

PARLIAMENT OF VICTORIA

**LEGISLATIVE COUNCIL
LEGISLATION COMMITTEE**

Criminal Procedure Legislation Amendment Bill

Tuesday, 26 February 2008

Chair

Mr B. Atkinson

Deputy Chair

Ms C. Broad

Members

Mr B. Atkinson

Ms C. Broad

Mrs A. Coote

Mr D. Drum

Ms J. Mikakos

Ms S. Pennicuik

Ms J. Pulford

Substituted members

Mr G. Rich-Phillips (Mrs A. Coote)

Mr P. Hall (Mr D. Drum)

Also present

Mr B. Tee, Parliamentary Secretary for Justice.

Mr G. Byrne, director, criminal law — justice statement, and

Ms P. Jobling, legal policy officer, Department of Justice.

Mr E. O'Donohue.

CRIMINAL PROCEDURE LEGISLATION AMENDMENT BILL*Legislation Committee***Referred from Legislative Council**

The CHAIR (Mr Atkinson) — I declare the public hearing open and welcome everyone. Formally I would advise that the Legislation Committee has been asked to consider the Criminal Procedure Legislation Amendment Bill 2007 — a bill for an act to amend the Children, Youth and Families Act 2005, the County Court Act 1958, the Crimes Act 1958, the Crimes (Criminal Trials) Act 1999, the Magistrates' Court Act 1989, the Sentencing Act 1991, the Summary Offences Act 1966 and the Supreme Court Act 1986 and for other purposes.

The legislation has been referred to the Legislation Committee because of some concerns that were raised in the course of the debate. I would invite Mr Tee to make any comments initially on the legislation, and then I will seek some questions specifically about some of the issues.

Mr TEE — Yes, I am very pleased to do so. Essentially we are here today at the request of a number of the other members of the house who have raised a number of concerns, and really we are keen to do what we can to allay any fears or concerns. I am appearing today. I have two people from the department who will be supporting me, but essentially the appearance is by myself today. I introduce Greg Byrne, on my left, and Prita Jobling.

Can I indicate at the start that the Sentencing Advisory Council final report was for us, for the government, compelling reading. What the report in essence found is that late guilty pleas were the single most common reason that criminal trials do not proceed on their day of listing. That has enormous consequences for the efficiency of the courts; it has enormous consequences for the prosecution, but it has enormous consequences for victims and witnesses, who for a very long period have court dates hanging over their heads where they have got a difficulty in moving on and getting on with their lives because of the threat of having to go through what can be a very traumatic experience in court.

That finding by the Sentencing Advisory Council caused the government to give considerable weight to its recommendations looking at ways of trying to encourage earlier pleas. That is really, I suppose, the crux of the bill: looking at ensuring that victims can get out of the justice system, can get on with their lives by removing that unnecessary delay. I am ready to answer any questions, but I think that is the broad briefing as to why we are here today.

The CHAIR (Mr Atkinson) — Can I also indicate for the benefit of the committee as a whole and particularly visitors that in a meeting where we were looking at the procedures for our hearings it was noted that on this particular legislation Scrutiny of Acts and Regulations Committee has revisited the legislation and has made some further comments. Because that report has yet to be tabled in Parliament we are not privy to what SARC's concerns may or may not have been in its revisiting of the legislation. That may mean our ability to actually form a view or to deal with this matter entirely at this meeting might not be possible. It may be necessary to come back later once we have seen the SARC report. It is also possible that the issues in the SARC report might be addressed by the questions at any rate and will be resolved. I just indicate that for the courtesy of all people who are associated with this matter.

I propose to go through the bill clause by clause. If members have questions on a specific clause they can raise those. The first clause is the purpose clause. Are there any comments or concerns about the purposes?

Clause 1

Mr RICH-PHILLIPS — I have some questions, Mr Chairman, but before I do I want to clarify the capacity in which Mr Tee is appearing in place of the minister? I assume he has authority to speak for the government on this bill and that the government would be bound by any commitments or comments that he makes. Is that the status of his attendance?

Mr TEE — The status of my attendance as I understand it is that the minister is the planning minister who is responsible for the Attorney-General's bills in the Legislative Council. It is his view, a view that has been communicated to the committee, that as Parliamentary Secretary for Justice I am in the best position to assist the committee on this issue. The approach that has been adopted is consistent with clause 16.11 (3) of the standing orders, which says:

The minister, minister representing or such other persons nominated by the minister or member in charge of the bill may give evidence to the committee.

So my capacity is that set out in that clause of the standing orders.

Mr RICH-PHILLIPS — I raise the point from the perspective that when any report of this committee is adopted by the house we may seek to have the relevant minister endorse the matters raised by his representative here, so it is clearly on the record they are the views or the position of the responsible minister in the house.

Under the purpose clause, the first question I want to raise — I will be guided by you, Mr Chairman, as to whether this is the appropriate spot — when the bill was announced on 19 September by the Attorney-General by way of media release entitled 'Greater transparency in sentencing', the Attorney-General indicated that the government would introduce a pilot sentence indication scheme. It is not clear from the bill how this is a pilot. Can you explain how this will operate as a pilot rather than an ongoing scheme, what is the time frame for the pilot and how that pilot will be evaluated?

Mr TEE — In terms of the issue of the pilot, what the government has done in terms of this bill is to follow the Sentence Advisory Council recommendations. It might be helpful if I could take members of the committee to those recommendations. Do members of the committee have copies available? They are not very lengthy so, with the indulgence of the committee, I will read the recommendations. Essentially recommendation 4 provides that:

A pilot process for the provision of sentence indication should be established in the County Court in accordance with the framework set out in recommendation 6 ...

We then obviously move to recommendation 6. Recommendation 6 provides that:

The County Court should adopt a sentence indication procedure that incorporates the following elements ...

And then there are identified some nine elements in recommendation 6. What we have done in this legislation is no more and no less than is set out in those recommendations by the Sentencing Advisory Council. I should add for completeness that recommendation 4 has a second part which says that:

The Department of Justice, in collaboration with the County Court, the Office of Public Prosecutions, Victoria Legal Aid and the Sentencing Advisory Council, should monitor its impact on case flow, on sentencing, and on the resources and operation of the key participating agencies.

So in terms of the recommendations of the Sentencing Advisory Council in relation to the pilot project, we have followed those recommendations lock, stock and barrel. We have, it is worth noting, gone somewhat further in the sense that, as I have indicated, recommendation 4.2 provides for a monitoring, which, as I have said, the government will be doing, but in addition the government will be asking the Sentencing Advisory Council to lead that monitoring process. The government will be asking the Sentencing Advisory Council to make the outcomes of that monitoring public to make sure that there is a public monitoring, so that members of the public can have an input into that monitoring process, but also that the outcome of the Sentencing Advisory Council's monitoring will be publicly available. So subject obviously to that monitoring by the department — by the Sentencing Advisory Council — there may, of course, be further suggested amendments to practice or indeed to the legislation.

Mr RICH-PHILLIPS — Over what sort of time frame are we expecting the Sentencing Advisory Council to report its monitoring? Is it going to be a six-monthly or 12-monthly process?

Mr TEE — At this stage there has been no decision made in terms of the monitoring, but I think, to give an idea to the committee, it is fair to say that we would anticipate that there would need to be at least a 12-month period of operation of the legislation, assuming it goes through, before we could really have a sensible review or an outcome

of a sensible review. So, as I said, there has been no decision made, but it will be no less than, we would have thought, a 12-month period based on the nature of the legislation and the processes that are being envisaged.

Mr RICH-PHILLIPS — I guess the committee can take from your first answer that pilot programs should not be read to be a discrete trial program? It is an ongoing program; it is not ‘we will try it for six months and then review it’? It is not the government’s intention that it be a discrete period of time; it is an ongoing program?

Mr TEE — Absolutely, and that is consistent with the recommendations, that is right.

Mr HALL — So it would be more accurate to describe it as a program with ongoing review rather than a pilot program?

Mr TEE — I think that it is a fair description, and again I suspect as envisaged by the recommendations, but that is a fair description of what is proposed.

Clause agreed to; clause 2 agreed to.

Clause 3

The CHAIR (Mr Atkinson) — Are there any comments in respect of clause 3 of the bill?

Mr RICH-PHILLIPS — This is the clause that introduces the requirement to state what discount has been given for a guilty plea where a discount has been given. There is a question though in my mind as to how a judge or a magistrate will make a distinction between the various elements that they can provide a discount for. If a discount is provided on the basis of a convicted person’s remorse, as well as their guilty plea, as well as their capacity for rehabilitation, how is it envisaged that a magistrate or a judge will be able to make a distinction between those various elements that they consider when giving a reduced sentence?

Mr TEE — There is no formal requirement for the, in this case, court to categorise in essence the discount provided for, taking into account those particular circumstances of mitigation or otherwise that have occurred. Essentially, the position is this: today the courts, when sentencing an accused who pleads guilty, are required to take into account the fact that the accused has pleaded guilty when determining the sentence. That is an existing obligation that the court has. The proposal in the bill is to add a layer of transparency, a layer of accountability, to that existing provision by requiring the courts to articulate the discount that has been given because of the guilty plea.

Mr RICH-PHILLIPS — I understand that, but your opening comment was that there is no requirement to categorise the discount for the mitigating factors, but effectively this will require at least the discount as related to the guilty plea to be separated out and reported upon.

Mr TEE — Yes.

Mr RICH-PHILLIPS — My difficulty is: how is a court going to make that categorisation between the other factors and the guilty plea discount, and therefore a court would of necessity need to make a distinction between the different elements in order to be able to report on that one element as this bill will now require?

Mr TEE — Yes, but as I understand it the existing and current practice is that today the court, as I said, when faced with a guilty plea, will take into account remorse; it will take into account where the plea is made — whether it is made during the trial or early on in the process; it will take into account victim impact statements, to the extent that the victim has made a statement; it will take into account the circumstances. All of those things are taken into account. What is required of the courts under this bill is that they take those issues into account and that, once they have taken into account all those factors, they articulate the discount that they have given because of the guilty plea.

Mr RICH-PHILLIPS — I will approach it a different way. Is it the government’s view that a court currently takes those mitigating factors into consideration and comes up with a number?

Mr TEE — Yes.

Mr RICH-PHILLIPS — Or is it the government's view that the court considers those mitigating factors individually, comes up with a number for each of them and then adds them together as a final sentence? Is it a holistic approach having regard to all the factors or is each factor being considered individually?

Mr TEE — The requirement in terms of the legislation is to come up with the discount.

Mr RICH-PHILLIPS — The final figure?

Mr TEE — The final figure; that is right. It may be that the court would want to articulate that in some greater detail, and that is a matter for the individual judges in making that decision.

The CHAIR (Mr Atkinson) — Any further questions in regard to clause 3?

Mr TEE — Sorry, which clause is it this?

The CHAIR (Mr Atkinson) — We are dealing with clause 3.

Ms PENNICUIK — Clause 3 inserts new section 6AAA(1)(b)(iii), which states that in part:

... the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.

I raised the question in debate, and I am still not sure how the courts can provide advice on what would have applied if all the evidence had been heard had the defendant pleaded not guilty when they do not know that evidence, if you see what I am saying. If a trial proceeds because the defendant has pleaded not guilty, then you hear all the evidence, but if it is a guilty plea, then the amount of evidence you hear is not the same, so how is the court able to say what the sentence would have been?

Mr HALL — I think what you are saying, Sue, is how can an indicative sentence be given without first hearing all the evidence?

Ms PENNICUIK — That is right; that is what I am saying. It puzzles me how a court, which has not gone through and heard the evidence it would hear if there were mitigating circumstances or aggravating circumstances which could change a sentence, can give an indication of that sentence without having heard that evidence?

Mr TEE — Again I suspect it is an issue that occurs on a daily basis when the courts take into account the fact that there has been a guilty plea. At the end of the day the judge will not have all of the evidence. The trial will not have proceeded, so witnesses will not have necessarily given their evidence — although they might be part way through it if the guilty plea is entered during the trial — so the judge will make a decision based on the evidence that has been provided to the courts, which may again, as I said, include witness statements, statements from the prosecution or victim impact statements. Yes, the judge will need to make a decision based on the material that is before the judge, which will not be the complete evidence, but, as I have said, that is the existing practice and has been for some time. It is a practice which is encouraged so that we do not necessarily put people through the inconvenience and delay of a trial. What we are working towards is we are trying to make the process more transparent and, in being more transparent, more accountable by actually stating what that discount is.

Ms PENNICUIK — I hear that. I suppose what I am suggesting is that this might be a not-so-positive spin-off of the whole system. If somebody is, for example, guilty of committing a crime with aggravating circumstances, they are encouraged to plead guilty early, and they probably could end up with a more lenient sentence than they would have had, had the evidence all been heard. It is just an observation that that could be an outcome of this legislation.

The CHAIR (Mr Atkinson) — Just further to that question and your remarks in regard to the purposes clause on the monitoring process, will that monitoring process include a measurement of public confidence in the new system as distinct from just the efficiency of the process?

Mr TEE — Coming back to the point Ms Pennicuik raised first, and that is that in cases where there is a victim impact statement provided and the victim has an opportunity to do so, the judge will then have — and Ms Pennicuik raised the issue of an aggravated offence — in essence an uncontested view by the victim of the

circumstances of the offence, the degree of aggravation and the impact on the victim, so it is not as if the court goes in blind, as it were. There is a degree of material that may be available to the court.

The second issue that was raised by you, Mr Atkinson, is that of monitoring — will that include the views or the confidence of the community? I suppose there are two answers. The first thing is that the Sentencing Advisory Council recommended monitoring on case flow, on sentencing and on the resources and operation of key participating agencies, and certainly it will be the view of the government that that consultation will go to various organisations and groups representing victims.

Ms PENNICUIK — It is all complicated and complex, and there are consequences, both positive and negative, of any actions taken but perhaps the monitoring could include a report on the changes and any trends in sentencing for various offences?

Mr TEE — I should indicate that there is considerable work done now in terms of sentencing snapshots and outcomes, but, again, it is not inconsistent with this process that those figures be taken into account when monitoring the impact of this legislation.

The CHAIR (Mr Atkinson) — Just a further remark — and I know Mr O’Donohue has a question — but I am interested in the monitoring process as outlined by yourself in regard to these changes, because I would have thought that from a public point of view the issue is not the streamlining of the courts. That might be an outcome desired by the government and indeed by much of the legal fraternity and people who, as you said, are in some degree of limbo with regard to their outcomes where they have perpetrated crimes and are not sure what their future is to be, but I would have thought that the more overwhelming issue in these sorts of matters is in fact public confidence in the judicial system.

I think the point Ms Pennicuik raised is a very pertinent one in that sense in respect of judges making decisions without having all of the information in place. Now I accept what you say, that there is already a degree of this that is happening. But given that this legislation does propose what is effectively a streamlining of the court system, I would have thought that it is very much incumbent upon the government taking this extra step to ensure that the monitoring process takes into account very seriously public confidence. I think the integrity of the system is absolutely of paramount importance in this, and I am not sure that that is necessarily addressed by some of the remarks in the debate.

Mr TEE — If I can just respond. I suppose I keep coming back to the recommendations, and on one reading of the recommendations the emphasis is on case flow. I understand the committee does not have the recommendations so I will read it again. This is the Sentencing Advisory Council recommendation:

The Department of Justice, in collaboration with the County Court, the Office of Public Prosecutions, Victoria Legal Aid and the Sentencing Advisory Council, should monitor its impact on case flow, on sentencing, and on the resources and operation of the key participating agencies.

At one level this is broad but, as I have indicated, in addition the government will ask the Sentencing Advisory Council to lead the process, to make sure that the process is a public process so that people have an opportunity to express a view on any matters that are raised in relation to this process. So there will be a broad public process. The outcome of that process will be publicly reported upon, so I think that any fears that somehow public confidence might be tested are not necessarily well founded if you look at the totality of the review not only in terms of the recommendations but also in terms of what the government is doing, and that is making it a public review.

Mr O’DONOHUE — I will just make a comment in response to Mr Tee. I think the issue of case flow is as much about resourcing and giving the judicial system appropriate resources so that there are enough courts and enough judges as it is related to issues such as those that are before the committee. I think that is a point well worth noting that it could be argued that the judicial system does not have the resources that it should to do the job that the community expects. Having said that, Mr Tee, you made a comment about victim impact statements. I am concerned that through a sentence indication and an early plea that the full impact on victims may not be known. Is there any mechanism here in this legislation or in this provision that will require a judge to take into account the impact on victims, noting that if a full trial occurred that the opportunity to lead evidence from victims or alleged victims et cetera is extensive?

Mr TEE — The issue of victim impact statements or the views of victims rightly takes up a considerable part of the Sentencing Advisory Council's report, and if I may I will just read one sentence. What the Sentencing Advisory Council does is it has a look at the existing legislative provisions including the Public Prosecutions Act 1994 and the Victims Charter Act of 2006 and it concludes, and I quote page 120:

The combined effect of these provisions is to create a statutory obligation on the prosecution to confer with the victim and a corresponding right of victims to be consulted as part of the process.

What the council then does, as part of its recommendations, is ask the government to review the provisions to ensure that the views of victims are taken into account. The government has undertaken such a review and has found that the existing provisions are indeed adequate. It might be worth paraphrasing briefly, if I may, some of the protections that are in place to ensure that victims views are taken into account. I should say at the outset that the government is very committed to making sure that victims rights are respected and promoted and that this bill in no way takes away from that commitment by the government.

As part of sentence indication, a victim impact statement can be made. That is something that the courts may take into account when determining sentencing — certainly that will be a matter for the courts. In addition, victim statements are often made to police. That is part of the summary of evidence that is provided to the courts. If a victim chooses not to make a victim impact statement, there are other means for the court to be informed of the views and of the impact on victims.

For indictable proceedings there is the additional safeguard that all statements tendered during committal proceedings, which may include the statements provided by victims, are included. The legislation itself, that would have enabled the bill, has a number of safeguards to ensure that the views of victims are taken into account. The prosecution, firstly, may refuse to approve sentence indication, because, in its view, there is not sufficient information in relation to the victims — that is the discretion. The court itself has an unfettered discretion to refuse indicative sentencing if it believes that there is no victim impact statement and it is not satisfied that there is enough information on the impact on the victim. There will be before the courts, and the courts have a discretion deliberately to make sure that the voices of victims are heard.

There are of course a number of obligations on prosecutors which are set out in the victims charter, which sets in place the structure in relation to victim impact statements and has the requirement that the courts may take into account the victim impact statements. There is the statutory requirement on the prosecution in the victims charter to take into account the needs of victims, and there is a positive obligation in the victims charter requiring that the prosecution ensures that the victim is informed of the progress of proceedings.

The Public Prosecutions Act also has a number of relevant provisions. Sections 24, 36, 38 and 41 — I will not go to any detail on those — provide obligations on the DPP, the Crown Solicitor, the Solicitor for Public Prosecutions and the office staff there, to provide appropriate consideration to the concerns of victims.

We also have, as I indicated, under the Sentencing Act an obligation for the court to consider the impact on victims — that is a positive obligation on the courts — and an obligation that goes to that unfettered discretion that the court has not to make an indicative sentence if, for example, the provisions in the Sentencing Act requiring the court to consider the impact on victims is not met. The Sentencing Act provides a requirement that the courts consider the impact of the offence, the personal circumstances of the victim and any loss or damage caused by the offence. There is also, as I indicated, the right to make a victim impact statement to assist the court in delivering a sentence.

Taken as a whole, this bill plus the safeguards that are in place — safeguards which place a positive duty on the courts to consider victims, place a proactive duty on the prosecution to consider the views of victims — I think provide a very comprehensive opportunity for victims to put their views and impose an obligation on the courts to take those views into account.

Mr HALL — Mr Tee's answer goes in part to the question I was going to ask, which is with respect to this particular sentence indication and in particular clause 7 of the bill which inserts new section 23A(3) in the Crimes (Criminal Trials) Act. I am looking at page 8 of the bill, which says:

An application under subsection (2)(a) may be made only with the consent of the prosecutor.

I presume that is in the County and Supreme courts only; it does not apply in the Magistrates Court, on my reading of this bill. But if we line that up with the minister's comment in the second-reading speech towards the bottom of page 5 it says:

An indication can be provided upon application by the defendant but can only be heard by the court if the prosecution consents —
but then the minister has added the comment —
following consultation with the victim.

The legislation, as I read it, does not contain those words; it does not require the prosecutor to consult with his client, the victim. However, am I right in assuming that your comments about the victim's charter provide that safeguard and require the prosecutor therefore to consult with the victim?

Mr TEE — That is exactly right. Section 6 of the victims charter places an obligation on the prosecution to take into account the needs of the victim, but also under section 11 of the victims charter, there is an obligation on the prosecution to keep the victim informed of proceedings, because the victim has an opportunity to put in their own victim impact statement, they have got that right. So there is an obligation on the prosecution to do both of those things: to take into account the views of the victim, which is something they will need to inform themselves about; but also to make sure that the victim is aware of their rights, including the right to put in a victim impact statement.

Mr HALL — Does the victims charter apply to cases before the Magistrates Court as well?

Mr TEE — Yes, it does.

Mr HALL — Though this particular provision in clause 7 only applies in the County and Supreme courts?

Mr TEE — I am sorry, Mr Hall?

Mr HALL — The ability for the prosecution to object to a sentence indication, though, only applies in the County and Supreme courts and not the Magistrates Court?

Mr TEE — That is right.

Mr RICH-PHILLIPS — In that scenario, what would apply in the Magistrates Court? How would a victim's rights be preserved there?

Mr TEE — The position in the Magistrates Court is unchanged. No, that is not right. The position in the Magistrates Court has been codified by the provisions of this bill. The practice in the Magistrates Court that has been codified in this bill has been in practice there since 1993. We have consulted broadly, and I confirm that by taking the committee to recommendation 2 of the Sentence Advisory Council report, which says:

The Magistrates Court Act 1989 ... should be amended to provide explicit statutory authority for magistrates to indicate the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, and for the Chief Magistrate to give any directions or make any rules required for this purpose.

So, as I said, the Sentencing Advisory Council, having had a look at the operations of the Magistrates Court and having consulted broadly, has recommended that those existing practices be codified, and that is essentially what we do.

Again, if I can just briefly take the committee to the Sentencing Advisory Council report where its findings are articulated, it says:

Sentence indication has been available in contest mention hearings in the Magistrates' Court of Victoria since 1993 ... Data showing the proportion of cases resolved at or after a contest mention hearing attest to the effectiveness of this process in resolving contested summary matters ...

The council found strong support for formalising this successful scheme, to optimise and extend its use.

In line with this, the council has recommended that the Magistrates' Court Act be amended to provide magistrates with explicit authority to give indicative sentences. So in essence the government has again followed the recommendations to codify the very successful process which has been in place in the Magistrates Court since 1993.

Clause agreed to; clauses 4 to 6 agreed to.

Clause 7

Mr RICH-PHILLIPS — Clause 7 introduces the sentence indication provisions to the County Court and the Supreme Court and mirrors those inserted for the Magistrates Court with the exception of the provision relating to prosecutors.

The first issue I would like to ask about is that the Sentencing Advisory Council report and the Attorney-General's press release of 19 September indicated that the scheme would be introduced as a pilot in the County Court. This provision clearly extends to the County and the Supreme courts. Can you explain why there is that difference between what the Attorney-General has announced and what the government has actually done?

Mr TEE — The government had a careful look at the Sentencing Advisory Council's report. In essence, as you would expect, the Sentencing Advisory Council's report and its work focus very much on the Magistrates Court but even more so on the County Court, because really that is where the bulk of the matters that are covered by this regime are dealt with. Essentially the focus of the report was on the County Court. What the Sentencing Advisory Council found was that it was the County Court that needed this — and I think this is the expression the report used — 'circuit breaker' in terms of indicative sentencing.

As has been indicated the bill applies to the Supreme Court, but it is fair to say, based on the data provided by the Sentencing Advisory Council, that it is not going to have a major impact on the Supreme Court. Based on the Sentencing Advisory Council's figures there were some 109 criminal cases in the Supreme Court in 2005–06. The overwhelming majority of those were serious criminal cases — terrorism, murder, et cetera — where irrespective of whether or not there was a plea of guilty the sentence would invariably involve a custodial sentence. Invariably the issue there is the length of sentence. In reality the impact on the Supreme Court will be minimal.

Following the release of the Sentencing Advisory Council's report and following the government's media release on 19 September, which has been referred to, the government took into account the findings of that report and took into account the views of other stakeholders including the DPP, Victoria Police, the courts, the bar, the law institute and the VLA in relation to that report. Having done that the government decided it would not exclude the operation of the bill from the Supreme Court, and it did that for a number of reasons, as I have indicated, including the limited impact on the Supreme Court and a concern that there be a degree of consistency in the approach as between the three courts. It just did not make any sense to legislate and have an inconsistent approach in the Supreme Court to that which would apply in the County Court and the Magistrates Court.

That argument was really strengthened by the fact that for the Supreme Court there is not an obligation to provide a sentence indication, but a discretion — with the consent of the prosecutor — to provide that sentence indication. The Supreme Court judges and the other judges do not have to give a sentence indication if they do not want to, and really the government was of the view that it wanted to provide maximum flexibility to the courts. I think it should be noted that the Sentencing Advisory Council recommendations do not expressly exclude the Supreme Court; it is a matter of comment through the discussion paper. If I can summarise, I think the initial position was influenced by the response following consultation and by a desire to have consistency through the courts.

Mr RICH-PHILLIPS — The recommendation you referred to earlier — I think it was recommendation 3 — that proposed the County Court pilot — —

Mr TEE — Yes.

Mr RICH-PHILLIPS — Following that and the government's announcement of that on 19 September, those other bodies you referred to — the DPP, Victoria Police, et cetera — did they support or recommend to government that you extend it to the Supreme Court?

Mr TEE — They were all consulted; they were all advised that the proposal was to include the Supreme Court, and they did not raise any objections to that outcome. They were not proactive; none of them wrote and said, ‘That is great, thank you very much’, but equally they had an opportunity. They were consulted, they had an opportunity and they did not object.

Mr RICH-PHILLIPS — So after the government itself announced it was a County Court pilot in September, it was the government, on its own initiative, that then decided it would be the Supreme Court as well, and no-one objected to that — is that what you are saying?

Mr TEE — The government, in consultation with — —

Mr RICH-PHILLIPS — But in your previous answer you said you had already proposed to these bodies — DPP, Vicpol, et cetera — that it be a Supreme Court trial. So somewhere between this press release saying it would be County Court and this bill the government has decided that it would be Supreme Court as well, and you are saying there was no objection to that?

Mr TEE — I suppose there was an intermediate step. That is, I am not sure where the idea came from — whether it came from the bar or some other group, or it might have originated with the government or somewhere else. That idea was then tested with all those parties, and they did not oppose that extension.

Mr RICH-PHILLIPS — Was the Sentencing Advisory Council consulted on that, given its recommendation was County Court?

Mr TEE — This might take a moment longer. Yes, the Sentencing Advisory Council was consulted and, again, it did not oppose the Supreme Court being included.

Mr RICH-PHILLIPS — The next issue on this clause I want to raise is the Attorney-General’s announcement that it would not apply to people accused of murder and sex offences. Can you outline to the committee how clause 7 excludes murder and sex offences?

Mr TEE — It doesn’t. The bill does not exclude murder or sex offences. Nor, might I add, does the Sentencing Advisory Council report. The reality is that in the report its finding in relation to murder — I think it did a study — was that in reality it does not apply to murder, because in murder situations people go to jail, essentially. The sentencing advisory figures show that between 1998 and 2006 all those convicted of murder received a custodial sentence. The reality is that the bill does not exclude the application to murder, because in essence it is unnecessary to do so, because history has shown us that since 1998 people convicted of murder have received a custodial sentence.

In relation to sex offences, again the Sentencing Advisory Council — and I might add that this applies to the issue of murder as well — recommended that no offences be excluded.

Recommendation 9 states:

There should be no formal restrictions on the types of cases in which sentence indication can be made available.

Again, consistent with that, murder has not been excluded but recommendation 9 goes on to say:

The council cautions against the inclusion of sexual offence proceedings in a pilot sentence indication scheme and suggests that proceedings in relation to fraud, other property and illicit drug offences may be particularly suitable for inclusion in a pilot project.

In summary, the way it has proceeded, consistent with the Sentencing Advisory Council, is that no, there have been no restrictions on the types of cases. We have heeded the Sentencing Advisory Council’s caution in relation to sex offences, and there is a detailed discussion in fact in the Sentencing Advisory Council’s report in relation to sex offences, because, as the report finds, there is a high attrition rate in cases of sexual offences.

The number of cases that are commenced and those that are completed, there is a high attrition rate, so in essence if you are the accused, there is almost an incentive to go the distance because of the attrition rate. Taking that into account it is probably helpful that there are incentives to an early plea, particularly in view of the nature of cases involving sexual offences. The Sentencing Advisory Council noted that for a number of the victims in sexual

offences cases there would be relief with a guilty plea, but the council also noted that a lot of victims would want to have their day in court, and what the bill ultimately tries to do is to strike that balance.

It provides for sentence indication as a way to avoid the trauma of having to unnecessarily go to court but it also provides a number of safeguards, including, as I mentioned, the discretion for prosecution and the courts and the requirement to take into account the views of the victims via written impact statements and otherwise. Consistent with the recommendations of the council, we did not exclude any offences.

Mr RICH-PHILLIPS — Why did the Attorney announce he was going to exclude them, then?

Mr HALL — Changed his mind?

Mr TEE — I think, as I indicated, the view as of 19 September 2007 was influenced by those broader consultations.

Mr RICH-PHILLIPS — Has the Attorney made any other public releases like this one saying that his exclusion of murder and sex offences no longer applies?

Mr TEE — I am not aware; I have not checked.

Mr RICH-PHILLIPS — On the issue of murder cases, as you said in practice for custodial sentences there is nothing in this bill to prevent a person facing a murder charge from applying for a sentence indication, is there?

Mr TEE — No.

Mr RICH-PHILLIPS — Notwithstanding what the outcome may or may not be, a person facing a sexual offence charge, a person facing a murder charge has exactly the same entitlements as anyone else facing any other charge in the Supreme or County Court to seek to apply for — —

Mr TEE — They have got a right to ask and the prosecutor has a right to refuse and the court has a right to refuse, and that refusal by the court is not appealable; it is final. So they do not have the right to an indicative sentence, they have the right to ask.

Mr RICH-PHILLIPS — As with any other offence, they have the right to apply?

Mr TEE — Yes.

The CHAIR (Mr Atkinson) — Can I just clarify in respect of that line of questioning, essentially you indicated that the government has concurred with the Sentencing Advisory Council's viewpoint that no offences should be excluded but that for murder and sex offences the government would anticipate that the provisions of this legislation would not apply to such cases?

Mr TEE — It is unlikely to apply in relation to murder; with sex offences that caveat does not apply. It will apply to some sex offences in a way that it will not apply to murder.

The CHAIR (Mr Atkinson) — Yes, but despite what is in the press release, there is no provision in the bill that excludes those offences?

Mr TEE — That is right.

The CHAIR (Mr Atkinson) — Right.

Ms PENNICUIK — Two points: one is you were at pains to say that the government has basically implemented the recommendations of the Sentencing Advisory Council and you mentioned in just that last explanation that the Sentencing Advisory Council recommended not to exclude any offences but it also said that it would be appropriate to trial property and drug offences, for example, in the County Court. From my whisking through that, the flavour to me from the Sentencing Advisory Council was that the government should institute a trial or a pilot in the County Court for those types of offences, and that is not what we have. We have a bill that basically introduces sentencing indication similar to what exists in the Magistrates Court for summary offences into

the whole court system. To my way of thinking, it is a lot further than my reading of the flavour of the Sentencing Advisory Council report, which is have a go, have a trial to see how it goes, not completely change the whole law in terms of County Court and Supreme Court and sentencing practice there. Would you agree with that?

Mr TEE — I would agree that the Sentencing Advisory Council report uses words such as ‘pilot’ but when you read the recommendations, as I set out before, recommendations 4 and 6 read together provide a process and an outcome that we have followed.

Ms PENNICUIK — Yes. I am just observing that I think you can read that report in two ways. The government is reading it one way and I am seeing different things. But I would like to just go back to, if I could on this clause 7 and the new 23A(3) that Mr Hall was talking about before, the expression ‘only with the consent of the prosecutor’ — and we have been discussing the charter of victims rights. Under the charter, the victim has the right to be consulted and the right to be kept informed of the proceedings. What concerns me here is a little bit about the timing. It may be in the charter but how is it ensured that if the victim does not want the sentence indication to go ahead and the guilty plea, the prosecutor knows that and does not give the consent, rather than the prosecutor giving the consent and then informing the victim that the consent has been given and the victim then saying, ‘I wish you had not done that’. As you said, some victims do want their day in court. They do not necessarily want to be spared that even though that was in your opening remarks as one of the reasons for the bill.

Mr TEE — The bill is, I suppose, informed by the victims charter, which provides an obligation on the prosecution to take into account the needs of victims, and of course there is an obligation on the court which has that unfettered discretion to — —

Ms PENNICUIK — Sorry, Mr Tee. I suppose what I am asking here is: does that clause ensure that the victim has input before the prosecutor consents?

Mr TEE — Read in conjunction with the victims charter, yes.

The CHAIR (Mr Atkinson) — Any further questions in regard to this clause?

Mr TEE — It might be that the prosecution decides to consent notwithstanding the view of the victim. The obligation is to consult; well, no, the obligation is more than consulting. The obligation is to take into account the needs of the victims and the obligation on the court is to take into account the impact on the victims, and there is an obligation under the Public Prosecutions Act again for the DPP, the Crown Solicitor, the solicitor for public prosecutions, to give appropriate consideration to the concerns of the victim. So there is a whole range of existing protections that will influence and impact on the prosecutor when they are exercising their discretion in section 23A(3).

Mr O’DONOHUE — Mr Tee, following up from Mr Rich-Phillips’s question where you stated on two occasions that this can be perceived as an incentive to plead, do you think that incentive could be seen as an inducement to plead guilty?

Mr TEE — No.

Mr O’DONOHUE — Do you think there could be a perception in the community that there is an inducement to plead guilty?

Mr TEE — Just to be clear, as you know there are two parts to the bill: there is the sentence indication and there is the discount for the articulation of a sentence for pleading guilty. So in terms of the articulation of any discount that is provided for a guilty plea, that is an existing provision. All we are doing there is we are not asking the courts to provide a greater incentive to plead guilty; all we are doing is asking the courts to articulate what discount, if any, they provide to the accused when they plead guilty. Equally, in relation to sentence indication, the courts are simply asked to provide an indication. In relation to the guilty plea, if anything it enhances transparency and ensures that the public understands what discounts are being provided. It makes sure the public understands and has confidence in the system. It is a way of improving public confidence in the system by providing transparency. At the moment the public does not know what discounts are being provided for a guilty plea; under this regime they will.

Mr O'DONOHUE — Although going by your earlier answer there will be no consistency in how those discounts are arrived at? They will be determined by the respective judge.

Mr TEE — Taking into account the individual circumstances of the case before them, yes, although I suspect over time you would hope that the judges' decisions, as they are now, would take into account precedents that have occurred before them. This will add to that body.

Ms BROAD — With the Chair's indulgence, could I put forward a motion to adjourn to a time — —

The CHAIR (Mr Atkinson) — Can I just take that in about 5 minutes?

Ms BROAD — Sorry, I thought I was going — —

The CHAIR (Mr Atkinson) — That was just a form of words. We are going to have to have negotiations with the parties, but thank you. I know there is some further discussion on clause 7. We are going to have to reconvene and there is going to need to be some discussions between the party leaders because of the logistics, taking into account Hansard's constraints, so we are going to have to look at a suitable time that we can reconvene. What I need to understand perhaps is the length of time that a second hearing might take. We have got some more on clause 7. Are there any further clauses that are going to be examined by the committee?

Ms PENNICUIK — Yes. It is clause 14 or 15; I am not sure — 14, I think.

The CHAIR (Mr Atkinson) — Extensive?

Ms PENNICUIK — It may not be.

The CHAIR (Mr Atkinson) — That is okay. Only clause 7. I will take that motion in 5 minutes — at 5 to 2. Mr Rich-Phillips, a further matter on clause 7.

Mr RICH-PHILLIPS — Mr Tee, on the issue of extending to the Supreme Court, the Sentencing Advisory Council report states at page ix:

We consider sentence indication would be unlikely to have a significant impact on the timing of defendants' plea decisions in the Supreme Court or that court's case load and for this reason have recommended against the introduction of such a scheme in that court.

At the same time, in his second-reading speech the Attorney has said:

The Sentencing Advisory Council also recommended that this process be extended so that it is available in the County and Supreme courts.

Why did the Attorney say that when, quite clearly, the Sentencing Advisory Council said the opposite?

Mr TEE — There are, as you indicated, in the body of the report — the sentence that you have just read out — the recommendations. I do not have the *Hansard* in front of me, but my recollection based on your reading of that *Hansard* is that the Attorney may have been referring to the recommendations per se rather than the body of the report. His use of the recommendations might be as per the recommendations rather than as per the body.

Mr RICH-PHILLIPS — The text of the report is pretty clear: 'have recommended against the introduction of such a scheme in that court', meaning the Supreme Court. Are you saying that he is using the report selectively: pick the recommendations, ignore the actual text? It is a fairly stark contrast, when the Attorney himself has said that they did recommend it, when quite clearly they are saying that they did not.

Mr TEE — If the reference to the word 'recommendation' is the nine recommendations, then it is not entirely inconsistent, whereas if you are referring to the body of the text, it depends on which recommendation you have in mind.

Mr RICH-PHILLIPS — At the very least it would be misleading for the Attorney to say that the SAC recommended it when the text says they do not recommend it.

Mr TEE — I do not know if I can take it any further.

Mr RICH-PHILLIPS — The second point I wanted to raise is the inclusion of sexual offences. On page xvi of the report the SAC states:

The council cautions against the inclusion of sexual offence proceedings in a pilot sentence indication scheme and suggests that proceedings in relation to fraud, other property and illicit drug offences may be particularly suitable for inclusion in a pilot project.

I think you made a similar reference yourself earlier. This question seems to turn on the word ‘pilot’. Is this bill introducing the pilot that the SAC recommends, or is this bill introducing something entirely different?

Mr TEE — Recommendations 4 and 6 deal with the bill. It very, very closely follows the recommendations, and I have gone through those recommendations, which deal with the nature of the pilot process, as set out by the Sentencing Advisory Council. The government has followed the recommendations in 4 and 6 to the letter.

Mr RICH-PHILLIPS — So why has the government not heeded the Sentencing Advisory Council’s caution not to include sexual offence proceedings?

Mr TEE — Indeed, the government has been very cautious about it and has read, as I have indicated, the report carefully. It has consulted.

As I have indicated, there are two views. There is a view that we ought to look at ways of reducing the attrition rate. Some victims want to have their day in court. The last thing some victims want to do is to have their day in court; they would like to have a guilty plea as soon as possible. The government took into account the safeguards that have been provided in terms of the discretion the court has, the discretion the prosecution has and the opportunities for the victims’ views to be heard by the prosecution and by the courts. The government has taken a very cautious approach, but in doing so and in following the recommendation 9 the government has not provided any formal restrictions on the types of cases in which sentencing indication can be made. The government’s approach is entirely consistent with recommendation 9, which places an obligation to be cautious about it. Having been cautious about it we have complied with recommendation 9, which says there should be no formal restrictions.

Mr RICH-PHILLIPS — But not consistent with the caution that a pilot program should not include sexual offences.

Mr TEE — Again, it is a reading of recommendation 9, which — —

Mr RICH-PHILLIPS — Page xvi says, ‘The council cautions against the inclusion of sexual offence proceedings in a pilot’ program, et cetera.

Mr TEE — But that recommendation also includes the first sentence, which says there should be no formal restrictions. We have provided for no formal restrictions — —

Mr RICH-PHILLIPS — Except for a pilot program where they should not be there. As I said, it goes back to the issue: is this the pilot program the SAC recommends or is it not?

Mr TEE — As I said, it is the government’s view that it is, and it is that view based on the fact that the government has implemented recommendation 4 and recommendation 6 fully, which deals with the issue of what the pilot process ought to look like.

Clause agreed to.

Ms BROAD — I move:

That this public hearing be adjourned to a time to be set by the Chair.

Motion agreed to.

The CHAIR (Mr Atkinson) — Can I indicate our appreciation of your forbearance in having to come back again. We are not sure when, but you will be advised as soon as possible. Thank you for your assistance today. I also thank Hansard for its assistance today; we will try to accommodate it in the timing of the next hearing.

Committee adjourned 1.58 p.m. and resumed at 7.00 p.m.

The CHAIR (Mr Atkinson) — I welcome back Mr Tee and Mr Byrne. I indicate to the public hearing that we have an apology from Mr Hall, who will not be attending this session. Are there any further apologies? If not, I would then propose to ask, having seen the SARC report tabled, whether there are any members who had issues arising from SARC that would have had any impact on the decisions already made by the legislation committee, which effectively has agreed that clauses 1 to 7 stand part of the bill. Are there any concerns about any aspects raised by SARC that would impact on our deliberations thus far?

Mr RICH-PHILLIPS — I have had a quick look, Chair. In relation to the sentence indication provision, which is the key aspect of the bill, the SARC report indicates that the attorney was relying on studies from New South Wales and Scotland as grounds for stating that it is possible to have a system of sentence indications without inducing defendants to plead guilty. The committee has made the point that at the time of the studies that the attorney relies upon were done, those two jurisdictions did not in fact have sentence indications. I am wondering if Mr Tee can enlighten the committee as to why the attorney has relied upon those studies, which apparently are irrelevant to the issue of sentence indication?

The CHAIR (Mr Atkinson) — Mr Tee, if you could comment on that. Obviously we are moving to clause 8 shortly, but I have introduced this because the committee was mindful of the SARC report coming forward, and I think it is relevant to clear that matter before we move back to going through clause by clause. I would invite you to make some comment on Mr Rich-Phillips's question in that respect.

Mr TEE — I am not aware of the New South Wales or Scotland studies. Sorry, I just have not had an opportunity to consider this or track it.

Mr RICH-PHILLIPS — You are unable to make any comment — or the departmental officer?

Mr TEE — I will just take a moment, if I may. We might be able to resolve it.

Thank you for the indulgence of the committee. The *Alert Digest* No. 16 of 2007 has the Attorney-General's response, which I think is the part that is referred to in the Scrutiny of Acts and Regulations Committee's *Alert Digest* No. 2. The position is this: what is said in the *Alert Digest* no. 16 of 2007 is as follows:

The Council concluded that this empirical evidence supports the conclusion that it is possible to have sentence indications and discounts without inducing guilty pleas.*

Then there is a reference to the New South Wales and Scottish reports, which deal with the issue of discounts without inducing guilty pleas. The rest of their response deals with sentence indications. So the answer in relation to the question is that New South Wales and Scottish reports, as set out by the Attorney-General, deal with discounts. The report itself deals with sentence indications, but the New South Wales and Scottish legislation supports the fact that discounts will not induce guilty pleas. It does not because those jurisdictions do not have sentence indication, so it does not deal with sentence indication.

To summarise, the issue dealt with by the Attorney-General refers to sentence indication and discounts, but the research referred to supports the issue of discounts and not sentence indication. Sentence indication is dealt with in the body of the Attorney-General's response.

Mr RICH-PHILLIPS — The Attorney-General is not relying on the Scottish and New South Wales reports — studies — to form a view that sentence indication will not lead to guilty pleas?

Mr TEE — I do not know if you can separate the two. What the Attorney relies on in the research is as follows. The research is relied upon which:

... suggests that it is possible to make reforms to law and procedure that will encourage defendants to advance the stage at which they enter a guilty plea without improperly inducing defendants to change their plea from not guilty to guilty.

That is the extract in the digest that deals with the New South Wales and Scottish research.

Ms PULFORD — I was involved in the discussions at SARC. As with SARC's consideration of all bills, these comments are for the attention of members in the Parliament if they consider this bill. The committee resolved to further write and to make those comments so that members, in determining how they would vote on this bill, would have that information to hand. Clauses 5 and 7, we have discussed and resolved at an earlier point.

The CHAIR (Mr Atkinson) — I accept that, but we had flagged the dilemma that we had earlier in the day and I guess, to some extent, the Legislation Committee is an evolving process. We have noted that this could well be a potential area that we need to address in future in terms of, if nothing else, of the timing of our meetings. I did seek to include SARC's report as part of discussion at the outset tonight notwithstanding that we have dealt with clauses 5 and 7 as a means of ensuring that the Legislation Committee is comfortable with its position given that it also will report to the Parliament. I note your remarks, and obviously they are understood.

Ms PENNICUIK — I do not know whether this is out of the order of the proceedings, and this follows on a little bit from the point that Gordon Rich-Phillips was making from the SARC report. The final report, summary and recommendations of the Sentencing Advisory Council, makes the point that sentence indication has been used in summary proceedings for several jurisdictions over a decade but only rarely and then with limited success in indictable proceedings. It goes on to say that the New South Wales scheme was ultimately abandoned when it was found to have given rise to sentencing disparities without delivering the expected gains. That was a pilot scheme, and the English courts have been permitted to provide sentence indications since 2005, but it is too early to ascertain the impact of it. I think that goes to the other point about the research that is being relied upon.

Mr TEE — As I understand, the final report of the Sentencing Advisory Council had a look at the New South Wales experience — I think that is where that quote is from. It also considered the English experience and it said that English courts had been permitted to provide sentence indication in indictable matters since 2005. I think it then had some discussion around that and reached the conclusion and the recommendations that it did and which we have adopted.

Ms PENNICUIK — I suppose I am saying that this report said that it was too early to ascertain the impact of the English courts and that the New South Wales one was abandoned because it did not give rise to the benefits it expected.

Mr TEE — Yes. Again, the government asked the Sentencing Advisory Council to have a look at the material. A lot of that material was canvassed by them. They came up with the recommendations that they did. Having asked the experts to make a recommendation, the government has decided to implement those recommendations. I understand you are saying that they are competing views: those competing views were considered by the experts informed by their broad consultation. We accept the outcome of that process.

The CHAIR (Mr Atkinson) — I guess one of the things that the committee would be keen to understand, Mr Tee, is that the matters referred to by Ms Pennicuik and Mr Rich-Phillips, particularly in regard to people entering into a situation where they pleaded guilty to expedite matters, that they will be the subject of the monitoring process. We need an assurance, I suppose in the context of those questions, that will be part of the monitoring that you referred to earlier in the day.

Mr TEE — Sorry, can I just get a clarification on that? You are asking that the monitoring — —

The CHAIR (Mr Atkinson) — Essentially, earlier in the day Mr O'Donohue raised the issue of people pleading guilty to expedite matters and to do away with the problem. I think that was, again, the nub of some of the SARC concern and was raised by Mr Rich-Phillips this evening. Ms Pennicuik has also raised the issues in respect of the New South Wales and Scottish experiences that have been relied on — in fact, they have been inconclusive — so what we need to understand as a committee in terms of framing our report going back to the Parliament is that these matters, which are matters of concern to SARC and have been matters of concern raised in the Legislation Committee, will be part of that monitoring process and will be subject to report in the future as you have outlined.

Mr TEE — The impact of sentence indication on sentencing: I can give the committee the assurance that that will be part of the ongoing monitoring that will be overseen by the Ombudsman.

The CHAIR (Mr Atkinson) — Are there any further questions?

Mr TEE — Sorry, by the council, not the Ombudsman — I meant the Sentencing Advisory Council rather than the Ombudsman.

The CHAIR (Mr Atkinson) — I thought you were giving rise to a new line of questioning.

Ms PENNICUIK — I suppose with the New South Wales provisions, the phrase that jumps out me is that it was found to have given rise to sentencing disparities without delivering the expected gains. That is what I think the monitoring should be mindful of. If that is the outcome of this legislation, it is not a good outcome.

Mr TEE — Yes, and we will keep on the sentencing. As I have indicated, the Sentencing Advisory Council will lead a process that will consider the impact of the legislation on sentencing to ensure that these sorts of issues are addressed.

The CHAIR (Mr Atkinson) — Mr O'Donohue had a line of questioning earlier today that was consistent with some of the SARC reservations. Do you have no more points to make?

Mr O'DONOHUE — No.

The CHAIR (Mr Atkinson) — Are you satisfied?

Mr O'DONOHUE — Yes.

The CHAIR (Mr Atkinson) — Are there any further questions in regard to the broader issues raised by SARC?

Mr RICH-PHILLIPS — Just to pick up on Ms Pennicuik's issue with respect to indictable offences, I want to get a clear idea of where the government sits with respect to sexual offences. Is it the government's intention that sexual offences be covered by sentence indication provisions?

Mr TEE — I am not sure that I can enormously add to the answers that I gave today — that is, that essentially consistent with the report a cautious approach has been adopted.

Mr RICH-PHILLIPS — So it is the government's intention that those people facing sexual offence charges will have this mechanism available to them to obtain sentence indication?

Mr TEE — I spent some time on it, but the government has not provided any form of restrictions on the types of cases in which sentence indication can be made available.

Mr RICH-PHILLIPS — So there is nothing to prevent a person charged with sexual offences from seeking a sentence indication under the provision of the bill?

Mr TEE — The answer is correct, subject, of course, to the caution that relates to the victims' capacity to have influence in terms of expressing their views to the prosecutor and the prosecutor having a proactive obligation to take into account the needs of the victims, and the similar caveat in relation to the obligations on the courts to take into account the needs of the victims.

Mr RICH-PHILLIPS — But the defendant has open slather to make an application?

Mr TEE — I think any defendant — I will get Mr Byrne to check. It is not open slather. I think there is one application that can be made.

Mr RICH-PHILLIPS — To make the application, and the government is not seeking to prevent that occurring?

Ms BROAD — Chair, I think we have been backward and forward on this for a period.

Mr RICH-PHILLIPS — I just do not think we have a clear answer.

Ms BROAD — Attempting to put words into someone's mouth is just going over and over it.

The CHAIR (Mr Atkinson) — I am mindful that we have covered this. I think Mr Tee has actually provided answers to the line of questioning; I am mindful of that as well. Mr Tee, did you want to make any further comment on that?

Mr TEE — No.

The CHAIR (Mr Atkinson) — Mr Rich-Phillips, are you satisfied?

Mr RICH-PHILLIPS — I am not satisfied, but that is fine. Thank you.

The CHAIR (Mr Atkinson) — Yes, I chose the wrong word. Are there any further comments in regard to the SARC report that members have now had an opportunity to view?

Mr O'DONOHUE — Just on provisions up to clause 7, or in totality?

The CHAIR (Mr Atkinson) — No, I am taking it as a general discussion on the SARC report, but I am also mindful of the point made by Ms Pulford that in fact the SARC report is guidance to members in the house. I think it is also guidance to members in the Legislation Committee, by the nature of the Legislation Committee, but there will be, if you like, an opportunity for members to have some reference to this when it goes back to the house on our report. I guess the matters have been canvassed, and in fact they have also been drawn out in some of the questions tonight in regard to pertinent matters.

Mr O'DONOHUE — If I may add a comment, Chair. The charter is a relatively new thing and we are all navigating our way through it. It is complex and how it relates to legislation is something which is evolving. I think this is an excellent forum in which to explore how it evolves. In a practical sense it does add complication and complexity to many pieces of legislation, and this bill to me is a prime example of that, so I think it is an appropriate forum to tease out some of these issues.

The CHAIR (Mr Atkinson) — What is there another specific example you had?

Mr O'DONOHUE — If we are having a general discussion I would like to raise the issue in clause 15 of the bill.

The CHAIR (Mr Atkinson) — We will get to that clause. So is there nothing more generally on the SARC report?

Mr O'DONOHUE — There is something in relation to the SARC report that affects clause 15.

The CHAIR (Mr Atkinson) — When we come to clause 15 we will specifically deal with that. I do not think we have to actually take any formal recognition of the SARC report in terms of our minutes or proceedings. I thank members for allowing that discussion because I think that nevertheless was pertinent to the issue and we have indicated that in some ways this is an evolving process.

Clauses 8 to 13

The CHAIR (Mr Atkinson) — I am advised that there are no further issues in regard to the legislation on clauses 8 to 13. Do any members have any matters they wish to raise on clauses 8 to 13? If not, I propose to put clauses 8 to 13 to the test.

Clauses agreed to.

Clause 14

Ms PENNICUIK — I am not sure if it is clause 14 or clause 15. Just bear with me while I read something from the letter from the Law Institute of Victoria (LIV), addressed to Mr Byrne actually. On page 2 of the letter the institute raises a concern that:

The draft bill provides that the court may give a sentence indication 'at any time' during summary proceedings. Under the current wording, a sentence indication will be available at a mention hearing.

The LIV repeats its recommendation that sentence indication should only be available from the contest mention stage of proceedings ... to ensure that defendants are not unduly pressured to seek an indication where the prosecution has not disclosed the case against the defendant to the point where it is reasonable for the defendant to consider a plea decision.

And it goes on. It refers to clause 15, but when I look at clause 15 it does not seem to be about that. Clause 14 seems to be about mention hearings, and that is why I say that. The institute may have meant clause 14, although it says clause 15. So perhaps the law institute is saying that the sentence indication should only be available from the contest mention stage. I cannot see in here whether that is clear or not clear; the institute asks for clarification on that.

Mr TEE — The sentence indication can be sought at any stage of the proceedings. The sentence indication stage can only be initiated by the defendant, and so the flexibility is on the defendant to use sentence indication at the time that he or she considers most advantages them.

Ms PENNICUIK — To me that still raises the issue of feeling pressure, not necessarily being in the right time, but relying on the defendant to know the right time, I suppose.

Mr TEE — That is right. It is entirely in the hands of the defendant.

Ms PENNICUIK — So in clarification, it is the government's view that the law institute is wrong here?

Mr TEE — I have not seen the letter, but — —

Ms PENNICUIK — Or their concern is not accommodated by the bill?

Mr TEE — To the extent that the bill provides that sentence indication can occur at any time at the request of the defendant, and to the extent that the letter suggests a different outcome, there is a different view.

The CHAIR (Mr Atkinson) — And would it be true, Mr Tee, that you have conveyed to the committee, certainly by impression if not specifics, that in fact the court is likely to have a mind or a view on the timing at which the defendant indicated that they were interested in a sentence indication? In other words, if the defendant entered the trial at the outset and said, 'Look, I am interested in this process, because I am prepared to plead guilty and to indicate the mitigating factors — to put those on the table as part of the judgement', then the court may well form a different view, and indeed a more benevolent view, than it would if the defendant saw that the mood of the trial was actually going against them and sought that opportunity at a later stage in the trial.

Mr TEE — If I may consult.

Thank you for giving me that opportunity. Yes, sentencing indication, as we have indicated, can occur any time during the process. If it occurs halfway through the trial as opposed to at the first hearing, then the way it will occur is in one sense unchanged from current practice — that is, in considering the outcome the court will take into account a plea of guilty and will provide a discount, and that discount will be influenced by the stage at which that plea is entered. So if the sentence indication leads to a guilty plea early on, as opposed to halfway through the trial, the consequences of that guilty plea — which is the outcome of the sentence indication — will be influenced by the stage at which the plea is entered.

The CHAIR (Mr Atkinson) — Yes, thank you.

Clause agreed to.

Clause 15

Mr O'DONOHUE — As I indicated previously, clause 15 in effect abolishes reserve pleas. Mr Tee, would you like to make a comment on that and on the rationale for that?

Mr TEE — Sure, and I thank you for the opportunity. The bill does abolish reserve pleas. The current position is that, if a plea is reserved, it is the equivalent of a plea of not guilty; it is treated by the courts as in effect a plea of

not guilty. So the change at one level is minimal, because the reserve plea is the equivalent of a not guilty plea, and the process continues as if the defendant has pleaded not guilty. Why make the changes? The government has sought to try to encourage the defendant to institute a plea earlier, and that is in essence what abolishing the reserve plea does. But it has been part of a package of changes that the government has made so that the defendant is in a position to enter a plea earlier on. For example, there have been amendments to the Courts Legislation (Jurisdiction) Act of 2006, which made changes to the committal process. These changes will include a precommittal hearing or conferencing so that again the defendant is furnished with sufficient information to be able to enter a plea.

Legal Aid Victoria has increased its funding for the earlier stages of proceedings so that it can ensure that the accused is represented at that earlier stage and can effectively participate in committal proceedings. The Office of Public Prosecutions has received additional funding, and it has established an early resolution unit again to help achieve earlier outcomes. Together, this package of changes is designed to ensure that both the prosecution and the defendant are ready so that they can consider their positions earlier, negotiate if need be at an earlier stage and enter a plea at that earlier stage. As I said, the objective is to get that plea earlier on by making sure that people are ready to enter that plea at an earlier stage.

Mr O'DONOHUE — Thank you, Mr Tee, for that answer. Legal aid funding and funding for the OPP (Office of Public Prosecutions) are budgetary items and therefore subject to the various calls on government expenditure from year to year. That is right? The funding increases you are talking about are not enshrined in legislation and not guaranteed beyond the next budget period?

Mr TEE — That is right, yes.

Mr O'DONOHUE — So you are saying that these changes are to encourage a defendant to plea earlier? You made similar comments earlier in relation to other clauses, and the balance, or the trade-off, for that is the increased funding for the OPP and legal aid, but that could be cut tomorrow, it could be cut the next budget, and this legislation will stay the same. That is the position, is it not? So that trade-off is potentially a very short-term trade-off, and you are sacrificing —

If I may say, I disagree that the change is minimal. I think the change is quite significant, and for that significant change you are providing potentially short-term funding.

Mr TEE — Again, the other part of the equation — the changes that have been made by the Courts Legislation (Jurisdiction) Act 2006, which have put in place a number of steps which enable the provision of further information to the accused, but, equally, whether or not the accused reserves their plea or makes a plea of not guilty does not have an impact on the way the trial progresses.

Mr O'DONOHUE — I just want to pick up your point, Mr Tee, about these additional resources, and further information to the accused. Not all the information that is to be furnished is by sworn evidence; is that correct? Is any of this information or additional resources through legal aid or through the new unit in the OPP or the additional information to be furnished to accused people done through sworn evidence?

Mr TEE — The committal process and the committal proceedings have sworn evidence and, I am advised, are subject obviously to the rules of perjury.

Mr O'DONOHUE — Okay. That is of some comfort, but I suppose the fact remains that this is change in the nature of the integrity of the accused, to me, to have their matter properly ventilated, if they so desire, through sworn evidence, and inducing an accused to plea earlier, to me, is most concerning.

Mr TEE — I am not sure what the inducement is to plead earlier other than providing them with information on which to make a considered decision. At an earlier stage they have got the information they need to make an early decision. If they plead not guilty, the impact would be the same as if their reserve plea was still in place, so their rights are not affected. What they do have is a capacity to plead earlier on. They may decide to plead not guilty, and then as the process progresses they may change their plea, and that is impacted by this proposal.

Mr O'DONOHUE — I will just ask one further question: how do you see this sits with the charter of human rights and the provisions relating to limits on freedom of expression?

Mr TEE — I think it enhances the rights of the defendant because they are able to access a greater source of information to make an informed decision. They are better represented at an earlier stage.

Mr O'DONOHUE — Perhaps I could ask the question a bit more tightly. By abolishing reserved pleas, does that not invoke the charter's right to freedom of expression?

Mr TEE — There is no limit on your freedom to express yourself. There is a requirement that you enter a plea. It is not —

Mr O'DONOHUE — Which, in effect, impinges on a defendant's right not to speak?

Mr TEE — There is a requirement on the defendant to enter a plea to the charges that have been put.

The CHAIR (Mr Atkinson) — Would it not be true that the defendant is not mandated to accept this process?

Mr TEE — And the defendant can remain mute. There is no requirement, or they can remain mute. There is nothing the court can do to force them to speak. I suppose there is, but there is nothing in this legislation or any legislation that forces them to speak.

The CHAIR (Mr Atkinson) — Can I just establish this: in the event that the review that is undertaken of how this actually operates establishes that there are some shortcomings, are there any, or would there be any, appeal rights available to people who had been convicted, who had in fact entered into pleas as part of this process, who in fact perhaps in their perspective felt they were duded as the process went its full course, and in fact that position was, to at least to some extent, vindicated by a review that found the process was unworkable?

Mr TEE — A review in itself will not provide any such rights. Of course if the defendant has got concerns about their rights being impeded by opting into sentence indication, they can choose not to apply for it.

The CHAIR (Mr Atkinson) — But having applied for it their appeal opportunities are basically non-existent?

Mr TEE — The accused is able to appeal the sentence, as is the prosecutor.

Ms PENNICUIK — I suppose I am a bit concerned about it, in terms of it clearly says in the SARC report that it does interfere or engage the defendant's right not to speak, so if you are required to plead, then you are required to speak. However, my question is: are there other jurisdictions that have abolished the right to reserve your plea?

Mr TEE — I understand that there are a number of jurisdictions, but we are unable to identify them at this stage.

Ms PENNICUIK — Perhaps Mr Byrne can furnish that information later.

The CHAIR (Mr Atkinson) — Perhaps he could furnish us all with that information. Can I perhaps go back in that context? The review process, as you said, is likely to be at least 12 months of operation before a review would be completed, and I think that is understandable.

Mr TEE — I indicated that at this stage no decision has been made, but the nature of the process — —

The CHAIR (Mr Atkinson) — It is likely?

Mr TEE — You would expect that that would be the minimum.

The CHAIR (Mr Atkinson) — In that review process is there likely to be any reporting back to Parliament as part of that review process? What form does the review take? Is it simply a report to the Attorney-General, or is that likely to be a document provided to the Parliament?

Mr TEE — It is a report that the Sentencing Advisory Council will make to the Attorney-General. It is not tabled in Parliament, but it will be made publicly available.

The CHAIR (Mr Atkinson) — So we have an assurance that that will be made publicly available?

Mr TEE — Yes.

The CHAIR (Mr Atkinson) — And that is the Attorney-General's position on that?

Mr TEE — Yes. I am advised that not only is it the Attorney-General's position, but it is the government's position.

The CHAIR (Mr Atkinson) — Thank you. I appreciate that.

Mr RICH-PHILLIPS — Taking up Mr O'Donohue's issue on the reserve plea, in practice if a defendant refuses to enter a plea of guilty or not guilty, the Attorney-General has indicated in his previous response to SARC that they simply have the option of remaining silent, and that would be taken as a not guilty plea. Is that correct?

Mr TEE — I have not seen what the Attorney said —

Mr RICH-PHILLIPS — It is in the earlier digest.

Mr TEE — but that is certainly my understanding of the outcome, in the same way that a reserve plea was taken to be a not guilty plea.

Mr RICH-PHILLIPS — Is there any potential in that environment for a defendant that refused to respond — would that give rise to action against the defendant for contempt of court or any action like that? In practice would a defendant have the option of simply remaining silent?

Mr TEE — I understand that it does happen from time to time. It has happened, and in those circumstances the proceedings proceed as if a not guilty plea had been entered. It is not an issue to which the courts have taken offence.

Mr RICH-PHILLIPS — Because to date they have not able to, because the defendant has had the right to reserve their plea.

Mr TEE — Reserve pleas arise at the committal stage, and if a reserve plea is currently entered into, essentially the outcome is that it can continue through the trial stage, even though there is no reserve plea allowed for at the trial stage. At the trial stage currently you are asked to enter a plea. You are required to enter a plea. You are not able to reserve your plea. The current position is that in essence you plead guilty or not guilty — or on occasions people have been silent, exercised their human rights to remain silent, and the trial has continued. What we are doing with removing the reserve plea is just bringing that existing stage forward, or back to the committal proceedings.

Mr RICH-PHILLIPS — Can the government give an assurance that if a defendant declined to enter a plea at either the committal or trial stage that contempt or similar action could not be taken against them?

Mr TEE — The best I can do is give evidence in relation to current practice. Any undertaking is entirely a matter for the courts and is not something that I, the Attorney-General or the government can give on behalf of the courts.

Clause agreed to; clauses 16 to 22 agreed to.

The CHAIR (Mr Atkinson) — That concludes the hearing in terms of the actual consideration of clauses of the bill. As has just been indicated, the committee will meet at a convenient time tomorrow to adopt a report, subject to the availability of the Hansard transcript for that report. I would ask if Mr Tee would want to have a look at the Hansard transcript before it is adopted by the committee?

Mr TEE — Yes, please.

The CHAIR (Mr Atkinson) — Okay, we will arrange for that to occur so that Mr Tee has an opportunity to look at that record.

Are there any further motions or issues that any member of the Legislation Committee has in respect of the bill and the report that I will make to the house? If not, that basically concludes our deliberations. Mr Tee, I thank you for your assistance in this matter and for your representation of the minister. We appreciate the responses that you were able to give, no doubt assisted by Mr Byrne.

Mr TEE — Aibly assisted.

The CHAIR (Mr Atkinson) — You have been ably assisted by Mr Byrne and earlier in the day by Ms Jobling. We thank you for appearing before the committee and for assisting our deliberations today. I also extend thanks to Hansard. The interesting thing about this committee is that it is probably always likely to be working on the wing, by its very nature. It therefore needs forbearance by a lot of people to ensure that its deliberations proceed. We thank everybody for their participation and for ensuring that we were able to consider this bill. I declare the meeting closed.

Committee adjourned.