REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

UNCORRECTED TRANSCRIPT

At Sydney on Monday 29 March 2010

The Committee met at 9.45 a.m.

PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. J. G. Ajaka
The Hon. D. J. Clarke
The Hon. G. J. Donnelly
Ms S. P. Hale
The Hon. L. J. Voltz

CHAIR: Welcome to the first public hearing of the inquiry of the Standing Committee on Law and Justice into spent convictions for juvenile offenders. This inquiry was established to consider whether the convictions for minor sexual offences should continue to be excluded from the spent convictions scheme. In developing recommendations on this issue the Committee needs to balance competing interests; first and foremost the need to protect the community from sexual offenders. This imperative needs to be weighed against supporting those persons who have committed minor sexual offences, sometimes when very young, to put their past behind them and become law-abiding members of society. Today's public hearing will provide the Committee with further evidence on this important issue.

The first witnesses this morning are from the Department of Justice and Attorney General. The Committee will then hear from the Acting Commissioner for Children and Young People and followed by Mr Dale Tolliday who oversees programs for sexual assault offenders. On Thursday the Committee will hold a second hearing with a number of additional witnesses. Before commencing I wish to make some comments about procedural matters. In accordance with the guidelines of the Legislative Council for the broadcast of proceedings only Committee members and witnesses may be filmed or recorded. In reporting the proceedings of this Committee you must take responsibility for what you publish or what interruption is placed on anything that is said before the Committee. A copy of the guidelines is available from Committee staff. Any messages from audience members should be delivered through Committee staff. I remind everyone to turn off his or her mobile phone.

GABRIELLE CARNEY, Assistant Director, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General, and

KIERSTEN ELISE PERINI, Policy Officer, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General, affirmed and examined:

LAUREN ROSE JUDGE, Principle Policy Officer, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General, sworn and examined:

CHAIR: If any of you take any questions on notice during your evidence the Committee would appreciate the response to those questions being forwarded to Committee staff within three weeks. There is also the possibility that questions on notice will be sent to you following the hearing. On first glance this issue would appear to be fairly straightforward, and when the terms of reference were given to us by the Attorney-General the Committee felt that although there would be different points of view perhaps the matter would not be incredibly complex. But this particular question is incredibly complex, and as the submissions have been received, and from further reading, the Committee has come to understand that. The Committee looks forward to the outcome of this inquiry and will be working very hard to achieve an outcome that benefits both the community and the individuals affected by the process. Would any of you like to make an opening statement?

Ms CARNEY: Yes. Good morning and thank you for giving the Department of Justice and Attorney General [DJAG] the opportunity to be before you today. Before I start I would like to clarify that I am appearing on behalf of the Legislation, Policy and Criminal Law Review Division within [DJAG]. I understand that Corrective Services New South Wales has already made a written submission in relation to this inquiry. As members would be aware, the Attorney sits on the Standing Committee of Attorneys-General [SCAG]. DJAG has been part of an in-depth SCAG process to develop a Model Spent Convictions Bill. The Ministers at SCAG recently agreed to the model bill but the bill does not provide a definitive approach to the issue of whether sex offender's convictions could be spent. The reason is for this is largely because jurisdictions and stakeholders across Australia have expressed a variety of views on the issue and no consensus was reached.

The Attorney General is aware that this is an important issue but also a contentious one. That is why he has referred the matter to the Standing Committee on Law and Justice for consideration. The views held by members of the New South Wales community on this issue are a vital and important consideration to the New South Wales Government and the inquiry by the Standing Committee is an important mechanism by which the Government can capture and canvass those views. Once the Attorney has had the benefit of the recommendations of the Standing Committee, he intends to develop a proposal to submit to Cabinet for consideration. The Government has not yet made any commitment to adopt the SCAG model bill, as such any recommendations from the Committee will assist the Government in making this decision; particularly so in relation to the question of convictions for sex offences. We also have some documents that we were planning to table. Those documents are really in response to some of the questions that we believe may be raised during the hearing. Perhaps we could table those as the questions arise?

CHAIR: That would be an excellent process to use, thank you. I will start the questions. The model bill allows each jurisdiction to reach its own decisions on how sex offences should be dealt with. If New South Wales decides convictions for sex offences should be capable of becoming spent, must New South Wales adopt the court application option outlined in the model bill or can New South Wales develop its own model in relation to sex offences?

Ms CARNEY: Essentially the Attorney General has referred this matter to the Committee for consideration before coming to a Government position on the issue. As a result he will be waiting to hear from the Committee as to which option it favours before determining what the Government position will be.

CHAIR: So the answer to my question is that the Committee will decide that?

Ms CARNEY: He will certainly be taking—

CHAIR: I understand his outcome: the Government has the right to respond to our recommendations but the recommendations in our report will decide that question.

Ms CARNEY: Certainly the Government has not as yet come to a position on the question.

CHAIR: The 2002 Breaking the Circle report by the Home Office in the United Kingdom noted that in the United Kingdom over one-quarter of the working-age population had a previous conviction. Could you comment on the number of past offenders in New South Wales who may be impacted by the spent convictions scheme and, in particular, the number of sex offenders?

Ms CARNEY: We have sought advice from the New South Wales Bureau of Crime Statistics and Research [BOCSAR] in relation to this question. BOCSAR has advised that it does not know the proportion of the New South Wales population that has a criminal conviction. However, BOCSAR does know the number of unique individuals appearing in court in New South Wales from 1994 to the present. It advises that over the period from January 1994 to June 2009, 802,913 distinct individuals had at least one proven court appearance for any offence in the New South Wales Children's Court, Local Court, District Court or Supreme Courts; 9,266 distinct individuals had a proven court appearance for at least one sexual assault and related offence in one of those courts, and of that number 3,816 individuals received a penalty of imprisonment, home detention, a suspended sentence with supervision or a suspended sentence without supervision of more than six months for a sex offence.

BOCSAR also advised that two relevant studies might assist the Committee, and we were hoping to table those two studies. One study was published in 2006 and looked specifically at the proportion of people born in 1984 who had a criminal conviction by the age of 21 years. It showed that 9.4 per cent of the people born in New South Wales in 1984 had a conviction by the time they were 21 years of age. The other study was published in 2003 and estimated that 6.5 per cent of the New South Wales population who were at or over the age of criminal responsibility appeared in New South Wales court charged with a criminal offence between 1997 and 2001.

CHAIR: Both those studies have been published so we do not need to formally adopt them.

Documents tabled.

Ms SYLVIA HALE: If a young person, for example, was convicted of an offence involving violence or assault that conviction would be automatically spent after three years. Given that sex offences that do not involve consent also often have an element of violence and aggravation in them, do you think the sexual element in such an offence is sufficiently important to say it should not be spent? Does that add such an aggravating circumstance that it should not be spent?

Ms CARNEY: Essentially DJAG does not have a formal position on the issue of the spending of sexual sex offences because the matter has been referred to the Committee. Therefore it is difficult to answer that question in a sense because we do not have a formal position on that. Certainly comparisons could be made between the elements of offences and the facts that arise in relation to different offences between violence offences and sex offences. I think that there may be factual situations that arise in relation to sex offences that are also the case in relation to violence offences and yet they are treated differently.

Ms SYLVIA HALE: What are the main differences between the provisions of the Model Spent Convictions Bill and the current spent convictions scheme in New South Wales?

Ms CARNEY: We have prepared a table that compares the two sets of legislation, which we were hoping to table to the Committee.

Documents tabled.

CHAIR: Is the information contained in table you have given the Committee with the Judicial Information Research System [JIRS] statistics publicly available?

Ms PERINI: As I understand it, with the Judicial Commission statistics I think you have to be a member—it is certainly not available on a public website that you can access without logging in details and so forth. I am not sure of the specific requirements as to who can access those statistics.

CHAIR: Can you give the Committee advice as to whether or not the Committee can publish that information or whether it should remain confidential?

Ms CARNEY: We will do that.

The Hon. LYNDA VOLTZ: In regard to the JIRS statistics on the use of violence, the sentencing would usually reflect those offences that do not have that violent element to them are more likely to receive sentences under six months? From looking at those statistics that would be correct, would it not?

Ms CARNEY: I think that would be right.

Ms JUDGE: That is certainly the premise of the basis of the spent convictions scheme, that the sentences do reflect the facts and circumstances of the particular case.

The Hon. LYNDA VOLTZ: Have you looked at the use of spent convictions in sexual offences in other jurisdictions where sexual offences are included in spent convictions and what have been the outcomes in those jurisdictions?

Ms CARNEY: I think our answer on that one is that the New South Wales Government submission provided as much information as we really have about the operation of those frameworks in other jurisdictions. DJAG has not done any comprehensive work on this recently so we would not have anything to add to the Government's submission.

The Hon. GREG DONNELLY: I want to clarify something I did not understand from Ms Hale's questioning about matters that are spent after a period of time compared with matters dealing with sexual offences. Can you explain to me the dichotomy there? With matters of a sexual nature there is no spending of them versus is it all other matters or just a component of other matters that might come before the criminal justice system?

Ms CARNEY: Under the current New South Wales legislation we have the spent convictions regime, which applies to any offences with up to six months imprisonment. However, there are exclusions from it. Those exclusions include sexual offences, offences by a body corporate I believe, and certain offences that have been prescribed by regulation.

The Hon. GREG DONNELLY: They are the only exclusions, and they are specifically provided for?

Ms CARNEY: There is a number of them, but they are specifically provided for.

The Hon. GREG DONNELLY: This question relates to the issue of the nature of a sexual offence and other aspects to it, which follows Linda's question. In regard to some of those matters, obviously there could be instances in which there is evidence of compulsion, or in an extreme example, rape at one end of the scale and at the other end of the scale you have difficult ones too. For example, consider people presenting at emergency departments of hospitals and the doctors and other treating staff suspecting something had happened but, for perhaps a range of reasons, there is a reluctance or a non-preparedness to explain in detail and take it a step forward by involving the police. It is that sort of spectrum that makes it rather difficult to understand the issue very clearly about the nature of what has happened in relation to these types of matters. Do we therefore have to rely on the determination made by the magistrate or the court, whatever the case may be, and from that point look at how this matter should be dealt with?

Ms CARNEY: Certainly in relation to sexual offences, there is a whole range of offences that are covered by this exclusion—some such as sexual assault, and others such as acts of indecency or public exposure, I believe. There is certainly a broad range of conduct that would be caught by the exclusion. That is why, in a sense, I think the test has been, and currently is, to look at the length of the sentence imposed on the person to determine what the court considered, having viewed all the circumstances, the level of seriousness of the offence to be.

The Hon. GREG DONNELLY: My final question has come up in the context of another inquiry in which I have been involved. It relates to the ongoing, deeper understanding of the way in which the adolescent brain matures and develops. I was rather fascinated by evidence given at the other inquiry I attended. The evidence was that we know today a lot more than we did even five years ago, let alone 10 to 20 years ago, about the maturation process of the adolescent brain or the brain of the person in terms of their capacity to cognitively make judgements about their behaviour. The evidence from the inquiry suggested—and I do not think it has

been contested seriously—that in the instance of a male, it may well be not until their mid-twenties that they mature. I see you are smiling at this.

Ms JUDGE: No comment.

The Hon. GREG DONNELLY: This comes as probably no surprise to the females in the room, or indeed males, but on the other hand I think it is understood by science and it has not really been challenged. For females it is in their early twenties. That sort of understanding of the ability for young people to cognitively assess things and make judgements, do you see that as having any relevance for the decision of this Committee in terms of reflecting on the types of matters that in some sense influence the way in which young people, or people who in many instances we would not consider to be adults, behave and act?

Ms CARNEY: I think that issue was raised in another submission to the Committee. Essentially I think the question comes down to this: what is the purpose of the scheme? Really the purpose of the scheme is to provide a framework that adequately balances the public interest in assisting the rehabilitation of offenders with the public interest in ensuring community safety. With young offenders, the reason that the crime-free period was three years as opposed to 10 probably reflects the interest in giving them an opportunity to rehabilitate. There are two aspects to that which probably include the fact of recognising the probability of reoffending as they mature and also giving them the opportunity to move on from past mistakes as a teenager.

The Hon. JOHN AJAKA: Can I go back to the original starting point so that I can understand this? The law as it currently stands sets out the situation for spent convictions. If anyone is actually sentenced to up to six months, for an adult in 10 years time it is spent automatically unless it comes within one of the exceptions such as a sexual offence, and within three years for a juvenile. I understand that even with a juvenile, the exception in relation to sexual offences also still applies.

Ms CARNEY: Yes.

The Hon. JOHN AJAKA: What the model bill tries to do for an adult, and which it has not done yet, is suggest that we should move it from six months to 12 months and keep it at 10 years, and for a juvenile we move it from six months to 24 months.

Ms CARNEY: Yes.

The Hon. JOHN AJAKA: Whereas previously with a juvenile in it was three years, we will increase it to five years. Is that fair?

Ms CARNEY: Yes.

The Hon. JOHN AJAKA: It relates to one offence only. Once you have committed a second offence, the exemption no longer applies to the conviction being a spent conviction within that period of time. Has anyone given any thought to a situation of the sentence increasing proportionately with the time period being increased? For example, if we take an adult under the proposed model bill of 12 months and 10 years, has any thought been given to 24 months and 15 years, or 24 months and 20 years? In other words, I am suggesting almost a scaling.

If a person has been convicted of an offence and is sentenced to 11 months, in 10 years time, provided they have done absolutely nothing else, the conviction is spent. If you are a person who is convicted of an offence and given 18 months imprisonment, should there be a provision for us to consider that it will not be spent after 10 years. But if you have gone 15 years or 18 years, the conviction would be spent. In other words, we would also increase the incentives so that we do not simply cut it off at a 12-month period.

Ms JUDGE: Unfortunately, the formula of when and how you can give spent convictions is not a science. There is not a clear formula. Around Australia different jurisdictions have different things and different formulas. By the time you get to the United Kingdom, the formula becomes even more complex. When the Standing Committee of Attorneys-General [SCAG] was considering the timeframes we should be looking at, there was a large consultation program. We got a lot of different views from different stakeholders. Unsurprisingly, these were quite diverse, but the majority thought that 24 months was appropriate for juveniles with about a five-year period with no recidivism and a further 12 months for adults.

That comes from a number of different things. It comes from what community expectations are and that there may be a perception that juveniles should be given more of a second chance than adults. The other aspect is the length of period for which the convicted person does not reoffend. If someone has not reoffended for 10 years, what are the chances of their reoffending in that five years? As I see it, there is not a formula. In coming to the model bill, it really was drawing on what the community was saying and drawing on what other jurisdictions have done, and looking at that. In answer to your question—no, there has not been any specific analysis of how long you should be crime free, depending on your sentence, but there has been a lot of thought and consideration gone into community expectations as to what those numbers should be.

The Hon. JOHN AJAKA: I understand the role of this Committee is that we have almost been given carte blanche on this. We have not been told what is expected of us, and I agree with that position. You are asking us in fact to do the opposite: you have looked at everything, and this is what you think the Attorney General should do by way of recommendation. It concerns me a little bit. For example, I would hate to see the situation of a young person being given 30 months for an offence and after five years it is not spent, but another young person being given 23 months for an almost exactly similar offence. We all know that there is a slight parity of sentencing between magistrates and judges. For someone given 23 months, their conviction is spent after five years.

We have to consider whether the answer to that is that the offender committed an offence as a young person and was given 26 months, which is just over the 24 months, yet for the next 10 years or 15 years or 30 years that conviction is never spent. I am quite uncomfortable with that. As Greg Donnelly mentioned earlier, if we are looking at a young person who is 15, 16 or 17 years of age who commits an offence and who gets a sentence of 28 months, the reality is that by the time that person is 27 or 28 and he has never committed another offence ever again, one would have to say that he is a completely different person. To think that that conviction is going to hound him for the rest of his life seems a bit unfair. That is why I was interested to know whether anyone has looked at that aspect of it rather than simply saying 24 months goes with a three years, five years or 10 years cut-off, end of story.

Ms SYLVIA HALE: I am going to go off on a tangent.

CHAIR: Tangents are healthy.

Ms SYLVIA HALE: Is it correct that at the moment a crime carrying a maximum penalty of 10 years would still be caught by that, even if you are sentenced to imprisonment for only one year? It seems to be the nature of the offence with which you are charged that determines whether or not your conviction may be spent, regardless of whether you are at the higher or lower end of that offence. Is that correct?

Ms CARNEY: It is the sentence you receive rather than the maximum penalty.

Ms SYLVIA HALE: Fine. That clarifies it for me.

The Hon. JOHN AJAKA: I understood that. I will go to another area, which is section 10. As you may be aware, under the provisions of 556A, we did not actually have what appears to be a dilemma that has now been created by section 10. Under 556A, whether they are driving-type offences or other offences, we did not have the offence-proved concept. Under section 10 my understanding is that the offence is proved without proceeding to a conviction. Is section 10 creating a problem in relation to spent convictions?

Normally section 10 is granted because the judge is absolutely convinced that, in the circumstances, there should be no conviction whatsoever and simply no penalty imposed whatsoever. But the fact that we are still using the terminology of offence proved begs the question: what happens with the section 10 offence if it was under 6 months and if in 10 years it becomes spent? That person still has to wait that full 10-year period, do they not?

Ms CARNEY: I do not believe that is the case. Under the New South Wales legislation there is a provision that if the offence is proved and a conviction is not recorded, the offence will be spent immediately after the finding is made. It is section 8 (2).

The Hon. JOHN AJAKA: Excellent.

Ms CARNEY: That is the case in relation to offences other than those that are excluded.

The Hon. JOHN AJAKA: That was to be my second question. With the exclusion, that does not apply, does it?

Ms CARNEY: That is right. If a person received section 10 in relation to a sexual offence, obviously that would not be spent immediately because it is incapable of being spent.

The Hon. JOHN AJAKA: We await the 10 years and the three years?

CHAIR: It cannot be spent at all.

Ms CARNEY: It cannot be spent at all.

The Hon. JOHN AJAKA: We are looking at that. One of the issues we are faced with, in relation to sexual offences and this Committee's recommendation, is whether we should treat section 10 situations differently from convicted situations. In other words, if we were to say that sexual offences are not to become an exemption, we really have two separate categories that we should look at. If it is a section 10, therefore the exemption would no longer apply and we would allow the spent provisions to come into effect immediately. If it is not a section 10, either we again allow the usual 10 years with 6 months, or whatever the provisions are, or say that it will remain an exemption and never will be spent. Is that a fair summation?

Ms CARNEY: It is up to the Committee as to what it chooses to recommend in relation to that issue.

The Hon. JOHN AJAKA: There could be a possible difference between a section 10 offence and someone who was given six months imprisonment or 12 months imprisonment?

Ms CARNEY: I think that distinction could be made, yes.

The Hon. LYNDA VOLTZ: I refer to reoffending and to different types of sexual assaults. Obviously there is a range of sexual assaults. For example, sexual intercourse with a child would fall into a different range. However, some sexual offences would fall within that six-month to 12-month imprisonment period. Although I have not had a chance to go through the figures do you have any evidence, in particular relating to juvenile offenders, of the likelihood of offences outside the spent conviction periods of five or 10 years? Even though these offences are spent convictions they could have been committed at different times. Is there anything to support or to refute that?

Ms CARNEY: Do you mean that a person might commit another offence of a similar nature after 10 years?

The Hon. LYNDA VOLTZ: Let us say, for example, that a sexual assault without consent is one such offence. If a person does not re-offend within 10 years possibly that would be consistent with the pattern of behaviour for that type of offence—a one-off type of offence. I refer to the offence of sexual intercourse with a child under the age of 10. In the case of a juvenile offender there might not be an offence within five years. Is there any evidence to support the fact that these types of activities do not have a high recidivism rate?

Ms CARNEY: I think we would have to take that question on notice. However, I make the point that if we are talking about a very serious offence it is unlikely that it would fall within the spent convictions.

The Hon. LYNDA VOLTZ: I refer, for example, to the offence of sexual intercourse with a child aged 10 to 14 where there are two adult offenders, one of whom has been given a sentence of six months or less, and the other who has been given a sentence of 12 months or less. These figures perhaps imply that these might be serious offences, in particular, if a juvenile is involved. As a rule, juveniles are not given large sentences. There is a reluctance by the courts—and quite rightly so—to impose large sentences on juveniles. There is a range of sexual offences. Certain types of offences have high recidivism rates and others do not.

Ms JUDGE: In our submission we provide some data relating to recidivism rates surrounding sexual offences. On a self-reporting basis it would appear that sex offences have a lower recidivism rate than many other offences, especially when we compare them to property offences that have huge recidivism rates. There is speculation as to the validity of that data—whether it relates to a problem with reporting, or self-reporting—and they cannot track the data. Some data in our submission refers to recidivism rates.

The Hon. LYNDA VOLTZ: Is there any data that deals with the different types of sexual offences, and are there different types of recidivism rates?

Ms JUDGE: Certainly.

Ms CARNEY: We could take that question on notice.

The Hon. JOHN AJAKA: I refer again to the issue of one offence. I know that this Committee is focusing on sexual offences. Another area of concern relates to juveniles and to the fact that, if they are males, they do not mature until they are 27. If a minor offence is committed and the offender is sentenced for under six months—possibly under section 10 or section 33 if the offence relates to a child—and in eight or nine months time the offender commits a second minor offence and then he or she does not commit an offence for the next 10 years, in the current legislation, or even in the model legislation, there is no way that one or two of those offences summarily will be spent. A juvenile could go on a silly rampage and commit one, two or three minor offences. Ten years later, in adulthood, that person could become a model citizen. There is no provision that would allow for those convictions to be spent. Do you have any views on that?

Ms CARNEY: This is not in relation to sexual offences; this is in relation to—

The Hon. JOHN AJAKA: I am referring to offences and also to sexual offences.

CHAIR: Which may or may not include sexual offences?

The Hon. JOHN AJAKA: Which may or may not include sexual offences.

CHAIR: It is a general question about spent convictions?

The Hon. JOHN AJAKA: Yes.

Ms CARNEY: The issue is how the system operates when a person has committed several offences.

The Hon. JOHN AJAKA: The offences might not have been committed at the same time. I am talking about offences being committed within months of each other. Let me give you an example. A 15-year-old or 16-year-old boy runs away from home and commits his first silly offence of trespass, break and enter, or malicious damage. He is picked up by the police and brought before the courts. Two or three months later he commits another silly offence and two or three months later he commits another silly offence. He suddenly wakes up to himself, and 10 years later he is a model citizen. He completes university, has a wonderful job and has great prospects, but these three convictions remain with him and cannot be spent because there is more than one.

Ms SYLVIA HALE: What would happen if you had one incident out of which three or four charges were laid and the person was found to be guilty? Would that be regarded as one offence, or would he automatically be found to have committed three offences?

Ms CARNEY: I think we might need to take that question on notice.

The Hon. JOHN AJAKA: I am happy for you do so. The issue occurred to me only a few moments ago.

Ms SYLVIA HALE: I refer to pages 2 and 3 of your submission under the heading, "Findings and Orders. " Your submission states:

> Section 5 of the Criminal Records Act deems certain findings or orders of a court to be treated as convictions for the purposes of the Act. These include:
>
> - a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction.

You refer also to a number of other examples. What is the rationale for continuing since there has been no conviction, or an offence has been sufficiently mild for a court to say, "We want you to be subject to a good behaviour bond"? What is the rationale behind keeping those offences on the record, as it were, rather than them being spent?

Ms CARNEY: I do not know what the rationale was at the time that the provisions were inserted into the legislation. However, I note that the way it operates is such that even though those are treated as convictions for the purposes of the legislation, there are specific provisions dealing with matters relating to spending the conviction. For example, in the first case, "a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction" that conviction is spent immediately after the order is made. In the second case, "a finding that an offence has been proved, or that a person is guilty of an offence, and the discharging of, or the making of an order releasing, the offender conditionally on entering into a recognisance to be of good behaviour ..." I believe that conviction is spent when the conditions of that order have been complied with. In a sense, they have been brought into the framework, but they are treated differently within the framework.

CHAIR: Two issues, the first of which relates to summary offences, puzzle me. There has been quite a bit of discussion about summary offences that are heard in the Local Court getting tied up in sexual offences. I think—I am not sure—that they often relate to indecent exposure, that is, drunks who are caught peeing in the street. I should not use a personal reference but I am the mother of two sons. Throughout the great Sydney metropolis there are very few public toilets that are accessible after hours. It appears to me that it is fairly common for someone to be caught and to be convicted of such an offence. Does such an offence of indecent exposure carry the non-spent conviction issue?

Ms CARNEY: If it is indecent exposure it is included as a sexual offence.

CHAIR: So students who are studying to be educators or nurses might summarily be dismissed from their training?

Ms CARNEY: They might not necessarily be dismissed.

CHAIR: They will not get a job.

Ms CARNEY: They will be brought within the legislative framework that operates relating to sexual convictions.

CHAIR: The Committee needs to be supplied with a list of convictions that fall within that framework. I know that we currently have a list and that we have some information, but we need some definitions to help us work through this issue. Today you increased the complexity of that question. I am not having a go at you; I am saying that we are back where we started.

Ms SYLVIA HALE: You have as a general heading "indecent exposure" which has far worse connotations than someone having a leak behind a tree. When we get a list of offences it would be worthwhile to attach some sort of descriptor to the sort of behaviour that might result in someone being charged with such an offence.

CHAIR: A real descriptor.

Ms CARNEY: I understand that the list of offences was attachment B of the Government submission. If you need further information we can provide that.

CHAIR: I think we need a better description, if that is possible. We have read all the submissions.

The Hon. LYNDA VOLTZ: Regarding the issue of indecent exposure, it is probably not possible to get a breakdown of figures. There is a difference between someone having a pee behind a tree late at night and someone standing outside a shop having a pee in the middle of the day, which is what my daughter and I witnessed the other day. That is different from someone who is driving a car, who stops on the side of the road, and who drops his trousers to have a pee in full view of onlookers. Indecent exposure covers a number of offences that carry similar convictions. I do not know whether you can provide us with a breakdown of those figures. It is not simply a matter of someone having a pee because he stayed at a disco too long and did not bother to go to the toilet before he left.

The Hon. JOHN AJAKA: You might wish to take this question on notice. Indecent exposure has to have occurred in front of a person or persons. In other words, if a person goes behind a tree and no-one sees

him, there is no problem. However, there is a problem when such an act occurs in the presence of a person or persons.

Ms CARNEY: We can take this question on notice. We will certainly try to establish whether there is more information about the different sorts of scenarios that lead to this offence.

CHAIR: I used that as an example of the complexity of these offences. It is not excusable for young men to become drunk and to stand in a row on the side of the street, which is a fairly common occurrence. I understand why it is included in summary offences. But that then becomes a sexual offence, with no spent conviction. That is the question that I am asking; I am not asking whether they are being naughty or good.

The Hon. GREG DONNELLY: I have a question that you might need to take on notice. I refer to page 12 of your submission and to the heading, "Discussion paper option A." Under "Community expectations" it says:

> The exclusion of sexual offences recognises the strong societal concern attached to sexual offences by ensuring that such offences remain on an individual's record as relevant for all purposes for which a criminal record may be used.

It is also footnoted. The last sentence in the next paragraph says, quoting from the then Attorney General's second reading speech in *Hansard* with respect to the Criminal Records Act:

> Nevertheless, there will be some cases where this is not so,—

That is, dispensing with matters—

> and in my view prevailing community standards preclude the disavowal of such convictions.

With regard to prevailing community standards, does the department have a view about where this Committee could look to try to discern what "prevailing community standards" means today? I mean that in the sense that we as a Committee can sit around and debate the point and put forward a collective view that we might have, but does the department or the Attorney General have a view about where the Committee could look to try to discern whether community standards have shifted vis-a-vis when this was dealt with by the then Attorney General?

Ms CARNEY: I am not aware that the department does have a view on that, however—

CHAIR: That is what we are doing.

The Hon. GREG DONNELLY: Hold on, I know that that is what the Committee is doing. That was not my question. My question was whether the department or the Attorney General has a view about where we might specifically look to establish that.

Ms CARNEY: One of the advantages of referring this matter to this Committee is that the Committee has the capacity to seek submissions from members of the community. I am aware that individual members of the community have made submissions to the Committee, so that certainly would be one of the areas. Otherwise I do not think I could give an answer on that.

The Hon. GREG DONNELLY: Just to be clear, as I understand your answer, the view is it comes down to what people who make submissions to this inquiry or those who give evidence say and that is the best way to discern whether there has been a shift or change in community—

Ms CARNEY: No, that was an example of the ways in which this Committee could obtain information that I am aware of. The answer is that I am not aware that the department has a formal position on how the Committee should go about doing its work in relation to the inquiry. If you like we could take it on notice, but I suspect we will not have much more to add to that.

The Hon. GREG DONNELLY: It is not so much to go to the work of the Committee but rather whether government has a thought or view about where we might look and whether there are specific places to look.

The Hon. JOHN AJAKA: Can we go back to the issue of urinating in public? From my perspective, a young person or even an adult urinating in public is clearly offensive and completely inappropriate but I do not see it as a sexual offence. Should the Government, your department or this Committee be looking at a situation where some consideration should be given to going back to the old offensive behaviour-type offences where they are classified more specifically as offensive behaviour/urinating in public or offensive behaviour/doing something else, and not be brought under the category of sexual offences if we are going to maintain the exemption that no sexual offence will ever be spent?

Ms CARNEY: If you go back to the terms of reference for the inquiry, they are quite broad.

The Hon. JOHN AJAKA: I understand that we can look at that. I am trying to gather your opinion. Is that something that your department would consider and would go along with if we made that recommendation?

Ms CARNEY: I think we would consider all recommendations that came out of this inquiry. I have noted before that the department does not have a formal position on this and so it is difficult to express a position. Certainly we would be open to any of the recommendations.

The Hon. JOHN AJAKA: Maybe I will approach it another way. There is nothing to prevent your department from bringing in amendments to the crimes legislation to say that from now on anyone committing the offensive act of urinating in public would be, pursuant to sections X, Y and Z, subject to a penalty of X, Y and Z and there is no connection with or reference back to a sexual offence, therefore the exemption will not apply.

Ms CARNEY: If the Attorney General took that to Cabinet and Cabinet agreed and the Parliament approved it, it would be possible.

CHAIR: It comes back to the processes.

The Hon. LYNDA VOLTZ: Can I follow up on the issue of indecent exposure as well? Can I get a breakdown of the number of men and women found guilty of this offence?

The Hon. JOHN AJAKA: And whether they are juveniles or adults.

The Hon. LYNDA VOLTZ: That is right. I would be interested to see the difference in the figures for men and women convicted of indecent exposure. While I understand what John Ajaka is saying about men urinating in public not being a sexual thing, I would be interested to understand why there is a difference between the male and female figures, if that is the case.

Ms CARNEY: We can take that on notice. Can I clarify my earlier response? In relation to the issue of the exclusions, some of those exclusions are in the regulations and so obviously there would not be the same process of having to take the matter before Parliament.

The Hon. JOHN AJAKA: You just amend the regulations.

Ms SYLVIA HALE: You talk about mechanisms for spending convictions and suggest that an offence might be automatically spent unless there was an application to the court or to the Administrative Decisions Tribunal, for example. Do you know of any instances where that mechanism operates, whether in Australia or overseas and, if so, whether it has been subject to criticism? Clearly, we have had submissions that have suggested that if this required an application to a court it may disadvantage young people who are already unfamiliar with or intimidated by the system.

Ms CARNEY: We know that Western Australia has a framework in which an application needs to be made to the court in order for the conviction to become spent. That is the only jurisdiction I am aware of in Australia that currently has that framework.

Ms SYLVIA HALE: Do you have any statistics as to how often that provision is made use of?

Ms CARNEY: We will have to take that on notice.

CHAIR: Maybe I will set this off again, but can you give us a definition of "aggravated"? There are lots of expressions throughout our documents that include the word "aggravated" and we use the term quite comfortably and so do newspapers. I would like a definition of "aggravated".

Ms PERINI: The legislation prescribes what the circumstances of aggravation are. If you look at, say, aggravated sexual assault, which is under section 61J of the Crimes Act, it will detail what the circumstances of aggravation are. There is a whole range of circumstances of aggravation. One of them is breaking into the victim's home to commit the offence.

The Hon. JOHN AJAKA: My understanding is that aggravation is different in different circumstances for different types of offences. You need to look specifically at the offence. There is no one general definition.

The Hon. GREG DONNELLY: Section 61J, which is part of your attachment B, refers to aggravated sexual assault.

CHAIR: Yes, but we have to go back to the legislation to look at that definition of aggravation. They hook the word on to say there is some other thing that predisposed what happened but it is not necessarily consistent across the entire gamut of the law. That is what you are saying.

Ms CARNEY: That is right.

CHAIR: I think you have sort of answered this question but I will ask it again. It is a question you had on notice but I want to hear what you have to say. Attachment B of your submission lists sex offences that are not capable of becoming spent under the current spent convictions scheme, which is all of them. Are you aware of any category of offence that would commonly attract a sentence of six months or less and would any category of offence commonly attract a sentence of 12 months or less for an adult or 24 months or less for a juvenile?

Ms CARNEY: Those are outlined in the document that we tabled previously.

CHAIR: That is very good. The submission from Professor Dianna Kenny at the University of Sydney, submission No. 18, argues on page 4 that more research is needed into sentencing trends for juveniles before deciding on the benchmark sentence under which a sex offence could become spent. What evidence was used to decide on the benchmark sentence of 24 months in the model bill?

Ms CARNEY: Unfortunately, we have not had the opportunity to read that submission because it was not available on the website. However, I can advise that the Standing Committee of Attorneys-General [SCAG] process for developing the model spent convictions bill was lengthy and the consultation was comprehensive. SCAG released a discussion paper in 2004 in which stakeholders were asked to indicate what they considered to be the appropriate point in the sentencing scale at which an offence should be ineligible to become spent. Most stakeholders agreed with a sentence of imprisonment of more than 24 months as the appropriate threshold for defining a serious offence. Further negotiations then took place between jurisdictions and with key stakeholders and the thresholds of 24 months for a juvenile and 12 months for an adult were developed.

CHAIR: Is the report from SCAG available or did they just produce the model bill as the result of their discussion?

Ms CARNEY: There would be a communiqué outlining the decision of that meeting and the model bill.

CHAIR: Okay. We have the model bill.

Ms SYLVIA HALE: I suppose the problem confronting the Committee is the realisation that for young people having a record, particularly a record for a sexual offence, comes at a time that is critically important for their employment prospects and therefore critically important for the rest of their lives. It has much greater implications, it seems to me, for a young person than for an older person because an older person has either established themselves in the community or is more mature than a young person. Therefore, it seems to me we should be erring on the side of making it easier for convictions to be spent rather than making it more difficult. This is probably expressing an opinion.

The Hon. LYNDA VOLTZ: I would have thought that was the case.

Ms SYLVIA HALE: Yes. Has any research been done on the impact of having a record for a sexual offence on children or young persons' ability to subsequently obtain employment?

Ms CARNEY: I would have to take that on notice.

CHAIR: We may have to ask some other witnesses, the academics.

The Hon. JOHN AJAKA: I was thinking that, too.

Ms CARNEY: I am not sure it is something—

Ms SYLVIA HALE: It is not something that the Bureau of Crime Statistics and Research has pursued?

Ms CARNEY: We can certainly look into it and provide any information we have.

CHAIR: The Government's submission, page 15, notes that "it is difficult to determine whether an offence should become spent based on the grounds that the sexual act was consensual". Some of the evidence we have received so far in submission form relates to older people particularly being tangled up in this particular issue. Any of us here who are a bit old and have lived in the country know that these issues are very real. Can you comment on the difficulties of defining "consensual"?

Ms CARNEY: This is question 9.

CHAIR: Yes, I just put a few sentences in the middle of it.

Ms CARNEY: If the issue of consent is relevant to an element in proving a sexual offence, then evidence about consent would arise in the hearing. However, there are offences in which consent is not an element of the offence, such as indecent assault. In those circumstances evidence as to consent would not necessarily arise during the course of the hearing. In addition, as the age of consent in New South Wales is 16 years of age, any person who has sexual intercourse with a person under the age of 16 years is guilty of an offence, whether or not the person was consenting. This reflects the decision of Parliament that up until a certain age children are to be protected from sexual conduct, even if they are willing participants. However, despite this, young people below the age of 16 do engage in sexual activity. While any person who has had sexual intercourse with a person under the age of 16 years may be guilty of an offence, the issue of consent is relevant to the objective seriousness of the offence and may be taken into account on sentencing. So in that case it may not have been relevant to establishing an element of the offence but it could be taken into account in sentencing.

CHAIR: No, may be.

Ms CARNEY: Therefore, a court may make a finding about consent when determining the person's guilt or in sentencing, but this will not always be the case. In addition, any finding may or may not be reflected in the remarks on sentence that the court delivers. In these cases it could be problematic if the issue of consent becomes the basis for determining whether a conviction may be spent. If this approach were adopted, the court would need to turn its mind to whether the sexual offence was consensual at the time of sentencing and make a finding on it. This could require further evidence from the victim and/or the offender. Alternatively, it could mean that this particular issue had to be litigated or relitigated on an application for the conviction to become spent, and this may have an adverse impact on the victim and the offender if evidence was required to be given again in relation to the matter.

The Hon. JOHN AJAKA: Just taking that scenario that was raised, you hear of circumstances where, for example, a 19-year-old or 20 year-old boy, a girl who is 15 and nine months, he is convicted of the offence, given a very light sentence, well under the six-month provision, years later they are married, they have children, yet his conviction will not be spent in those circumstances. I guess that is another area we need to be looking at.

CHAIR: Thank you.

Ms CARNEY: I was going to go back to one point about whether SCAG released the report at the time with the model bill. I would like to take that on notice so we can check for sure on that. I believe the answer is

no but I would like to make sure. The other point I was going to make was in relation to our table of comparison between the New South Wales legislation and the model bill. If possible we would like that not to be publicly available because we would still like to check the absolute accuracy of it.

CHAIR: And you will get back to us when and if that can become publicly available.

Ms CARNEY: That is right.

CHAIR: I know we have not asked you all your questions but they will be sent to you on notice. This Committee is quite famous for never getting through our questions on notice because we divert off, but that is fine. Did you have anything else that you wanted to say to us?

Ms CARNEY: I think that is it.

(The witnesses withdrew)

(Short adjournment)

JAN McCLELLAND, Acting Commissioner, Commission for Children and Young People, and

VIRGINIA CLARE NEIGHBOUR, Director, Working with Children, Commission for Children and Young People, affirmed and examined:

CHAIR: Thank you very much for coming to this first day of hearing for our inquiry into spent convictions for juvenile offenders. I will not go through all the formal notifications except to say that when we received this inquiry we knew it was not a light, easy matter, but the complexity of it is increasing as our work is continuing. We thank you very much for participating in the inquiry. We have broadcasting guidelines for the media, and they know what they are. If you take any questions on notice the Committee have decided that we would like replies back within three weeks. If there are any problems in complying with that you can contact the secretariat and they will work something out. Would both of you or either of you like to make an opening statement?

Ms McCLELLAND: I would like to thank you for the opportunity to meet with the Committee and to discuss what is a very important and relevant issue to the work of the Commission for Children and Young People, particularly its role in relation to promoting the safety, wellbeing and welfare of children in providing advice both to government and non-government agencies in relation to legislation, policies, practices and services affecting children and also in our capacity for administering the legislation relating to the working with children check and other screening processes. So it is very relevant to the work that we do.

It is quite a complex issue, as you have noted in your own discussion paper, because it requires a consideration of balancing the interests of protecting society but also ensuring that young people are not disadvantaged through some stigma or having to bear the burden of a juvenile offence for the remainder of their lives. So it is in that context that we are looking at it. The spent conviction process itself recognises the need for the rehabilitation of young people and it also recognises that young people should have some chance in their lives. It is for that reason that we believe that spent sexual convictions should be treated no differently from others, particularly insofar as it affects young people's opportunities to apply for employment in various ways, to apply for various documents and, in some cases even, it can affect their travel arrangements.

So for the reasons that we have set out in the submission we support option B that is being proposed. We think there needs to be some looking at this from the point of view of the working with children check, and no doubt with your questions I can talk about that further. But we think that option B proposes a sensible way forward in treating juvenile sexual offences no differently from others, provided that they have not incurred a penalty of more than six months and provided that there has been the requisite period of time without a subsequent offence. That is by way of an opening address.

CHAIR: How do you perceive that the requirement to disclose convictions impacts on the ability of past sex offenders, including juvenile sex offenders, to obtain employment and achieve social inclusion?

Ms McCLELLAND: A young person convicted of a sex offence can be affected in their future employment as he or she may be required to declare their past convictions when applying for certain types of employment or other roles. In relation to child-related employment, section 15 of the Criminal Records Act, as you would be aware, allows disclosure of spent convictions for the working with children check. Under section 33B of the commission's Act, people convicted of a sex offence that could attract a penalty of 12 months or more are automatically deemed to be prohibited persons and prohibited from child related employment.

The definition of child-related employment is quite broad and can cover a wide range of situations—working in schools, foster care, preschools, or it can even involve driving a school bus; so it is quite broad in its application—and a conviction for a sex offence, whether it is committed as a juvenile or an adult and whether it is spent or not, results in that person being deemed to be prohibited from child-related employment. So the consequences for a young person are quite significant. By enabling young offenders' convictions for less serious sex offences to be become spent in the same way as other offences provides an opportunity for those people to have a chance at rehabilitation, to gain employment—admittedly, not child-related employment, certainly at this stage, but at least in other areas of employment—and to improve their life opportunities. It is for those reasons, as I said earlier, that we support option B that is being proposed.

CHAIR: We have been given in this inquiry a very long list of offences that fall under the definition of sexual offence, many of which offences range from blatant very troublesome charges to quite often things that could be perceived as either not so offensive to the community or as offences that could predispose the offender to future problems. What do you think of that part of the issue that we are looking at—the enormity of the range of offences that fall in a blanket way under both your Act and under the Spent Convictions Act?

Ms McCLELLAND: You are right, and I think your paper draws attention to that range, and it can include very serious offences, but it also can include offences where there was deemed to have been consent—a whole range of offences. When it comes to our working with children check our legislation relates to those offences that can attract a penalty of 12 months or more and the person is prohibited in those circumstances even though the court may have awarded a lesser sentence. So it is the actual maximum penalty that can be attracted that determines whether they are prohibited or not. The majority of the sex offences fall within that scope. There is only a small number that would fall outside the scope of that, such as the ones under the Summary Offences Act, and in those cases the people who may have a conviction there would be picked up under our employment screening processes and we would conduct a risk assessment of that individual and look at what has happened in their lives since they committed that offence.

CHAIR: But employers, including public sector employers, very rarely go to the risk assessment process. So if you are a public sector employer and up comes carnal knowledge there are plenty of areas where they are just going to get crossed off.

Ms McCLELLAND: They have no option because that person is a prohibited person.

CHAIR: So it does not necessarily equate to the 12 months at all?

Ms McCLELLAND: Because that offence attracts a penalty of 12 months or more it is automatically picked up into that and the person is then prohibited unless they apply for an order.

CHAIR: So it is not actually the sentence they are given, it is what the sentence can attract?

Ms McCLELLAND: That is exactly right: It is not the actual sentence imposed it is what it can attract, and particularly in the case of people applying for an order it has been our experience that some young people are even reluctant to go down that path because they have found the whole process so daunting and upsetting for them that they even avoid that.

CHAIR: So it is not actually the court processes that define this it is the law in itself?

Ms McCLELLAND: It is the law.

CHAIR: I would like you to outline, even though we feel this is right, why stable employment is important in rehabilitating offenders and protecting against reoffending, particularly for young people?

Ms McCLELLAND: In our view it is very important, it relates to that whole role we have in ensuring the safety, wellbeing and welfare of young people; it builds on employment and a stable lifestyle built on rehabilitation that they may have had for their offence; and it improves their opportunities to gain some financial independence and to start to integrate back into life and participate as a fully participating member of society.

The Hon. LYNDA VOLTZ: I do not know if you would be able to provide us with breakdowns of these—maybe the Attorney General's department can—but when they have provided us with the figures of those convicted of sexual intercourse without consent there are 130 people, none of whom, according to this, appear to have been given sentences under 12 months. Is it possible to find out the numbers of juveniles convicted of sexual intercourse without consent that may have had a sentence of more than 12 months?

Ms McCLELLAND: We would need to do some research on that. That is not information that the commission would typically hold, but we could make some inquiries. We would need to probably go to the Attorney General's department or the Bureau of Crime Statistics.

The Hon. LYNDA VOLTZ: And likewise, aggravated sexual assault?

Ms McCLELLAND: We would certainly need to take that on notice.

CHAIR: That is a good question and we will send it to the Attorney General's department for definition.

The Hon. LYNDA VOLTZ: The reason why I would be interested in looking at those figures is because I noticed the other ones where you do have juvenile offenders that have received sentences under six and 12 months in particular are aggravated indecent assault of a child under 10; you have offences there for under six and 12 months.

The Hon. GREG DONNELLY: They do not know what you are referring to.

The Hon. LYNDA VOLTZ: I know they have not seen the figures to which I am referring. The only other area where I can see there are juvenile offences under 12 and six months is in relation to indecent assault of a female under 16 which we would know would possibly go to those consent issues that you have raised. When we are talking about the range of offences obviously some offenders are not being picked up in these figures because they are at the more serious end and come in over the 12 months. So we do not know how many juveniles fall within them. Within those two that I have mentioned there are some juveniles, not a large number, six and four that are receiving offences within the six to 12 months. Are they the type of offences that you believe should be looked at in terms of spent convictions?

Ms McCLELLAND: We are saying under six months, not between six and 12 months. We say we would see it appropriate that they be treated in the same way as all other spent convictions.

The Hon. LYNDA VOLTZ: But there may be a large number of juveniles that fall outside of that?

Ms McCLELLAND: Between six and 12 months?

The Hon. LYNDA VOLTZ: And longer.

Ms McCLELLAND: We can have a look at that. Our experience is that we come across these people mainly when they apply to work with children, and we would then see the nature of the convictions. We come across a number of cases, particularly of adults, who have offences recorded for when they were juveniles. In fact, one of the submissions that I note you received was from a wife in relation to her husband, that type of situation is not uncommon for us to see where someone has been charged with carnal knowledge as a juvenile, and has subsequently married and had children with the victim at the time. And it is very distressing for those individuals, particularly when they apply for employment and we have to automatically deem them to be prohibited, and then the onus is on them to demonstrate that they are not.

The Hon. JOHN AJAKA: I will look at three separate areas. I will refer to juveniles only. With the current legislation any imprisonment up to six months and up to three years with no reoffending is spent, with the exception of sexual offences. The model bill is taking it to 24 months, instead of six months, and up to five years, in which case the conviction will be spent, again I assume with the exemption of sexual offences. Should minor sexual offences—I will not define them for the moment—still be part of the exemption or should they be spent in those circumstances? If a young person commits a very minor sexual offence and receives a sentence of less than six months, and under the next provisions of 24 months, clearly receives a sentence of less than 24 months, does not reoffend in five years and grows up to a fine hardworking adult, yet the offence will stay with them forever. In your view should those offences clearly be spent or just left as is?

Ms McCLELLAND: It is our view that those offences should be spent.

The Hon. JOHN AJAKA: There are no provisions anywhere for sexual offences or otherwise when two offences are committed within a short period of time, again, by a young person. Say the first offence was when he aged 15. Then three or four months later he reoffends, and then in another three months commits another offence during a period in his life when everything was going wrong for him. Suddenly he wakes up to himself, if I can use that expression, and again becomes a model citizen, completes university, and has a wonderful profession and wants to work within the public sector yet those convictions cannot be spent. What is your view whether in such a scenario with second or third offences, a system should exist for those convictions to be spent at appropriate times?

Ms McCLELLAND: Yes, I do. I think it really is all about looking at the risk. What is the risk? Again it comes back to that point about balancing the need to protect society, and the community, but also not unnecessarily disadvantaging the young person. The research suggests that the recidivism of young sex offenders is reasonably low, so the type of scenario you have described is not a pattern that is typical. I am not saying it would not occur because clearly there have been situations where it might have occurred. Consistent with the principle that we are talking about, yes, I think it should be spent but if it is over a long period of time or goes beyond the boundaries that we are talking about of five years or so then that would be a different scenario.

The Hon. JOHN AJAKA: Leaving aside sexual offences, I am interested in other areas where, for example, a young person who is convicted of break and enter, and might be convicted of another minor matter with no real sentence was given, and then a sexual offence. Sometimes there can be a combination of two or three offences. In those circumstances, even if you were to say the sexual offence could be spent because of its minor nature, the fact that there are two or three offences, should there be a regime, especially for young people of not being a matter of one, and one only, and that is the whole criteria? In fact, we should look at whether there are one, two or three, and a regime to spent them.

Ms McCLELLAND: When we are looking at child-related employment we get the full criminal history record of an individual, whether it includes spent or unspent convictions and whether they are sexual or non-sexual in nature. We look at the whole history of that person's experience, including the number of offences, the type of offences, how long ago they were, the age of the victim, what has happened in their life since. We do a thorough risk assessment. We look at the factors affecting the individual. We look at the nature of the work that they are going into and what safeguards the organisation might have in place to protect children.

The Hon. JOHN AJAKA: But you have a dual role, if I understand it correctly.

Ms McCLELLAND: We do.

The Hon. JOHN AJAKA: You have to ensure that whoever is employed is not a danger to children and the other is to take care of the children, what is best for them and what do they need to assist them. I am looking at your second role and a young person has a finding of guilt of one or two offences against them and suddenly having the label, if I can use that term, with them for the rest of their life and it will not be spent because it was a second or third offence, whether sexual or otherwise.

Ms McCLELLAND: It is our view that young people should have every opportunity for rehabilitation and every opportunity to progress in their lives and not be affected by the stigma attaching to them.

The Hon. JOHN AJAKA: If a drunk person—maybe a footballer to use that common analogy these days—urinates in the street, for example, they are convicted in the category of a sexual offence. From my perspective a person who is completely drunk and leans up against the telegraph pole, not knowing where he was or what he was doing, is very different to a person who commits a serious sexual offence. However, the conviction will not be spent even though it is under six months as it comes within an exception. What is your view?

Ms McCLELLAND: It would be our view consistent with our submission that minor offences of a sexual nature should be spent, particularly where they fall within the timeframe.

The Hon. JOHN AJAKA: Or possibly a different offence category, maybe we should look at instead of it being a sexual offence that it is offensive behaviour offence with no sexual connotation.

Ms McCLELLAND: In fact, there is a piece of research that we referred to in our submission by Righthand and Welch, which actually raised that point. They suggested that the term young sex offender should not be used, the focus should be on the behaviour, not the person, to avoid that stigma being carried forward. The focus is on the behaviour of a sexually abusive nature or, in that case, indecent behaviour rather than the person being labelled a sex offender. I would share that view.

Ms SYLVIA HALE: In your submission you say that the commission considers that the rationale behind the spent convictions scheme should be that the initial determining factor for whether a conviction can become spent should not be the type of offence rather it should be the seriousness with which the courts viewed

the offence, as demonstrated by the length of sentence imposed. You seem to have opted for six months as the cut-off point. Why six months rather than 12 months? Does that clearly indicate offences that are considered to be of lesser import than sentences of, say, eight, 10 or 12 months or is it just an arbitrary guiding line?

Ms McCLELLAND: I suppose it seemed to us that that was a sensible way, in the current circumstances, of moving forward. It does relate to the earlier discussion about category as distinct from seriousness. I suppose it was really looking at it in the context of taking into account my two roles, the Working with Children check side of things. At the moment we have no room to move because it is related to the offence rather than the seriousness. It is only when we are challenged, in a sense, and somebody seeks an order for an exemption that we are able to then look at those other factors such as the seriousness.

Ms SYLVIA HALE: Are you of the view that the Working with Children check should be adjusted in some way?

Ms McCLELLAND: Yes, and we are looking at it all the time. Recently we developed some new guidelines, a copy of which I am happy to leave with the Committee, which take into account the changes that have come about as a result of the Wood inquiry. But the legislation is due for review towards the end of this year and certainly it is our view that we should be looking at some of these issues in the context of the legislative review.

Ms SYLVIA HALE: Last weekend publicity was given in the *Sydney Morning Herald* as to the variations in sentences imposed by judges—some seen to be excessive and others not. In your experience can the same variation as to the sentence that is like to be imposed be correlated to a particular member of the magistracy, judiciary or court? Do you see a similar intervention of personal susceptibilities on the part of the person handing down the sentence?

Ms McCLELLAND: I am not in a position to answer that. I have only been relieving in the role for four months and I have not examined to any of the cases in detail. I am not sure whether Virginia is able to answer that?

Ms NEIGHBOUR: I can add a little bit but I might not be able to answer the whole question. Generally speaking we get to see the record in relation to a review of prohibited status in maybe 40 or 50 matters per year, where there is an appeal brought forward. In the numbers of cases that are brought forward the records of the sentences have been made over many years, and sometimes many States even, so to determine a pattern of individual judgements within that range is something we have not attempted.

The Hon. JOHN AJAKA: But you would not have enough matters to do that anyway?

Ms NEIGHBOUR: I suspect we do not.

Ms SYLVIA HALE: How often would you say an appeal is upheld?

Ms NEIGHBOUR: Prohibited persons, maybe about 20 per year we seem to grant an order, but it varies of course.

Ms SYLVIA HALE: That would be, say, 20 out of the 50 you are suggesting?

Ms NEIGHBOUR: Yes, a number of them are withdrawn when the applicant sees it is a very bad idea to proceed.

The Hon. JOHN AJAKA: You are looking at about 40 per cent on average.

Ms SYLVIA HALE: It is quite a significant figure, is it not?

Ms NEIGHBOUR: But again we are talking of a very small number every year.

CHAIR: How much work is it for the individual?

Ms NEIGHBOUR: It depends. It is not a great deal of work. They have to make submissions and sometimes they—

The Hon. JOHN AJAKA: You said there are 50 appeals. Are you able to indicate how many are rejected to start with?

Ms NEIGHBOUR: I have not got the actual figures with me.

The Hon. JOHN AJAKA: Will you take that on notice?

Ms NEIGHBOUR: I am happy to take that on notice.

The Hon. JOHN AJAKA: Because if there are 500 rejections, 50 are appealing and 20 are succeeding that gives us a different concept of the percentage.

Ms NEIGHBOUR: We only start off with a base of 50-odd applications per year—that is our starting point.

The Hon. GREG DONNELLY: I direct your attention to paragraph (d) Application to the Court, which appears at the bottom of page five of your submission and says:

> The Commission does not support the option suggested in the discussion paper requiring an application to the court to be made before an offence is spent. Making an order to the courts is a daunting process for many people, particularly young people, which requires access to information and resources that many young people would not have.

Given the nature of these offences that we are talking about, and given that at least at this point there has been some societal expectations and societal views around these types of matters, and that is why they are not spent in the way that other offences are, do you think this may be an appropriate way to proceed? What that would in effect do is to create a review or formal process where literally on a case-by-case basis individual instances are looked at, and some assessment made, before it was spent. In other words, what that might do is create a sense of faith or support in this process of spending the conviction if there is a sense that a review has taken place?

Ms McCLELLAND: I can understand the point you are making. Our comments were made in the context of our support for option B, with the automatic lapsing of spent convictions where the sentence was six months or less and after a period of three years. We were supporting the approach that is adopted in Queensland where there is an automatic lapsing without the need to apply for that to occur. We would see that as being appropriate particularly in the concept of some of the lesser offences that we have talked about. As we said before, it is our experience that young people will often avoid even doing that. In our case they often avoid applying for an order to remove the prohibited status from them, even in situations where if they had applied it is more than likely it would have been granted. Because it is just another connection, I suppose, with the situation that landed them or where they are the moment. It is still our preferred approach to make it as easy, seamless and less traumatic for children as we can.

The Hon. GREG DONNELLY: Playing the devil's advocate a moment. I understand what you have said in terms of a facilitative approach: if it is automatic it will happen after a period of time. But given the nature of the matters we are talking about are sexual offences—to use that phrase in the generic sense—and obviously of a lesser nature given the way in which the penalty is framed, the process of going before a court and having it reviewed to see whether it will be spent, surely in and of itself would become a powerful way of reinforcing to the offender the way in which society finds these things to be very serious. In other words, that is the other side of the coin. I can understand your argument to make it as smooth as possible and pass it through, but an argument could be developed that given the serious nature of these matters, notwithstanding the person who conducted the offence was young, these are very serious matters and it is in the interests of society to have it reinforced that what they did is unacceptable.

Ms McCLELLAND: I concede that is a view but looking at it from the point of view of the young person themselves, if the conviction is spent and the time has passed then I suppose it is our strong view that they should not have to endure any further processes that would resurrect that for them. I would want to be convinced I suppose that the benefits for society outweighed any detriment to the young person in those circumstances. I think possibly you would need to look at the seriousness of the offence in question, which means again you have some cut-offs. But from our perspective, in the context of looking at convictions of six months or less and three years had passed without anything, it was our firm view that the matter should lapse.

The Hon. LYNDA VOLTZ: If the data supported that certain types of sexual offences as a rule attracted those types of sentences for juveniles, would it be a better approach to identify those offences as being part of spent convictions and allow another process perhaps for other types of offences? Given the differing range of sexual offences—some are minor or major based on the circumstances at the time—offences such as indecent exposure perhaps or sexual consent between a 17-year-old and a 15-year-old are likely to be offences that attract shorter sentences.

Ms McCLELLAND: I think there is some merit in doing that, and that is the sort of thing we would be wanting to look out in terms of our own legislation as well, to make it clearer as to what categories or what types of offences are included in the prohibited employment situation.

CHAIR: The Committee is working on spent convictions in relation to sexual offences under the Sexual Offences Act, but your working with children process disconnects from the spent convictions process because it operates on a totally different plane. In the review process that you are to undertake at the end of the year will this sort of question be considered or do you perceive that the working with children process has been so successful that many persons who have been excluded should be? Is there a perception in your organisation that that is what should happen?

Ms McCLELLAND: It is our view that we need to look seriously at the legislation to make sure that people who have been denied employment are not prohibited in certain circumstances. The situation that comes up quite regularly in these checks is the case that I mentioned earlier of carnal knowledge as a young person and subsequently the person has been married—they are automatically prohibited unless they apply for an order. Of more concern, is if the age gap between the two individuals was more than three years then there is no right of appeal—to use colloquial language—for that person at all. The offence might have occurred many years ago and the person has had a clean record since but there is nothing we can do. We have sought advice from the—

CHAIR: They still could have married the 15-year-old?

Ms McCLELLAND: In many cases they are married. We have sought advice from the Crown Solicitor's office as to what action is open to us in those circumstances and the advice is nothing.

CHAIR: Because of the law?

Ms McCLELLAND: Because of the law. So there are clearly situations such as that that need to be remedied, and there are others as well that we would be looking to overcome.

The Hon. DAVID CLARKE: Your submission notes that juvenile brain development continues until a young person is in their mid-20s. Can you elaborate on your comments that young people may need help with reasoning and to control their emotional responses?

Ms McCLELLAND: The research we are referring to there is research conducted by Sarah Johnson and others who looked at work that had been done on the development of the brains of young people and looked at how that research over time has linked with public policy—the intersection between the two. The research suggests that the part of the brain that controls impulses and rational thinking does not fully develop until late teens, if not early 20s, and that studies have typically found the type of behaviour that is very common in teens—and they identified that these factors come out in all of the studies—the most commonly seen behaviour changes in teens are increased novelty seeking, increased risk-taking and a shift towards peer-based interactions. They also refer to studies using MRI technology in recent years and suggest that this might help us understand that some of the offending sexual behaviour might have been committed as a result of immaturity, peer pressure and those sorts of issues. We think it is important research that we need to be aware of and to try and understand the implications in what we as a Commission can do to help overcome some of this behaviour on the part of young people.

The Hon. DAVID CLARKE: Do you think it has a particular impact in regard to sexual conduct? Is that what the evidence shows?

Ms McCLELLAND: Certainly that is what this piece of research, which looked at a whole lot of research, suggested: it was one way of explaining that that might have occurred. Certainly research that has been conducted on the factors that are inherent in juvenile sex offenders—there were some research conducted by Sue Righthand and Carlann Welch, which identified a range of factors that were apparent in these groups of

individuals, and they too suggested that some of the behaviour might have been related to this impulsive behaviour of young people.

The Hon. DAVID CLARKE: Is the development the same with male and female, or is there a difference between the two?

Ms McCLELLAND: I am not a neuroscientist and I do not think that the Johnson study made any distinction between the two. That is my recollection. I do not think it made any distinction between the two.

The Hon. GREG DONNELLY: Can you restate the reference? I cannot see the reference in your submission.

Ms SYLVIA HALE: The Johnson one is 7.

The Hon. LYNDA VOLTZ: Was consideration given in the study to looking at change in lifestyle over the last few decades or a shift away from high youth employment in the 15 to 17-year age group in the 1960s and 1970s to what we have today, with youth in that age group being more likely to be still in educational institutions? Has consideration being given in the study to the change in society in terms of employment rates and lifestyle?

Ms McCLELLAND: In relation to sexual behaviour?

The Hon. LYNDA VOLTZ: No, when they are looking at risk-taking behaviour of young people.

Ms McCLELLAND: In the study by Sue Righthand and Carlann Welch, one of the factors they identified is a reasonably high level of education in the group of sex offenders they studied, but that is the only reference to education and work that was in it.

The Hon. LYNDA VOLTZ: I asked the question only because I recall an Arthur Beetson interview in which he was asked why he did not have these troubles during his days in rugby. He said that he was a bricklayer and that by the time he got to training, he was too exhausted to do anything else other than have a sleep. I wonder if there has been an examination of the shifts in lifestyle of young people.

Ms McCLELLAND: I am not aware of any off the top of my head, but certainly it is an interesting question. We can certainly have a look at that.

CHAIR: I thank both of you for attending today. Do you have anything really important that you want to tell us that you will not be able to tell us in answer to the long sequence of questions we will send to you for return within 30 days? Was there anything you wanted to say that you think we have missed?

Ms McCLELLAND: No, I think we have covered all we had to say in our submission and in response to today's questions. Again, thank you for the opportunity to appear.

CHAIR: Thank you very much indeed. It is very important evidence for us. It certainly entangled the question further!

Ms McCLELLAND: Good luck with your deliberations.

(The witnesses withdrew)

DALE ROBERT TOLLIDAY, Program Director—Pre-Trial Diversion of Offenders Program and New Street Adolescent Service, Sydney West Area Health Service, sworn and examined:

CHAIR: Good morning, and thank you very much for attending on our first hearing day in relation to this incredibly complex question. I will not go through the formal notices because I have stated them for the record already. We have broadcast proceedings instructions that are available. The press who work in this building understand the processes. If you have a mobile phone, please turn it to silent mode and keep it away from the recording mechanism because it interferes with Hansard, who take down every word we say very carefully, and they will not have a checking device if we wreck it with the phone. I welcome you to the Committee's hearing. If you take questions on notice, which often happens, we would like the responses to be returned within three weeks, and we would be very grateful for that. The secretariat will send questions to you and organise the process. Do you have an opening statement that you would like to make first?

Mr TOLLIDAY: No.

CHAIR: What is the role of the New South Wales Pre-Trial Diversion of Offenders Program and the New Street Adolescent Services?

Mr TOLLIDAY: I will start with the Pre-Trial Division Program, which has been in operation since 1989. It is a program for families in which a parent has sexually abused one or more of the children. It has a connection to the prosecution process in that a person is diverted for assessment pre-committal.

CHAIR: The parent?

Mr TOLLIDAY: The parent—and is assessed for their eligibility and suitability for the program. If they are both eligible and suitable, they enter the program as an alternative to the usual sentencing. They have a conviction recorded, but they enter the program effectively as a sentence, provided that they complete the requirements of that. The program itself provides direct treatment to that person, all family members including child victims, and including extended family.

CHAIR: Who makes the decision? Where is the decision made that the person will enter the program? Which part of the process orders the person to participate in the New South Wales Pre-Trial Diversion Program?

Mr TOLLIDAY: The person elects to be assessed. They are provided with the information soon after being charged. The Office of the Director of Public Prosecutions determines if they are eligible. They have a suitability assessment in the program itself as a final check.

The Hon. JOHN AJAKA: It needs the consent of both the offender and the Director of Public Prosecutions. They both need to agree?

Mr TOLLIDAY: No. The Director of Public Prosecutions has a set of guidelines. There is not much discretion. There is one discretionary element in the regulation. The determination essentially rests with the program itself—with the director of the program.

The Hon. DAVID CLARKE: This is for offending parents.

CHAIR: Yes.

The Hon. DAVID CLARKE: What percentage are biological parents? Are any figures kept?

Mr TOLLIDAY: Approximately half.

CHAIR: We interrupted you when you are moving on to the next section.

Mr TOLLIDAY: It is a subject we can spend a lot of time discussing.

CHAIR: Although it is a side issue for our subject today.

Mr TOLLIDAY: The New Street Adolescent Service is now a network of services provided by New South Wales Health. The original service was based at north Parramatta. Services are now established or are being established in Tamworth, Newcastle and Dubbo. These are services for adolescents or young people between the ages of 10 and 17, so as to duplicate the age range for Juvenile Justice's clientele, who have sexually assaulted or abused another child or a young person and who are not being prosecuted, whether that si because there is an evidentiary issue or some other reason why the pathway to Juvenile Justice services is not open to young people. In effect, it has been a strategy to have a net to capture quite a large gap.

CHAIR: Recognising that this is not your actual role in life, I would like to know this: if they join the New Street Adolescent Program, does that mean they have picked up a conviction or a registration that they have been in the process that will follow them?

Mr TOLLIDAY: No. It means that a decision has been made to not prosecute them for the behaviour. It does not preclude them from later being prosecuted, if other information comes to light. In fact, if that eventuates, that is reported and investigated.

CHAIR: If you have two 15½-year-olds having consensual sex, would that mean that they could end up in this program?

Mr TOLLIDAY: They may be referred. I do not know that we have actually seen any young people who have engaged in consenting sexual behaviour in the years in which we have been operating. I should have said that the New Street service started in 1998.

The Hon. JOHN AJAKA: What this Committee is looking at is the issue of spent convictions and the issue of whether offences up to 6 months within a certain period of time would become spent, or whether that 6-month period should be extended, especially to juveniles; and whether the year period should be extended. One of the exemptions to all of that is sexual offences where you cannot have a spent conviction. That is another issue we are looking at. If I understand correctly what you are saying, if those who are referred to your program undertake the program and satisfactorily complete the program, the DPP no longer will prosecute them for the offence?

Mr TOLLIDAY: In fact that decision is made before they finally come to us, in order that we do not undermine that decision, of course.

The Hon. JOHN AJAKA: In reality, as far as this Committee and our terms of reference are concerned, none of those persons has a conviction, full stop.

Mr TOLLIDAY: Correct.

The Hon. JOHN AJAKA: There is no aspect of the conviction being spent on not being spent within the exemptions?

The Hon. LYNDA VOLTZ: That is only with the New Street, not with the other program.

Mr TOLLIDAY: Correct.

The Hon. JOHN AJAKA: With the other program, there is still a prosecution.

Mr TOLLIDAY: Absolutely—prosecution and conviction, and application to the Child Protection Register. In fact, they are one of the agencies involved in the Pre-Trial Diversion Program.

The Hon. JOHN AJAKA: Of those, would most of the offences that are being referred to be of a serious or minor nature? In other words, are they the types of offences that would receive a prison term exceeding 6 months or a prison term of less than 6 months?

Mr TOLLIDAY: In relation to juveniles, or adults?

The Hon. JOHN AJAKA: Let us take the adults first.

Mr TOLLIDAY: The adults definitely are likely to have a prison sentence in the alternative.

The Hon. JOHN AJAKA: Although the sexual exemption is still clear. They probably will not come within the exemption of the periods of time. And with the juveniles?

Mr TOLLIDAY: There is probably very little difference in the nature of the offences about the juveniles we see and those who are prosecuted. For example, the majority have committed offences of the highest significance, such as sexual penetration offences.

The Hon. JOHN AJAKA: Again, the penalties would probably exceed—

Mr TOLLIDAY: There is quite a deal of difference in relation to the sentencing of juveniles. One of the differences between the young people we see in our service and those in Juvenile Justice is that we see young people who average 13 to 13-and-a-half years whereas the Juvenile Justice clients on sexual offences are over 16 years, on average, when they first turn up. The offending does not look to be terribly different, but of the young people we see, 50 per cent have committed the offences against a sibling whereas with Juvenile Justice I think it is around 25 per cent. That is one of the compelling issues with this matter for juveniles. Sexual offending is relational, predominantly. It is offences committed against people who are well known and closely related in the majority of cases, not strangers.

Ms SYLVIA HALE: Presumably in the New Street Adolescent Program, you would not pass on information for the purposes of working with children checks because there would be no basis for passing on information: they would not have been found guilty of an offence.

Mr TOLLIDAY: In all instances they probably would have been subject to an apprehended violence order , so they would need to make disclosures in relation to a working with children check. We do not have that role; it is the role of young people.

Ms SYLVIA HALE: If they have information about an apprehended violence order having been taken out against them that would provide the background as to why that order was taken out?

Mr TOLLIDAY: Yes.

Ms SYLVIA HALE: But apart from facing a potential prohibition on working with children, other run-of-the-mill employers would be under no obligation to disclose?

Mr TOLLIDAY: Correct.

Ms SYLVIA HALE: I think you said it was started in 1998, which is 10 or 12 years ago?

Mr TOLLIDAY: Yes.

Ms SYLVIA HALE: For how long do you continue to follow up those children?

Mr TOLLIDAY: We follow up over a number of months after the initial two years that we work with them and their families. We do not have the resources to follow up over a longer period, although we have had an externally conducted evaluation of outcomes for the young people we have seen over a two-year to six-year follow-up period.

Ms SYLVIA HALE: What does that research show?

Mr TOLLIDAY: It shows a very low rate of recidivism for those who have completed our program. It was a controlled study of 50 young people who came into the program. Fifty young people who were unable to come into the program were matched on seven criteria. The sexual recidivism of the persons in the program was one person a report, not prosecuted, but one report, so that represented 2.9 per cent of the completion group and 30 per cent of the withdrawal group, which is the major concern group. I might need to look at the research to give you the exact figure, but it was about 14 per cent of the comparison group. As with other treatment programs, the effective treatment greatly reduces recidivism. It also reduces non-sexual recidivism. Another feature of sexual offending is young people engaging in non-sexual offending.

Ms SYLVIA HALE: You said that there was a withdrawal group.

Mr TOLLIDAY: Yes.

Ms SYLVIA HALE: Are they adolescents who have said, "I will not necessarily pursue this program any further"?

Mr TOLLIDAY: When we looked more closely at the withdrawal group we found that their reasons for withdrawal were the withdrawal of resources from other agencies to support them and their families to participate. That is something we have consequently been addressing more substantially. Typically, young people themselves do not seek to withdraw because they find a great deal of personal benefit in the program.

Ms SYLVIA HALE: Does the program involve families as well as young people?

Mr TOLLIDAY: Correct.

Ms SYLVIA HALE: Families might withdraw because one of the parents moves elsewhere to find a job, or whatever. Would it be because of those sorts of circumstances?

Mr TOLLIDAY: They do not have funds for the transport to get there, or they have other children in childcare whilst they are participating. If possible we would like to work with young people on a weekly basis. That intensity is for about six or nine months. It then becomes less intense and it drops back to fortnightly and then to monthly. We target a two-year period in a young person's life to try to capture a whole developmental phase, if possible.

Ms SYLVIA HALE: What is critical is the provision of resources. That is more important than, say, some sort of arbitrary cut-off point after which a conviction—in this case there will not be a conviction, but let us say that there is—is spent or otherwise?

Mr TOLLIDAY: Yes.

Ms SYLVIA HALE: You need those resources to deal with reality?

Mr TOLLIDAY: Yes.

CHAIR: Do the people who drop out get charged?

Mr TOLLIDAY: No. The decision has already been made upfront.

Ms SYLVIA HALE: How many children do you see each year?

Mr TOLLIDAY: It varies greatly. The number of referrals has exceeded our capacity by a factor of three or four in the Sydney metropolitan area, which is part of what has been driving an expansion of services, as well as the outcome of the evaluation, of course. When we have a full complement of staff at any one time we can accommodate around 35 families.

Ms SYLVIA HALE: Who provides your current funding?

Mr TOLLIDAY: NSW Health. We have funding for a subprogram under Community Services. It defines up to 12 or 14 young people with high and complex needs, including sexual behaviours, in the care of that department. That is a subsidiary small target group that we have.

The Hon. LYNDA VOLTZ: No-one in the juvenile program has been convicted?

Mr TOLLIDAY: They may have been convicted. We have had persons come to us once a decision has been made not to prosecute and then more offences come to light. At that stage we do not stop seeing young people. They may disclose the offences themselves. In only a couple of instances they have been subsequently convicted.

The Hon. LYNDA VOLTZ: But overwhelmingly they are convicted?

Mr TOLLIDAY: Correct.

The Hon. LYNDA VOLTZ: Unless subsequent evidence comes to light. Obviously all those in the adult program have been convicted?

Mr TOLLIDAY: Correct.

The Hon. LYNDA VOLTZ: Have you conducted an evaluation of the follow up of offenders in that program?

Mr TOLLIDAY: We have. The evaluation that was completed last year was a follow up of the persons referred to the service from 1989 to 2005. The evaluation looked at the outcomes from 2007. Again, there was a significant reduction in reoffending for the treatment group: a 65 per cent reduction in sexual offending. That evaluation is now publicly available.

The Hon. LYNDA VOLTZ: What was the rate of reoffending?

Mr TOLLIDAY: I need to look at the evaluation to give you precise figures for the rate of reoffending. It was under 5 per cent for the program completers, and it was just over 13 per cent for those they were compared with, which equates with the meta-studies published overseas.

CHAIR: And that is less than the general recidivism rate.

The Hon. LYNDA VOLTZ: In the adult program did the offences involve sexual assault on a family member?

Mr TOLLIDAY: Yes, on a child.

The Hon. LYNDA VOLTZ: You would expect them to attract sentences of more than 12 months?

Mr TOLLIDAY: Yes.

The Hon. LYNDA VOLTZ: But under your program they receive no sentences. The sentence is not recorded and they are required by law to attend the program?

Mr TOLLIDAY: Yes. The incentive involved in the scheme is the existence of the program.

The Hon. LYNDA VOLTZ: I do not know whether you have this information, but is there an average age for those involved in the adult program?

Mr TOLLIDAY: Yes. It is in the low forties.

Ms SYLVIA HALE: And are they predominantly male?

Mr TOLLIDAY: To date they have all been male.

The Hon. GREG DONNELLY: That answered one of my questions. In looking at all this one of the areas that concerns me is the question of consent—understanding the matter of consent. From your experience and from the organisation's experience in dealing with offenders—whom to date have been all male—you have the finding of fact by the court, the tribunal, or whatever it is, that there has been consent. However, we often hear anecdotally that alcohol is involved, the taking of some drug, or whatever. That muddies the water somewhat in trying to determine whether or not there has been consent. Would you care to comment on that?

Mr TOLLIDAY: Are we talking about young people now?

The Hon. GREG DONNELLY: Yes, let us deal only with young people.

Mr TOLLIDAY: Young people's capacity to make judgments is not the same as an adult. When substances such as alcohol are involved that impairs judgment further. There can be apparent consent, but there must be a substantial investigation to establish whether consent existed at the time. We see that often with young

people who come to us. The initial description is that there has been some level of consent. We then see that advantage has been taken, or exploitation by way of intellectual capacity, occasionally substances being used, and more usually specific knowledge by the actor of the sexual nature of the conduct, or something of it, as distinct from the understanding by the child who has been abused. The understanding by the child who does the abusing can also be quite naive, in particular, when we are talking about people who are 10 years old or 11 years old.

The Hon. GREG DONNELLY: Has your work with these young offenders given you cause to understand what is behind some of this? What have been some of the motivating influences? What have been some of the inputs into shaping their behaviour to perpetrate such acts?

Mr TOLLIDAY: Absolutely.

The Hon. GREG DONNELLY: Would you like to comment on that?

Mr TOLLIDAY: Overwhelmingly, the young people we see come from circumstances of significant disadvantage. They have been exposed to trauma, violence and emotional abuse. In fact, it is rare for us to see a young person who has not had exposure to some kind of traumatic event. In our evaluation I spoke last year at a conference in Italy on children and the law. Without intending it we found an outcome with our young people, unique in the field internationally. Once young people are identified as sex offenders or labelled as such their status as a child seems to disappear because of the offending. The only interest that people seem to have in them later is whether or not they offend again—whether they harm other children.

However, we understand that they have been subject to all kinds of harm that brings them to the position of harming others. It makes a great deal of sense. Through records held by the New South Wales police and the Department of Community Services, as it was at the time, we looked to see whether the children were subject to crime or personal violence, or whether they were subject to risk-of-harm reports. The results for the non-completers in our comparison group was 69 per cent, and for our completer group, which was concerning to us, was 29 per cent. We saw a reduction as a result of what we did, but we were stunned at the size of that.

The Hon. DAVID CLARKE: Is that figure of 69 per cent based on evidence or on what the offenders told you?

Mr TOLLIDAY: Confirmed reports to the police, or reports to the Department of Community Services. It was a file audit, if you like, rather than a personal review. When we looked for some comparative data internationally we found that there was no published research. We could find no PhD studies anywhere in the world where any person had contemplated the safety and wellbeing of a young person after he or she had been identified as being a sexual offender. We found interesting the way in which young people are perceived. That then flows on to how they are treated, and how they are treated shapes how they behave later.

CHAIR: They can do it, so suddenly they are adults.

The Hon. LYNDA VOLTZ: I seek clarification of one issue. Earlier the Commissioner for Young People gave evidence. I asked her a question about lifestyle studies and she said that the information showed that sexual offenders, in particular, young sexual offenders, were highly educated. Do the people that you are seeing represent a specific small category of sexual offences? I do not know of the studies to which she was referring, but we should try to track them down.

Mr TOLLIDAY: I do not know what she meant by "highly educated".

The Hon. LYNDA VOLTZ: They had a high education.

Mr TOLLIDAY: Predominantly our kids come from a poorer advantage, but we see a broad spectrum. We see kids from families with quite a deal of economic resources, so they get access to education more readily. However, due to the media that they now have, such as the Internet, computers, mobile phones, et cetera, they have much more specific sexual knowledge a lot earlier than did the preceding generation. An issue of some debate is whether that is knowledge about the place of sexual behaviour in human development. I believe that they do not understand that, but they have more specific knowledge about acts of a sexual nature than did the preceding generation.

The Hon. LYNDA VOLTZ: There is a broad range of sexual offences, some of which are quite serious. Whilst some sexual offences are serious they might be considered minor and they might attract lesser sentences. Obviously your program deals with very young children aged 13 to 14, who fall within the more serious offence category, and those convictions might be established later. Are there categories of sexual offences? You are seeing a small specific range of sexual offences, but there is a broader range of sexual offences. There is a differentiation between members of the community, given their socioeconomic backgrounds, their educational levels and a whole range of things.

Mr TOLLIDAY: We see young people between 10 and 17. The average age is 13, so we are seeing kids across that whole spectrum. We see kids in that age group when there is a reluctance or an incapacity to prosecute, which brings our age down. The nature of the behaviours that they engage in does not appear to us to be any different from the reported range of behaviours of the older kids. The younger the children, in fact, the less inhibited they seem to be about behaving in this way. It is a factor of their developmental immaturity. In terms of the nature of the offending, the profile of the serious offences in itself does not look to be any different.

The Hon. LYNDA VOLTZ: Do you have children from a higher socioeconomic group?

Mr TOLLIDAY: Yes.

The Hon. LYNDA VOLTZ: Are they from certain ethnic groups or are they broken down in particular ways?

Mr TOLLIDAY: We do an internal review of those sorts of status. I do not know that I can give you here and now a reference comparing socioeconomic and cultural backgrounds. Responding directly now, I would say the majority of those kids are from an Anglo-Celtic kind of background.

The Hon. LYNDA VOLTZ: From an urban or a rural environment?

Mr TOLLIDAY: I am speaking directly to the Sydney-based service. In the rural environment, the Newcastle and Dubbo services have not started working with young people yet and the Tamworth service has only been on the ground for 12 months.

The Hon. LYNDA VOLTZ: Did your evaluations show whether these children completed their Higher School Certificate?

Mr TOLLIDAY: The evaluation did not show that but our internal records for education are a substantial focus of our attention. If they complete our program, with few exceptions they complete their education. If they do not complete an HSC, for example, they are mentored or supported into employment or employment training.

The Hon. LYNDA VOLTZ: Do you know what the educational level of the withdrawal group was?

Mr TOLLIDAY: Once they withdraw we lose access to the information of what happens to that withdrawal group.

The Hon. LYNDA VOLTZ: So the evaluation would not have considered those as part of the—

Mr TOLLIDAY: The evaluation only had a capacity to reach into Police and Community Services records.

Ms SYLVIA HALE: In terms of addressing the needs of these children, presumably you try to encourage them to complete their education, but is the focus on developing a greater empathy with others or is it on gaining greater insight into why they are acting as they are?

Mr TOLLIDAY: Both. I would say empathy ahead of insight. Insight has only a limited degree of relevance to young people. It will be pitched to their level of development. The primary focus of what we are doing is to work with them on their day-to-day safety and being cared for. If their day-to-day safety and care are well structured, the issues of behaving aggressively or harmfully to others diminish by a great degree. One of the features that distinguish our program from many others is that we work intensively with the families of the young people or the carers. About a quarter of the kids are in out-of-home care. So we manage the behaviour

environmentally and we get the kids back on track to have their developmental needs met, and the behaviours can settle. For a very small number of kids who have engaged in the behaviour itself we need to be more specialised in what we do, but we do not provide the more specialised intervention for all the young people. It is not necessary and in fact may be counterproductive.

Ms SYLVIA HALE: You referred to a paper that you gave in Italy. Is that available publicly?

Mr TOLLIDAY: Yes, I can provide that.

The Hon. LYNDA VOLTZ: Could you also provide a copy of the evaluation?

CHAIR: Is the evaluation public property?

Mr TOLLIDAY: The pre-trial diversion evaluation has been released publicly. The New Street evaluation was not released publicly. It is held by all of the relevant departments. We are sort of an interdepartmental group.

The Hon. LYNDA VOLTZ: It is the one for the adults.

The Hon. JOHN AJAKA: Going back to the issue of a determination being made and prior to the prosecution continuing or even proceeding, they join your program and you indicated there is a withdrawal rate. They are not prosecuted further because the determination has already been made. Are you aware of the merit scheme in the court system in relation to drug offences?

Mr TOLLIDAY: Yes.

The Hon. JOHN AJAKA: As I understand the merit scheme, they continually report back to the court until the matter is finalised and then no conviction is entered and it is not proceeded with. There is an incentive to continually meet the merit program otherwise they know they will be back before a judge in a short period of time. Would that be of assistance in reducing the dropout rate or would it be too much for everybody to be concerned with?

Mr TOLLIDAY: In the children's legislation there are some provisions for an order to be made in the Children's Court for a young person to participate in a therapeutic program—a therapeutic treatment order. It has been in the legislation I think since 2000. To my knowledge one order has been made. Victoria introduced therapeutic treatment legislation probably two years ago and I know they have made over 300 orders and provided a pathway for young people through the Children's Court to nominated treatment providers.

The Hon. JOHN AJAKA: Does that operate similarly to the merit program where there is monitoring?

Mr TOLLIDAY: There are obligations to report back.

CHAIR: But does the conviction have to be made in order for that to kick in?

Mr TOLLIDAY: No. There is discretion for the magistrates.

Ms SYLVIA HALE: Why do you think the therapeutic program option has not been followed by the courts here?

Mr TOLLIDAY: I am not sure. I know that in a number of instances when parents of young people have been told, "It's participate voluntarily or have an order", they have participated voluntarily. In Victoria when an order is made resources flow, which supports the participation. I am not really strongly of a view about orders here but I am strongly in favour of providing resources to assist the families who need that support.

CHAIR: Going back to our terms of reference on this issue, you were sent a question and I think it would be worthwhile asking it now. What guidance can be provided by recidivism rates in considering whether sex offences should continue to be excluded from the spent convictions scheme? From your experience of dealing with these issues, what guidance can you give on that question?

Mr TOLLIDAY: Referring to the untreated group, it is difficult to distinguish that group in adulthood from a group not identified in adolescence, so the recidivism rate does not actually show a pathway. In the treatment group it shows a reduction in offending, which is an improvement of a slight degree over the general population. Using recidivism to support later orders or controls does not seem to give great strength to the resources that would go into that.

CHAIR: Of course recidivism rates are the basis for the spent or unspent conviction process.

Mr TOLLIDAY: Yes. Internationally the benchmark that all programs are looking to with recidivism rates for juveniles who have gone through a treatment process is 5 per cent or less within a short period of years, perhaps six years. With the untreated group you are looking at benchmarks of around 20 per cent. In New South Wales, Juvenile Justice published a study on the first 300 young people who went to the sex offender program. I do not know if that report has been made available for this inquiry. It showed 25 per cent having a subsequent conviction for a sexual offence as a juvenile and I think 4 per cent were subsequently convicted as an adult, at an average age of 23. It showed quite a deal more behaviour in adolescence, as a minor, and then a marked decline in early adulthood.

CHAIR: It is very difficult for us to separate the issues we have been presented with in the submissions in regard to young people having consensual sex who go on to get married. They may end up with two convictions before they are 16. It is difficult for us to separate those because the offences are identical.

Mr TOLLIDAY: Yes, at law, but in fact in the dynamics and inter-personally they are not identical at all, they are very different.

CHAIR: That is the complexity of your job, isn't it?

Mr TOLLIDAY: Yes. I noted in the discussion paper consideration of whether there would be a process giving discretion in the Children's Court to determine whether a person's conviction would become spent. I think that would be a positive thing, even though the Children's Court may not agree with it, in that if an incentive could be placed there for young people to participate in a treatment process of some kind that was monitored and accountable and came to a completion, we would expect from all of the research that their rate of recidivism would decline markedly, and that may then be a reasonable trigger for a spent conviction. They would have an additional incentive built into that.

CHAIR: How does this address the issue of the 50 per cent intra-familial?

Mr TOLLIDAY: That is another of the complexities. The first thing that strikes us about sibling intra-familial is that if we go broader for our services and look at cousins, nieces, nephews and other children of close relationships it is actually 85 per cent of our pool.

CHAIR: It has not changed since time immemorial.

Mr TOLLIDAY: We checked with a program in Auckland, New Zealand, which is another multicultural city, and they have almost identical percentages, so we thought we were not finding something odd in what we were seeing, we were finding something the same. In a family where parents need to provide care for a child who has harmed another child—there is an offending child and a victim child—they face the issue of supporting a full criminal process and what the outcome will be. They genuinely want to protect both children. I receive calls from parents from time to time asking advice about how to manage the investigation process, which I cannot provide. It places me in a very difficult position. If I were an independent legal practitioner it would be different. Those practitioners typically advise the parents to support the child who has done the behaviour by not making any admissions. There is no incentive to confirm those admissions. They should make their way past the point in time where a decision is made to prosecute and perhaps negotiate to undertake to participate in treatment with a private provider, or to separate the children. We find parents do extraordinary things. They will move children to other family members. We have had parents who have taken up separate residences to have children in different households. There are all sorts of expressions of their commitment as parents, but they are trying to protect both children.

The Hon. JOHN AJAKA: I want to follow up a question asked earlier. The Chair indicated that maybe a judge should be given the discretion to determine what should be a spent conviction. What is your view on an independent panel, whether of judges or other professionals, to which referrals could be made in relation

to spent convictions to see whether they came perfectly within the scenario. If a circumstance arose where it was not going to be a spent conviction under the Act, whatever the provisions then were, someone could lodge an application to an independent tribunal to look at whether, having regard to all the circumstances of the offence and the current circumstances, a decision could be made to override the legislation.

CHAIR: Like the consensual couple.

Mr TOLLIDAY: I think a panel would be good. Personally I think a legal practitioner should be on the panel and possibly a judge should head it, but other expertise is available.

The Hon. JOHN AJAKA: A panel of a judge, a lawyer, a psychologist, a criminologist—something of that nature. At the moment we clearly do not have that. We have a black and white situation. You come within the legislation so it is a spent conviction; if you do not come within the legislation it will not be a spent conviction. Maybe we need some in-between avenue.

Mr TOLLIDAY: Yes, I think that would be an advantage.

Ms SYLVIA HALE: Would you attribute the decline in reoffending to the fact that as children themselves age they are more capable of moving out of the family home so the family tends to split up and if a lot of this offending occurs because the opportunities are available, when those opportunities cease to exist then the offending declines? Is that your experience or do you need a much more intensive intervention?

Mr TOLLIDAY: The children are actually quite diverse. It is not a single group. So both of the scenarios you have just painted exist, and there needs to be a discretion to apply one to the other. If I could apply one generalisation, the degree of close care and connection for those children, all of them, with their parents has had some difficulty so before they are launching into independence if we can address that in a positive way that would be a key part of an appropriate—

Ms SYLVIA HALE: If you do not intervene and these families are spread across the globe as it were, how frequent or how likely is it that those children who were either victims or perpetrators within a family and who subsequently have children will repeat that offending behaviour?

Mr TOLLIDAY: Statistically, no differently to just an average child plucked at the same age.

CHAIR: Do you have a reference for that piece of statistics?

Mr TOLLIDAY: I will get one for you.

CHAIR: Can you do that on notice? That would be very helpful.

Mr TOLLIDAY: Yes, sure.

The Hon. LYNDA VOLTZ: You may only have this anecdotally because I am not sure if we can get it from the statistics, but how often would you see offences with juveniles where the offence is against a family member convictions over 12 months?

Mr TOLLIDAY: We do not see that in our treatment group. That would be an issue juvenile justice would have more access to.

The Hon. LYNDA VOLTZ: I thought you may anecdotally know.

Mr TOLLIDAY: I do know that 25 per cent of the juvenile justice cohort have as their primary or one of their offences an offence against a sibling. In terms of the sentence, though, I am not sure.

CHAIR: What per cent was that?

Mr TOLLIDAY: Twenty-five per cent.

CHAIR: Thank you. Do you have anything else you want to tell us?

Mr TOLLIDAY: One last piece of information comes to mind. I notice that the previous witness or person giving evidence from the Children's Commission was asked a question about females offending. I was asked a question about the adult program but not in relation to the adolescent service. In the adolescent service we have had on average over the years of operation 10 per cent females, which surprises some people but not ourselves. In relation to the safety of those females, the information I gave before about 69 per cent of our comparison group and 29 per cent of our completion group later being victims of some kind, with the females it was 100 per cent of the comparison group and 80 per cent of the treatment group. So it shows the context in which girls are living and the girls who we see who have sexually harmed others is quite unsafe and it continues to be very unsafe. So there are some distinct differences in terms of the degree of vulnerability between girls and boys.

CHAIR: I have a strong suspicion we may have some questions for you later. The secretariat will organise to get answers to the questions we sent you originally. Thank you for your valuable information, giving us another piece of perception on the whole issue.

(The witness withdrew)

(The Committee adjourned at 12.35 p.m.)