REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO CHILD SEXUAL ASSAULT MATTERS

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At Sydney on Tuesday 26 March 2002

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. Ron Dyer (Chair)

The Hon. Peter Breen
The Hon. John Hatzistergos
The Hon. John Ryan
The Hon. Janelle Saffin

NICHOLAS RICHARD COWDERY, QC, Director of Public Prosecutions, 265 Castlereagh Street, Sydney, and

LEE PURCHES, Manager, Witness Assistance Service, Office of the Director of Public Prosecutions, 265 Castlereagh Street, Sydney, affirmed and examined:

CHAIR: Did you receive a summons issued under my hand in accordance with the Parliamentary Evidence Act?

Mr COWDERY: Yes, I did.

Ms PURCHES: Yes, I did.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr COWDERY: In broad terms, yes, I am.

Ms PURCHES: I am.

CHAIR: Will you please briefly outline your qualifications and experience as they are relevant to the terms of reference of this inquiry?

Mr COWDERY: I am the Director of Public Prosecutions [DPP], responsible for the prosecution of all child sexual assault cases in the State, at Local Court, District Court and higher levels. It is in that capacity that I provide the evidence that I do. I have been the DPP since 1994, and that aspect of my functions has been the same throughout that period.

Ms PURCHES: I have three degrees and I am a social worker employed as manager of the witness assistance service with that qualification. My role involves overseeing the delivery of the service statewide to all the regional offices as well as our Sydney head office. I have a range of experience in, I suppose, counselling and other areas in the Department of Health and other organisations and experience in working with victims of sexual assault as well as our experience with the witness assistance service in supporting witnesses who are giving evidence in matters relating to sexual assault prosecutions.

CHAIR: Mr Cowdery, you have made a written submission. Is it your desire that that be included as part of your sworn evidence?

Mr COWDERY: Yes, it is. It is a submission provided on 13 February.

CHAIR: Ms Purches, I take it you are also willing to have the Office of the Director of Public Prosecutions' written submission included as part of your sworn evidence?

Ms PURCHES: That is right.

CHAIR: And you have made a separate one as well?

Ms PURCHES: Yes.

CHAIR: And I take it you are willing to also incorporate it?

Ms PURCHES: Yes, a separate submission.

CHAIR: Mr Cowdery, I now invite you to make a brief oral opening statement to the Committee.

Mr COWDERY: Thank you. I do not wish to add to the substance of what is already provided to the Committee but I record that I made a written submission on 13 February; that a number of specific questions were provided to me on 19 March in written form, answers provided in the Committee; and that yesterday, 25 March, detailed answers to those questions were provided in

writing to the Committee. I request that those answers be incorporated into the evidence I give to the Committee or into the submission, whatever the appropriate course is.

CHAIR: I think the appropriate course is if you table those responses that you have emailed through and we will have them as part of our record.

Mr COWDERY: I do so. I table those responses provided on 25 March.

Document tabled.

CHAIR: Do you wish to add anything?

Mr COWDERY: I do not wish to add anything, thank you. I believe the written submission and the responses to the specific questions address matters of relevance on which I am able to give evidence that arise out of the terms of reference of the Committee.

CHAIR: I state for clarity that any question that I or my colleagues might ask may be responded to by either or both of you as you choose.

Mr COWDERY: Thank you.

CHAIR: I start by referring to the equipment used in the course of court proceedings for child sexual assault matters. In your responses to answers—that I have seen only this morning—you appear to refer to a considerable number of problems that sometimes arise. These problems are detailed in a report from the Office of the Director of Public Prosecutions made in August 1999 to the Attorney General's Department apparently in connection with a survey of electronic equipment. I want to cite quickly some of the examples you give. First of all, you say that the problem can arise out of the multiple listing of matters requiring closed-circuit television [CCT]. For example, there would be one CCT facility at Penrith Local Court and Penrith District Court. Another problem that the report states is that court staff did not know on a particular occasion how to use the equipment at Wagga Wagga and Sutherland. You also referred to a problem of screen size and, finally, the positioning of the camera within the courtroom. Could I ask you to expand to the Committee on those problems of a practical nature?

Mr COWDERY: A number of issues are included in the report that we made in August 1999 to the Attorney General's Department. The multiple listing of matters is something that I would assume is self-evident. If there are a number of matters of a similar kind requiring the use of limited equipment, then there is greater demand than there is supply. Some of the needs of witnesses in the particular cases that are listed are not taken into account at the time of the listing of matters. That is an administrative issue that could be addressed. Part of the problem, of course, is that the courts are anxious to deal with these matters as soon as they can and in the listing process they try to ensure that there it is no unnecessary delay, but the net result is that one part of the system—that is the system responsible for listing and hearing the matters—is not keeping pace with the other part of the system, the provision of the equipment required for them.

The provision of electronic equipment to the courts has always been limited by resources, by the funds available for the provision of equipment, and particularly for the provision of high-class equipment, equipment of a sufficiently high technical standard to enable the objective to be achieved. In a sense, we have done it a bit on the cheap, and if we do not address that issue now we will create more problems for ourselves further down the line. Another matter that you refer to is court staff not knowing how to use the equipment. That is a fairly straightforward training issue in the administration of courts. Where equipment is installed it should be accompanied by appropriate training regimes for the court staff who will be required to use it. There is nothing too difficult about that issue.

Screen size is something that troubles us. What we try to create ideally by closed-circuit television is the ability to bring the child witness into the courtroom in all senses except physically. In other words, to have the child participating in the court proceeding at a level approximating that of a witness who is physically present in the courtroom. When a witness gives evidence in the witness box in the ordinary way, the witness is present, reacting to questions, visible to the decision-makers—whether it be the judge or the jury or both—evident to the questioner or to others who may question

the witness later. Their reactions are able to be seen, nuances in the evidence are able to be detected if they are there. There is the opportunity to make an assessment, not just of the content of what the witness is saying but of the reliability and credibility of that witness. In our adversarial system that is an important issue. When the witness is removed from the courtroom to a remote location and is present in the courtroom by image on a screen, it is impossible to duplicate all those subtleties of having the witness present in person, but we should be aiming to try to do it as much as possible given the limits of technology.

The size of the image of the person is important, because if the person is seen as a very small image in a large court room there are implications involved in that. The ability of the judge, the jury and counsel to see the reaction of the witness is hampered if the image is physically small and difficult to see from a distance in the courtroom. An additional complication is created when there is a desire to have not just the witness beamed into the courtroom but also the surroundings so that people can be satisfied that there is no prompting going on in the room or inappropriate support or contact being made while the witness is giving evidence. If you have to zoom back and take in a bigger part of the room in which the witness is giving evidence, the image of the witness becomes even smaller and all those problems are exaggerated. So the provision of adequate technical equipment to enable the child to make a full and proper impact on the proceedings without physically being in the courtroom and without being subject to scrutiny by the accused and unfair pressure by other means is a very difficult issue.

The positioning of the camera within the courtroom is another issue. This is, in one sense, a very minor technical issue which must not be difficult to overcome but it can have a big impact in the way in which the witness gives evidence. The child has to be able to see the person who is asking the child the questions, the judge, and not be able to see the accused, which sometimes happens. These technical matters are somewhat sensitive, but they need to be given full attention. Speaking for myself, I get the impression that this is something that has been introduced perhaps without sufficient forethought and planning. We need to take stock of the situation and to do that planning at this stage before we go any further. There are some very good systems in operation. I have seen myself the system that is operating in the District Court in Perth, for instance, where they have large screens, well set-up remote rooms where the witness is giving the evidence and very competent staff running it. Very good precautions have been taken. That is in one court complex which is centralised in metropolitan Perth. You can do that sort of thing where you have got everything under the one roof. Where you have got a large number of courtrooms scattered across the State to be serviced in this way, it is a very much more difficult exercise to bring the performance up to that high level of uniformity.

CHAIR: One would hope that in a busy court such as Penrith, to give one example, that difficulty would not arise.

Mr COWDERY: One would hope so. Maybe it is a question of resources. That is what is often cited to us. Of course, the administration of all of this is in the hands of the Attorney General's Department, which has the responsibility for conduct of the courts.

Ms PURCHES: In relation to Penrith court, I am aware of the Witness Assistance Service Officer [WASO] raising on a number of occasions that several child sexual assault matters with child witnesses have been listed for the same date. There being only one facility (CCTV) there, that means having all those children prepared for giving evidence on the day and for the emotional build-up, and then only one of those matters can be heard on that day. So it does have a lot of impact on the children in terms of uncertainty and not knowing and then some matters going ahead and some not. That is not an uncommon occurrence. Because of the large number of child sexual assault matters that are heard in some of the courts, it is very difficult. Those matters are prioritised to be heard, but not all can be heard or the children might have to elect not to have the facilities available to them if they want to proceed.

CHAIR: I note that it is stated at page 23 of your prepared response to our questions:

> In the District Court child sexual assault trials are a significant part of the trial case load.

In Sydney west and in the country you say that 30 to 50 per cent of all criminal trials are sexual assault cases, mainly child sexual assault trials, and it is not unusual in country circuits for two or three weeks of the trials to consist of child sexual assault matters. Given the propensity of these cases to be in the lists, it seems to me that if as a matter of policy the Government believes that closed circuit television [CCTV] and the other technical resources ought to be available, those facilities should be available at least in main country venues.

Mr COWDERY: I agree with that entirely. The facilities should be provided, and they should be provided at the highest technical standard that is capable of being achieved. Further, the people who operate them should be trained in their operation. To me, that is fairly basic stuff.

CHAIR: The report I referred to a short time ago, which your office made in August 1999 to the Attorney General's Department, was apparently in response to a survey about electronic equipment. Are you aware of what happened following your response to the survey?

Ms PURCHES: Just to comment on that, my awareness is that a questionnaire was circulated by the Attorney General's Department. I was actively involved in ensuring that it went out to all our solicitors and Crown Prosecutors. They individually responded to the questionnaire, which was then formulated into a report that was compiled by the Attorney General's Department. I do not personally have a copy of the report.

CHAIR: I am really asking what to your knowledge has been the response of the Attorney General's Department as far as providing resources and equipment arising out of the defects that might have been identified in that report.

Ms PURCHES: There have been some changes. One of the changes that has been advantageous is the use of a mobile CCTV unit which can be taken to courts where there are no CCTV facilities. To my knowledge there is just one of those mobile units. That has made a bit of a difference because prior to that we would have to have matters relisted at another court. There has also been increased size of screens in a number of courts. I am not aware of the number of those courts, but we have seen an upgrading of facilities in courts.

CHAIR: It is stated in your submission, as I recall, that defence counsel sometimes make an application to the presiding judge on the basis of their claim that the use of this equipment would cause some prejudice to the accused. I do not understand that argument. How in one case could prejudice be said to exist where it would not usually exist, if it is a standard available form of equipment?

Mr COWDERY: I think it is a bit of a hangover of an argument from a former time. Defence counsel need to move with the times as well.

The Hon. JOHN HATZISTERGOS: You cited one case in Wollongong. I do not know what that is about. You say, "e.g. Wollongong" on page 8.

Ms PURCHES: I could make some comment about that. Some of the resistance to the equipment being used and concern about it being prejudicial seems to be localised. One example is that it was reported to us on a number of occasions in the Wollongong area that defence counsel are arguing that the use of CCTV is prejudicial to the accused. That was citing one example of one area where that argument seems to be more common. In other areas it is not such a problem. So it seems to be localised.

CHAIR: Some submissions, as distinct from your own submission, also suggest that prosecutors, as distinct from defence counsel, are not willing to use electronic means to give evidence. Are you aware of that and, if so, does that unwillingness arise out of their perception that the equipment might be less than satisfactory?

Mr COWDERY: I am aware of that. That is one of the concerns—inadequacy of the equipment that is available. Another concern from the point of view of some prosecutors is that juries may be less inclined to put weight on the evidence that is given by closed circuit television because they are removed from the witness and do not have that immediate contact, which may be more

persuasive to them. I know that some prosecutors certainly have that view. I do not know what the current state of research is, but some research has been done into this issue of whether or not conviction is more or less likely following the use of closed circuit television. I could have access to that material later, but I think the results are contradictory. In some studies it is thought that conviction is more likely. The view is that juries paradoxically give more weight to what they see on a television screen to what they see in person because they have become used to watching things on television and accepting that at face value. On the other side, there are some who are less impressed because they feel that the jury is remote from the witness and a witness does not have the same impact that a person in the same room does. There are different views held by different people about it.

Ms PURCHES: I have just recently read a study which I will need to find the reference for you. There certainly seems to be differing opinions. Some of the recent research indicates that in controlled studies—not necessarily around particular court cases—looking at the influence of CCTV on decision-making about wrong doing, it does not necessarily hamper people coming to a particular judgment. I think there is a current debate still going on about exactly where it does influence juries in their decision. That debate will probably continue for some time, I would imagine.

CHAIR: At pages 10 and 11 of your submission you refer to the matter of cross-examination of child witnesses. If I could put to you some of the difficulties that you have identified. For example, you say:

> Suggestions that might be put to the complainant include that they are not telling the truth, that they have been confused or that they are making up stories.

You also state:

> Children often disclose a little at a time to see what response such disclosures receive and then may disclose more after time.

You say the outcome of that can be that the defence will suggest that the child has been making things up as he or she goes along. You also refer to general techniques of cross-examination and say, for example, that the use of leading questions is developmentally inappropriate for children. You also say:

> Children are reported to rarely seek clarification when they do not understand a question and that WAS [witness assistance service] officers have also observed that when providing court support.

You say that those officers have sometimes reported seeing that a child may not understand a question and that situation is not picked up by counsel or the judge who often have their heads down reading and writing and are not directly looking at the child. I invite you to comment on some of those fairly obvious difficulties as far as children's evidence is concerned. I also ask the obvious question: What, if anything, can be done about some of those matters?

Mr COWDERY: The background to all of this is that we operate an adversarial system of criminal justice. Traditionally, it has been very confrontational in the way in which it is implemented. It is adversarial in the sense that one case is battling against another case. It is not a search for the truth; it is putting a Crown case against a defence case, and the jury being asked whether or not they are satisfied beyond reasonable doubt that the Crown case has been made out. Traditionally, counsel have been schooled in taking full advantage of that adversarial system and the confrontational approach, and their adversarial techniques have been developed with that in mind.

The phenomenon of the prosecution of child sexual assault is comparatively recent. In this State the flood really began, I suppose, about 10 or 12 years ago and it has been building ever since. But it is not only in this State where it has happened; it is an international phenomenon that has been experienced in virtually all countries around the world, which is one of the interesting aspects of this. Even in places like China and countries in South America and some African countries, they are experiencing a huge increase in the number of child sexual assault cases being reported and brought to trial.

My own view is that this does not necessarily reflect an increasing incidence of this offending; it reflects an increasing amount of reporting of it. As I say, this has been comparatively recent, within the last decade or so. Counsel who are appearing in these matters and judges who are presiding over these trials have, by and large, come up through the old system, if I can call it that,

where no particular concentration had to be put on the most effective way of prosecuting and defending cases of peculiar sensitivity, such as child sexual abuse.

Many judges, magistrates and counsel have brought themselves up to modern thinking and have made adjustments to their techniques to accommodate the particular sensitivities of these cases and have gone to some effort to educate themselves and to keep themselves abreast of developments, but many have not. I think it is fair to say—and we are talking about cross-examination of child witnesses here—that there are still some defence counsel who are convinced that the most effective way of doing service to their client is to continue on that confrontational boots-and-all cross-examination approach, which can seriously affect the way in which the case is adjudicated and the outcome of the case and also, of course, seriously affect the child witness involved.

I think it is a matter of increasing sensitivity in the profession to the particular challenges of these types of cases and bringing out training regimes and our level of expertise up to modern standards. Within our office, we try to do that in relation to prosecutors by having training courses and the like and all the assistance of people such as the Witness Assistance Service officers, but defence counsel are very often from the private bar, and of course what arrangements they make are a matter for them.

CHAIR: At page 4 of your submission you say: "Those questioning children in court should also be well versed in child development and linguistics and adapt questioning to meet the needs of the child." I think it flows from what you are saying that that may not necessarily be the case, particularly with defence counsel coming, as you say, from the private bar.

Mr COWDERY: There may not be much incentive for them to spend time, and perhaps money as well, obtaining the materials, obtaining the training and gaining the knowledge that enables them to approach the matter in a more sensitive way. They will have to catch up eventually, because they will find themselves out of step with the judges, the magistrates, the prosecutors, and indeed the juries as juries become more aware of the sensitivities involved in these cases. So they will have to catch up, but until now there have been some fairly alarming examples of the old-fashioned method being used by defence counsel.

The Hon. JOHN HATZISTERGOS: What you are saying, as I understand it, is that some actually feel that it is in their clients' interests to advance their cases in this particular fashion. Presumably, those people may not be susceptible to too much training; that is the view they take.

Mr COWDERY: Exactly, yes.

CHAIR: Before you respond further to the Hon. John Hatzistergos' question, it seems to me that it is well known that judicial officers, for example, undergo forms of training these days. Why should it not be that members of the private bar specialising in a given area might not be required to undergo some form of training?

Mr COWDERY: That is a large issue. I speak as a former member of the private bar of some length. But it is coming in. From 1 July this year there will be mandatory continuing professional development.

The Hon. JANELLE SAFFIN: It is general; it is not directed to any particular skills or competencies?

Mr COWDERY: That is correct. But it may be possible to graft onto that new scheme some specialist training in this area, and perhaps in other areas too, and award extra points as an enticement to them to undertake it, or something like that.

CHAIR: Traditionally, judges have been very jealous of their independence and they have accommodated themselves to undergo various forms of training. It does not seem to be beyond the entire realms of reality that the bar might do likewise.

Mr COWDERY: No. To be fair, I think the bar is moving in that direction. The institution of this program that starts on 1 July is recognition of that, and the bar has become much more sensitive to public views and public requirements over recent years.

CHAIR: Page 6 of your submission contains reference to the Witness Assistance Service. It is stated that there are 14 WAS officer positions and one WAS officer indigenous identified position across the State, and that the aim of WAS is to have contact with every child who is a sexual assault complainant where the matter is briefed to your office to prosecute. How adequate are the resources of WAS at the moment, and is there a need for some additional staffing or resources to be devoted to the service?

Ms PURCHES: We have worked very hard at responding to the recommendation of the Wood Royal Commission, which recommended that Witness Assistance Service officers be available to all child sexual assault matters. What we have put in place is a very proactive early referral process so that we are not reliant on solicitors or Crown Prosecutors to refer those matters to our service; we can electronically obtain that information, identify those matters and follow them up. And we now have a very good database system which allows tracking of those matters.

One of the problems that we are finding in terms of our resources is that we have competing demands. Child sexual assault matters are our main priority matter, and we have to prioritise child witnesses above all other service delivery. However, we do have very high caseloads of other priority matters. One of our main principles is to try to refer children as much as possible to the sexual assault counselling services both with New South Wales Health and also with the non-government child sexual assault and adolescent sexual assault counselling services.

One of the things we are encountering as a problem is that those services are not always in place. Particularly in rural and remote areas, a retention of staff is difficult and often counsellors are fairly inexperienced and do not remain in positions for a long period of time, and when people leave positions it often leaves a vacancy for a considerable period of time.

By way of citing an example without wanting to disclose localities because some of the matters are currently still proceeding, we recently had one Witness Assistance Service Officer trying to cover from a larger centre one of the regional courts and there were quite a number of child witnesses giving evidence over a three-week period. And none of those children could be assisted by sexual assault counsellors, and that Witness Assistance Service officer had to travel and remain for a three-week period in that locality to assist those children who had not had court preparation and did not have access to court support. That also means that a large number of matters in the more major area were then unattended, including some sexual assault matters.

So there are a lot of competing demands on our Witness Assistance Service officers to be able to provide that service, but they will provide the service to the child. But that also is less of a quality service from our point of view, and in that it usually is a service that is provided at the last minute, as opposed to a service where, if those resources were available or we had more resources, children could be given more thorough court preparation and counselling leading up to a court case, which we know does assist children.

That is one of the dilemmas for our service. We are feeling quite stretched because of the inability to necessarily be able to refer those children to other services. So whether we actually look at what is happening with those other services or we look at increased resources for our own Witness Assistance Service, I am not too sure which would be the most appropriate.

CHAIR: I return to the question of children's evidence. A passage at page 10 of your submission reads: "Defence barristers are skilled and trained in cross-examination techniques. A child is generally helpless when undergoing questioning of this sophistication. At times the Crown is unwilling to intercede, fearing that this will only prolong the cross-examination and the length of time that the child is in the witness box."

It seems to me that in this inquiry we are dealing with a very emotive issue in many respects. It also seems to me, reading the submissions that have come in to us from people who have "been through the mill", that there is a very sharp focused concern on the perceived inequality between the

child and those who are doing the questioning. In your view, what, if anything, can be done to reduce the inequality?

Mr COWDERY: There are at least a couple of considerations operating here. One is that the Crown Prosecutor is not the witness's representative. That is a misconception which is commonly expressed by victims and witnesses in prosecutions. They constantly refer to "their barrister" or "their lawyer", meaning the Crown Prosecutor.

The fact of the matter is that the Crown Prosecutor represents the community at large, and not the individual interests of the victim or the witness. That is the way our system is structured, and that is the way it should be, unless there is some fundamental change. But it means that the victim has an expectation which is not realised, an expectation of support, assistance, and perhaps protection, which, when objection is not taken to a line of questioning, for example, is dashed.

The other factor that is operating is the forensic aspect of what is happening. The prosecutor is there to present the Crown case, and, subject to the law, the rules, ethics and so forth, to urge that case appropriately so that at the end of the day the verdict is guilty. If the prosecutor is seen to be interfering too much in the conduct of cross-examination, to be raising obstructions to the defence, to be interceding on behalf of a witness who may be in some difficulty, perhaps for reasons entirely unconnected with the truth or otherwise of what is being said, then a jury in particular may think that the witness has something to hide, that the prosecutor is assisting the witness to hide that, and that may do damage to the Crown case. There are at least those two aspects operating in this particular dilemma. It makes it very difficult for the prosecutor to decide just where to draw the line, when to intervene, when to take an objection, when to even indirectly provide some assistance to the witness in the delivery of the evidence.

Ms PURCHES: Witness assistance Officers who are present in the remote witness room while the child is giving evidence by CCTV often have a sense of great frustration because they can see problems that are not necessarily being picked up in court. There is currently no clear role for a support person that is available in that court room to convey to the court, because you are in a separate room, that there are some difficulties. That is something that we could look at to address—whether it is the support person or some other person that has a designated role that can address the court when problems occur. They may be problems in relation to the equipment—

The Hon. JANELLE SAFFIN: It is understanding the questions. Under cross-examination the defence counsel often talk in negatives—sometimes double and triple negatives. Adults have a problem with that. Children who have a problem with abstract thinking cannot deal with it at all. It is allowed to go on and I am surprised that the judges do not intervene, because the child is not able to understand the questions and so they cannot elicit answers. It is very frustrating.

Ms PURCHES: You are very right. Sometimes those things are difficult to pick up because the court professionals are concentrating on many matters and—

The Hon. JANELLE SAFFIN: It is so obvious.

Ms PURCHES: I think it becomes more obvious to the support person with the child who has got to know that child and can really pick up very subtle nuances from the child that they are having difficulties, whereas if someone is cross-examining or you have a judge who is unaware of child development and a child's level of understanding then perhaps it is not picked up quite so easily. Another difficulty is the child's understanding of those questions. The research and our first-hand experience of seeing children under those circumstances is that children are reluctant to say that they do not understand. Even though in court preparation we can assist children to know that they are allowed to tell the court if they do not understand, I think that children still believe that they might be in trouble if they do not answer questions. That puts them in a difficult position.

We have also had children who have articulated to us that even though they need a break to go to the toilet or just because they are feeling distressed or very tired they are reluctant to ask for that break. That is about two things: wanting just to get things over and done with because it is a very gruelling task for them, but also because they do not want to be seen to be interfering with the process. Children understand that it is an important process and what their job is in that process. So they try to

assist the court as best they can. It would be very helpful for someone to understand the development of the child, the subtle cues, and work with a court and plan with a court before the child gives evidence how there can be some intervening, and an agreement about that intervening, to assist the child where they are in difficulty.

CHAIR: In your submission you raise the interesting idea of a pilot designated children's district court and local court. Among other things you suggest that the specially designated court would entail the judiciary and the court staff in receiving training in the dynamics of child sexual assault, the developmental ages, linguistics, the special needs of children and the legislative provisions pertinent to children giving evidence in court. Court staff would be trained in the use of CCTV and the video and audio playing equipment. Further, mobile units would enable the children's, district and local courts to sit in rural and remote areas with circuit listings. That seems to me to be a very interesting and worthwhile idea at least to trial. Would you like to say something to the Committee about the rationale and merits of that suggested idea?

Mr COWDERY: As you mentioned Mr Chairman, from page 13 of our submission, we have elaborated a proposal to have a dedicated local court and a dedicated district court to deal with these matters. It seems to us to be one way of bringing into the adjudication of these matters the necessary skills, which are specialist skills, and doing it in a cost-effective way, in a way that does not do any injustice to the parties involved, including the accused. It is an adaptation of part of the existing system, not the creation of something entirely new. It would perhaps also assist in ensuring that there is not unnecessary delay in the adjudication of these matters.

We have precedents for special courts of one kind or another. We have specialist Children's Courts, of course, throughout the State. We have the pilot scheme of the Drug Court, which is operating at present. It is more experimental than what we have proposed for this, but it draws on those same ideas of having specialists involved in administering a specialised regime directed towards a particular end. For that reason this proposal is put forward as a trial, as a pilot, as an experiment of a way in which we might be able to reduce some of the present difficulties and disadvantages that we face by running these cases through the ordinary court system. If it is organised properly I think it could be virtually cost-neutral apart from training because it would take existing personnel, existing resources, the existing system and just adapt one portion of that. We put it forward quite strongly and seriously as something that perhaps should be considered.

CHAIR: I remember having a conversation with former Chief Justice Sir Laurence Street—in a non-judicial context—on one occasion when he said that he leans against setting up specialist tribunals. His main argument in that regard is that there tends to be a breaking down of the generalist abilities of the court and there are some dangers in that people tend to have an in-house view of issues and they become isolated from the general trends in the law. I am not sure whether I have explained his position adequately but that was the effect of what he was saying. It is certainly true that in recent years all sorts of specialist courts—you referred to them in part—and quasi-judicial tribunals have been set up. Do you think this is going too far and that we ought to remember that there is still a Supreme Court and a District Court?

Mr COWDERY: No, I understand those concerns and if these initiatives are not properly managed there is a risk of people becoming indoctrinated in their own little patch and losing sight of the wider picture. But a proposal like this could be managed in such a way that once the systems are in place the personnel can be rotated through it. So the magistrates, judges and prosecutors could do a stint in the special court, acquire the necessary skills and expertise to conduct that court and put that into practice for a time at all levels and then be rotated out of it and somebody else rotated in. That would have the side benefit that people who have done this period of time in this special court would then take with them the skills, knowledge and expertise that they have developed in the special court and then would be in a position to apply them more generally to similar circumstances in the wider system. It might be that the special court, after a time, would no longer be necessary because sufficient people would have gone through it and been sent back into the wider system, where they can apply everything that they have learned. Administratively, though, at least for some years I would think, there would be other practical benefits achieved by having a specialist court.

CHAIR: You put forward another interesting idea, the proposal for an independent expert interviewer. That appears at the bottom of page 14 of your submission. Would you like to say

something to the Committee about that? It appears to involve providing the court with a report to assist the court in adapting the court proceedings to best meet the interests and needs of the child, among other things.

Ms PURCHES: I will address that question. An independent expert interviewer would appear to be of some assistance to the setting up of the specialist court and the proceedings. We have suggested that that person would be involved in the initial interviewing of the child, would be an expert in forensic interviewing of children and would conduct the initial interview. They would not be involved in conducting the actual investigation after that interview had taken place but they would be in a prime position to also assist in assessing the child's needs for when they then are required to go to court as a witness and would be able to provide the court with an assessment of those needs so that right through from the beginning of the process to when the child is required to appear at court that information is available so that a plan can be put in place for that child's ongoing well-being and referral to appropriate services, and then for the court to be assisted in adjusting the process to meet the needs of the child.

We were talking earlier about children and their understanding of questions and those sorts of things. The expert interviewer would be in a position to do that. Because they are independent of the conduct of the actual investigation process and not involved in the prosecution process they are seen as independent but also would be very much part of the process. In the questions you put to us prior to the hearing you asked about what involvement they might have with joint investigation response teams and others. I would see that as being vital because they would be needing to provide information to the child protection agency about the child protection needs of the child. They would also be needing to pass on the interview on the video and the transcript would need to be acquired by the police. They would possibly even be allocated with the joint investigation response teams. It would be important for them to be part of the process but independent to each stage of the process.

CHAIR: Some years ago in another capacity, together with the Commissioner of Police, Mr Ryan, I launched the joint investigation team concept at Ashfield. That is, as you will be readily aware, a joint enterprise between DOCS and the Police Service. What is your impression as to how that is working in practice? Has it been an improvement?

Mr COWDERY: I think it is a great success.

Ms PURCHES: I think we see this—

CHAIR: I am not asking for praise.

Mr COWDERY: I am not directing praise anywhere in particular. I think the concept has been very successful and I think I am on the public record as having endorsed it years ago.

Ms PURCHES: What we found was that the reports from the evaluation of the pilot of setting up the joint investigation team originally were very favourable. I think that things have probably become a little more difficult because of the lack of resources available for fully utilising that structure. Like anything, you need to have the resources for anything to work really well. I think where the joint investigation response teams are struggling is particularly in rural and remote areas because we have had a number of reports of children having to wait considerable periods of time to actually be interviewed. That is problematic in itself because we understand that children need to be interviewed quickly. They need that so that they can be referred to sexual assault counsellors so that they can get on with their recovery process. Also, the longer they are not interviewed, the more likelihood that there is an opportunity for the evidence to be contaminated before they are interviewed, so that can then affect the prosecution process. So there is a real need for children to be interviewed quickly, and in some instances that is not happening.

The Hon. JANELLE SAFFIN: Can I ask a question just on a point you made? You said that children are not referred to sexual assault counsellors until they have had the investigation.

Ms PURCHES: That is right, and until there has been a disclosure by the child.

The Hon. JANELLE SAFFIN: Why is that?

Ms PURCHES: That has been because of fear of contamination of evidence so that counselling does not began until they have been interviewed by a sexual assault counsellor.

The Hon. JANELLE SAFFIN: How long might the delays be in rural and remote areas?

Ms PURCHES: We have had some reports of several months and that is just anecdotal. I do not have statistics on that.

The Hon. JANELLE SAFFIN: That cannot be in the best interests of the child.

Ms PURCHES: It is not.

CHAIR: So you see the independent expert interviewer, which seems to be a useful idea, as working with the JIT team, do you?

Ms PURCHES: Very much so. We should not abandon good ideas and structures that are in place, but we are probably adding another layer to that and that would increase the resources that are available. I mean, any of these ideas that we have talked about in terms of the specialist courts and having expert interviewers would require an adequate resource base.

CHAIR: Finally, on page 16 of your submission you refer to alternative models for the punishment of offenders. This may be getting into a fairly controversial area. You refer to the proposition that sex offenders who prey on children should be treated rather than punished, and that may have some merit. You go on to say—rightly, I would think—that such offenders rarely seek treatment voluntarily and that some form of criminal sanction is usually necessary to force them into some form of pre-trial diversion. Can you say something to the Committee about that matter?

Mr COWDERY: It does seem to be conduct that calls out for treatment as well as an expression of the community's view of disapproval through the criminal justice process. There are some diversion schemes in operation but they are very limited and, as you have commented, they are not usually selected by the offenders unless there is some compulsion for them to do so. There are some benefits in dealing with these people through the criminal justice system and imposing punishment under law but one of the other things that we should be considering, and considering very strongly, is how to prevent these people from offending again in the future and how to extend the services that are available to potential offenders. That is a more difficult area because they are not likely to self-select for treatment. One of the purposes of putting that in the submission is to draw attention to these issues and hopefully to encourage some examination of some of those issues and what may be some of the remedies.

The Hon. PETER BREEN: Is it the case that offenders against prepubescent children are less likely to recover—in those categories there are far more cases of recidivism—whereas people who are involved with post pubertal children—I think that is the expression—are often immature or in a situation that they have not been in before and when they feel the full effects of the law and proper counselling and support their prospects of recovery are often much better?

Mr COWDERY: Yes. It should not be forgotten that we are dealing here with a very wide range of people both as offender and as victim. We are talking about all kinds of offenders, male, female, heterosexual, homosexual. We are talking about all kinds of victims, males under 18 and females under 16. That encompasses a very wide range of permutations and combinations of offender and victim so it is difficult to generalise perhaps in the way that I might have done. Certainly, the literature seems to suggest that there are categories of offender against certain types of victim who are not amenable to treatment, that it is a condition that will persist, but it does not apply to every offender in the category that we are looking at.

The Hon. JANELLE SAFFIN: When you say "treatment" do you mean psychological or chemical treatment? Do you have a body of evidence that suggests a certain treatment? Is there any international evidence on that?

Mr COWDERY: I must say that I have not come prepared to talk about that.

Ms PURCHES: It is probably outside our area of expertise but there are people who have greater expertise than ourselves to comment on that. I guess probably the main program that we are familiar with is the pre-trial diversion program at Cedar Cottage. They would be able to comment on the actual success rate of their program in the treatment of offenders and also what program they are using. I think it would be better for them to comment on that. I guess probably one of the things I could add to what the Hon. Peter Breen was raising as a concern about young people offending is that it has been brought to my attention by sexual assault services that they see a large number of victims were matters do not come to us at the Office of the Director of Public Prosecutions for prosecution but where siblings have perhaps offended against other siblings and those sorts of areas. Some of those matters do not proceed criminally but there is often concern about the available services and treatment for these young offenders. I think that is probably another area where there could be a lot more done because I guess we are not so familiar with the research and the outcomes for those various categories of young offenders but one would certainly want to do more. One would hope that there could be change so that these young people who are offenders do not go on to reoffend.

The Hon. JOHN HATZISTERGOS: Just on that issue, you say there is a wide category of offenders and victims with whom you are dealing in any particular case. I think it would be correct to say that in terms of child sexual assault matters there would be different relationships between both the victims and the offenders. In some cases those relationships may be such as to inhibit your ability to obtain material which might bring an offender to justice more readily than would otherwise be the case if they were in a more distant relationship. Does the nature of the relationship between the offender and the victim in any way influence the level of support we give to victims who might be giving evidence? Are you sensitive to the relationship?

Ms PURCHES: It is very difficult to generalise about those situations. We find that there are very individual differences in each case that comes to us. What we do find is that where the offender is within the family or a person close to the family it can often be quite difficult. Either the family and the community around that child will be supportive of the child who is the victim of the sexual assault or they may not be. They may be struggling with the disclosure of the sexual assault, denying that it has happened, having difficulty believing that such a thing could happen in their family or their community. So it is really the dynamics of what is going on around and we cannot predict that from one case to the next, to say that this is the level of support.

Certainly when there are conflicts within the family around disclosure and the support of the children proceeding through the criminal process and coming to court, those children need a lot more support. It is a big struggle for them to go to court when they are not supported by the people that they really need to support them. A lot of the research has highlighted that one of the factors that assists children in coming to court and in the long term overcoming the experience of going to court is support from their mother and other people close by but maternal support is seen as crucial to that longer term impact and whether or not the child overcomes the impact of going to court a little bit quicker and in the long term.

The Hon. JOHN HATZISTERGOS: I go back to something we were discussing a little earlier that related to the previous question, that is, the question of CCTV. As I understand it, ultimately it is for the judge to determine whether he will make CCTV available in a particular case. On reading your submission, there have been instances where judicial officers have either not been aware of the legislation or for one reason or another have not been prepared to make orders allowing the use of CCTV. Are you able to summarise what sorts of factors have influenced the exercise of the discretion, and have they included things like the availability of equipment, the standard of the equipment that might be available and the particular circumstances of the victim in relation to the sexual assault?

Mr COWDERY: I am not in a position to give you a survey of reasons for the exercise of judicial discretion. That is something that I would have to canvass with prosecutors individually to see why they believe particular decisions were made in particular cases. I do not have a general sense of that, I am afraid.

Ms PURCHES: We did include in our submission a memorandum that was sent to me from one of our trial advocates who raised a number of issues in relation to judges' discretion around the

use of electronically recorded evidence, but it is difficult to tease out, without having the court transcript, whether any consideration was given to the needs of the child. What has been reported anecdotally to me from witness assistance officers is that it is not very often that the well-being of the child is discussed. It is more around legal issues that need to be decided by the court as to arguments around whether those facilities should be utilised. We have some court transcripts that indicate that on a number of occasions judges have also acknowledged that they have very little knowledge of the legislation so they struggle with knowing what to do with the legislation. We had one instance of a child who had given their statement electronically by audio tape and the legislation was difficult to interpret in the court proceedings because the judge felt concerned about the child being able to listen to their audio tape as their evidence-in-chief prior to being cross-examined. We felt that was probably a difficult position for the child to be placed in because they are about to be cross-examined on something that they have not had an opportunity to hear prior to going into that cross-examination.

They are some of the difficulties. I think that some of it is lack of awareness of the legislation. They are struggling with the legal aspects of what are being put in terms of legal argument about those facilities, whether or not equipment is available or malfunctioning or of a particular quality. Sometimes the interviews are not of a good quality, and that is an area we need to look at in terms of joint investigation response. Sometimes the actual quality of the interview hampers the ability to implement the legislation, but probably the wellbeing of the child gets a little bit lost in those discussions and most of the decisions are made on the basis of legal decisions.

CHAIR: I find lack of awareness of the legislation is a troubling matter, given what we were discussing earlier about the incidence of these matters in lists in courts across the State, including country areas. It seems to me to be highly regrettable, to use very mild language, that a judicial officer would not be aware of the legislation.

Ms PURCHES: We certainly have transcripts that indicate that a lack of knowledge has been acknowledged, that they are not aware of or have very little familiarity with the legislation and, in fact, it being reported that the judge's colleagues were also equally unfamiliar with the legislation, and that is quite concerning for us. The legislation, like any legislation, does not really give procedural information that assists the court. When you have deliberations around whether a child should listen to the audiotape, the legislation does not really spell out those procedural matters. That is where you can have a lot more discussion at a legal level, which is not necessarily in the interests of the child.

The Hon. PETER BREEN: To what legislation are you referring?

Ms PURCHES: I am referring to the Evidence (Children) Act 1997 and amendments to that.

The Hon. JANELLE SAFFIN: I want to ask some questions about what you say on page 2 of your response to questions. You say that it is no longer formally necessary for children's evidence to be corroborated, yet corroboration is the key to success. That immediately sets up a really paradoxical situation. It is not necessary, but it still happens. Yet you are always searching for that really strong corroboration. A recommendation from the Wood royal commission involved that whole issue, but that recommendation has not yet been picked up.

Mr COWDERY: That is correct. There is no longer a legal requirement for children's evidence to be corroborated in the legal sense. The word "corroboration" is a term of art in the law. Nevertheless, in proving the case one looks for primary evidence and other evidence that is either corroborative in the usual English-language use of that word, or confirmatory of the primary evidence. Our experience is that the presence of corroborative or confirmatory evidence can be crucial in a jury accepting the primary evidence of a child and proceeding to conviction on the basis of that. But, nevertheless, as raised in one of the other questions, it is possible for convictions to be achieved on the basis of just the evidence of a child witness, and that does happen. It will depend very much on the circumstances of the particular case, how reliable and persuasive the jury finds the evidence of the child to be and whether they are prepared to act on it beyond reasonable doubt.

The Hon. JANELLE SAFFIN: You talked about strong warnings that the appellate courts have insisted upon. Then you said that they have been more prepared than in other cases to substitute their own views of the evidence.

Mr COWDERY: Yes.

The Hon. JANELLE SAFFIN: Could you elaborate on that?

Mr COWDERY: There are two issues, one is the question of the warnings given by trial judges to juries, and that comes back to another recommendation of the Wood royal commission, and I will mention that in a moment. The second issue that arises out of that passage is the function of an appellate court. The theory on which most criminal trials proceed is that the appellate court is looking for error on the part of the primary court. In other words, it is not seeking to review the matter to form its own conclusions and to come to its own decisions afresh on the basis of the primary material. But, as the submission says, our experience is that in these cases in particular the appellate courts are slipping into that area much more of examining the primary material and expressing their own views about it and coming to their own conclusions on it, rather than identifying error on the part of the primary court, and correcting that error. That is what is involved there.

I mentioned the Wood royal commission. It is perhaps appropriate to mention the final report, volume 5, of the paedophile inquiry issued in August 1977, chapter 15, at pages 1326 and 1327 the nine recommendations made by the royal commission in this area. By my count one half of one of those nine recommendations has been implemented, and the other 8½ have not. They are recommendations 84 to 92, and I think I am right in saying that only the first half of 84 has been implemented to date. One of those recommendations, recommendation 90, is that consideration be given to an amendment to the Evidence Act 1995 consistent with draft recommendation 5.8 of the report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission relating to warnings to be given by judges in jury trials involving the evidence of child witnesses.

It is a reference to section 165 of the Evidence Act. It refers also to the Australian Law Reform Commission report entitled "A Matter of Priority, Children and the Legal Process", issued in May 1997. The New South Wales Attorney General's Department examined that report, which picks up a number of matters in the Wood royal commission, and issued a response in September 1997, which, in relation to that matter and a number of other matters, simply said that the police royal commission made recommendations about this and the Government is considering it, or giving attention to it. The simple fact of the matter is that a lot of very useful recommendations were made by both the Australian Law Reform Commission and by the Wood royal commission.

The vast majority of the recommendations have not been acted upon. That is a matter of some concern, given that those reports were issued in 1997. I have given the Committee reference to the Wood royal commission, volume 5, chapter 15, to the Australian Law Reform commission report and to the New South Wales response to the draft recommendations paper of the Australian the Law Reform Commission, which was issued in September 1987. It is a useful exercise to compare what has been recommended at various points and what has been implemented. I regret to say that we are some distance behind the game in relation to all of those matters, but it involves a somewhat detailed comparison of the documents and subsequent legislation, but it is an exercise that would be very valuable.

CHAIR: Is it possible for you to table for our information a copy of the Attorney General's response?

Mr COWDERY: Yes, I can do that. Would it be possible to have it copied? It is the only one I have.

CHAIR: Certainly.

Mr COWDERY: I table that under a covering letter from the Director-General of the Attorney General's Department dated 4 September 1997.

The Hon. JOHN HATZISTERGOS: Could you summarise your understanding of the reasons why those recommendations have not been acted on?

CHAIR: That might be mere speculation.

Mr COWDERY: It is speculation on my part.

CHAIR: If you do not know–

Mr CODERY: I feel that there is just a lack of commitment in the appropriate circles to the amount of work, the time and effort required to address these matters in a comprehensive way and the diversion of resources into other activities. I do not include my office in that because my officers, sometimes me personally, but certainly my officers have been very diligent in preparing information, arguments, material in support of various changes, and that has always been referred to the appropriate bodies. I include the Witness Assistance Service in that. I take the opportunity to say that the Witness Assistance Service performs a hugely valuable task in relation to the prosecution system in this State. I would like to see more resources made available so that its job can reach more deserving people so that they would not be as stretched as they are now to provide what are becoming essential services to people who find themselves caught up in the criminal justice process.

CHAIR: To what agency are they attached?

Mr COWDERY: My office. I know, for example, that Gordon Samuel's report on charge bargaining will be released at some time in the next month, and I believe that he will also have much to say about the Witness Assistance Service and its role in providing the interface between victims and witnesses, and the prosecution process.

The Hon. JANELLE SAFFIN: The first page of the response to the questions refers to competence. Firstly, it says that screening for competency takes place throughout. Who does that? Is it a series of priorities?

Mr COWDERY: It is a series of priorities at each stage of the process. The police, when they are investigating, will have regard to the level of competence of the people they are dealing with; the prosecutors, when they come to them, will assess that as well; the court, when they come to be called to give evidence, has a duty to do that; if any other circumstance arises during the course of a witness' evidence that might indicate that the witness is not competent to continue, steps can be taken there, too.

The Hon. JANELLE SAFFIN: How often does the defence counsel raise it as an issue, particularly if the child is over 12? Do they raise it as a standard? Is it raised in a perfunctory way?

Mr COWDERY: I do not think so.

Ms PURCHES: It is probably less likely for children over 12. Issues around competence arise more for younger children.

Mr COWDERY: In a former life I had two witnesses who were aged five years, who were the only evidence on which someone was convicted of murder.

The Hon. JANELLE SAFFIN: If it were in a former life, then presumably it was before a lot of these changes?

Mr COWDERY: Yes.

The Hon. JOHN HATZISTERGOS: I refer to an article on 19 March in the *Sydney Morning Herald* by Bettina Arndt who made a number of claims, one of which referred to a report from the Victorian Law Reform Commission that found a drop in conviction rates for sexual assault which could in part be a reaction to juries having to consider in the back of their mind that a person could be getting a very severe penalty as a result of an increase in penalties in this area and that led to an adverse reaction. Also, prosecutors were criticised in the past because they failed to prosecute cases of this nature for whatever reason and there has been a tendency on the part of prosecutors to prosecute many more cases, even though the evidence might be slight, and that is also contributing to a failure of prosecutions. Do you have an comment in relation to either of those matters, bearing in mind that they relate to a Victorian study?

Mr COWDERY: I can't speak of the Victorian experience in any detail. We have had similar criticisms made in New South Wales. There was a famous article by Acting Judge Nader which was published in the New South Wales Bar Association's *Bar News* which elicited a vigorous response from me. Judge Nader and I have since buried the hatchet. Conviction rates are very rubbery things. I would not want to make any general assessment on the basis of raw numbers of convictions or rates of convictions to numbers of cases run or cases reported. By way of example, I could achieve probably a 99 per cent conviction rate in the trials that I run very easily, but I would be extremely busy in my Chambers discontinuing matters left, right and centre.

The reasons why there are convictions or acquittals in cases are many and varied. It is everything from the first stage of the investigation all the way through to the decisions that are made about prosecuting, through to the conduct of the trial itself and through to what the jury had for breakfast that day. There are so many variables operating that I would be loathe to draw any general conclusions from conviction rate figures. They should certainly not be regarded as a measure of performance by prosecuting authorities. It is true to say that in the past 10-12 years there have been very many more of these cases actually brought to trial than there had been in the years before that. I suppose just on the law of averages, if you bring more cases you are going to have more acquittals as well as more convictions. I do remember briefly reading that article, but I do not remember the detail of it now and, as I say, I would be wary about drawing any conclusions from just conviction rates.

The Hon. PETER BREEN: On the last page of your answers to the written questions you said that District Court child sexual assault trials are a significant part of the trial caseload. In Sydney West and in the country 30-50 per cent of all criminal trials are sexual assault cases, mainly child sexual assault trials. That is an extraordinarily high number.

Mr COWDERY: Yes, it is.

The Hon. PETER BREEN: Are you suggesting that those numbers have only risen in the past 10-12 years?

Mr COWDERY: That is my perception, yes.

The Hon. PETER BREEN: Is it possible to make any comparisons between the trial results in the past 10-12 years and say, the previous 10-12 years? Would there be anything useful achieved by such a comparison?

Mr COWDERY: I suppose the Bureau of Crime Statistics and Research might have useful figures going back, I do not know, but I frankly do not think that there would be any useful purpose served by doing that because the whole environment has changed enormously between the two decades. There is a much greater awareness in the community now of this particular problem, a much greater level of reporting of child abuse and different attitudes taken even in country juries to this type of offending, so I do not think you would be comparing like with like. I would not advise a comparison of that sort. Yes, the figures are high. It should be borne in mind that we divide the State into three areas: Sydney which is the inner metropolitan area, Sydney West which is the outer metropolitan area and country which is everywhere else. Those figures relate to Sydney West and country. I do not know what the situation is in the city, although it is still a fairly high proportion in the city.

Bear in mind too that these are criminal trials so these are defended matters: They are not to be extrapolated as a proportion of all matters with which we deal. These are the matters that are defended and go to trial in the District Court. We are disposing of a huge number of matters now in the Local Court very often by a plea of guilty and there are all the pleas of guilty in the District Court and well over 90 per cent of matters are dealt with by way of plea.

The Hon. PETER BREEN: For my own edification, do the penalties change for child sexual assault depending upon the age of the child or is the penalty the same? How do you describe a child?

Mr COWDERY: There are different categories of offending depending on age and higher penalties for younger age. I think it is under 10 and then from 10 to 16 so far as females are concerned.

The Hon. PETER BREEN: They are in the Crimes Act?

Mr COWDERY: It is in about section 66 and following of the Crimes Act which has varies categories of offending and then there are different penalties prescribed for the different categories.

The Hon. PETER BREEN: Is child sexual assault the main category? Is that the one you deal with mostly in the office of the Director of Public Prosecutions?

Mr COWDERY: There are different categories of relationships. I do not know the answer to that: it is a large proportion of what we do. I cannot tell you what proportion of the work it is.

The Hon. JOHN RYAN: Does the age of consent have an impact on your capacity to prosecute a trial? The argument I have heard run is that it is difficult to prove child sexual assault on victims who are close to the age of consent so it is almost not attempted because the defence would always have the argument that they could reasonably have presumed that the person was of an age to consent. There has been a suggestion, I think it is called a rotating age of consent in the Model Criminal Code, which would set a younger age of consent but the issue would be the difference in age between the accused and the child which obviously is an easier issue to prove than say whether a person was above or below 16 or 18. Are they factors that add any difficulty or ease to the issue of prosecuting an offender?

Mr COWDERY: They are factors that probably do influence the outcome of proceedings in that they may have some influence on the minds of juries whether the juries are acting strictly in accordance with the directions they are given or not. It is fact of life, yes.

The Hon. JOHN RYAN: Is there any advantage from a prosecution point of view to having the Model Criminal Code enacted as the age of consent?

Mr COWDERY: To be honest I cannot remember all the provisions in the Model Criminal Code on this aspect.

The Hon. JANELLE SAFFIN: None of them reflect the mean age at which young people become sexually active anyway.

The Hon. JOHN RYAN: As I understand it, it is more to do with the difference in age between the parties rather than reaching a particular age. In any event, are there difficulties in proving sexual assault where you have people who are close to the current age of consent in New South Wales?

Mr COWDERY: Do you mean if the victim is close to the age of consent?

The Hon. JOHN RYAN: Yes, for example, a 16½ year old boy, is that difficult to achieve a conviction because the age of consent is 18?

Mr COWDERY: It might be depending on the way in which the other evidence unfolds, yes it might be. It is very hard to make a blanket assertion about that: it is going to depend very much on the circumstances of the individual case, the actions of the people involved, the appearance of people and so on.

CHAIR: At an early stage of your submission you deal with the issue of whether there ought to be criminal or civil responses to child sexual assault. You say that there is a school of thought that sometimes resurfaces which considers that it is inappropriate to prosecute offenders for various reasons, including the traumatisation of the child. You refer to a suggestion that might amount to decriminalising the process, for example, by using the civil standard of proof. This is a controversial area but do you want to offer any thoughts to the committee on that matter?

Mr COWDERY: As the submission shows, I do not come down on that side of the argument but my counterpart in South Australia, for example, Paul Rofe, raises this from to time as a possible way to achieve a greater level of justice for the victims of child sexual abuse. I think that is what motivates his thinking. We all recognise that proof beyond reasonable doubt is often difficult to achieve where it is the word of one person, and an immature person, against usually an adult. Juries in many cases, and probably understandably, are reluctant to draw the conclusion, beyond reasonable doubt based upon the evidence of an immature witness. By relaxing the burden of proof to the civil onus, the balance of probabilities, that obstacle in the way of juries finding guilt might be reduced, if not removed. I think that is the reason why that suggestion is put forward.

CHAIR: It is obviously highly controversial?

Mr COWDERY: Yes, I do not adopt it as my position. I think criminal proceedings require the criminal standard of proof. We should be looking at other ways to make the process more valid and more reliable in coming to proper conclusions. Other jurisdictions react in other ways. For example, in California and in some other States in the United States of America, sexual abuse cases whether it involves children or adults as victims, are not prosecuted unless there is corroboration either from medical evidence, independent corroboration of a witness or an admission or something of that kind. That idea has been floated here from time to time but I do not adopt that idea either. I think if a lone victim tells a story which is otherwise credible and reliable then that allegation should be adjudicated by the court, even without corroboration.

CHAIR: Dealing with another matter, I note that the bottom of Page 11 you refer to what you described as "most matters" that result in a conviction at trial go on appeal to the Court Criminal Appeal. What you mean by "most matters"? Would that be 90 per cent or some lesser percentage?

Mr COWDERY: Again, I do not have the figures. It is a matter of impression only on my part. I would say at least three-quarters.

Ms PURCHES: I would not be able to give the Committee figure. Certainly, a large number of the matters that we are involved with that result in a conviction go to the Court Criminal Appeal—both for children who are giving evidence and also where we have adults who were abused as children. Those matters very often go to the Court of Criminal appeal.

CHAIR: You say, rightly in my view, that as there is an abundance of case law pertinent to child sexual assault matters and the directions that are to be made by the trial judge, matters are frequently sent back for retrial on the basis of misdirection by the judge to the jury when he or she was summing up. You go on to say that often in such an event the family of the child decide that is not in the interests of the child to proceed to a further trial—which I would imagine is entirely understandable because there would be a lot of trauma at that point.

Mr COWDERY: I discontinue quite a steady number of those matters over time, yes.

CHAIR: There seems to be a problem. If there are so many appeals—you guess it might be of the order of 75 per cent—and so many matters sent back for retrial, this may be a cause of the disquiet that has surfaced to this Committee and in a way has generated this inquiry. People are aggrieved by the criminal justice system and the way it operates. I know there is not an easy answer, but there does seem to be a problem, does there?

Mr COWDERY: The trial process has become technical at the stage of directions to the jury. All sorts of requirements have been imposed upon trial judges by appellate courts and by interpretations of the Evidence Act 1995. It is very difficult for trial judges to get it right and not to create an appeal point at some stage, particularly in these cases which are very often one-on-one, one witness against the accused. The accused, if convicted, naturally seeks to take advantage of those technical requirements and try to identify error on the part of the trial judge. That is why we get such a high number of appeals in this category of cases.

CHAIR: I am not sure whether I am allowed to talk about bench books. Are they a judicial secret? Is their room to improve the material in those?

Mr COWDERY: I do not think they are secret any more. Once upon a time they might have been. The bench book is under constant review by the Judicial Commission of New South Wales. There are a number of people involved in those reviews, including retired judges who contribute their time. That is an ongoing process, trying to keep pace with the development of the law, which is not always easy. They provide a huge amount of assistance, but it still falls to the trial judge to interpret the requirements that may be described very plainly in the bench book, in the context of the evidence in the particular case and the way in which that evidence has fallen out.

Often that is where the appeal court picks up on some failure by the trial judge to give an adequate direction in relation to a particular matter, because of the circumstances of the particular case. So the appeal court do a thorough re-examination of the whole court process and come to the view that there was some technical breach which requires a retrial. That then means everyone has to decide whether they want to go through it again.

CHAIR: Which in many cases, of course, understandably they do not.

Mr COWDERY: Yes. In many cases the victim is satisfied that there has been a conviction and that there has been a mark of acceptance of the version given by the victim, and a mark of disapproval by the community, and is satisfied to leave it at that. In other cases, they just simply do not want to go through the trauma of having to give evidence again.

CHAIR: I do not think we have dealt directly with the issue of committal hearings. You say in your responses to our questions that victims are still frequently required to give evidence at committal hearings, despite the provisions of section 48 E (2) of the Justices Act. You go on to say that, at times, the court requires children to give evidence at committal hearings for good reasons. You also mention that this can place the child at considerable developmental disadvantage compared to an adult in the same situation, in that it leaves the child witness vulnerable to confusion and an increased likelihood of inconsistencies in evidence. What are the good reasons to require a child to give evidence at committal hearings? Would they be the perceived weakness of the material, comparatively speaking?

Mr COWDERY: In general terms, yes. There may have been inconsistencies in statements made by the victim in the course of the investigation and those inconsistencies may need to be explored at the committal hearing. There may be inconsistencies between what the witness says and what another witness says, or what another piece of evidence exposes and that inconsistency needs to be tested. There may be uncertainty about time or place where events happened and defence counsel wants to explore that. But the courts have become better at protecting witnesses from unnecessary examination and in many cases the court, when making the order to allow a witness to be cross-examined, will confine the areas in which that cross-examination may take place.

Nevertheless, that does not happen all the time and there are still cases where child victims are required to testify and be cross-examined. It adds another layer to proceedings. It potentially creates another area of inconsistency, no matter how small, that might be explored at trial. It means that at trial, where all of this matters, the witness is confronted with a number of competing propositions which then have to be evaluated and selected by the witness. That is a very difficult exercise, particularly for very young witnesses.

Ms PURCHES: I certainly could add to that, from the point of view of Witness Assistance Officers. Having observed the process, when a child who is being cross-examined on number of sources—the child's statement to the police and the transcript of the committal hearing—it is often not made clear the source that the material is coming from The child has been asked to comment on the inconsistency between one version and another and they are very difficult conceptual issues for a child to struggle with. I would support the proposition that, where possible, it would be best for children not have to go through that process. I think the courts as well as all the professionals around the process leading up to court have tried to minimise the number of times children have to give evidence and have to talk about what happened to them. There are occasionally possibilities that, when a child is called at a committal hearing, even though there may be restrictions on the cross-examination, a request will be made for those (areas of cross-examination) to be expanded once the proceedings commence. Also, the child is not necessarily expecting to have to give evidence about certain things.

The Hon. JOHN HATZISTERGOS: Are you advocating dispensing with committal proceedings in these sorts of cases?

Mr COWDERY: Not dispensing with committal proceedings, but there may be arguments for not enabling children, perhaps below a certain age, to be the subject of orders to be cross-examined at committal proceedings.

CHAIR: I presume that under your proposed pilot—Children's District and Local Court—it is contemplated that committal proceedings would sometimes the part of that process?

Mr COWDERY: Oh, yes. Yes, indeed. It is a difficult enough process for an adult witness to be confronted with something that he or she said to police on one occasion, something that was said during the committal proceedings and something that might have been said somewhere else. The witness has to put each statement into context and remember what was happening at that time and why something was said. For children to undertake that exercise is almost impossible.

The Hon. JOHN HATZISTERGOS: If you were to take the view that a child below a certain age should not be the subject of cross-examination in a committal proceedings, which are not agree that that could have a serious impact on the utility of the committal hearing in these cases?

Mr COWDERY: In those cases, yes. It would, because in those cases that witness is likely to be the only witness who might be required for cross-examination. Sometimes there may be other witnesses who need to be heard, but not often.

CHAIR: Thank you very much indeed for subjecting yourself to this two-hour interrogation. The Committee is very much indebted to you and are pleased with the detail you have supplied.

Mr COWDERY: Might I indicate that if there is any other information that the Committee desires from my office relevant to anything that we do, we would be quite happy to provide that.

(The witnesses withdrew)

The Committee adjourned at 12.00 p.m.