EDUCATION AND HEALTH STANDING COMMITTEE

AN INQUIRY INTO IMPROVING EDUCATIONAL OUTCOMES FOR WESTERN AUSTRALIANS OF ALL AGES

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 20 JUNE 2012

SESSION TWO

Members

Dr J.M. Woollard (Chairman)
Mr P.B. Watson (Deputy Chairman)
Dr G.G. Jacobs
Ms L.L. Baker
Mr P. Abetz

Hearing commenced at 10.45 am

MARTIN, CHIEF JUSTICE WAYNE STEWART
Chief Justice of Western Australia,
C/- Supreme Court of WA,
Stirling Gardens, Barrack Street
Perth 6000, examined:

The CHAIR: On behalf of the Education and Health Standing Committee, I would like to thank you for your interest and your appearance before us today. The purpose of this hearing is to assist the committee in gathering evidence for its inquiry into improving educational outcomes for Western Australians of all ages. At this stage I would like to introduce myself, Janet Woollard; and next to me are committee members, Peter Watson, Graham Jacobs and Peter Abetz; then our secretariat, Brian Gordon, Lucy Roberts; and from Hansard we have Melissa Pilkington. The Education and Health Standing Committee is a committee of the Assembly of the Parliament and this hearing is a formal proceeding of Parliament and commands the same respect given to proceedings in the house. This is a public hearing. Hansard will make a transcript of the proceedings for the public record. If you refer to any document or documents during your evidence, it would assist Hansard if you provide the full title for the record. Before we proceed to the questions we have for you today, I need to ask you: have you completed the "Details of Witness" form?

Chief Justice Martin: I have.

The CHAIR: Do you understand the notes at the bottom of the form about giving evidence to a parliamentary committee?

Chief Justice Martin: I do.

The CHAIR: Did you receive and read the information for witnesses briefing sheet provided with the "Details of Witness" form today?

Chief Justice Martin: I did.

The CHAIR: Do you have any questions in relation to being a witness at today's hearing?

The Witnesses: No, thank you.

The CHAIR: Chief Justice, we are very pleased that you have given us the time to come here today to discuss with us this inquiry and your views on this inquiry and how the areas that were addressed in this inquiry affect the legal system and what can be done. We are hoping from you first that you will maybe talk. Then maybe —

Chief Justice Martin: Yes. I have prepared an opening statement so I am happy to deal with that and I am happy to proceed that way and then throw it open to questions, if that is convenient.

The CHAIR: That would be wonderful if you are happy to do that then.

Chief Justice Martin: I start by thanking the committee for giving me the opportunity to appear to address term of reference 5, which concerns foetal alcohol spectrum disorder. Can I also express my appreciation to the committee for taking up this very important issue? As I have said many times since my appointment as Chief Justice, the overrepresentation of Aboriginal people in the criminal justice system of this state is probably the single biggest issue confronting that system. Tragically, foetal alcohol spectrum disorder is becoming an increasingly significant component of the many interrelated issues that produce that overrepresentation of Aboriginal people in the criminal justice system. I apologise in advance for the length of my opening statement. What I will endeavour to do

through the opening statement is to cover all the issues that I think are relevant to FASD and the courts and the justice system and hopefully that might reduce the need for questions, but I am very happy to take questions on any subject after I have completed my statement.

In order to address the significance of the problem it is necessary to commence by looking at the evidence we have about the extent to which FASD occurs in the community. As I am sure the committee would be aware there have been a number of statistical studies which endeavour to place an estimate on the incidence of FASD, usually per 100 000 live births. Those studies have come up with a spectrum of estimates of the incidence of FASD. The breadth of that spectrum is probably due to the many difficulties that are associated with diagnosis, including uncertainty with respect to the exact criteria for FASD, the variability of systems experienced by FASD sufferers and, in Western Australia, the lack of diagnostic facilities in the areas in which many FASD sufferers are born. It is also been suggested in the literature that there may be some reluctance on behalf of the health professionals to diagnose FASD because of the stigma which attaches not only to the patient but of course also to the family of the patient and in particular the mother of the patient.

One estimate that I have seen suggests that FASD sufferers may comprise up to two per cent of the population. Whatever be the correct statistic, my discussions with health professionals, including paediatricians, and with magistrates in regional Western Australia lead me to the view that the incidence of FASD among Aboriginal people in regional and remote Western Australia is alarmingly high and increasing. The prevalence of FASD, I think, is likely to be compounded by the fact that while it was once thought that FASD was associated only with gross or chronic alcohol abuse during pregnancy, most recent studies, I think, suggest that even relatively moderate amounts of alcohol use during pregnancy can cause the condition, particularly if alcohol is imbibed at particularly sensitive stages of the pregnancy.

Turning then to the connection between FASD and the courts, there have been studies attempting to assess the incidence, if you like, of FASD sufferers coming before the courts. One study suggested that 60 per cent of those who suffer FASD have some intersection with the criminal justice system. I think there are good reasons to conclude that people with FASD are more likely to come before the courts, and I will address those shortly, but I think you need to be cautious before applying a statistic like that to conclude that there is a causal relationship between FASD and court representation. The reason for that is that the studies also show a clear correlation between the incidence of FASD and Aboriginality and low socioeconomic status. Aboriginality and low socioeconomic status are themselves predictors of likelihood of appearing before court, so you cannot conclude that merely because FASD sufferers appear before the court, that is the cause of them appearing before the court. But when you have regard to the symptoms commonly associated with FASD, I think it is very likely that there is in fact a causal connection.

Turning then to those symptoms, obviously, the committee would be better assisted by evidence from a clinician with respect to the range of symptoms associated with FASD than by the evidence from a judge. But I think it is vitally important for those involved in the criminal justice system, including police, prosecutors, defence lawyers, judges and magistrates and corrective services officers, to have an appreciation of the symptoms that are often associated with FASD in order to identify the problem and perhaps come up with an appropriate disposition. Some of the diagnostic features of FASD have little to do with criminal behaviour; they include reduced size and sometimes craniofacial abnormality. Other symptoms including attention deficit and difficulties in solving problems and completing tasks are more likely to have an indirect rather than a direct effect upon criminal behaviour. But there are a number of symptoms commonly associated with FASD that are likely to have a direct effect on offending behaviour. They include the difficulty which FASD sufferers have in learning from experience and in understanding the consequences of their actions. Other features of personality often associated with FASD include lack of empathy, difficulty restraining impulses and in making judgements and understanding time and sequence. Inappropriate sexual behaviour is another common feature of FASD. Fairly obviously, all of these

symptoms are very likely to predispose a person to offending behaviour which is likely to result in them being brought before a criminal court. There are a number of other conditions often associated with FASD which also are likely to have a criminogenic effect. As I have already indicated, FASD is often associated with low socioeconomic status and poor or unstable home environments, including poor parenting, substance abuse, domestic violence and poor nutrition. That kind of background is a characteristic of many offenders within the criminal population. In addition, FASD sufferers also have a very high incidence of diagnosis with other mental or psychiatric conditions, and studies have estimated that 90 per cent may be suffering some other mental or psychiatric condition, and very often conditions associated with substance abuse. Again, these are prevalent characteristics of the criminal population.

[10.55 am]

In summary, there are a number of symptoms of FASD that will almost certainly increase the likelihood of a person with that condition coming before a court. In addition, there are other health and environmental factors associated with FASD that are likely to produce precisely the same result. There are also symptoms of FASD that will place a person at a significant disadvantage when they enter the criminal justice system. Those symptoms include high levels of suggestibility, which means that people with FASD are very likely to agree with propositions that are put to them by police in their interview. Other symptoms include memory deficit. That obviously is going to place a person at a disadvantage when trying to explain their behaviour to police or when giving instructions to defence lawyers or when giving evidence to a court in defence of a charge brought against them. FASD sufferers also have considerable difficulty understanding sarcasm, idiom or metaphor, and these are all common characteristics of language used in the courtroom process. Hearing impediment is another feature of FASD, which again places a person at a significant disadvantage in the court process. Those factors in combination, together with language difficulties and low socioeconomic status, almost inevitably place FASD sufferers at a very significant disadvantage in their dealings with police, in securing adequate legal representation, in comprehending the court process, in deciding upon the strategy to be adopted in response to the charges that are laid and in either defending themselves or placing relevant material before the court in relation to a sentence to be imposed.

There are other aspects of the criminal justice system in which FASD sufferers are significantly disadvantaged. If bail is granted, it will almost inevitably be granted with conditions. The various symptoms to which I have referred and which are often associated with FASD make it quite likely, or certainly increase the likelihood, that an FASD sufferer will breach the conditions of bail. If that happens, bail is likely to be revoked. If bail has been revoked, it is likely that when that person is charged again, bail will be refused because of previous breach of bail.

One of the symptoms often associated with FASD is lack of empathy. In the sentencing process there is a real risk that that will be seen as a lack of remorse, with the result that a more significant sentence will be imposed. When consideration is given by a court to the question of whether a custodial or a non-custodial penalty should be imposed, previous failure to comply with the conditions attached to a non-custodial penalty will likely encourage the court to consider a custodial penalty more seriously. If a person with FASD is sentenced to a custodial penalty and imprisoned, they are likely to suffer significant disadvantages within the prison system. There are, of course, a number of rules and regulations imposed by prison authorities in relation to the behaviour of prisoners within the system. FASD sufferers are unlikely to be in a position to fully comply with those rules, with the result that they will find themselves in trouble with the authorities. And of course there are social hierarchies within prisons, which have their own rules. Again, FASD sufferers are at a disadvantage in complying with those social rules, with the result that they are very likely to find themselves in trouble with their fellow inmates.

So in summary, the various factors that I have referred to provide, I think, a coherent explanation for the significant overrepresentation of people suffering from FASD within our court system. Not only are such people more likely to commit offences but they are also more likely to be apprehended, they are more likely to be refused bail, they are more likely to be convicted and, if convicted, they are more likely to be sentenced to a term of imprisonment, which they are likely to do harder than other prisoners. Because of all those impacts for FASD within the court system, the next obvious question is: are the people involved in that system sufficiently aware of FASD and its consequences? In particular, are the people who work within the system, which includes police, prosecutors, defence lawyers, judges, magistrates and corrective service officers, aware of the condition and its consequences for appropriate disposition? My own view—it is very hard to get a scientific basis for an answer to that question—is that we still have a long way to go in Western Australia for levels of awareness to be as high as one would like. There was a study of judicial awareness and attitudes with respect to FASD conducted in Queensland which suggested that levels of awareness within that state are not as great as they were in relation to a similar study conducted among judicial officers in Canada. My research of the literature suggests to me that Canada is significantly more enhanced than Australia in recognition and awareness of FASD and in program development for dealing with the problem.

I am not aware of any study on the subject of judicial awareness of FASD in Western Australia, so I am dependent upon anecdotal experience. My discussions with regional magistrates lead me to conclude that they would almost certainly all be well aware of the condition and of its consequences. But the lack of diagnostic screening, the pressures of having to deal with a large number of cases at any one time, coupled with the lack of any relevant management or treatment programs, I think, have the consequence that, very often, even an awareness of FASD would not be acted upon or have any significant consequences in the way in which that person is dealt with through the system. That is not, of course, to say that FASD is never taken into account; far from it. In Western Australia, the Sentencing Act provides any judge or magistrate with the power to order a pre-sentence report from a number of disciplines, including medical and psychiatric disciplines. So if FASD is suspected, that power can be exercised and a report obtained on whether or not the offender suffers the condition, and I am sure that that happens from time to time. But I would also be fairly confident that there would be a number of cases in which FASD was suspected but that power was not exercised. There would be a number of reasons for that, I think. The first is the very limited availability of medical and psychiatric resources in the regional and remote parts of our state where this condition seems to be most prevalent. The second is the delay that is likely to be occasioned by the commissioning of a report in a situation in which the magistrate may not be scheduled to revisit that circuit location for quite some time, and so commissioning a report will inevitably delay the disposition of the case quite significantly. Another factor discouraging inquiry into the condition is the fact that even if an offender is diagnosed, there simply are no programs or management plans to deal with that diagnosis. So it is useful information, but its utility is limited by that sad fact.

I would also like to suggest that police and prosecutors and defence lawyers are much more likely to have access to the information that would create a prospect of an FASD diagnosis than judges or magistrates. A judge or magistrate called upon to sentence an offender does not have a great deal of interaction with the offender before sentence is passed. Usually, they will simply see them sitting in the back of a court room; they will have little opportunity to observe their behaviour in such a way as to give rise to a suspicion of FASD. By contrast, police, prosecutors and defence lawyers have much greater interaction with the offender and would be in a better position to assess the possibility that FASD may be involved. I do not for that reason mean to suggest that judicial awareness of FASD is unimportant, but what I do suggest is that if you are looking at improving awareness of the condition, training of police, prosecutors and defence lawyers is more likely to pay significant practical dividends than training of judges and magistrates. Better still, of course, would be the

provision of resources in terms of skilled health professionals capable of undertaking diagnosis. That could be court based; even better still, in my view, a regionally based screening program applied in the regions where this condition appears to be most prevalent would, I think, be the ideal paradigm solution to these problems of diagnosis.

The last subject I would like to address is about FASD and sentencing, because FASD sufferers do pose some significant problems for courts in relation to sentence. I would like to address that in two ways: firstly, by looking at the principles that govern sentencing and, secondly, by looking at the specific sentencing options that courts in Western Australia have. Dealing firstly with the principles, the primary principle of sentencing is, of course, that the court must impose a punishment which reflects the seriousness of the offence and the culpability of the offender. Related sentencing principles include the public denunciation of the offending behaviour and the exaction of retribution from the offender for the harm which they have caused to the victim and to the community. In the case of FASD offenders, I think there is good reason for thinking that each of these factors should be given less weight. Dealing firstly with punishment, I think most reasonable people would agree with the proposition that the culpability of an offender suffering from FASD is less than an offender who commits a similar crime who is not suffering from the criminogenic conditions that are often associated with FASD. Because the culpability of those offenders is lower, again I think most reasonable people would consider that the need to exact retribution from that offender is reduced, as is the need to denounce FASD suffers, particularly in a context in which if one were looking to denounce aspects of that offender's behaviour, one would really be denouncing the family background and the society that has allowed the offender to suffer from that condition.

Another very significant sentencing principle is, of course, that of deterrence, and that has two components—general deterrence, which is to deter people generally from offending, and specific deterrence, which is to deter the particular offender from reoffending. Again, I think with FASD sufferers, there is reason to think that this factor should be given less weight. General deterrence is unlikely to be significant because non-FASD sufferers are unlikely to be affected by the penalty imposed on somebody who is known to suffer FASD. In the case of specific deterrence—that is, discouraging reoffending by the particular offender—one of the tragic aspects of FASD is, of course, that many of the symptoms are not susceptible to treatment so that the prospect of deterring somebody from reoffending by punishment is reduced.

[11.05 am]

Rehabilitation is, of course, another very significant sentencing factor. In the case of FASD offenders, I have already mentioned the fact that some of the symptoms are not readily susceptible to treatment. I do not mean to suggest by that that we should throw our hands in the air in despair and not do anything about those offenders. In Canada, they have developed a program for FASD offenders, which in turn suggests that there are things that can be done to reduce the risks associated with the presence of those persons in the community. I think another aspect of the acknowledgement of the fact that these offenders are resistant to treatment is that, in terms of long-term management, probably the most effective way of diminishing the risk of reoffending is by providing a safe and stable environment in which these people can be managed within the community in a way that reduces the risk of offending behaviour. The problem at the moment is that there are simply very few options to judges and magistrates to produce a sentence that will encourage that sort of environment, unless either family members or community members come forward and offer to provide that sort of support, and unfortunately that does not happen very often at all.

The final sentencing principle I will refer to is what is sometimes referred to as "incapacitation", and that refers to the fact that while an offender is in prison, obviously they are prevented from committing offences against the community generally. But, of course, incapacitation only works for as long as the offender is in custody, so unless one is resigned to incarcerating a person effectively

for the rest of their life, it is not a very effective means of reducing reoffending, and it is very expensive. Many FASD offenders commit offences at the lower end of the criminal spectrum, with the result that incarceration for lengthy periods of time is simply not justified by the seriousness of those offences. But for some of the FASD sufferers who commit serious sexual offences, prolonged incarceration is likely to be the only way of adequately protecting the community, unless some other alternative can be devised.

So those are the sentencing principles. Moving on to the types of sentences that courts have available to them in relation to FASD sufferers. There are, I think, problems with each of those, and I will deal with them, if you like, in increasing levels of severity. The sentence most commonly applied in Western Australia is that of a fine. In relation to FASD sufferers, though, this penalty is often problematic. Often they will lack the capacity to pay, or even if they do have the capacity to pay, they will lack the wherewithal to make the arrangements to pay within the time stipulated by the court; the organisational skills necessary to actually organise payment are often beyond them.

Moving up into community-based orders, there is a range of community-based orders available to courts under the Sentencing Act, almost all of which have conditions attached to them. Because of the symptoms I have already mentioned, imposing conditions that have to be complied with upon these offenders is often likely to lead to breach, with the result that they will be brought back before the court and sometimes with a more serious sentencing disposition arrived at.

Moving up the scale, the next sentence available to the court is that of a suspended prison term. Again, that is, of its nature, conditional; it is conditional upon the offender not reoffending during the period of suspension. Because of the various aspects of FASD to which I have referred, that type of sentence is very likely to be setting a person up to fail, because they will reoffend during the period of suspension and then they will be brought back before the court and the suspended prison term will be imposed, together with another penalty for the offence that they have committed to breach the suspended term.

The most serious penalty we have available to us is, of course, imprisonment. For reasons I have already mentioned, it is very likely that FASD sufferers will do their time harder than other prisoners and, of course, because there are presently no management or treatment programs available for FASD sufferers within the prison system, there is unlikely to be anything done that will address their offending behaviour while they are in prison.

In summary, people who suffer from FASD are, I think, likely to be predisposed to offending behaviour, and they are likely to be significantly disadvantaged at virtually every point in the criminal justice system.

It is, I think, poignant to recall that people suffer from this condition through no fault of their own. There is, I think, room for the view that our current processes do not fairly and justly deal with people who suffer from this condition. Ways in which those processes could be improved include, in my view, greater awareness and training among police, prosecutors, defence lawyers, judicial officers—judges and magistrates—and Corrective Services officers. Better still would be improved diagnostic screening services provided by health professionals. One way would be to provide those through the court, so that when somebody comes before the court, they are screened. Better still, I think, would be a regionally based screening program that would cover all the people likely to be at risk in the regions of the state, where, we have reason to suspect, these conditions are more prevalent. I say that because such a program would, I think, produce information, particularly when a diagnosis was made, that would be very helpful to a range of agencies. Those agencies would include, obviously, Health, the Department for Child Protection, Education, the police and disability services, not just the courts. That is why I suggest that a broader-based screening program would be of great assistance.

Within the court system, sentencing dispositions could, I think, be improved by the availability of a program specifically designed to reduce the risk of such offenders reoffending and by the provision

of resources that would enable those offenders to be managed in a safe environment within the community, which would reduce the risk of them reoffending. I do apologise again for the length of my opening address.

Mr P.B. WATSON: Excellent address.

Chief Justice Martin: They are fairly complex issues, and I hope I have covered the ground the committee is interested in.

The CHAIR: I might start the ball rolling, before asking you some questions—your presentation was wonderful.

Chief Justice Martin: Thank you.

The CHAIR: You covered most of the areas; in fact, there was very little that you did not cover in that. We have never done this before, and the committee would need to think about this afterwards, but normally when someone makes a presentation to the committee, the presentation goes back to you to check it is all correct, and then it goes up on our website for our hearings. I think your presentation was so comprehensive that I am certainly going to ask committee members whether they would consider including your presentation as a chapter within our report.

Dr G.G. JACOBS: It was a lovely summary.

The CHAIR: It really needs to go in the report.

Mr P.B. WATSON: With your permission.

Chief Justice Martin: Absolutely; you can use it in whatever way you want—put it on the website, in your report. However you want to use it is fine

The CHAIR: Thank you.

Chief Justice Martin: I have used a lot of second-hand information because I am not at the coalface. I sit occasionally in the remote parts of the state, but I am not the East Kimberley magistrate. But I have been in communication, obviously, with the East Kimberley magistrate, and with the president of the Children's Court. I do not know what your time frame is, but I think each of those people would be interested in providing information to you if you would find that of assistance. Perhaps I will have a chat to Dr Gordon later about whether we could arrange for them to provide written information to you based on their first-hand experiences.

The CHAIR: We would very much appreciate that.

Chief Justice Martin: I will take that up with Dr Gordon after the hearing.

The CHAIR: Shall I start the ball rolling with questions?

Mr P.B. WATSON: Can we get to Dr Jacobs because he has to go early?

The CHAIR: Yes. Graham sends apologies—he has to leave—but before he leaves.

[11.15 am]

Dr G.G. JACOBS: Thanks Chief Justice for a fantastic overview. In your knowledge, the practice of referring a suspected people that have FAS or FASD, are they often referred—when they come before a judge or magistrate, can they be referred for an assessment before —

Chief Justice Martin: It does happen, but not as often as the condition would be suspected for the practical reasons identified. Time is a big issue. If you are a regional magistrate and you are visiting, say, Balgo and you know you are not coming back to Balgo for another, say, two months, then if you wait for a report, it slows down the disposition by two months. You have got to balance the delay with the fact that even if you know that the person suffers from FASD, what are you going to do about it because there is simply no program or facility available for those people. So, it is probably not going to have a dramatic impact on your deposition.

One area where it is very relevant concerns capacity to plead, so that if there is a question about whether the effect of the FASD produces the result that the person is unable to deal with criminal process, so they cannot fairly be tried, then you need, obviously, to have a detailed report so that you can answer the questions posed by the criminally impaired offenders act—whatever that horrible piece of legislation is named.

Mr P.B. WATSON: Would you be concerned that lawyers might use it as an excuse and say, "Look, my client has got FASD"?

Chief Justice Martin: I am not aware of that ever being a phenomenon. I think it is much more likely to go under-recognised than promoted. Again, it is a double-edged sword for a lawyer because if you say, "My client's got FASD," the magistrate is going to think that means they are very likely to re-offend and there is nothing we can do about it. So, it is very much a double-edged sword.

Dr G.G. JACOBS: I suppose one of the other issues in talking about the Balgo situation is where you send these people to have that assessment even.

Chief Justice Martin: Exactly. So, really again you have got to rely on the fact that somebody would have to come to Balgo from, say, Kununurra—someone qualified in making the diagnosis. Of course, if the person is before an adult court, you really need a history from 18 or 20 years ago; that is unlikely to be available, unless the mother is still around. Very often the mother will not be available. So, diagnosis is itself problematic for all the reasons that we know about and given that there is no effective disposition that has been affected by the diagnosis, I am sure it does not happen.

Mr P.B. WATSON: Mr Martin, if the mother drinks in the first trimester, they get the pixie-like things, but if they do not and they drink later, you do not get those characteristics in the face. So, a lot of these people are getting classified as ADHD and they are put on Ritalin and all that. So, it is very hard for a magistrate, who thinks, "It might be ADHD or it could be FASD", and that must be a hard decision for them to —

Chief Justice Martin: Very, very difficult. Again, without the benefit of skilled diagnostic services it is almost impossible for the magistrates to make—sometimes a case will be obvious. As you say, if there are the characteristic facial features and the behaviour is gross, then it will be relatively easy to identify. But in the more difficult case to which you refer, Mr Watson, there would be real problems in a magistrate trying to draw their conclusions without the benefit of a diagnostician.

Mr P. ABETZ: Just a question. This aspect of protecting the community from the criminal behaviour, I often struggle with that whole issue with drug addicts and that sort of thing in terms of what is the best place for them to be. Often it is not jail but in a rehab facility. Like in Sweden they have a system where if you are under the influence of drugs, it is an offence and you do not go to jail, but you go to a rehab facility or you have a choice of going to court—98 per cent of people stay in the rehab facility where these people can live in a semi-institutional-type of setting where there is sufficient protective frameworks around where people understand their issues and also try to train them in terms of moving forward. Do you think that is a possibility?

Chief Justice Martin: Thank you very much for the question. I think that is exactly what I would see as the way forward. Much criminal behaviour is the symptom of an underlying cause and the reality is that the best way to protect the community is to address that underlying cause. The classic illustration is the one you have given—that is, the drug addict. Very often the criminal conduct will be motivated by a desire to get money in order to feed the addiction. Until you address addiction, you are never going to change the criminal behaviour, which is why we have the Drug Court and it works.

The problem, of course, with FASD is that a lot of symptoms are not susceptible to treatment. If you cannot remove the cause of the offending behaviour or address it, you have got to mitigate the

risk. How do you mitigate the risk? I think exactly in the way you have described—that is, some kind of community support which prevents these vulnerable people being exposed to the sort of risks that lead them to commit offences in relation to things like aberrant sexual behaviour, for example. There are programs—one in Canada has been mentioned—where you can try to introduce the idea to these people that that sort of behaviour is simply unacceptable and will not be tolerated. Because of the symptoms of FASD there are limits to how effective that will be, which again means that providing them with a safe and supportive place in a community setting that reduces risk is likely to be cheaper and more effective than locking them up.

The CHAIR: Chief Justice, as you mentioned, more is possibly being done in this area with the courts in Canada and I know that in the prisons they are looking at assessment tools for—I think it was Manitoba that they are looking at assessment tools to help diagnose and from their statistics, I think, in Canada they are saying that there is possibly almost 1 million people suffering from FASD. Because we do not have the diagnostic tool, we do not have the statistics, so we do not know how many people in WA may be suffering from FASD. We know that in some regional areas—we were told as a committee it can be up to 25, 30 per cent in some areas. When you mentioned the screening and the regional screening, I assume that would be for people like the member for Southern River mentioned—people who come in contact with the police or the alcohol and drug authority or people who have had some, I guess, contact with the justice system. We know yes, there is a high percentage in some regional areas, but we also know that FASD now is something that is across WA. We cannot roll it out—you know, firstly we have to get the tools, validate the tools and we have to make sure there is money to help those people, because we know that they do not have the same lifestyle that other people have and they do need support systems. Could you maybe expand a little on how you would find that regional screening?

Chief Justice Martin: Can I say a couple of things? First of all I have had the benefit of interaction with judicial colleagues in Canada and I have pursued those interactions, because every time I talk to those colleagues, I am struck by the similarities of the conditions that they are dealing with in Canada and which we are dealing with in Western Australia—large expanses of mostly unpopulated area populated by Indigenous people who have significant problems with alcohol abuse and all the other problems that go with that. So I think we have a lot to learn from our colleagues in Canada. I will be very surprised if the incidence of FASD in Western Australia was any lower than has been detected in Canada. My suspicion—it is only a suspicion—would be, if anything, it is likely to be higher than it is in Canada.

In terms of the screening process, I am not skilled in community health, but my preference would be for a screening process that is more broad-based than merely based on intersection with police or criminal justice. I would have thought that screening at the point of birth now would be appropriate in some of these areas where, like you, I have heard from the paediatricians that they rate the prevalence very highly in the sort of percentages you mentioned—25, 30 per cent. I would have thought that justifies a screening process applied to all babies born in these areas. That, of course, will only catch babies born from now on.

In terms of where you go from here, in respect of the people already born, I would have thought anybody who gives any government agent or officer reason to suspect they might be affected could be screened for the condition. Whether it be a school teacher or Centrelink worker or anyone like that who thinks there might be a problem, there ought to be a facility that will enable that person to be screened. As I say, I think the agencies will benefit from that information, not just courts and police. Education, child protection, disability services, all of these agencies would, I think, benefit from much greater diagnostic information.

The CHAIR: Thank you so much, because that was my concern when you mentioned the regional screening and we have had Dr Fitzpatrick present who is one of the paediatricians attached to the

Lililwan project along with Professor Elizabeth Elliott and they are hoping that we will get a diagnostic screening program for FASD —

Chief Justice Martin: I think that would be terrific.

The CHAIR: — in the regional areas. It is obviously something that many of us will support so that from birth children are identified and given that support. Then, again, as you have also said, the screening could also, as it has been developed in Canada—then that later screening for children who come into contact with juvenile justice or come into contact with the courts, so that if it has not been picked—because there would be other people if we start now who it will not be picked up on, but it can be identified later and then assistance can be given to those people.

Chief Justice Martin: One of the advantages is that—I do not want to keep you—with juveniles, of course, diversion away from the court system is one of the key techniques we have available to us. If you know that a juvenile suffers from FASD, then that would be a pretty good reason for diverting them away from the court system, because of all of the problems that I have mentioned. There is not much we can do in the court system for people like that, so it would help make decisions to divert them away and deal with them some other way.

The CHAIR: Shall we let Graham go first.

Dr G.G. JACOBS: Thanks, Chief Justice. You sort of touched on that Criminal Law (Mentally Impaired Accused) Act, CLMIA or something.

Chief Justice Martin: CLMIA, yes, that is it. It sounds like a condition, does it not?

Dr G.G. JACOBS: People with FAS and FASD—it is an awful term, but there is an element of mental impairment. So, would you see, maybe when we have got, obviously, more work in and around the diagnostic issues, having FASD come under this act or an act like this, so that obviously there is all those basically considerations that basically you cut these people a bit of slack, a bit of leniency, if you like?

Chief Justice Martin: I have no doubt that FASD would come within that act. It would meet the definition of "mentally impaired" for the purpose of that act. There are some very serious problems with that legislation that I have referred to before. It covers two areas. One, as I have already mentioned, is capacity to plead and the other is sentencing disposition if found not guilty on the basis of unsoundness of mind. The level of capacity to plead—the problem is that for the judge or magistrate the only two options you have available to you, if you find that somebody is not fit to go through the trial process, is a complete discharge, acquittal, effectively no charge will be brought against them, or indefinite imprisonment. So, they will then only be released effectively by the Governor on recommendation of the Mentally Impaired Accused Review Board. There is no halfway house. You cannot say, "I will release you on the condition that you live in a certain area or that you undertake this treatment program or that you live with your aunty."

Dr G.G. JACOBS: So it is all or nothing.

Chief Justice Martin: It is Sydney or the bush, and that is a very, very difficult position for a judge to find themselves in, because often the offence will not be serious enough to justify locking somebody up indefinitely, especially given, of course, that they have not been convicted. The same problem applies with not guilty on the grounds of unsoundness of mind. Again, really the courts only have two options. One is to completely discharge the offender, which if they have been convicted is unlikely to happen. The other is that they are sentenced to indefinite detention because the act allows for people to be kept in a place other than a prison, but there is currently no declared other place. So, those offenders go to prison indefinitely. If you put yourself in the position of a lawyer and you have got somebody who has been charged with, let us say, a minor burglary, there is no way that you would ever plead them not guilty on the basis of unsoundness of mind, because they will get indefinite detention and they might end up locked up for much longer than if they get convicted and sentenced—locked up in exactly the same place. They are going to be in prison. So,

you would never enter a plea of that kind except for a very serious offence. The act has got some serious problems.

[11.30 am]

Dr G.G. JACOBS: Would you excuse me? Thank you very much for your time.

Mr P.B. WATSON: Chief Justice, a couple things. You are saying it is a statewide issue with FASD. My electorate is Albany and just talking to school teachers, there is a lot of them in the schools at the moment, but because we are not up north and, you know, the focus is not here, a lot of these kids are going through the justice system and just being seen as really bad kids, but it is not concentrated on. I was just wondering if there should be training when the justices go through their courses, for police and also for prison officers, so they are made aware that if someone is classified with FASD—you cannot treat them differently, otherwise—but be aware that —

Chief Justice Martin: It has an impact on the appropriate disposition, I think. I agree entirely with that and in terms of your electorate, can I say that the Nyoongah people within the south west rightly complain that they are not nearly as visible as the other Aboriginal people in our state and that is because, of course, there is a much higher percentage of white people in the area which they inhabit, but numerically Nyoongah people are as significant an Aboriginal group as any other—well, probably more significant than any other group within the state. But they tend to get submerged, whereas in other parts of the state where the white population is fewer, Aboriginal people are more prominent. I agree entirely with your observation. We should not overlook the south west by any means.

Mr P.B. WATSON: Excuse me, great southern. It is a very, very pertinent point.

Chief Justice Martin: Training is, I think, vitally important, but as I suggested, training for judges and magistrates is very helpful, but the keys are the people who have direct contact with people who are likely to suffer FASD—teachers, police, defence lawyers in the criminal justice system, defence lawyers and prosecutors. These people meet these people in a room. We do not see them in a room. We just see them in the corner and we have no real way of knowing whether they are likely to be suffering from the condition. People who are at the coalface are the ones who, I think, would benefit most from training.

The CHAIR: I very much look forward to reading through your presentation because there was so much in there that I would like—in many ways I wanted to stop you as you went through, but in other ways I did not want to interrupt your flow. At each point in your presentation you gave a summary of the area you had just addressed and it is such an enormous area.

Chief Justice Martin: It is and, unfortunately, increasingly important. The numbers are getting larger and more significant. What we are finding is that as the kids who suffer from these conditions get older, the numbers of intersections they have with the courts are getting more numerous and their offending behaviour is getting more serious. It is really becoming a very serious problem.

The CHAIR: You said that there can be more education in terms of practitioners for identifying, more education for police in relation to FASD, for prosecutors, for defence lawyers. Now, we could as a committee make a recommendation, but —

Chief Justice Martin: Somebody has got to fund it.

The CHAIR: But it is not just the funding. It is: who puts that together? But we are going to recommend—because we know that that work is being done in Canada. We know that there are lawyers for people with FASD. We know that when someone goes to court they go off and they get assessed. We know that in the prisons they are looking now for FASD and because it is an actual diagnosis they have got funding for when people come outside prison. But in relation to juvenile justice and the court system and if we are going to say, “Look, we think more needs to be done,” who would be the people who we would recommend sit down and look at that system and

determine what should, apart from having a diagnostic tool, the defence lawyers be given? What should the prosecutors be given? What should be happening in the prisons to help identify—because you have mentioned that people may not have just FASD; a lot of Aboriginal people also have hearing problems. Who is the body for the justice system to look at something like this? If we were making a recommendation, who should we say should be funded to look at this area and try to develop some—initially be funded to put together a package to the government with: this is what we think should be done; how it should be done; and what it should cost or what it might cost?

Chief Justice Martin: In terms of practical delivery of training and awareness, happily all the people who would benefit most from greater training and awareness are employees of the state—the police, prosecutors, even the defence lawyers. Almost all the defence work in the parts of the state most affected is done by Legal Aid and the Aboriginal Legal Service. Corrective services—of course, they are all employees of the state; judges and magistrates are all employees of the state. So, if the agencies that employ these people are given the training to properly train and make their staff aware, there is no reason to think that they would not utilise that resource. In terms of the agency best equipped to deliver that training resource, I would have thought that it is a health issue and I would have thought that the health department would be best equipped to identify, if you like, an information package and training module and to assist other agencies in developing, perhaps through Corrective Services, a treatment program that would be available both as a community-based order—that is, as a condition attached to a community-based sentencing disposition or within the prison system. I would see it as health taking primary responsibility, providing resources to the other agencies and working with corrective services to develop a treatment program.

Mr P. ABETZ: Just a quick question on the incidence of FASD-affected people coming before the courts. Since Aboriginal people have been allowed to access alcohol—I am trying to remember when that was —

Chief Justice Martin: It was about the mid-1960s.

Mr P. ABETZ: Mid-1960s. So, one would have expected this problem to just sort of have already peaked and gone back down, but from what you are saying it is still increasing.

Chief Justice Martin: I think there are a number of other facts associated with these things, such as the availability of pension entitlements and the introduction in some parts of the state of equal pay of Aboriginal stockmen, which of course resulted in areas of the Kimberley where people were unemployed overnight, which resulted in people who had been living useful lives on stations and being employed on stations being relocated to places like Fitzroy Crossing and Halls Creek where they are given a pension, there is a pub in town and there is nothing else to do. I think that is a sort of deadly cocktail that happened by the early 1980s, which resulted in chronic drinking and the problem has been exacerbated. Lifestyles have developed where drink is now the focus of the daily activity and that started to emerge during the 1980s. I am sure members of this committee would be well aware this is a really critical time, I think, for lots of Aboriginal communities in the remote parts of the state. Because of the problems of alcohol abuse, many of the children who are affected by FASD are being raised by their grandparents because their parents are incapable of rearing them. Those grandparents of course have significantly lower life expectancies than non-Aboriginal people. So, there is the risk that these children will be left effectively orphaned with nobody in a position to care for them and, in addition, the grandparents are the repositories of language, culture and lore and when they are gone, it is gone forever and it is irreplaceable. In a very real sense, this is the last roll of the dice for a lot of these —

Mr P.B. WATSON: We will lose a generation.

Chief Justice Martin: We will lose a generation—we have lost a generation, I think, in some of these areas. It is very serious stuff.

The CHAIR: We were told, Chief Justice, that this is now third generation.

Chief Justice Martin: That would probably be right.

The CHAIR: Children are being born with third generation FASD.

Chief Justice Martin: And of course half the Aboriginal population is under 20. So, that is a very significant problem.

Mr P.B. WATSON: The young kids have not got the respect for the elders anymore either. I remember when I got into my job 12 years ago now, if I had an issue, I went to an elder and he brought the young child in and he sorted it out with the complainer. These days they just do not have any respect for them at all.

Chief Justice Martin: That is right. Happily there are still some very good and responsible elders in communities around the state and, you know, we really need to encourage those people to step up and empower them to take responsibility because the solution really lies in their hands. We need to do what we can to encourage them.

The CHAIR: Chief Justice, I would like to thank you very much for your evidence before the committee today. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 days from the date of the letter attached to it. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence.

Hearing concluded at 11.41 am