meet diagnostic criteria. It is important to have that distinction in mind because the treatment that someone who would meet diagnostic criteria for paedophilia requires is going to be different again from someone who does not meet the criteria.

CHAIR: A victim would not know the difference, though?

Ms PRATLEY: No.

Reverend the Hon. FRED NILE: What is the percentage of the paedophiles out of that range?

Ms PRATLEY: I could not say off the top of my head. I would have to do a literature search for that.

Reverend the Hon. FRED NILE: You indicated it was a very low percentage?

Ms PRATLEY: Based on my professional experience and the professional experience of my colleagues it is a low percentage. The majority of child sexual offenders do not meet the criteria for paedophilia.

The Hon. HELEN WESTWOOD: For the non-paedophile type sexual offenders, what then is the trigger or motivation for the sexual assault?

Ms PRATLEY: It is a good question. It can be a number of things. There are a number of different paths by which someone reaches a point in their life where they make a decision to sexually abuse a child. In most cases a sexual interest will come into it but again sexual interest is different from paedophilia. Sexual interest may be a factor. Relevant factors include intimacy deficits, difficulties with problem solving, difficulties of emotion regulation which may combine with other factors in terms of opportunity that might arise. It is not a black and white issue. It highlights the importance for each individual offender of being able to identify what their specific motivation has been because by identifying that we are then able to tailor the treatment that is required to be able to manage it.

The Hon. HELEN WESTWOOD: In terms of our brief, which is about sentencing with a view to prevention, is there an answer to that then? If there is no pattern that we can rely on to look at what triggers or motivates people to sexually assault children, how is a sentence going to be a deterrent?

Ms PRATLEY: That is a good question.

The Hon. HELEN WESTWOOD: Your recommendation 5 about young people really interests me. Earlier today we talked about the incidence of similar age sexual offences where you have a 16-year-old having sex that they perceive as consensual sex with a 14-year-old or indeed a 13-year-old. A significant proportion of those young people are the subject of reports but then they do not go on to being sentenced. Do you know whether or not those cases end up on the child protection register?

Ms PRATLEY: My understanding of the legislation is that, yes, they do and my understanding is that children and young people who are convicted of a sexual offence against another child or young person, if it is a registrable offence, are then placed on the child protection register but for a period of half the time that an adult would be. Our position is that this is not appropriate or helpful because it has all sorts of effects for that young person in terms of their engagement with education and engagement later on with employment. The way young people reach that point of engaging in sexually harmful behaviours is very different to the way that an adult

reaches a point of perpetrating a sexual offence against a child. Recidivism rates are also much lower for children and often with appropriate treatment and intervention can be completely minimised, effectively.

The Hon. HELEN WESTWOOD: When we are talking about community perceptions and expectations I think it would be inconsistent with community expectations that 16-year-old boys would end up on the child sex register for having sex with someone that they may go on to have a long-term relationship with. Perhaps the Committee could consider that matter. The other question relates to evidence from witnesses from Corrective Services about retention of support workers in Corrective Services, workers who support or treat child sexual assault offenders. Does your association have a view on how they could best be supported? It seems to be an extremely demanding role. Does your association recommend a certain standard of professional support should be in place?

Ms PRATLEY: Certainly things such as supervision and support are really important, as well as the networks we develop both professionally and informally, and we see a lot of that through our association. The point where people experience frustration is where there is a difference between what we see as being best practice in the field and sometimes the constraints that people have to work within in terms of an organisation. Sometimes when there is a difference that is when difficulties arise in terms of longevity. In other areas there is considerable longevity within the field and the way we support that is through access to supervision and training to formal and informal networks, as well as having that sense for people that what they are doing is making a difference. Everyone who works in this field gets into it out of an interest in preventing further offending and further harm to children so being able to see that is really important.

Reverend the Hon. FRED NILE: You mentioned the Cedar Cottage program. You actually worked in that, did you?

Ms PRATLEY: I did, yes.

Reverend the Hon. FRED NILE: Do you know the reason it was closed down? Did it have some value?

Ms PRATLEY: Yes, it absolutely had some value. Research was conducted showing that the program reduced recidivism in offenders who participated in the program. I also conducted research which showed that the fathers who came into the program actually disclosed significantly more about their sexual offences than the children had initially disclosed. That is really important because we know that the best outcomes for children are seen when they are believed, when they are supported and when their experience is validated. Again it is about that idea of responsibility and so by the fathers taking responsibility and acknowledging the full extent of their abusive behaviour, they have removed the responsibility from the child to have to do that but also they have validated their experience. It also meant that people who were working to support the child had access to the full account of what the child had suffered. They were able to then target their intervention at an appropriate level without the child having to be the person who said what happened. We saw benefits in that regard as well as reductions in recidivism.

The Hon. MELINDA PAVEY: Do you have a percentage on that?

Ms PRATLEY: Not off the top of my head.

Mr PAUL LYNCH: It was an 80 per cent reduction, I think, from the research I saw.

Ms PRATLEY: I am currently conducting research that will not be finished until next year looking at victim outcomes, so that will be something that is really important.

Reverend the Hon. FRED NILE: Where is it physically located, within a prison complex?

Ms PRATLEY: No, and it is still running until the end of this year. They are finishing off the last few clients. It is currently located out at Westmead. It is a community setting. I believe it is funded by the Department of Attorney General but managed by Health. It is associated with Westmead Hospital.

Reverend the Hon. FRED NILE: Does it have any security factors associated with it?

Ms PRATLEY: Yes, it has two different entrances. The men would come in a separate entrance and then come into a secure room. They could not access the rest of the building without being let through, and there was a separate entrance for mothers and children. Staff working there took quite extensive measures to make sure that a family member would never attend on the same day that the program participant, the father, would attend, so there would be no chance of people running into someone unless they were coming for a planned meeting. Things would be arranged so that the father would arrive early so that there was not a risk of running into him on the street.

Reverend the Hon. FRED NILE: Would you recommend that it should be continued?

Ms PRATLEY: Absolutely.

Ms MELANIE GIBBONS: We talked about a 16-year-old and a 14-year-old. You said that they would likely get half the time on the register as an adult. How long is half?

Ms PRATLEY: It depends on the nature of the offence. There are category one and category two offences.

Ms MELANIE GIBBONS: What would be the lowest time one could get on the register?

Ms PRATLEY: The lowest is eight years for an adult so it would be four years.

Ms MELANIE GIBBONS: So a 16-year-old would be looking at until they are 20?

Ms PRATLEY: Yes, and if it was a category one offence it is 15 years for an adult so 7½ years for a young person.

The Hon. HELEN WESTWOOD: As part of the Cedar Cottage program did you accept paedophile offenders, those who met the diagnostic criteria of paedophilia? Were those offenders also included in the program?

Ms PRATLEY: Yes, that would not have been an exclusionary criteria but it was not a common presentation.

The Hon. HELEN WESTWOOD: How would the treatment differ for a paedophilia offender as opposed to a non-paedophilia offender?

Ms PRATLEY: The treatment would differ in lots of different ways because the treatment for each person who came to the program was tailored to their needs. It may be that there would be more of a focus on sexual management, particularly when looking at long-term management in terms of relapse prevention. There may be different focuses there in terms of how to have sexual needs met without harming anyone and engaging in any sexual offences.

CHAIR: What guidance, if any, would you want to see given to judicial officers to assist them with sentencing child sexual assault offenders outside of a pure legal framework?

Ms PRATLEY: I think the reliance, as happens in some cases currently, where people have psychological assessment reports prepared. I know the Department of Corrective Services prepares some and as a private practitioner—

CHAIR: Pre-sentence reports?

Ms PRATLEY: Yes. Those reports include formal risk assessment and often include recommendations in terms of the best course of rehabilitation and I think that is a really important step because, as we have said, it is not just about sentencing; it is looking at how we manage the sanctions alongside the treatment. That is how we optimise public safety.

CHAIR: Thank you for taking the time to appear today. Your information and evidence has been very helpful to our deliberations. As I indicated earlier, if there are any further questions the Committee would like to garner from you, if you would assist, that would be appreciated. Thank you very much for your time.

Ms PRATLEY: Thank you for the invitation.

(The witness withdrew)

(Luncheon adjournment)

STEPHEN JAMES ODGERS SC, Chair, Criminal Law Committee, New South Wales Bar Association, and

DAVID ACTON HAMER, Member, Criminal Law Committee, New South Wales Bar Association, affirmed and examined:

ACTING-CHAIR (The Hon. Melinda Pavey): Welcome to today's hearing. I am the Deputy Chair of the Committee. We have the extraordinary circumstance in New South Wales in which the Chair of the Committee has become a Minister and has had to attend a Cabinet meeting this afternoon. He is planning to finish his work with the Committee, which is important in terms of committee processes. We are in interesting territory. He offers his genuine apologies for not being here. I draw your attention to the fact that your evidence is given under parliamentary privilege and that you are protected from legal or administrative action that might otherwise result in relation to the information you provide. I also point out that any deliberate misleading of the Committee may constitute a contempt of the Parliament and an offence under the Parliamentary Evidence Act 1901. As time is limited, the Committee may wish to send you additional questions in writing, the replies to which will form part of your evidence and be made public. Would you be happy to provide written replies to any further questions?

Mr ODGERS: Yes.

Dr HAMER: Yes.

ACTING-CHAIR: Thank you. Before we proceed with questions, would you like to make a brief opening statement taking not more than five minutes?

Mr ODGERS: I have been nominated by the Bar Association to appear on its behalf and to a large extent what I say can be understood to reflect the association's views. The president, Mr Boulten, SC, has made a submission dated 3 March 2014 on behalf of the Association. I am sure that members have seen and read that submission. I take note of the relatively short opportunity to comment on it or to add to it, but I would like to raise a few points which occurred to me as I was walking here and which I believe should be mentioned and perhaps expanded upon later.

First, a question asked in the terms of reference is whether greater consistency in sentencing and improving public confidence in the judicial system could be achieved through alternative sentencing options. I will begin by raising the question of whether that term of reference might mislead the Committee or lead it to give greater weight to considerations where other matters require at least equal consideration. It is desirable to have consistency in sentencing, but not at the expense of producing injustice. For example, we could all adopt the Old Testament notion of an eye for an eye or a tooth for a tooth, or something comparable. That would be simple and consistent, but it would not fit with modern, civilised views about how people should be sentenced. That reflects the proposition that not all offences are the same, even an offence that falls within a particular statutory definition.

There are many factors that vary in terms of how an offence is committed, the circumstances in which it is committed, the motives behind it, the state of mind of the offender at the time it was committed and so on. In a civilised sentencing system all of these factors are properly taken into account in determining an appropriate sentence. In addition, sentencing is not only about sentencing for an offence; it is sentencing an offender. Offenders are not all the same; they vary enormously. Again, many factors bear on the appropriate sentence that an offender should receive. Of course, considerations of specific deterrence, general deterrence and so on play an important part. But so do considerations of rehabilitation. For example, if in the eyes of a sentencing court an offender is someone who is very unlikely to offend again, that person is appropriately dealt with in a very different way from someone who has shown a high level of recidivism and where there is no reasonable prospect of rehabilitation.

The contemporary view about sentencing subject to statutory introduction of mandatory sentencing—which I will deal with very briefly later—as established by the High Court of Australia in repeated judgments is that sentencing is a complex process requiring consideration of a variety of sentencing goals, many of which do not operate consistently and many factors that must be taken into account in determining sentences. As a result, it is inescapable that we need sentencing discretion to achieve a just outcome. I will expand on those points later.

Reference to improving public confidence should also be approached with a degree of care. I think it can be accepted that in the general community there may well be a perception that sentences are too lenient generally and in respect of specific offences. However, when research is done looking at how ordinary members of the community would sentence when they are provided with the same information that is provided to a judge—particularly a judge who is determining sentences for the more serious offences—it almost invariably reaches the conclusion that the judges' determinations generally fall within the range determined by the ordinary member of the community in respect of that offender.

It has been repeatedly shown in studies overseas and in Australia that when the ordinary member of the community—as I said, jury studies have confirmed this—is given the details, not only a snapshot provided in a very short media report that tends to sensationalise and omit important information, notwithstanding that the juror has the view that sentences are too lenient, when he or she is asked to determine an appropriate sentence it is surprising their consistency with the sentences imposed in particular cases. The Bar Association urges this Committee to recognise that research. It is ongoing. Kate Warner has been asked to conduct further research in New South Wales—members may well be aware of it—into how juries would sentence if they were provided with the appropriate information. It is a continuing area of research. Studies certainly do not support a conclusion that magistrates and judges are significantly out of whack with what the community believes are appropriate sentences for particular offenders.

The Bar Association has made it clear and members would know that it is very opposed to mandatory sentencing generally and necessarily mandatory sentences in respect of sexual offenders. I will not burden the Committee with a lengthy dissertation on why the association holds that view. I have already presented part of the argument; that is, we need to look at a range of considerations in determining appropriate sentences. Mandatory sentencing, by definition, limits the scope of available considerations and necessarily will result in unjust sentences for people who are less culpable than other offenders or for whom there are very strong prospects of rehabilitation. Mandatory sentencing is problematic because it will lead to increased jail populations for no real benefit. We already have overcrowding in jails in this State.

One questions what is the point of locking up people for longer periods. Imprisonment can be criminogenic. Young offenders can leave prison worse than they were before they went in, particularly if they have committed a less serious offence. Judges and magistrates are well aware of the considerations that should be taken into account in determining an appropriate sentence. There is no good reason that this State should move to mandatory sentencing generally or in respect of sexual offences. I make the point, which I think has been made in other contexts, that the research does not support the proposition that increasing sentences will result in a reduction in crime.

The research invariably shows that what matters in terms of whether people commit crimes is their consideration of the probabilities of being apprehended and convicted. They do not turn their minds to the maximum penalties, and they certainly do not factor in increases in penalties when they are deciding whether to commit a crime, assuming they even turn their minds to those kinds of considerations. Why that is so is a matter of jurisprudential and criminological debate. The fact is—and the New South Wales Bureau of Crime Statistics and Research and a Victorian report have shown—that what matters in terms of discouraging crime is the prospect of being arrested and prosecuted. Increasing sentences does not have a deterrent effect.

ACTING-CHAIR: I am sure that much of this will come out during the question and answer process.

Mr ODGERS: The only other topic that I intended to mention that may or may not come out relate to whether the jurisdiction of the Local Court should be increased. Members might want me to talk about that topic.

ACTING-CHAIR: I think they will.

Mr ODGERS: I can do that in due course. There are issues about standard non-parole periods and their desirability. Of course, the Bar Association has made it clear in its submission that it generally does not support them. I have spoken for more than five minutes.

ACTING-CHAIR: You have

Mr ODGERS: It is obviously a complex topic and one with which the Bar Association has been involved for a number of years. I feel passionate about it, which is probably evident.

Dr HAMER: I advise the Bar Association and I drafted the part of the submission dealing with the anti-androgen treatments, and I will briefly address that issue. It should be noted that anti-androgen treatments are already being used under the Crimes (High Risk Offenders) Act 2006. They are now being used and the Bar Association's position is that there should be no extension beyond their current use. Under the Act, they are used with the consent of the offender as a condition of release from detention under a supervision order. The Association believes that if they are to be used, that is appropriate. In particular, the Association believes it would be inappropriate for the law to be reformed to enable anti-androgen treatments to be imposed on an offender without consent. There are a couple of reasons for that. One is that these treatments involve quite serious medical intervention. Prior to their being used there should be a proper assessment of the offender involving both their medical and psychological conditions to determine whether the treatment would be beneficial.

The Committee has no doubt heard from other witnesses that anti-androgen treatment reduces testosterone levels. It can be an effective way of addressing those crimes that are committed because the offenders have such strong sexual urges that they are unable to control themselves. Even if we are talking about sex offences it is not all sex offences that are committed from that motivation, from a strong sexual urge. Sex offences may be committed for other reasons such as an expression of the power of the offender over the victim or simply because the offender is totally unable to control themselves generally. With those other causes anti-androgen treatments would not be effective.

There would need to be a proper psychological and medical assessment before the treatment is considered and if the treatment is considered to be appropriate for the offender there would have to be continuing medical supervision. There would have to be an assessment of the dose to give to the offender and consideration of the possible side effects. There would have to be continual monitoring to see whether the side effects are being suffered and whether the dose needs to be changed. It is a medical treatment and quite a significant and invasive medical treatment and for that reason consent would have to be obtained from the offender because, apart from anything else, the medical professional would be reluctant to carry through with this work without the consent of the offender, of their patient.

It would be contrary to the ethical obligations of a medical practitioner for them to be asked to impose medical treatment on an offender without the offender's consent. The notion of informed consent to medical treatment is firmly established as an ethical aspect of the medical profession. From that point of view consent would have to be obtained. And from a practical perspective this is not something which can be given as a one-off to the offender; it requires ongoing monitoring and supervision. It is not a single dose treatment. Anti-androgen treatment has to be taken on a regular basis—sometimes daily or at least weekly—with constant monitoring. The offender would have to report back to the medical practitioner for testing and changes to the dose. To enable that to happen without the cooperation of the offender would be extremely difficult to achieve. For that reason to impose this on an offender who is not happy to go along with this and does not want this option would be impractical.

A further point that I want to make on behalf of the Bar Association is that it would be inappropriate to view anti-androgen treatments as achieving the goals of retribution or deterrence. Under the Crimes (High Risk Offenders) Act the objects of that Act are rehabilitation of the offender and, primarily, protecting the community. The goals of protecting the community and rehabilitating the offender are appropriate goals that may be achieved by anti-androgen treatments. But it would be inappropriate for anti-androgen treatments to be used to achieve the goals of retribution or deterrence because anti-androgen is a highly invasive medical treatment. It directly changes the offender's biology and their personality. It may be justified to try and achieve this through drugs, to change the offender's biology and personality, if the view is taken that this change would benefit the offender because they are suffering from urges that they cannot control, which would impact their life. It may be justified from the point of view of rehabilitation.

If the offender is suffering from the condition of paraphilia and as a result of that there are threats to the general community then again some kind of intervention, even invasive intervention, may be justified. It would be totally inappropriate to inflict these biological and personality changes on an offender to redress a balance on the basis that an offender injured a victim so we are going to injure the offender. Or, the offender has injured a victim so we are going to make an example of the offender and impose biological and personality changes on the offender to send a message to the broader community. That would be totally inappropriate in the view of the Bar Association.

ACTING-CHAIR: Mr Odgers, in your view are the current sentencing options for child sexual assault offences effective, particularly in relation to the category of intrafamilial and younger offenders? In your experience are the sentences being handed down for these offences fair and just in most cases?

Mr ODGERS: I am not sure what the word "effective" conveys. If effective means effective for a particular purpose then one of the difficulties of sentencing, as I indicated earlier, is that sentencing has different goals, a variety of goals as spelt out in the Sentencing Act.

ACTING-CHAIR: Is the system getting it mostly right?

Mr ODGERS: I am not going to express a view on that for the—

ACTING-CHAIR: —we need your views, we need your opinion, that is why we are here.

Mr ODGERS: I understand that. Ultimately the concern of the Bar Association is getting the process right. Outcomes are a difficult thing to measure and we are not experts in terms of the ultimate results of reoffending. Research has been done on those issues such as the consequences for the community in terms of protection of the community. At the bottom of our perspective is you need to get the process right. The role of Parliament is to make normative judgements about what an appropriate penalty is for the worst kind of case and that is what the maximum penalty does.

Courts then attempt, taking into account that normity of judgement, to apply it to a vast variety of cases where they are required to consider conflicting goals, specific deterrence, general deterrence, rehabilitation and effect in the community, and sometimes they point in different directions. I am repeating myself but the point is that given the complexity of sentencing you need to have a system of discretion where judges take into account all of those matters in the light of the normative judgement made by Parliament as to the appropriate sentence for the very worst case with no significant subjective mitigating factors.

ACTING-CHAIR: Can we go back to process? You believe the process is good?

Mr ODGERS: As good as it can be.

ACTING-CHAIR: One piece of information that the Committee has received is that there are eight different pieces of legislation that need to be taken into consideration as part of the sentencing process and that creates a level of complexity around the process. Do you have any thoughts or suggestions about that complexity and how that could be looked at to make the process better?

Mr ODGERS: The Bar Association supports the recommendations made by the NSW Law Reform Commission. They are designed to simplify, to bring it together in a more practical and coherent way and to offer sentencing options to judges and magistrates that are appropriate to reflect the diversity of needs of the community to impose appropriate sentences. We support what the Commission proposed.

Mr PAUL LYNCH: Mr Odgers, the Director of Public Prosecutions gave evidence earlier this morning and one of the things he raised as a possibility was to reduce the number of separate trials where you do back-to-back trials of the one defendant and have them heard at the time. Does the Bar Association have view about that?

Mr ODGERS: Yes. We oppose that. The reason you have more than one trial is to avoid unfair trials. What does that mean? It means that we have rules of evidence which provide that, for example, tendency evidence, that is evidence showing that an offender has done something similar in the past to that with which he or she has been charged, may only be admitted in certain circumstances. There are rules of evidence which apply, and this jurisdiction has adopted, are essentially uniform around this country.

ACTING-CHAIR: Apart from Tasmania and Queensland?

Mr ODGERS: I am talking about the rules of evidence relating to the admissibility of tendency or propensity evidence. There are some differences but the uniform evidence law applies in New South Wales, Victoria, the Australian Capital Territory and the Northern Territory.

Dr HAMER: And Tasmania.

Mr ODGERS: And Tasmania. And I am pretty sure in this context there are differences in Tasmania but not in relation to this issue. The point is if the evidence is not admissible then it is impossible to accept a trial in which a jury is going to be told you are hearing all the evidence in relation to the two complainants and when considering the case against each you should disregard what you heard in relation to that complainant when considering the prosecution case against another complainant. No human being could do that. If the evidence is not cross-admissible, that is if the evidence of one complainant is not admissible in the trial of the other complainant, because of the operation of the rules of evidence, then it is essential, to avoid unfair prejudice to an accused, that the trials be separated.

That is essentially the reason why trials are separated. If the evidence is cross-admissible, if the rules of evidence permit one complainant's account to be admitted in the trial relating to the allegations made by the other complainant then there will be a joint trial. If the evidence is not admissible because of the operation of the rules of evidence then it should not be. That is the position we have taken and which we say must be correct. That is the best answer I can give.

Mr PAUL LYNCH: What is your view on the jurisdiction of the Local Court and whether it should be increased?

Mr ODGERS: I went back to find a submission the Bar Association made in 2010. It strongly opposed any increase in the maximum penalty that the Local Court can impose. We made fairly basic and obvious points about the differences between the Local and District Courts. In the District Court prosecutors are Crown Prosecutors independent of the executive and subject to substantial ethical responsibilities while in the Local Court they are often members of the Police Force who may be legally trained but are neither independent lawyers nor members of an independent office of public prosecutions.

The tribunal of fact: In the District Court you have a right to a jury while there is no such right, obviously enough, in the Local Court. The Bar Association believes that jury trial is an important right in our society and should not be diluted by increasing the jurisdiction of the Local Court. Even if it is an option to be able to go there, as distinct from mandatory for accused people, it is not desirable to increase the number of cases that are going to be heard in the Local Court because that dilutes the fundamental idea of a jury trial for serious criminal offences. It is a way of infusing community values into the criminal justice system and should be maintained.

There are issues about getting appropriate legal representation in the Local Court. The Legal Aid Commission does generally fund cases where people have a risk of going to jail but the nature of the funding and the actual resources that are provided in the Local Court for criminal defendants is not to the same level as it is in the District Court. Again that is a consideration that leads us to the view that there should not be an expansion of the jurisdiction of the Local Court. That is essentially the response we have taken in that area.

Mr PAUL LYNCH: One of the areas of discussion this morning is a specialist sexual assault court; do you have a view on that?

Mr ODGERS: Yes. It was an issue looked at by the joint task force, of which I was a member. As a participant in that task force I expressed the Bar Association's opposition. To be clear, if you are talking about having a streamlined system with specialist prosecutors and investigators, a system designed to minimise the stress and trauma for complainants/victims, then we are in favour of that. We would say that our criminal justice system has advanced considerably in the last 20 years in reducing the stress and trauma that is experienced by complainants in sexual offence matters. A lot is done by the courts to make it as non-traumatic as possible. We recognise that particularly if a complainant is in truth a victim, as many are, that we do not want to repeat or exacerbate the trauma they have suffered.

Having said that, we have a system which requires that people are entitled to a fair trial and that they have an opportunity to test the evidence against them but the real sticking point, as I understand it, is about whether we set up special judicial groups with particular judges allocated roles for dealing just with sexual offences or child sexual offences. They would spend their entire time doing those kinds of cases and supposedly bringing a level of expertise that is not held by all judges or magistrates in the system. We oppose that. The task force very comprehensively opposed it. My memory of it is—I have to admit that I have not refreshed it—that the task force looked at that in some detail and concluded that there was no pressing need for setting up a panel of judges who just did sexual assault or child sexual assault and that there were real dangers with such a process. I am afraid that is as far as I can take it.

Mr CHARLES CASUSCELLI: The majority of those in my community would see sentencing as serving two primary purposes: punishment and protection of the community in general. Most people would see that the longer the detention of individuals the lower the risk to the community. It would follow then that the lower risk actually produces lower criminal activity. That has been demonstrated by at least three local area commanders in my electorate who have shown me crime statistics and they have linked them back to individuals being incarcerated. Having those people in detention has actually produced lower criminal activity in my electorate. You said earlier that research generally shows that having people in detention longer does not reduce criminal acts.

Mr ODGERS: As deterrence. With respect, you are talking about incapacitation. That is a particular sentencing goal, which essentially is that if or she is locked up in prison they cannot be out committing crimes. That is the premise, and necessarily it is correct. But, of course, with the vast majority of offenders if they are not locked up for life they are going to come out some time. So you have to factor into that consideration what they are going to do when they come out. The reality is that in this State there is a fairly high recidivism rate—a lot of offenders come out and commit further crimes. Some might say that is an argument for never letting them out but unless we go down that path—and obviously I would not support it—we need to give a lot of consideration as to what they are going to do when they come out.

One of the purposes of taking rehabilitation into account is that in imprisonment if you have an offender who a court is satisfied will not reoffend then there actually may be harm in that case—it may be that this is a relatively rare phenomenon. We do have cases where the reasons for people committing offences were very discrete and there is very good reason to think that it is not going to happen again. If you lock them up for a period of time they may actually come out worse than they were when they went in, particularly with young offenders. It is obvious with young offenders that if they are not actually wedded to a criminal lifestyle, if they have been inside for a few years when they come out they are going to face all sorts of difficulties in terms of employment and becoming part of the community again. They may well have mixed with serious criminals who basically have encouraged them to become part of that criminal milieu.

I do not want to oversimplify it. All I am suggesting is that this is not something where you come up with a simplistic solution; you have to look at the bigger picture. When I was talking about the proposition that increasing penalties does not result in reduced crime, I was talking about the general deterrent effect of increasing penalties. We all know that if you commit murder and you are caught and prosecuted then you are going to go to jail for a long time. Now that has a deterrent effect on people but the research shows that if you increase penalties it does not increase the deterrent effect. You do not have less people committing crime because penalties have gone up. If I could quote from a Victorian 2011 study:

> The evidence from empirical studies of deterrence suggests that the threat of imprisonment generates a small *general* deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence.
>
> …
>
> A consistent finding in deterrence research is that increases in the *certainty* of apprehension and punishment demonstrate a significant deterrent effect.

Apropos the point I made earlier about the negative effects of imprisonment on some offenders and how they have come out, the study also states:

> The research shows that imprisonment has, at best, no effect on the rate of reoffending and is often criminogenic, resulting in a greater rate of recidivism by imprisoned offenders compared with offenders who received a different sentencing outcome.

It then goes on to discuss various reasons for it. We are not saying not to send people to prison; we have to send people to prison. Imprisonment is an important sentencing mechanism. It does serve the goal of incapacitation

as the High Court recognises and it is necessary to tell people in some cases that retribution requires imprisonment but, as the High Court says, there are these conflicting goals. The research does not support increasing sentences as reducing the crime rate. If you want to protect the community it is not just about locking people up; it is also about what they are going to do when they come out.

The Hon. HELEN WESTWOOD: This morning the Committee had a fair bit of discussion around the standard non-parole period—and your submission recommends that it not be retained. Indeed, the reason for this inquiry is because of the gap between community expectation of appropriate sentencing and the length of sentences being imposed on child sexual assault offenders.

Mr ODGERS: Assuming that community perception is accurate.

The Hon. HELEN WESTWOOD: Some of the discussion we had today was about whether that community expectation is linked to the standard non-parole period that was set. There was some discussion about whether or not it was set too high. Does the Bar Association have a view on that or has it reflected on that issue at all?

Mr ODGERS: There is a particular problem with some standard non-parole periods, particularly in the area of child sexual assault, and I can easily explain the problem. For some offences—I think indecent assault of a child under the age of something—the standard non-parole period is 80 per cent of the maximum penalty. Usually in New South Wales the ratio between the non-parole period and the head sentence is 75 per cent. So one would expect in the worst case that the non-parole period would be roughly three-quarters of the maximum penalty—the maximum penalty is reserved for the worst case. We do not normally impose a fixed term; we normally give a non-parole period. Where they are eligible for parole—they may not get it—it is usually 75 per cent or less. Therefore a standard non-parole period, which is 80 per cent of the maximum penalty and supposed to be an appropriate non-parole period for not the worst case but for a case in the middle of the range of objective seriousness—to use the old language, it has changed a bit but essentially that is the idea—is just incoherent and makes no sense whatsoever.

There is a really extraordinary range in percentages for standard non-parole periods compared with maximum penalties—up to 80 per cent for aggravated indecent assault in some cases and down to something like to 25 per cent in other offences. It ranges. We have never understood how those numbers were determined. It has never been publicly explained. We have made submissions to the Law Reform Commission that this has to be looked at and that there has to be a more considered and, dare I say, standardised approach to determining an appropriate non-parole period. Plainly, 80 per cent makes no sense whatsoever for the reasons I have explained but more broadly while we understand the motivations behind a standard non-parole system and we are also relieved by the fact that the High Court in Muldrock has made it clear that there is still a very broad sentencing discretion, in principle we have indicated that we are not big supporters of it. That is our position.

The Hon. HELEN WESTWOOD: Do you think it should have been reviewed after that High Court decision?

Mr ODGERS: It was reviewed. The New South Wales Law Reform Commission said it is fine as it is and certainly the Bar Association position is that we strongly support the current position in terms of the approach of the courts to standard non-parole periods. It is a guide post. Just as the maximum penalty is a guide post to an appropriate sentence, so the standard non-parole period is. The numbers have to be looked at again but the principles are entirely appropriate.

The Hon. HELEN WESTWOOD: Does the Law Reform Commission automatically review it when those sorts of judgements are handed down by the High Court?

Mr ODGERS: No. The New South Wales Law Reform Commission receives references from the Attorney General and is asked to look at particular issues. It was asked to look at sentencing generally and specifically to look at the significance of Muldrock.

Ms MELANIE GIBBONS: Would guideline judgements provide more consistency and how would you choose where they would apply?

Mr ODGERS: The current system is that an application is made for a guideline judgement by the Public Defender and/or the Director of Public Prosecutions—I think that is the position but I may be slightly

inaccurate about that—and then the Court of Criminal Appeal determines whether it is appropriate to provide a guideline. They were introduced without statutory basis back in the 1990s and they were done specifically for the purpose of increasing consistency while at the same time retaining sentencing discretion. The then Chief Justice, Chief Justice Spigelman, in a decision, the name of which now escapes me, explained the rationale behind guideline judgements. Essentially, it was as I have explained—to increase consistency without damaging sentencing discretion. In subsequent years and with statutory support there have been guideline judgements handed down in a number of areas but the greater the variety of offences within a particular offence the more the variety of circumstances in which offences are committed, and the greater the variety of offenders who commit those offences the harder it is to provide a suitable guideline—an example was a guideline given in respect of a burglary or break and enter offence and the court ultimately could not do much more than say, "There are all these factors you take into account."

I think it is fair to say that the practical difficulties of providing appropriate guideline judgements may well explain the fact that they have declined in terms of having been adopted. One was asked for I recall in respect of the one-punch death case, which generated a great deal of publicity at the end of last year. I do not think it is going to be provided, as I understand it, for various reasons. The bottom line is that they are a great idea in principle because they are a way in which the highest court in our jurisdiction can give greater guidance to sentencing judges and magistrates—because it applies to magistrates in the Local Court as well. In practice it has declined somewhat and there are a number of possible explanations for that, but we support them in principle.

Ms MELANIE GIBBONS: The community is obviously telling us that sentences seem too lenient. Is that something you would see as well? If not, how can we address that criticism?

Mr ODGERS: With great respect, when I did my little splurge at the beginning of this presentation I did say that one of our concerns is that we accept that there is a general community perception that sentences are too lenient and we accept that that applies in the context of child sexual assault, but I emphatically suggested that the research shows that when ordinary members of the community—for example, jurors who have sat in a criminal trial are asked to stay back and are then provided with all the information that the sentencing judge or magistrate—usually judge—is given, those ordinary members of the community strikingly tend to think that the sentence somewhere about the one that is imposed is the one that is appropriate. The point I would make is that that would suggest that community views about sentencing are not entirely accurate because they do not have all the information and because they receive information through media outlets, which tend to, dare I say it, sensationalise or bring a particular perspective that presents only one side of the picture.

The Chief Justice of this jurisdiction said in a speech he gave in 2011 that the research shows that in fact people do not realise that sentences in this jurisdiction are quite heavy. Can I make the point please—I should have said this earlier—there is a companion report to the New South Wales Law Reform Commission report, Companion Report 139-A. I encourage the Committee to have a look at it. It is about sentencing patterns and statistics. It reveals that New South Wales is not a lenient sentencing State. When you look at sentences, generally New South Wales is up towards the top. The Northern Territory tends to impose heavier sentences and there may be various reasons for that. Western Australia sometimes in some areas is heavy, but New South Wales is up at the top level. A commission study in 2007 compared full-time imprisonment rates in the District Court of New South Wales with comparable courts in Victoria, Queensland, South Australia, Western Australia, New Zealand, England, Wales and the United States and concluded New South Wales imprisons a higher proportion of convicted sexual assault offenders than any other jurisdiction.

ACTING-CHAIR: Mr Odgers, I think that is a really good answer.

Mr ODGERS: Thank you.

ACTING-CHAIR: We have just run over time, but Reverend the Hon. Fred Nile has not had an opportunity to ask a question.

Reverend the Hon. FRED NILE: You may have to take this question on notice. In your submission you talk about your criticism of mandatory minimum sentences. You say that it would lead to a substantial increase in the prison population, overcrowding and the building of new prisons. Is there any research to justify that statement? Can you find any research or examples?

Mr ODGERS: No. I have to be honest. I think it is more application of straightforward logic. If you are going to increase penalties and impose obligations on judges to lock people up when they would not have locked them up or lock them up for longer than they would have locked them up—that is really the purpose of mandatory sentencing, let us face it—that means you are going to have more people locked up and they are going to be locked up for longer, which means necessarily, straight logic, you are going to have greater numbers of people in prison. We know that today in New South Wales we are at the point that many would describe as overcrowding. It would only get worse with mandatory sentencing. Of course, if you make it mandatory sentencing for certain kinds of relatively common offences, the overcrowding is going to be much worse. If it is for offences that are relatively rare, it is not going to have the same impact in terms of overcrowding. The Bar Association was merely making an observation based on straight logic if you increase penalties.

Reverend the Hon. FRED NILE: But you are not assuming there is any practical effect from mandatory minimum sentences? There will be no practical value in reducing cases in our criminal system?

Mr ODGERS: No. Indeed, we are saying that it can be said with a high level of confidence that mandatory sentences that increase penalties will not reduce the crime rate. I have said a number of times: all the research shows that people do not think about the penalties they are going to receive. They do not. I do not want to overgeneralise. I acknowledge that in some areas of crime people engage in a cost-benefit analysis. Maybe if you imposed very heavy sentences for white-collar offenders, you would get a significant reduction in white-collar crime because they do think about it in terms of cost-benefit analysis. But a lot of offenders do not. Your average offender is not going to be thinking, "Am I going to be getting three years or four years or five years." That is not going to factor into their reasoning and decision-making about whether or not they go out and commit a crime.

ACTING-CHAIR: Thank you for your evidence today. Earlier you mentioned some research that was being conducted by?

Mr ODGERS: Yes, Kate Warner is a professor at the University of Tasmania. She has been funded, along with a number of academics from New South Wales—I do not know if David can help me with this—to engage in jury research in respect of sentencing generally and particularly for sexual offences where, essentially, jurors in New South Wales trials will be asked to engage in a sentencing exercise.

ACTING-CHAIR: That gives the Committee something to go towards in finding some information on that research. Thank you for your evidence today.

Mr ODGERS: Sure.

ACTING-CHAIR: Thank you for a very fulsome expression of your thoughts on the medical/chemical issue.

Dr HAMER: Thank you for listening.

Mr ODGERS: Thank you.

(The witnesses withdrew)

ANDREW TINK AM, Adjunct Professor, Macquarie University Law School, affirmed and examined:

ACTING-CHAIR: I draw your attention to the fact that your evidence today is given under parliamentary privilege and you are protected from legal or administrative action that might otherwise result in relation to the information you provide. I point out also that any deliberate misleading of the Committee may constitute a contempt of Parliament and an offence under the Parliamentary Evidence Act 1901. As time is limited, the Committee may wish to send you some additional questions in writing, the replies to which will form part of your evidence and will be made public. Would you be happy to provide a written reply to any further questions?

Mr TINK: Sure.

ACTING-CHAIR: Before we proceed with questions, would you like to make a brief opening statement of not more than five minutes?

Mr TINK: Yes. I have locally advanced prostate cancer and for that I take Zoladex, which is an LHRH drug. It completely suppresses libido. It is the equivalent of switching off a thing in my brain. There is just no sexual urge whatsoever. The side effects of this drug are, in my view, minimal. I have been on it for five years. I have had 20 injections. The only people I see are my oncologist and my GP. It just strikes me, and it is the reason I put up my hand to do this, not without some embarrassment I might say, that it is worth somebody coming forward and making this point that this is not a big deal, this is not a breach of somebody's civil liberties or civil rights, and it is not cruel and unusual. Tens of thousands of men are on this medicine for locally advanced prostate cancer. I think it is worth a run around the paddock to try this out for serious repeat sexual offenders.

In that respect, there is the New South Wales Crimes (High Risk Offenders) Act. I am not saying this is necessarily a drug for all sexual offenders but, obviously, not that this is in any way excusable, there are things such as date rapes and so forth and there may be special circumstances. This is perhaps not for a one-off, but for serious, bad-egg, high-risk, repeat sexual offenders who pose a risk to the community in some cases for the terms of their natural lives who will get out of jail one day—I do not know anybody who is in jail for the term of their natural life for a sexual offence—and on release continue to pose a risk. This is the sort of drug that I think should be looked at seriously for them.

It is clear from this Act that the court on evidence has the ability to keep people under supervision on release from jail after sentence. Also, this is most important, under section 11 (d) the Supreme Court has the power to give directions requiring the offender "to participate in treatment and rehabilitation programs." I am simply saying to put Zoladex on the list. It is not cheap but it is not that expensive either. An injection is about $1,500. That is $6,000 a year. To me it is just not a big deal. This is something that really needs to be tried out in the context of this legislation and made one of the options. That is all I want to say on that. The other thing, and I did speak to the staff, is that I have a supplementary submission on sentencing. I have reduced it to writing, if the Committee wants to read it. At the moment, in sort of broad terms, there are two sentencing options in this State, as I understand. There is sentencing by a judge along and by Parliament via mandatory minimum sentences or, in the case of police killers, mandatory sentences. I am suggesting a third way and that is to involve juries in sentencing.

That is something former Chief Justice Jim Spigelman recommended and I strongly support. It is not put necessarily from the point of view of a lack of confidence in the judiciary. I am not suggesting that. What I am saying is that as a matter of public policy, it makes sense to involve the community through juries in sentencing. It is just a simple, good idea. It gives a community ownership of sentences and it may well be, as Mr Odgers just said, that at the end of the day they come to the same view as the judges. But the idea of having juries involved in sentencing in principle is a good public policy thing to do. It would actually increase confidence in sentencing. How to do it. I think one of the tricks with juries is that it is important to keep things as simple as possible. What I have done in this little paper is take an example, to make it relevant to the Committee, of aggravated sexual assault of a victim under 16 years, which is about the most serious offence you can commit of the range of offences this Committee is considering.

Under section 61J (2) of the Crimes Act the maximum penalty to be 20 years and standard non-parole period 10 years. I propose that if a jury has found an accused guilty of this crime, under this scheme the judge would ask them whether based solely on the evidence they have heard during the trial the standard minimum, that is to say 10 years in this case, should be the starting point for the sentencing judge. If the answer is yes, then the jury is thanked and discharged. The judge then steps in, still has a very substantial sentencing role, and with the minimum starting point of 10 years, the jury having said, "Our conclusion is that the minimum should be the starting point" the judge then decides—based on all the usual things judges consider to decide sentencing, such as prior good or bad record, criminal record, prison assistance to police, childhood and all the rest of that sort of thing—what the sentence should be between the range of 10 and 20 years. If the jury says no, the standard minimum should not be the starting point, then they are thanked and discharged and the judge has the option to sentence up and down the full range from either nothing right up to 20 years. If the jury is hung on the question of sentencing, they can be discharged and the judge decides in the usual way.

It would be kept simple for juries. Juries have a complex task to the extent that they have to listen to complex evidence to determine whether somebody is guilty or innocent. That can be a difficult job but juries do it every day. Based on that very same evidence, the next question for them would be: "Do you believe the minimum sentence should be the starting point or not?" That is the second submission that I make. It is an alternative to mandatory sentencing. I do not have a problem with mandatory sentencing in the way the

Parliament has passed it a couple of years ago with police. All I would say is that this provides a little more flexibility than a sentence that has, in effect, been predetermined by the Parliament without the Parliament having the chance to listen to the circumstances of the individual case. Here, the jury would do that.

ACTING-CHAIR: Is this system adopted anywhere in the world?

Mr TINK: Not that I know of. I have got some good friends who are barristers. I have asked some of them about this. Nobody can really argue from a point of principle why it would not work. Juries, of course, are involved in sentencing in the United States and determine things like death penalties and all sorts of things. I do not know of a system which operates this way but, for the life of me, I cannot see why it is not worth some very serious consideration. As I say, my barrister friends who like to pick holes in things—all barristers do, I did that once—they are hard-pressed to say straight up why this would not work.

Mr CHARLES CASUSCELLI: It is their nature, is it not?

Mr TINK: That is right. As I said, the thing for juries is try to keep it as simple as they can. They would be asked a yes/no question, then thank them and send them on their way. The judge would still have the very substantial sentencing role, but the starting point would be the standard minimum sentence.

Mr CHARLES CASUSCELLI: What would you think about being a little more prescriptive about allowable mitigating factors and aggregating factors when you are going through this process you have described? Do you think it would assist or not?

Mr TINK: I think they are still matters for the judge. Unless things have changed, the sentencing laws, as I recall them, have all sorts of lists of things that are to be taken into account. The way I would see it, they are matters for the judge. They are quite complicated to apply. The proposal here is based on the proposition that to determine whether a standard minimum sentence should apply, it would be based on the facts of the case. That is to say the facts of the case that the jury heard to convict a person, not what sort of a childhood they had, whether they have got a conviction for something or other, whether they have got other extenuating or aggravating circumstances.

They would just be asked: On the facts of this case that has led you to convict this person, do you think that the standard minimum sentence—it could be set by Parliament—is the place to start; yes or no? If they say yes, the judge starts looking at aggravating and mitigating circumstances, but it cannot start below the minimum. If the jury says no, then the judge can look at the full range. It is putting a premium on the facts of the case as a starting point. I do not think most members of the public would have a problem with that. I just do not think they would. Plenty of lawyers perhaps would, but I do not think members of the public would and personally I do not either.

Ms MELANIE GIBBONS: I want to bring you back to Zoladex. You said it is an injection. I had been under the impression it was a tablet.

Mr TINK: No, there is a pill that is used in Perth, apparently. It is called cyproterone. It is a pill. Apparently it is a very nasty thing.

The Hon. HELEN WESTWOOD: Is that the same chemical compound?

Mr TINK: No, this would be different. Cyproterone causes liver failure and cancer and various things.

Mr PAUL LYNCH: It has been discontinued in Western Australia.

Mr TINK: The luteinizing-hormone-releasing hormone [LHRH] is an androgen deprivation medicine. Prostate cancer cells feed on testosterone. That is my big problem, so if you block the testosterone, they cannot grow as fast. They still do grow, however, and mine have got away a bit now so I am also on Casodex, which is an anti-androgen medicine. I do not want to complicate this but the terms of reference of the inquiry talk about anti-androgen medicines. In fact that is a bit of a misnomer. They are not relevant because they do not suppress libido; that is my understanding. The androgen deprivation medicine, Zoladex, does block the testosterone. There will always be a few cells that miss it. That is the nature of things. They then grow and multiply and that is where I am at, so I am on this extra stuff.

For people who have not got cancer but have a sexually perverted desire or mind, whatever it is, the drug blocks the testosterone. The only way I can describe it is that it does not act on my groin, it acts on my brain. To me, that is a critical thing. It is hard to describe. There is just nothing. I mean, I still appreciate a pretty woman and all the rest of that, women generally, but there is no sexual desire. To me, that is the huge thing about this. The other thing is that the side effects, unlike the pill they have discontinued, are a lot milder. You have problems with bone density, but I take Caltrate tablets, which is calcium, and I make sure I do plenty of walking and do some light weights, things like that. That is fine. That is all I seem to need to do after five years on this stuff. People live 20 years. If they get it as young as I do, they can live for 20 years on this stuff. As I said, there are tens of thousands of people who are on it. Unfortunately, the sort of prostate cancer I have got is very common.

There are a lot of people on this drug. As far as I am aware, most of us get by without the need for psychiatric help or psychologists or seeing any of these sorts of people. It does not come up on the radar. I have noticed from some of the other submissions that psychology and psychiatry and so forth loom large. There is just none of it with me or other people I know of. When I say "other people I know of", one way we know about it is because the people who manufacture the drug I am on put out a magazine every so often to tell us what is going on and what other people are doing, how people are travelling. There is never anywhere in the magazine a phone number or an email of a friendly psychiatrist or psychologist. I do not know how else to put it. It just does not loom as an issue. I am trying to say that for me, so far, and people I know who are further down the track than I am it is a relatively benign thing.

It is very different to what can happen to other people. A good friend of mine also had prostate cancer. He had an operation and he has a lack of libido for physical reasons. He is in a shocking situation because he is still mentally alert to it all but he cannot do anything, which is a terrible situation. I am not like that. That is why, in a way, I think this has got something to offer people who we know will get out of jail—the really bad eggs, the repeat serious offenders.

Ms MELANIE GIBBONS: It is incredibly personal, so thank you for coming and sharing your story.

Mr TINK: Well, I thought somebody had to.

Ms MELANIE GIBBONS: It is completely different to what we have heard so far. How long after the first injection did you start to feel the difference?

Mr TINK: It actually flares up first of all, funnily enough. They flare you right up before bringing you down. That lasted about three or four weeks. They keep an eye on you over that period, but a general practitioner can do that. From there on, basically I am on a three-monthly injection cycle. I know when I have had my last injection and it runs for three months. You get a prescription and then you go and see your general practitioner. It is a high bore needle in the gut. They put this pellet into your abdominal wall—it sounds dreadful but it is not, to be honest. It is a bit of a sting and you walk out after a five-minute consultation and go about your business. You get that once every three months. To achieve the same effect with the libido of, say, an offender, that is all that would be required.

I know the doctors have issues about prescribing things against people's will. Danny Sullivan, who is a forensic psychiatrist in Melbourne, is very much in favour of the LHRH drug being used for this purpose and also referred to the experience in Oregon where they have been doing this since the early 1990s. I will quote him, "The published studies very clearly have shown that of those assessed as needing it [and] who took it, reoffending rates were extraordinarily low. Those who were assessed as needing who refused to take it, around a third reoffended." He is very much in favour of this but he has got an issue about doctors prescribing it against the patient's will. My view on this sort of thing has always been that once you commit these sorts of offences, the community has every right to take charge of you to some extent and continue to take charge of you. They take charge of you when they put you in jail.

Frankly, compared with what I have heard about what happens in jail, taking this drug is nothing. This Parliament has already put into law this Act which says that by application to the court—and subject to proving the requirements of the court—the authorities can have continuing control of a sex offender and they can mandate that somebody is not to go at liberty unless they are on certain treatments. In a way, using this Act, and by application to the court, a prisoner can be put in a situation where they stay inside if they are not prepared to take the drug and then they have the free will choice, but perhaps they might be motivated to say to the doctor, "Okay, I am going to take the drug." Some people would strongly disagree with this, but for me it is just no big

deal when you square it off against the hideous lifetime consequences, especially a child who has been sexually assaulted and often times repeatedly.

Ms MELANIE GIBBONS: I know you are not a doctor, but do you think there is a way that somebody could get the injection and say the blocker is working and perhaps it is not? Is there a way to know that someone is out in the community but really not a threat?

Mr TINK: I guess there are two parts to it. One is whether they could somehow dodge the injection in some way just as somebody who is taking a pill could perhaps park a pill in the cheek and then spit it out. These are called depot injections and they shoot them into the abdominal wall. I suppose if you had a pen knife or something you could dig it out, but it would be a pretty nasty thing to do to yourself. A random blood test will prove very quickly whether or not somebody has done that. I cannot imagine that anybody would dig the thing out. If they did, you could test it quickly. As for it not having the desired impact, I am told by my oncologist that just does not happen in his experience. It is a drug which is very powerful in its effect and they do not know of people who are resistant to it. It is important to note that it is reversible and if you cease to take it one's libido comes back. For me, it is an interesting question—whether I want my life more than I want sex.

The Hon. HELEN WESTWOOD: Thank you, Mr Tink, for coming in. We appreciate you being willing to give evidence of such a personal nature. I am interested to know whether you have talked to any other men who are also on Zoladex and if so, whether they have experienced any of the side effects that are listed with the drug.

Mr TINK: I think everybody experiences side effects up to a point and some experience side effects differently to others. It sometimes depends on your age. I think the older you are when you go on it, the more likely you are to get problems with bone density and things like that. People who are offenders perhaps tend to be on the younger side. They would be younger than people with a typical prostate cancer profile and therefore, perhaps less likely to suffer the sort of side effects that older people get. *7.30* did something on this a little while ago and there were some emails that I received from people on Zoladex. They were all in favour, except one and he had only been on the drug for two injections, so I am perhaps being a bit unfair but perhaps he was still getting used to it, I do not know.

The Hon. HELEN WESTWOOD: I notice that one of the side effects listed is depression. Do you know of anyone who has had that experience?

Mr TINK: No, I cannot possibly say that it does not happen but it has not happened to me. There is a magazine called "Directions" that is put out by the manufacturer of Zoladex. It is a magazine that comes around regularly to everybody who is taking the drug and there are never any articles in that magazine on major issues relating to depression. It is more about things like good diet, exercise and that sort of thing. That is what I try to do.

ACTING-CHAIR: I was going to ask about Oregon, it was the basis of *7.30*, wasn't it?

Mr TINK: Yes.

ACTING-CHAIR: Again, looking at other jurisdictions across the world, they seem quite progressive in their approach to this. We have had a lot of evidence today suggesting that it would only work for child abusers with a heightened level of sexual activity and that is does not work for other abusers. That was the tone of the evidence we received today: that it would be appropriate medication or treatment only for a certain class of offender. Do you have any thoughts on that?

Mr TINK: I can only repeat what Dr Sullivan has said. I am quoting again:

> In Oregon the Government passed legislation in the early 1990s that all sexual offenders leaving prison be assessed for medication to reduce sex drive.

And the published studies have clearly shown that of those assessed as needing it and who took it, reoffending rates were extraordinarily low but of the ones who refused to take it, about a third reoffended. I cannot take it further than that but that has been in place now for, it must be 20 years. I know a little about Oregon and it is, generally speaking, a remarkably enlightened jurisdiction.

Mr CHARLES CASUSCELLI: It is one of the most progressive states.

Mr TINK: Yes, in the United States. So it is interesting that they have done this. Perhaps not if it were Texas—but it is Oregon and that gives me a little more comfort.

Mr PAUL LYNCH: In those figures you were quoting from Oregon, did they say how many of those who were exiting prison were assessed as needing it?

Mr TINK: No, not on the basis of this.

ACTING-CHAIR: Which goes to the issue of whether it suits everyone.

Mr PAUL LYNCH: I think, to be fair, that what Mr Tink said to begin with was that he thinks it should apply to serious offenders who are repeat offenders and might be subject to the high-risk sex offenders legislation which, de facto, is sort of what happens now.

Mr TINK: This is the definition of a high-risk sex offender under the Crimes (Serious Sex Offenders) Amendment Act 2013:

> An offender is a high risk sex offender if the offender is a sex offender and the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision.

It is a pretty high bar. I can only speak for myself but I would feel relatively safe in having this treatment option available if it were to be considered as part of this regime, because it would involve Supreme Court supervision and that sort of thing. At least it would be a starting point and not too far off what is done now where a court can issue directions requiring an offender to participate in treatment. I guess I am saying that, for me, Zoladex is something that is worth putting on the list. I do not think you would get it under the Pharmaceutical Benefits Scheme [PBS] for this purpose but, to me, it would be a very small investment by the State to keep some really bad eggs under control. I do not think that $6,000 a year is a lot of money—not for what we are talking about.

The Hon. HELEN WESTWOOD: Perhaps you may not be able to answer this, Mr Tink, it is something we may need to do as a Committee. However, it seems to me that there are different types of drugs that are being suggested as treatment. It seems to me you are the only one who has talked about Zoladex—other than the ABC in *7.30*. The other drugs being mentioned are quite different and I do not know whether or not the effect is the same.

Mr TINK: Danny Sullivan was saying that cyproterone—or whatever it is they were using in Western Australia—is a pill that has vicious side effects and doctors are balking at prescribing it within the Western Australian prison system. But then he goes on to compare it with the luteinizing-hormone-releasing hormone [LHRH]—which is Zoladex—and says from his point of view LHRH is a very different thing, the side effects are much more benign and that is why he thinks it is a good thing to prescribe to the really bad egg offenders.

The submission that goes into this is the former Premier's submission to this Committee. He talks about this from page 36 of his submission and at page 39 he talks about the use and effectiveness of LHRH drugs. He notes, on page 40, that LHRH has been reported to be successful when cyproterone acetate [CPA] or Medroxyprogesterone acetate [MPA] was not. CPA and MPA is the Western Australian pill, for want of a better expression. He goes on to say in the submission, "LHRH has had a more potent impact on testosterone levels and sexual arousal than the others and the side effects appear to be milder however osteoporosis—thinning of the bones—is a particular problem." Yes, it is a problem. I take calcium tablets, do a lot of walking and do very light weights—I mean very light weights, just a little bit of load bearing and I have been going pretty well.

ACTING-CHAIR: Thank you Mr Tink, it was a very good presentation and we appreciate your candour in coming forward and, as always, public policy is at the forefront of your heart.

(The witness withdrew)

(Short adjournment)

PILAR LOPEZ, Solicitor, Legal Aid, NSW, 323 Castlereagh Street, Sydney, and

MARK JOSEPH IERACE SC, Senior Public Defender, Legal Aid NSW, Public Defenders Chambers, Level 23, 1 Oxford Street, Darlinghurst, affirmed and examined:

ACTING-CHAIR: I am Melinda Pavey, Deputy-Chair. Our Chair has been promoted and is attending a Cabinet meeting. I offer his apologies and thank you for appearing before the Committee today. I draw your attention to the fact that your evidence is given under parliamentary privilege and you are protected from legal or administrative action that might otherwise result in relation to the information you provide. I should also point out that any deliberate misleading of the Committee may constitute a contempt of the Parliament and an offence under the Parliamentary Evidence Act 1901. As time is limited today the Committee may wish to send you some additional questions in writing the replies to which will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions?

Ms LOPEZ: Yes.

Mr IERACE: Yes.

ACTING-CHAIR: Before we proceed with any questions would you like to make a brief opening statement?

Mr IERACE: Perhaps I could make a few points in relation to some of the issues that have been raised in the response in the Legal Aid submission. One of the first points made in that submission is that when one looks at sentences handed down for child sex assault offences one notes that there is some variation reflecting variations in objective and subjective features. Might I refer to two cases to illustrate that? No doubt all of you heard about the Muldrock case but I wonder whether you are familiar with the facts of that case.

Mr PAUL LYNCH: I am but I do not know about the other members.

The Hon. HELEN WESTWOOD: I would be happy to hear them.

Mr IERACE: It is actually the leading High Court case on the issue of the relevance of an abnormal mental condition in the sentencing process for any criminal offence. I refer briefly to the facts of that case because it illustrates how even for one of the most serious child sex offences, it can be appropriate to hand down a very lenient sentence and one with which I doubt many members of the community would be particularly concerned. Mr Muldrock aged 30 had an intellectual disability and a report by probably the leading forensic psychologist in this State, Professor Susan Hayes, was to the effect that he had a mild degree of intellectual disability, an IQ of 62. The term "mild" is misleading; in fact, that is quite significant. Another way of putting it is that 99 per cent of the population had a higher intelligence than Mr Muldrock.

He pleaded guilty to a count under section 66A, which is sexual intercourse with a child under 10 carrying a maximum penalty of 25 years with a standard non-parole period of 15 years, so a very serious offence he pleaded guilty to. As well, he asked that another offence be taken into account, which was a count under section 66N, an aggravated indecent assault. Basically the facts were that he was living in the same block as a single parent with her nine-year-old child. He and the child became friends. They went on their bicycles to go swimming in the bush somewhere. The boy stripped off—the offender did not entirely strip off—and they went for a swim. The offender tried four times to touch the nine-year-old in the area of his bottom and was each time fobbed off but ultimately he succeeded in touching him in the area of his bottom and genitals and that was the aggravated indecent assault.

He then forced the boy to engage in fellatio and that was the section 61A offence. The boy broke free, rode off and raised the alarm. He knocked on the door of a stranger's house and the man who lived there took him home. Mr Muldrock was aged 30 and had a prior similar offence in Queensland some seven years before and on that occasion, having regard to his intellectual disability, he had been given what was in effect an intensive corrections order very similar to what we have as a sentencing option in New South Wales now; that was a 12-month intensive corrections order. Judge Black before whom this matter came in Lismore was obviously concerned about the degree of his intellectual disability and his history.

He had been sexually assaulted by his father when he was a child, and that is quite common, in my experience, with these offenders. It is very disturbing background. You might think that if you had been sexually assaulted as a child the last thing you would do is perpetrate that on someone else, and certainly that is the case with many who have been sexually assaulted but by the same token and inordinate number of child

sexual offenders have themselves been victims in their childhood, so Judge Black was clearly concerned about that and the fact that he had an intellectual disability and the relationship between them. He found properly, according to common law, because of his intellectual disability that he was not a suitable candidate for general deterrence—you do not demonstrate general deterrence to the community by giving a lot of weight to that factor in the sentence, but also primarily intending to focus on rehabilitation.

He wanted him to go to a place called Selwood Lane, which is a facility operated by the Department of Ageing, Disability and Home Care, the relevant State government department, a secure facility where there is line-of-sight supervision 24 hours. They were holding a bed for him. That was a facility that was designed to rehabilitate child sex offenders who have intellectual disability. With that in mind, having regard to the standard non-parole period of 15 years, he handed down a total sentence of nine years with a non-parole period of 96 days backdated so that he could be released that day but with a condition of parole that he spend 12 months in that facility; in other words, he could not leave for that 12-month period. The Court of Criminal Appeal intervened and upheld the nine-year head sentence and imposed a non-parole period of six years and eight months, I think.

The High Court said what it did about standard non-parole periods and I am sure there is no need to go over that. It then went on to elaborate the relevant principles where a person has an intellectual disability, a mental illness or brain damage or some other such condition when being sentenced. They remitted the matter back to the Court of Criminal Appeal for Mr Muldrock to be sentenced properly according to the appropriate principles. The Court of Criminal Appeal in a judgement of the court in quite strong terms noted that Mr Muldrock by then had been in custody for three years and said that an appropriate sentence really, having regard to the proper principles, was 12 months with a balance of term of two years—total sentence three years, and that is what they handed down, which meant that he was released on the spot. The point I am trying to make by taking you in such detail to that case is that it is not a bad example of where indeed it is appropriate that there be a remarkably lenient sentence, lenient in the sense of when one compares it to other sentences typically handed down for such a serious offence.

Public Defenders on our website have what we call sentencing tables and they are thumbnail descriptions of some factors in a range of sentences. There is a table for section 66A where the sentences are a very large number of years for overwhelmingly most cases but this was an example where it was appropriate to go outside that. That is the worry with mandatory sentencing. With mandatory sentencing, although it may well be an appropriate sentence for many offenders who come before the court, we take a huge risk that someone will come along who will be quite inappropriately and in a very damaging way, given the wrong sentence. It is important to keep in mind with mandatory sentencing that we are talking about the mandatory minimum sentence, in other words, that is, the mandatory bottom of the range. So the sentences to be imposed if we have a mandatory sentencing regime for a particular offence will start from there but will mostly be way above that in terms of the non-parole period.

The second case I want to mention—you will be glad to know much more briefly—is CTM. I do not know whether you know about the High Court case of CTM from 2008. That was a case where a 17-year-old was convicted at trial of having sexual intercourse with a child under the age of 16; she was 15. He was given a sentence of nine months non-parole, which was suspended. The High Court in that case at paragraph 16 of the joint judgement of Chief Justice Gleeson and Justices Gummow, Crennan and Kiefel stated:

> A related matter is how the law is to deal with the not uncommon case of the offender who is approximately the same age as the victim. The present appeal provides an example. At the relevant time, the appellant was 17, and the complainant was 15. The term "sexual predator" may be appropriate to describe some people who engage in sexual activity with consenting 15 [plus] year old females, but it is hardly of universal application. The present appellant was himself, in the eyes of the law, a child, and this was potentially relevant both to the procedures that governed his prosecution and to questions of penalty.

Similar statements were said elsewhere in the judgement. The point I make is that that is another example of how there has to be enough flexibility in the sentencing regime to ensure that the 17-year-old, who had sex with a 15-year-old, does not end up in prison and significantly and quite inappropriately damaged. That is a scenario many parents can relate to; I certainly can—the danger that their child at 17 may inadvertently fall into that category. What that case concerned was whether the defence of honest and reasonable mistake was open to the accused. It had been thought that it was not but that case held that it was.

I make those two points. I may not take much more of your time but quickly you will note the second point that was made in the Legal Aid submission was about public confidence. I think you heard about the Bureau of Crime Statistics and Research survey done in 2008 in conjunction with the Sentencing Council. I am

a member of the Sentencing Council, which found a high correlation between public confidence in the criminal justice system, between that and knowledge of how the criminal justice system actually operates; in other words, those who had little confidence in fact had a misunderstanding of conviction rates, incidence of crime and so on. Those who were accurate on the second factor interestingly enough rated having a high degree of confidence in the criminal justice system. That report is available on the Bureau of Crime Statistics and Research website from 2008.

On the use of anti-androgenic medication, I note that you have coming up before you Andrew Ellis and Chris Lennings. From my experience with them in various cases we have a very high regard for their views. I think Dr O'Dea probably has a different view. In general terms having had the benefit of exposure to the views of those and others, including Susan Hayes, we are concerned about the side-effects of such medication, the fact that it may interfere with the ability of an offender to develop proper full legal relationships. We wonder what the legislative scenario would be, given the legislation we already have for the administration of such medication for offenders once they have completed their sentences, what else could be contemplated but the bottom line is that we defer to the expert opinions in relation to that issue.

Finally, a general point coming very much from Public Defenders as well as Legal Aid is that I think guideline sentencing has been overlooked. It was fashionable, if I could use that word, in the early part of the first decade of the millennium and it has fallen out of use. It should be revisited because it is a vehicle which enables the court to elevate the sentencing pattern significantly where appropriate beyond what it currently is and to have regard to a wide range of material when it does that to go outside simple cases. There are proposals by the Law Reform Commission for a stronger role for the Sentencing Council in that regard. Again, that is a way of giving some assurance to the community that sentencing patterns will be increased but in a way that does not pose a grave risk to some offenders that they might be quite unfairly and inappropriately, even in the mind of the community, sentenced. With those opening comments we are here to answer your questions.

Mr PAUL LYNCH: You raise the issue of guideline judgements and the Law Reform Commission recommendation that talks about an expanded role for the Sentencing Council and for the Sentencing Council to perhaps engage with the public and the community generally. I am wondering how that would happen and what sort of mechanisms you think that might involve?

Mr IERACE: The Sentencing Council has looked at the role of other sentencing councils, both interstate and overseas, and particularly the British council. It is an issue that we have not resolved to our own satisfaction. We have engaged in one-way communication having town hall meetings in regional centres such as Dubbo and Tamworth to explain how sentencing works and they have been quite successful but we have not yet come up with a mechanism to obtain community feedback other than in that instance where we combined our resources with the Bureau of Crime Statistics and Research and engaged in a telephone survey of over 1,000 people. That was quite effective as far as it went. One of the issues with guideline judgements is the fact that they are resource intensive both for the Director of Public Prosecutions, Public Defenders because we have a role in them, Legal Aid and so on. I think that the Sentencing Council could take some of that burden; it would need further resources but I think the overall picture of resources could be reduced.

Mr PAUL LYNCH: The role for the Sentencing Council in the Law Reform Commission recommendation is comparatively limited in the sense that it is there to advise the Attorney General in his application or to advise the court when they do an own motion review or when they do an own motion consideration. That is a narrower role than the United Kingdom version. I wonder whether you think there is a greater role for the Sentencing Council in making guideline judgements.

Mr IERACE: I would not have a great difficulty with that. A number of us in the criminal justice system when the Loveridge issue broke late last year were anxiously hoping that would lead to a guideline judgement. It is fair to say that in a number of quarters there had been some concern about sentencing for manslaughter. We thought a guideline judgement might be the way to go to review that concern and to respond appropriately. Although that happened, it was overtaken by other developments.

Mr PAUL LYNCH: Do you have a view about a specialist sexual assault court?

Mr IERACE: I will respond first with regard to specialist courts generally. They have their place. There is a strong argument, for example, that the Koori court in the County Court of Victoria does very good work, as does the Drug Court in New South Wales. An advantage of a child sexual assault specialist court would be that inevitably it would become a focal point for the development of treatment. For example, there is not a lot

of treatment for juvenile sex offenders. That could be a good thing. There could be considerable benefit in having such a court. However, I am also mindful on the other side of the coin of the temptation to have specialist courts for a number of different sorts of offences. One must take a step back and work out whether we want to have a fractured court system. However, I am certainly open to the benefits of such a court.

The Hon. HELEN WESTWOOD: I am interested in going back to the case involving similar age offences and your point about the community not thinking that a custodial sentence was appropriate. What is your view of those offenders who are found guilty also being placed on the public register?

Mr IERACE: That was a big concern with CTM. As it stood, the conviction meant that for the rest of his life he would be on the sex offender register with all the consequences in terms of employers, type of work and so on. I do not think there is much of an issue where the offender is clearly a sexual predator, and particularly if there is a real risk of reoffending. That was simply not appropriate for him. That could be factored in by amending legislation to identify different characteristics with different penalties. However, I think you can only go so far down that track. If you have flexibility in the sentencing range then that is one way of addressing that concern.

The Hon. HELEN WESTWOOD: Could that be considered by the court at the time? Is that something the Committee could look at—whether or not the offender's name is placed on the register?

Mr IERACE: I would like to see the court having the power to review that. If not the court, there should be some mechanism so that that could be reviewed very quickly in appropriate cases.

The Hon. HELEN WESTWOOD: I understand that it is not the case in all jurisdictions that offenders of a similar age are automatically placed on the public register.

Mr IERACE: What do you mean by "all jurisdictions"?

The Hon. HELEN WESTWOOD: In the different States.

Mr IERACE: I do not know.

Mr CHARLES CASUSCELLI: You raised a couple of examples where if we were not careful we could unfairly compromise the sentencing outcomes for people who may not be in extended detention because of mental impairment, their age and so on. However, for the majority of others—that is, the worst offenders—do you think more prescription about what should be considered by judges as mitigating or aggravating factors in sentencing would make it more consistent?

Mr IERACE: I think the answer is yes. Presumably it would if there were a way of doing that, but you are then getting into the area of section 21A. The danger is that what you end up with as a practitioner—and I am sure on the bench as well—is a very long checklist. One wonders whether it really does lead to sentences that are any more onerous or lenient than what we would have with just the common law. If I can assist in terms of where the question is going—that is, how should one achieve greater consistency—obviously the first step is to work out whether sentences are inconsistent in the sense that they may not all be the same number, but they may be consistent in terms of application of principle. The public defender tables for serious offences demonstrate that they are very heavy sentences. I do not know that even looking at the raw figures one could say that there is any suggestion that sentences are not heavy enough for serious child sex offences. Do you have a particular mechanism in mind for identifying features? We have circumstances of aggravation that go down that track.

Mr CHARLES CASUSCELLI: I ask because I think there is a disconnect between what the community believes should be mitigating factors and what judges feel should be and the relative weight applied. For example, there is a small bunch of people in my community who believe that simply because someone had an unhappy childhood or was themself a victim of violence as a child that should not be used as mitigation in sentencing if that person has committed a crime against a child. There are other scenarios. I understand that judges have a fair amount of discretion when looking at the different factors and applying weight to them when sentencing. Is there a way of aligning community expectations about what are reasonable mitigation factors as opposed to unreasonable factors? If it is the second time someone has committed a sexual offence there are no mitigating factors—they should be wiped—and the judge should have no discretion in sentencing.

Mr IERACE: I strongly disagree with the idea that people have one bite of the cherry and that they are expected to learn their lesson the first time around. That is particularly so with our system. We do not always provide treatment. When the serious sex offenders legislation was first enacted and for the first time we were detaining sex offenders after they completed their sentence it often emerged that the offender had wanted to participate in the Custody-based Intensive Treatment program or whatever but was not able to because there were not enough places available. Prima facie that was unjust because we were locking up someone for longer without giving them the opportunity to participate in that treatment. I hasten to add that many did not want to participate; I am talking about those who did. If we are to have a one bite of the cherry approach it is incumbent upon us as a community to ensure that all the doors are open for treatment and rehabilitation.

You should not go into the big house and be exposed to all kinds of new ways of committing crime and then be let out and be whacked with no mitigation possibilities the second time around. I think we are going down that track to some extent anyway. For example, alcohol being removed as a mitigating factor will have a huge impact on many areas. I know how lame the rough childhood mitigation claim can sound to the community. Sentencing judges deal with it by throwing it into the mix and acknowledging it without indicating how much weight they are giving to it and move on. Ultimately it is given very little weight, especially in relation to child sex offenders. That is because it is outweighed by the protection of the community.

Going back to the earlier example, sometimes the fact that you have been a victim as a child and for complex reasons that are not obvious you have this predisposition to commit such offences means that you have to be locked up or treated to prevent you perpetrating further offences. It is not necessarily overwhelmingly one way; that is, it is not always a mitigating factor. You may know of the case of Veen, involving an intellectually disabled Aboriginal offender who killed twice. The court noted that sentencing factors cut both ways—they are both mitigating and exacerbating and the exacerbation outweighs the mitigation. The basic point is about community perception. The start must be to look at the thousands of sentences that are handed down each year in the District Court and how few are the subject of a Crown appeal.

ACTING-CHAIR: What is the percentage?

Mr IERACE: I do not know the exact percentage, but I can provide it easily. The tabloid media is frustrating in that it focuses on the extreme examples and does not give the full picture. I would like to see judgements placed online before they are handed down. If the judge can have it typed before it is handed down then surely with a small increase in resources it could be put on the website immediately after it is handed down. I am very encouraged to see the Chief Justice providing summaries of sentencing judgements so that the media can, if they want to, get a fair encapsulation of all of the relevant features. That would capitalise on what the research is telling us; that is, that when people have all the information they are happier about sentences. I think that that gets back to the concern about the community's reaction. If I can say so, politicians are in a difficult position.

Mr CHARLES CASUSCELLI: You can say that as often as you like.

Mr IERACE: It is obvious to us from research carried out by the Bureau of Crime Statistics and Research. Dr Don Weatherburn is a very effective researcher. It demonstrates that when that knowledge gap is closed many of these concerns go out the window. We are then left with the real issue and we can have a real debate about it. Our parliamentary representatives are at the crossover point between community expectations on the one hand and how the system works on the other. If we were to go down the road of more guideline judgements and if they were seen to deliver the goods—in other words, to allay the public concerns—in a way that those of us who work in the system who see the potential for great injustice are content, together with proper communication that may over time have an impact.

ACTING-CHAIR: You touched on the District Court. The *Sunday Telegraph* last weekend referred to the Local Court and the sentence of two years for a single offence and up to five years for multiple offences. Do you have any thoughts on that issue?

Mr IERACE: Yes, I do. I have the benefit of having looked at this issue at length in the Sentencing Council, which members are probably aware tabled a report specifically on this issue in 2010. Council members spent a lot of time on the report. My point of view is that if you are going to increase the jurisdiction in terms of sentences to, say, five years, and presumably eight or nine when there is a combination of offences, you are talking about offences or examples of a particular offence that are quite serious. The community will have more confidence in those matters where the accused pleads not guilty being dealt with by a jury rather than a single

judicial officer. It is interesting that when a jury comes back with a verdict that is contrary to what the media has led us to expect there is not a murmur of criticism or complaint. The jury system works quite well in that sense. However, that is not the case where a judicial officer is determining guilt or innocence.

Again, if we are talking about egregious examples of an offence where the sentence could be five years or eight years in combination, an advantage of going to the District Court is that the appeal is to the Court of Criminal Appeal. That is important because three judges deal with it and one of them is a judge of the Court of Criminal Appeal—the most senior court. District Court judges are bound to follow those judgements. In other words, that achieves a higher level of consistency. If the matter is dealt with in the Local Court the appeal is to a single judge of the District Court and fellow District Court judges are not obliged to follow it. It would be eating away at the extent to which the system provides a high degree of consistency.

ACTING-CHAIR: And support to the judicial officer at a higher level making that decision.

Mr IERACE: Yes, exactly. The Sentencing Council looked at a safety valve. Where the magistrate, having heard all the evidence, is of the view that the appropriate sentence range for the particular offence in the particular circumstances goes beyond the two- or five-year maximum, he or she can refer it to the District Court. All the evidence we looked at suggests that it is very rare that the Local Court bumps against that upper level of jurisdiction. The cases dealt with are appropriately dealt with in the Local Court. For a greater level of assurance that matters were being dealt with appropriately that might be a mechanism, in the view of the sentencing council, to enable that to happen with odd cases where the magistrate thinks, "This person should be looking at more than two years so I am going to refer it to the District Court". There are some issues with that, it is not black and white. It means the accused, having pleaded guilty in the Local Court, is then facing a higher sentence, if it is a sentence matter, and an additional cost in having to run two cases. On the other hand, it does relieve that issue.

ACTING-CHAIR: Part of the evidence today from the representative for the Department of Public Prosecutions is that victims and families approach going to the Local Court as an easier process as it is not as formal and feels more approachable to them.

The Hon. HELEN WESTWOOD: Quicker too.

ACTING-CHAIR: Quicker access too. Do you have any thoughts on that side of the Local Court process?

Mr IERACE: The quicker aspect, if I pick up on that, the current timetable in the District Court from when a matter is referred for sentence from the Local Court to the District Court is typically two weeks and there is a sentence date in about six weeks. A trial date has been, up until halfway through 2012, of a similar order, that is, six to eight weeks. For complex reasons, which are not fully understood, halfway through 2012 the number of trials going to the District Court increased by 50 per cent and we are all playing catch-up trying to resource ourselves to meet that sudden blow-out of trial numbers. Even so, in the District Court in Sydney, I think at the moment it is around six months. It is not a question of years being added.

I can understand why victims would think that the Local Court is a more community friendly court as it is less formal. Barristers do not wear gowns. It is a question of a number of factors to be taken into account. Another issue is that it is police prosecutors who prosecute in the Local Court and you do not have lawyers who are members of the New South Wales Law Society or the Bar Association with the ethical obligations that that entails and the review that entails in terms of being a member of the bar or the Law Society. That is a factor to be taken into account. You would have prosecutors who are prosecuting matters attracting high sentences that are not of the same professional standing as those who appear in the District Court.

Mr PAUL LYNCH: You mentioned a little while ago that offenders had difficulty accessing the Custody-Based Intensive Treatment [CUBIT] program. Is your understanding that there is still a problem with accessing CUBIT?

Mr IERACE: I have not had any information in relation to that in the last year and a half. I assume it has been corrected but I do not know for sure. I was going to suggest the name of a person in corrective services who could advise you, Mr Grant.

Ms MELANIE GIBBONS: We have been talking about the idea of having a separate court for these matters. What would your opinion be about that?

Mr IERACE: I mentioned earlier some concerns but I am quite attracted to it as well. The big attraction for me is that I think it would inevitably lead towards better development of treatment. I would like to think that includes treatment within prison. I think I mentioned that one of the areas where there is a need for treatment is juvenile offenders. There is a person by the name of Howard Bath who is an expert in that area who might be worth talking to. I mentioned in the context of the Muldrock case an offender with intellectual disability and suspect there are quite a number of offenders with intellectual disability that come into this area. Susan Hayes would be good to speak to about that. You do need specialist treatment for those people. You cannot put them in treatment facilities for those that do not have an intellectual disability.

If I could make the point that in relation to such offenders you will often hear it said that they have a mental age equivalent. So, someone who has a mild intellectual disability might have a mental age of nine or 10. It does not mean that they are to be understood entirely in that context, but it is a helpful guide. Often they are more comfortable in the company of people who are that same age but those people do not have the same sexual development. That is an example of how intellectual disability can lead to higher incidence of child sexual assault. I am not saying that intellectual disability tends towards that but by the same token I suspect there is higher incidence of intellectual disability in child sex offenders than there is in the general population.

The Hon. HELEN WESTWOOD: As someone who has worked in disability services I recall the programs we used to have to introduce for young people with an intellectual disability as they reached puberty. There was a very different way of those young people expressing their sexuality than those without an intellectual disability. It is one of the questions I asked earlier of the New South Wales Government representatives about the proportion of young people with intellectual disability who are offenders. At least with young people there seems to a method of assessing whether or not they have an intellectual disability. Is that the same with adult offenders, is there a process?

Mr IERACE: No. The best work to look at is Professor Eileen Baldry. I can give you references to the report. Professor Baldry did a major report called *People with mental and cognitive disabilities: pathways into prison*. She looked at a sample of over 3,000 adult prisoners in New South Wales prisons and found that half of them had either an intellectual disability or a borderline intellectual disability and something like 32 of those had been identified by the Department of Ageing, Disability and Home Care [DADHC], the relevant government department. In other words, a lot of them had gone right through the system without the disability being picked up.

It is an area of expertise of mine going back some decades. I wrote a book on intellectual disability in criminal law in the 1980s and maintained an interest in that area. I worked the Law Reform Commission on its major report on that issue in the early 90s. It continues to be a problem. If there is a process it certainly does not work. It is something we have pushed towards for 20 years, to have a proper screening process for all prisoners to identify those who have an intellectual disability. Even when that is done the services still have a long way to go in prison.

The Hon. HELEN WESTWOOD: I would have thought for sexual assault offenders who have an intellectual disability that any of the treatment programs would have to be designed to take into account their intellectual disabilities. If those intellectual disabilities have not been identified I would wonder about the appropriateness and efficacy of some of those treatment programs.

Mr IERACE: It is important to acknowledge that there is a wing in Long Bay for prisoners who have an intellectual disability and there are some specialist services there as well, which is very good. The problem is that there is a lot going through the system who are not being picked up. It is not until they are picked up that they have any hope of getting the appropriate services. Luke Grantham is the name of that person.

The Hon. HELEN WESTWOOD: An issue you raised earlier was the increased likelihood of perpetrators of child sexual assault having been themselves victims of child sexual assault. What informs that comment? We did have a briefing with experts, particularly psychologists who treat offenders, and when we asked that question their view was that, no, most offenders do not have a history of being victims of child sexual assault themselves, although that is a perception. I would be interested in what informs your view?

Mr IERACE: Two sources, the first is my own experience having offenders as clients who have plead guilty to child sex offences. They have told me and my instructing solicitor that fact. This is going back to the 90s before there could be any suggestion that they were doing it in a self-serving way. I can think of, for example, off the top of my head, a murder case where the fellow had murdered a six year old boy and there were some sexual overtones to it. He himself was a victim of child sexual assault. They are not two dots that you can necessarily join in a logical obvious way. In fact, you would think the opposite, that having been through it yourself that is the last thing you would do. The second source is I have read summaries of research to that effect, so I am surprised to hear that. I would be happy to track down that research.

ACTING-CHAIR: That would be appreciated.

Mr IERACE: The other was the District Court percentage.

(The witnesses withdrew)

GRAEME LESLIE HENSON, Chief Magistrate, Local Court of NSW, District Court Judge, sworn and examined:

ACTING-CHAIR: I am the acting-chair of the Committee. Our chair has been promoted to Cabinet and there is a Cabinet meeting this afternoon. He does extend his apologies. There was a hope he would make it back for your evidence today but that is not to be.

Mr HENSON: That is understandable in the current climate.

Mr CHARLES CASUSCELLI: You are doing a fine job acting-chair.

ACTING-CHAIR: We thank you for appearing before the Committee. I draw your attention to the fact that your evidence is given under parliamentary privilege and you are protected from legal or administrative action that might otherwise result in relation to the information you provide. I should also point out that any deliberate misleading of the Committee may constitute a contempt of the Parliament and an offence under the Parliamentary Evidence Act 1901. As time is limited today the Committee may wish to send you some additional questions in writing the replies to which will form part of your evidence and be made public. Are you happy to provide a written reply to any further questions?

Mr HENSON: Yes, of course.

ACTING-CHAIR: Before the Committee proceeds with questions, would you like to make an opening statement?

Mr HENSON: Not at all, I am here to answer your questions as best I can.

Mr PAUL LYNCH: The obvious place to start, I guess, are the comments in your submission to the Committee that achieved a degree of notoriety yesterday?

Mr HENSON: Yes, it is interesting to know how that came to be.

Mr PAUL LYNCH: The letter is up on our website, is the answer to that. Do you have any comments about the commentary provoked by the letter?

Mr HENSON: As to whether or not the jurisdiction of the Local Court should be increased or whether matters subject to my correspondence should be dealt with exclusively in the District Court?

Mr PAUL LYNCH: The issue it would be useful to address is whether matters are being finalised in the Local Court when they should be dealt with in the District Court?

Mr HENSON: There are some matters, as set out in my correspondence, which from time to time—it is not confined to sexual assault offences—trouble various members of my court as to whether they are in the right jurisdiction. Of course, that is a subjective assessment made by a magistrate; a different assessment might be made by another magistrate on the same set of circumstances. You have to understand it from that perspective. It is not a mathematical test. It is simply an application of that judicial officer's understanding of the

law to the circumstances that confront them in respect of that offence and that offender—the two cannot be separated. The decision as to whether to bring matters before the Local or District courts is made by the DPP, not by the magistrate concerned. That decision arises in two circumstances. One is where perhaps a more serious, strictly indictable offence is brought in the first instance, with a back-up charge of a table one offence or a table two offence. If the DPP decides not proceed with the strictly indictable offence they can then decide to leave the other matter in the Local Court for determination.

The other way in which it may arise is that persons charged by police with these types of offences can come before the court where the prosecutor is not the DPP but is a police prosecutor and for reasons best known to those people—and I will not comment as to the decision-making processes—those offences which might otherwise have been more appropriately dealt with in the District Court go through the system. Once the sentencing proceedings start before a magistrate in the Local Court they cannot be diverted by the DPP into a higher jurisdiction. There is a window of opportunity between charging and the sentencing process beginning where the DPP can intervene to take over the matter and elect to proceed with the matter by way of indictment. But there are rare cases, I think it is fair to say, that don't attract the attention of the DPP because nobody within the police thought it appropriate to refer it to the DPP for consideration.

ACTING-CHAIR: How often does it happen that the DPP captures a matter and takes it to the District Court?

Mr HENSON: It is a pretty good evaluation process by the police and sometimes by the court. It is impossible to mathematically guess. There are enough that it falls within my knowledge that it does occur from time to time.

ACTING-CHAIR: But it is unusual?

Mr HENSON: Not very often. The police are pretty good at referring matters off to the DPP but like every institution they are not perfect.

ACTING-CHAIR: I want to ask a question about the two-year sentences in the Local Court and five years for various offences. Evidence was given today from the DPP representative that families and victims actually like the Local Court process—it is timelier, more engaging and does not feel as threatening. Are you confident that the processes are working and that we are getting the appropriate sentences through the Local Court when they do appear there?

Mr HENSON: That is a somewhat ambiguous question if I might say. I am confident that the Local Court does its best to deliver justice in respect of those types of matters, I am less confident that it applies with 100 per cent reliability. There are—as I said in my letter, this causes me to go towards an increase in the jurisdiction—enough matters not just of sexual assault prosecutions but broadly across the table one category of offences, that increasing the sentencing powers of the court would ensure, I think almost with total certainty, that no matters escaped an appropriate sentence simply by reason of a failure on the part of the DPP to elect or a decision taken by the DPP to choose the Local Court as the jurisdiction of choice.

I do understand the DPP's concerns about victims. It is something that concerns the court because I understand, having been in judicial office for more than 25 years, that victims of sexual assault are worried by the process. The longer the process goes between arrest and determination the more the evidence begins to corrode in terms of the failing of memory and the more the concerns arise on the part of the victim as to whether or not justice is going to arrive at its due destination. The difference in time standards between the Local Court and the District Court are probably known to all on this Committee. The average delay within the Local Court for a defended matter is around about 14 weeks from charging to determination; I think within the District Court it is in excess of 12 months—and that is being kind. That does not count the period of time in which the matters remain in the Local Court under the committal process.

CHAIR: Your Honour, I apologise for not being here when you arrived.

Mr HENSON: Not at all.

CHAIR: Would an increase in capacity allay some of your concerns that too many matters are dealt in the jurisdiction of the Local Court?

Mr HENSON: Certainly, in my view totally.

CHAIR: The Committee heard evidence earlier today that less wigs actually facilitates a better outcome for the victim; it is a more conducive environment than perhaps a higher court. In your view would a Local Court in that environment but with greater powers provide better results?

Mr HENSON: I think a more consistent approach for the prosecution of matters at this stage and I think a better outcome in the longer term. I note from listening to talkback radio and reading the *Daily Telegraph*—

Mr PAUL LYNCH: Where do you get time?

Mr HENSON: I have to make time I am sorry in the word of modern communication. I note that there is some concern that the Local Court only deals with minor matters. I do not think the authors, either spoken or written, really understand that 98 per cent of all criminal prosecutions in this State are dealt with by magistrates. That is the stark reality. It is a question of the cost of the justice system over the capacity of the higher courts to deal with an increasing burden in the District Court. As we know, the workload of the District Court has increased by almost 50 per cent in the last 12 months without an increase in resources. Matters that end up in the District Court go through the Local Court in the first place. So whilst there may be an increase in the workload of the Local Court it is an increase in the nature of the workload rather than the fact of the workload. It does not mean that more people will be charged. The same people will come through the Local Court but they will stop at a point and not go on to the District Court.

Mr PAUL LYNCH: An increase in jurisdiction will presumably lead to an increase in workload and presumably more cases?

Mr HENSON: Yes and no. I go back to my previous answer—they are in the Local Court anyway.

Mr PAUL LYNCH: They are there for the committal process. A defended matter is going to take longer than simply being there for the committal process.

Mr HENSON: Yes, it does but it will take about one-third of the time that a trial in the District Court takes.

Mr PAUL LYNCH: That is certainly true but the problem is that you are eight magistrates down already and you have had to close a number of Local Courts. How can you seriously want to expand the jurisdiction when you are struggling under those burdens?

Mr HENSON: My view on increasing the jurisdiction was developed before the economic reality of the Local Court. It is actually four down. It will be six down in July and then eight down in July next year but to be fair the caseload has dropped as well. We are managing okay at the moment.

Mr PAUL LYNCH: I turn now to specialist courts. There has been a degree of discussion today about establishing separate specialist courts for sex offenders and child sex offenders. Do you have a view about that?

Mr HENSON: Because of the very nature of the Local Court I have never been a great fan of specialist courts. We are expected to provide access to justice from Wentworth on the corner of Victoria, South Australia and New South Wales, from Broken Hill to Tweed Heads, down to Eden and all points in between. Specialisation cannot be everywhere. That is the difficulty with the Local Court. You can provide it in the city as they have with the Drug Court but even the Drug Court is driven by postcode. So if you happen to be lucky enough to be within the Parramatta postcode or thereabouts you might get access to the Drug Court, the same with the inner city.

Mr PAUL LYNCH: It is driven by local government area rather than postcode.

Mr HENSON: It probably is, you would know better than I. I have enough to worry about without that court. But specialisation does create a problem. What happens when your specialist retires? You have to start all over again. These are the pragmatic issues that are of concern. The overriding concern is that sexual assault is not confined to central Sydney; it happens all over New South Wales.

CHAIR: It is the pragmatic aspects that very much weigh on the Committee's mind to make recommendations appropriate and outcome focused for the betterment of the community and also the victims as a priority. The Director of Public Prosecutions spoke about the capacity of the Local Court to use "Through-care"—I think that was the terminology used—in looking after the victim in a more holistic way, a quicker and shorter gathering of evidence and a capacity to present evidence, in order to minimise the exposure of giving evidence and cross-examination and those sorts of capacities. Do you think the Local Court would have the ability to cater for the descriptor of "Through-care"?

Mr HENSON: Very few matters prosecuted on indictment and going through the committal process result in the victim having to give evidence in the Local Court—that is part of the answer. Those that do, result in the victim giving their evidence by remote CCTV. So the Local Court already has that capacity. We are sensitive to the needs of victims. As I said earlier, is the Local Court confident that it can provide a greater degree of care in that regard? I think it already does. Domestic violence is part of the raison d'etre of the Local Court. We deal with thousands of matters where victims of domestic violence give their evidence. We fast track them. Where they are defended they are to be heard within three months, for the obvious reasons that emotions subside and the realities come to bear. Sometimes victims are prevailed upon by the wrong person for the wrong reasons not to give evidence.

CHAIR: Do you see a similar correlation between the domestic violence approach to that of the child sexual assault approach?

Mr HENSON: There is no reason why not. Let's get back to what I said earlier about the efficiency of the Local Court. It is and has been for the past 11 years—the former Attorney General said the past six years but he was wrong on that—identified by the Productivity Commission as the most efficient court in Australia in terms of the disposal of its criminal caseload. The average time across the State between a plea of not guilty and a hearing is 14 weeks. I am not sure that it is fair in the pursuit of justice to try and drag that down much further. I think that is a pretty good outcome. If you apply the same standard to sexual assault prosecutions as you apply to domestic violence matters yes it is possible, but it will come at the expense of other types of matters in the system.

CHAIR: You will be eight magistrates down in July next year.

Mr HENSON: That is what the previous Attorney General told me.

The Hon. MELINDA PAVEY: With less cases.

CHAIR: Yes. How many magistrates does that leave you with?

Mr HENSON: One hundred and thirty but you have to understand that as well—17 are dedicated to the Children's Court, five are in the coronial jurisdiction, 46 are on country circuits scattered around New South Wales and the rest are in the Sydney metropolitan area. So on average on any given day there would be around 100 magistrates sitting in courtrooms.

CHAIR: How many District Court judges could potentially have this caseload? I am wondering if there are more magistrates hearing these things is there a greater scope for the spread of inconsistency to occur?

Mr HENSON: Inconsistency in what way?

CHAIR: Is there a smaller number of judges who are hearing sexual assault cases?

Mr HENSON: Yes, the mathematics dictates that.

CHAIR: So a smaller cohort?

Mr HENSON: Yes.

CHAIR: Then there is a large cohort of magistrates?

Mr HENSON: Yes.

CHAIR: In your view would that impact on the range of inconsistencies?

Mr HENSON: No, I do not think so.

CHAIR: How can we protect against that?

Mr HENSON: You cannot protect against one person's opinion being different from another person's opinion. As the High Court said, what is aimed for is consistency in the application of the law not some sort of mathematical outcome. It is a difficult question to answer convincingly for that reason. There is a difference between somebody who is found guilty and someone who pleads guilty. The conduct may be identical but the outcome will be different because the law informs that the penalty should be mitigated because of the utilitarian value of the plea to the administration of justice. It is not readily understood within the community and some sections of the community think it should not matter but the law says that it should.

CHAIR: On that last point, today New South Wales Police argued that under section 21A of the Crimes (Sentencing Procedure) Act too much weight is given to mitigating circumstances.

Mr HENSON: Sections 21A (2) and (3). That would be aggravating and mitigating circumstances.

CHAIR: Yes.

Mr HENSON: That is the law created by the Parliament of New South Wales interpreted by the superior courts of New South Wales and the High Court.

CHAIR: The New South Wales police evidence today was that that should be given less weight or that section should be amended. You just articulated mitigating circumstances. What is your view of using mitigating circumstances for section 66A-type assaults on a child under 10 years that would be the community expectation?

Mr HENSON: You either have a law that is consistent in its application to every offence or you do not. If you singled out those types of matters to be excluded from section 21A (3) considerations, then somebody is going to say, "What about me? What about this offence" as we saw in the mandatory sentencing debate. It started with the one punch. It moved on to assaults on police and it has moved on to domestic violence. Everybody wants to have their outcomes mandated, in which case you have a serious problem in terms of the erosion of judicial independence. I am not going to comment on a decision made by Parliament to create section 21A (3) other than to say that it binds me as a matter of law as do the decisions that go to the exercise of the discretion that are handed down by the High Court and the Court of Criminal Appeal.

CHAIR: In the case of Muldrock, for example?

Mr HENSON: It does not affect the Local Court, but yes.

The Hon. MELINDA PAVEY: In your earlier testimony you mentioned that 98 per cent of criminal cases are heard in the Local Court. Has there been an assessment of the percentage of child sexual assault cases heard in the Local Court compared to the District Court or higher court?

Mr HENSON: I think we provided a schedule to the letter that we wrote setting out the difference. It is around about two to one: two in the Local Court and one in the District Court.

The Hon. HELEN WESTWOOD: My question is about specialist courts. This comes from my lack of experience of the criminal justice system. Does a specialist court have to be fixed in one place? Could the court not hear matters in places other than Sydney?

Mr HENSON: Yes it could, but depending what is attached to the specialisation makes it problematic, I think. I presume you are talking about victim support, psychologists and the like?

The Hon. HELEN WESTWOOD: Yes?

Mr HENSON: The more you add to the train, the harder it is to move it around the countryside. And there is a wear and tear factor on the judiciary in constantly dealing with sexual assaults. My colleagues in the

District Court raise it as a matter of concern to them in their enjoyment of their work. Almost day in day out they are doing back-to-back sexual assault trials. It is draining.

The Hon. MELINDA PAVEY: In relation to alternative sentencing options for child sexual assault offenders, what are your thoughts on the use of anti-androgenic medication for child sexual assault offenders?

Mr HENSON: Do I have to give an opinion?

Mr CHARLES CASUSCELLI: Yes.

Mr HENSON: I do not have the knowledge to be able to answer that question with any self-confidence.

The Hon. MELINDA PAVEY: That actually was a good answer. From the evidence the Committee has heard today from Andrew Tink and others, there is a real disconnect between what modern therapies are available and how they could be used. It is a developing space, which is part of the terms of reference of this Committee to look at.

Mr CHARLES CASUSCELLI: There is a real diversity of opinion.

The Hon. MELINDA PAVEY: Yes there is.

Ms MELANIE GIBBONS: Are there any other options in sentencing you have come across in other jurisdictions that we should be considering?

Mr HENSON: One thing I can say is that there is relevant consistency of sentencing options available throughout the Commonwealth. There are none that would answer your question of which I am currently aware. The criminal justice system is a fairly blunt instrument, I am sorry to say.

The Hon. MELINDA PAVEY: Is there any national platform level for judicial officers to look at or is it the domain for politicians through COAG?

Mr HENSON: I think it is the domain of the politicians. There is a separation of powers issue here. It is appropriate for the judiciary to provide advice to government. It is not appropriate for them to take on the role of government in any respect.

CHAIR: Has that advice been garnered?

Mr HENSON: Well, this is one area where some advice has been provided.

CHAIR: But specifically about the inconsistency across the jurisdictions and nationally?

Mr HENSON: No, not that I am aware of.

CHAIR: The Director of Public Prosecutions indicated that there was a good model in Victoria regarding the hearing of multiple cases.

The Hon. MELINDA PAVEY: In Tasmania.

The Hon. HELEN WESTWOOD: And in Queensland.

CHAIR: Are there jurisdictions from where you would like to take an example and put here in New South Wales?

Mr HENSON: I do not think I can answer that question off the top of my head. The Council of Chief Magistrates meets twice a year and we discuss amongst ourselves the various sentencing options available in other States and Territories. There are none in the forefront of my memory at the moment that would answer your question.

Ms MELANIE GIBBONS: Speaking of community expectation, one of the things we are finding is that the average sentence is that four years keeps coming up and that does not seem to be in line with community expectation. When the scope is so large for what can be sentence given, is there a reason why four years seems to be the appropriate sentence imposed?

Mr HENSON: That would be a sentence in the District Court?

Ms MELANIE GIBBONS: Yes.

Mr HENSON: I am not sure I should comment on sentences even though I am a member of the District Court. The head of the jurisdiction should comment on that. I can hazard a guess as to why that might be so, but the maximum sentence is reserved, according to law, for the worst case. People who are distraught as victims of sexual assault would think that their case is always the worst case and I can understand that.

Ms MELANIE GIBBONS: I guess for us four years seems hard to justify to the community for an average sentence, but that is from where some of this push for minimum sentences is coming.

Mr HENSON: Criminologists will tell you that the higher you raise the bar, the more people would be disinclined to enter a plea of guilty. So the more concerns the Deputy Chair spoke of regarding the impact of delay on victims of sexual assault will become exacerbated. It is a complicated maze, I am sorry to say.

Mr CHARLES CASUSCELLI: If the ultimate aim was to ensure greater consistency in sentencing outcomes, do judges need more or less prescriptive guidance from the Legislature?

Mr HENSON: It is consistency in approach to outcomes. It is not that everybody wakes up on Monday and imposes the same sentence at 10 o'clock in the morning.

Mr CHARLES CASUSCELLI: That is true.

Mr HENSON: It is a different thing. The opportunity to seek guidelines lies with the government of the day or the Attorney General of the day. That is a matter for government.

Mr PAUL LYNCH: Do you think the system would have benefitted from more guideline judgements?

Mr HENSON: That is an interesting question. My hesitation would suggest that possibly may be the answer, rather than yes—in some areas; not in all areas.

CHAIR: In the area of child sexual assault?

Mr HENSON: Possibly but, of course, the range of child sexual assault is so diverse from aggravated down to indecent assault of a child. For which ones do you want guideline judgements?

Mr PAUL LYNCH: That raises another question. Some things said to us include the complexity in the number and types of different offences and that there might be some benefit in having a review of those sections and perhaps rewriting them, making them clearer, simpler and with less divisions. Is that something with which you would agree from where you have been sitting?

Mr HENSON: Yes, I think so. I think there is a need to look at how many categories there are. It becomes complicated because there are so many.

The Hon. MELINDA PAVEY: Just by way of background, apparently there are 38 child sexual assault offences in the Crimes Act 1900 and eight different bits of legislation encompassing that area.

Mr HENSON: Government would know. I am not talking about the present Government but government in general would know the reason there are 38 separate offences. I do not. There are different activities that would justify a separate offence and, of course, you have the problem if you amalgamate too much conduct into the one offence that you may begin to breach what was identified in the High Court in DPP and De Simoni where you take into account extraneous considerations on sentence for a lesser offence. You also have the problem, and the DPP probably would respond in this fashion if it were asked the question, that it reduces the ability to charge bargain from a defended matter into a plea of guilty.

Mr PAUL LYNCH: Or the bargaining might come around the agreement of the facts?

Mr HENSON: But the agreement of facts has to be brought within the nature of the section charged otherwise you would have the De Simoni problem, which you take into account.

Mr PAUL LYNCH: Or the section and negotiation comes up in the charge over the facts, presuming both versions fall within the parameters of the section?

Mr HENSON: I cannot think of how it might be done, but I am sure it could be done.

CHAIR: Are you aware of the New South Wales pre-trial diversion of offenders program known as Cedar Cottage?

Mr HENSON: Yes, but not with any great detail. I know of its existence.

CHAIR: You are not aware of its success or otherwise?

Mr HENSON: No I am not.

The Hon. HELEN WESTWOOD: You mentioned the Children's Court. One of the things we have been looking at today is young offenders, particularly those where there are similar age offences. For example, a 17-year-old has perhaps what they perceive as consensual sex with a 15-year-old. Does that come before the courts very often or is that dealt with through other programs?

Mr HENSON: I think they do come up fairly often. Young love is no stranger to our society. I think that is quite a common offence. Whether it is charged universally by the police, I am not quite sure.

The Hon. HELEN WESTWOOD: In those circumstances, magistrates have the option to refer those young people to other programs?

Mr HENSON: To youth conferencing?

The Hon. HELEN WESTWOOD: Yes?

Mr HENSON: Unlikely for an offence of that gravity. Again, it would depend upon the circumstances, but more likely than not it would be dealt with through the ordinary processes of the Children's Court. I do not sit in the Children's Court so I should not be commenting on something that is better left to the president.

The Hon. HELEN WESTWOOD: All right. I thought you may have been able to offer some comments. If not, that is fine. I will leave it until perhaps we hear from someone from the Children's Court.

The Hon. MELINDA PAVEY: Thank you for your evidence today.

(The witness withdrew)

(The Committee adjourned at 4.43 p.m.)