

THE VOLKERS CASE

EXAMINING THE CONDUCT
OF THE POLICE AND PROSECUTION

MARCH 2003



CMC Vision:

To be a powerful agent for protecting Queenslanders from major crime and promoting a trustworthy public sector.

CMC Mission:

To combat crime and improve public sector integrity.

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Dear Sirs

In accordance with section 69 of the *Crime and Misconduct Act 2001*, the Crime and Misconduct Commission hereby furnishes to each of you its report, *The Volkert Case: Examining the Conduct of the Police and Prosecution*. The Commission has adopted the report.

Yours faithfully



BRENDAN BUTLER SC
Chairperson

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GLOSSARY

Alibi statements	The way Mr Volkert's legal representatives referred to the Defence statements (see below).
CMC	Crime and Misconduct Commission
The Defence	The legal representatives for Mr Volkert
Defence statements	The statements given to the ODPP by Mr Volkert's legal representatives to support their submission that the charges against Mr Volkert should be dropped.
Defence submission to the CMC	Submission under the hand of Mr Michael Bosscher of Ryan & Bosscher Lawyers, dated 17 October 2002, on behalf of Mr Volkert to the CMC
Defence submission to the ODPP	Submission under the hand of Mr Michael Byrne QC, dated 3 September 2002, on behalf of Mr Volkert to the ODPP
Defence submission for ex gratia payment	Submission under the hand of Mr Michael Bosscher of Ryan & Bosscher, Lawyers, dated 20 September 2002, seeking an ex gratia payment for Mr Volkert from the Attorney-General
DPP	Director of Public Prosecutions
ESC	Ethical Standards Command (QPS)
Notice to appear	An alternative way of starting criminal proceedings. Instead of arresting and charging a person, or serving a summons, police may issue a notice, similar to an infringement notice, called a notice to appear, which requires the defendant to appear in a nominated court on a designated date.
ODPP	Office of the Director of Public Prosecutions
Official misconduct	Conduct relating to the performance of an officer's duties that is serious enough to justify dismissal or is a criminal offence. The CMC has primary responsibility for dealing with official misconduct matters.
OPM	Operational Procedures Manual (QPS)
Police misconduct	Conduct (other than 'official misconduct') that is disgraceful, improper or unbecoming an officer, that shows unfitness to be an officer, or that does not meet the standard of conduct reasonably expected by the community of an officer. The QPS has primary responsibility for dealing with police misconduct; however, in some circumstances, the CMC may also become involved.
Pretext telephone calls	A number of telephone conversations between Mr Volkert and Complainant 1, set up by the initial police investigation and covertly recorded by police.
PPRA	<i>Police Powers and Responsibilities Act 2001</i>
QP9	QPS form outlining charges against a person

QPS

Queensland Police Service

Taskforce Argos

A police taskforce established by the QPS on 1 February 1997 to investigate allegations of paedophilia within Queensland.

SCOC

State Crime Operations Command (QPS)

KEY FIGURES

Main people mentioned in report: alphabetical order

Bosscher, Michael	Solicitor from Messrs Ryan & Bosscher, acting for Mr Volkens
Byrne, QC, Michael	Barrister acting for Mr Volkens
Clare, Leanne	Director of Public Prosecutions
Complainant 1	As a child, received swimming training from Mr Volkens. First of the three complainants to come forward with allegations against Mr Volkens
Complainant 2	As a child, received swimming training from Mr Volkens. Second of the three complainants to come forward with allegations against Mr Volkens
Complainant 3	As a child, received swimming training from Mr Volkens. Last of the three complainants to come forward with allegations against Mr Volkens
Davies, Jason	ODPP case lawyer for the Volkens prosecution
Marsh, Detective Sergeant	Taskforce Argos member, and Detective Senior Constable Shepherd's supervising officer
Pointing, Richard	Crown Prosecutor for the Volkens committal hearing
Rutledge, Paul	Deputy Director of Public Prosecutions
Shepherd, Detective Senior Constable	Taskforce Argos member and the arresting officer.
Shields, Peter	Solicitor from Messrs Ryan & Bosscher, acting for Mr Volkens
Vasta, Salvatore	Crown Prosecutor who provided advice to the police during the investigation
Volkens, Scott	Swimming coach charged with seven counts of indecent dealing with three former swimmers
Welford, MP, Rod	Attorney-General and Minister for Justice
Witness B	Received swimming training from Mr Volkens at the same time as the Complainants and provided evidence to the Defence
Witness G	Received swimming training from Mr Volkens at the same time as the Complainants, and was alleged to have been able to corroborate Complainant 2's statement about going to Mr Volkens's house
Witness K	Received swimming training from Mr Volkens at the same time as the Complainants, and was alleged to have been able to corroborate some of Complainant 3's version of events
Witness N	Received swimming training from Mr Volkens and was thought to have had a similar experience to Complainant 1
Witness W	Received swimming training from Mr Volkens at the same time as the Complainants, and provided evidence to the Defence.

Other persons mentioned in report

Doneman, Paula	Reporter for the <i>Courier-Mail</i>
Howes, Lincoln	Producer for '60 Minutes'
Johnson, Vaughan	the Shadow Minister for Police and Corrective Services
Jones, Dr Lyndel	Psychiatrist interviewed by Detective Senior Constable Shepherd
MacDonald, Detective Inspector	Officer in charge of Taskforce Argos
McGibbon, Deputy Commissioner	Acting Commissioner of Police when Mr Volkens was charged
Muller, Sonia	Victims Support Officer, ODPP
Rainders, Dr Jonathon	Psychiatrist interviewed by Detective Senior Constable Shepherd
Riley, Detective Superintendent	Juvenile Aid Bureau State Liaison Officer
Rouse, Detective Senior Sergeant	Taskforce Argos member
Soppa, Detective Senior Sergeant	Taskforce Argos member
Swindells, Assistant Commissioner	Acting Assistant Commissioner State Crime Operations Command during the Volkens matter
Tolhurst, Simon	Complainant 3's solicitor

CHRONOLOGY

4 August 2001	Police investigation commences after information received from parents of Complainant 1.
22 November 2001	Statement taken from Complainant 2.
27 November 2001	Statement taken from Complainant 1.
12 December 2001	Arresting officer Senior Constable Shepherd speaks to doctors for Complainant 1.
21 March 2002	Media becomes aware of police investigation.
26 March 2002	Mr Volkens arrested (charges in relation to Complainants 1 and 2). Charges set down for committal call-over on 17 June 2002.
11 April 2002	ODPP file created.
30 April 2002	Statement obtained from Complainant 3 — charges not preferred and statement not given to the Defence until 17 June 2002.
4 June 2002	Brief of evidence delivered to the ODPP and to the Defence, minus Complainant 3's statement.
17 June 2002	Committal mention; matter set down for committal hearing on 25 July 2002. Defence asked Crown whether it would be making inquiries regarding the medical records of the Complainants.
4 July 2002	DPP decision to obtain Complainant 1's medical records as a matter of urgency.
16–2 July 2002	Arresting officer obtains consent from Complainant 1's doctors to gain access to all her medical records.
22 July 2002	Medical records obtained under subpoena, and copy provided to the ODPP and the Defence.
25 July 2002	Committal hearing held and Mr Volkens committed on seven of eight charges.
6 September 2002	Meeting held between the ODPP and the Defence in the office of Paul Rutledge. Present were: <ul style="list-style-type: none">– Paul Rutledge, Deputy DPP– Michael Byrne QC, barrister for the Defence– Peter Shields, solicitor for the Defence– Jason Davies, ODPP case lawyer– Richard Pointing, Crown Prosecutor. At that meeting, the Defence made a submission, orally and in writing, to discontinue the proceedings against Mr Volkens. At the conclusion of the meeting, the Deputy DPP asked Mr Davies to prepare a memorandum addressing the strengths and weaknesses of the Crown case.
11 September 2002	Memorandum prepared by Mr Davies for the DPP and the Crown Prosecutor.
13 September 2002	Meeting between the DPP, Deputy DPP and Crown Prosecutor for the purpose of assessing Crown position.
16 September 2002	Detective Sergeant Marsh and Mr Davies further questioned Complainant 3.

	<p>Telephone call between Mr Shields and Mr Davies regarding Witness K.</p>
	<p>Telephone call between Mr Byrne and Mr Davies relating to the use of the Defence statements by the ODPP.</p> <p>Meeting between the DPP, Deputy DPP and Mr Davies regarding Mr Davies's conversation with Mr Byrne. Decision made to continue with the further inquiries.</p> <p>The Deputy DPP spoke with Mr Byrne regarding the use of the statements by the ODPP.</p> <p>Mr Davies received a telephone call from the Deputy DPP instructing him to have no further contact with Crown witnesses.</p>
<p>17 September 2002</p>	<p>Meeting between the DPP, Deputy DPP and Mr Davies. The DPP asked that outstanding inquiries be expedited.</p> <p>Detective Sergeant Marsh and Mr Davies interviewed Witness N.</p> <p>Detective Sergeant Marsh and Mr Davies visited Mr Volk's former residence.</p> <p>Detective Sergeant Marsh and Mr Davies interviewed a psychologist who had made notes regarding an outpatient counselling session with Complainant 1 in 1998.</p>
<p>18 September 2002</p>	<p>Meeting between DPP, Deputy DPP, Detective Sergeant Marsh and Mr Davies. Decision made to discontinue all three prosecutions against Mr Volk's. Complainants and Defence advised of the decision.</p>
<p>20 September 2002</p>	<p>Submission made by Mr Volk's legal representatives on his behalf for an ex gratia payment for the expense and hardship he had suffered as a result of the charges against him.</p>
<p>27 September 2002</p>	<p>CMC announced that it would conduct public hearings into the procedural issues raised by the matter.</p>
<p>10 October 2002</p>	<p>CMC announced there was sufficient material to warrant an investigation into the handling of the Volk's case and that it was the appropriate body to conduct the investigation.</p>
<p>20–21 November 2002</p>	<p>Public hearings at the CMC into the way the criminal justice system handles sexual misconduct matters.</p>

EXECUTIVE SUMMARY

BACKGROUND TO THE VOLKERS CASE

On 26 March 2002, following a police investigation that began in August 2001, internationally renowned swimming coach Scott Volkens was arrested on charges of indecent dealing with children under the age of 16 years. The arrest received extensive media coverage with reporters photographing Mr Volkens as he arrived at Police Headquarters after his arrest.

The police brief of evidence was sent to the Office of the Director of Public Prosecutions (ODPP) on or about 4 June 2002. Medical evidence from one Complainant was provided to the ODPP and Mr Volkens's legal representatives on 22 July 2002. On 25 July 2002, Mr Volkens was committed to stand trial on seven charges of indecently dealing with a child under the age of 16 years in relation to three Complainants.

On 6 September 2002, Mr Volkens's legal representatives — Mr Peter Shields, solicitor, of Messrs Ryan & Bosscher Lawyers and Mr Michael Byrne QC, Barrister-at-Law — approached the DPP to discuss Mr Volkens's case. A meeting was held with Mr Byrne and Mr Shields and several ODPP officers, including Deputy DPP Paul Rutledge, at which a written submission was presented. The submission argued that consideration be given to discontinuing the prosecution against Mr Volkens. Mr Shields later gave the Deputy DPP statements in support of the submission, but subject to him giving an undertaking as to how they could be used.

On 18 September 2002, the ODPP notified the three Complainants and Mr Byrne that the prosecution against Mr Volkens would be discontinued.

This decision received extensive media coverage.

On 20 September, Mr Bosscher of Messrs Ryan & Bosscher Lawyers made a submission to the Attorney-General on behalf of Mr Volkens seeking an ex gratia payment for the expense and hardship suffered by Mr Volkens as a result of the charges against him.

Also on 20 September 2002, Mr Shields made comments in the media, indicating that the new evidence presented to the DPP proved that the alleged incidents could not have taken place and suggesting that Mr Volkens might bring defamation actions against the Complainants. On 21 September 2002, Mr Shields further commented to the media, this time questioning the thoroughness of the police investigation.

Between 24 and 25 September 2002, comments were reported in the media by various politicians, academics and lawyers regarding the police investigation and the appropriateness of the undertaking given by the Deputy DPP.

Complainant 3 was reported on 26 September 2002 as having concerns regarding the decision to drop the charges and the alleged undertaking given to Mr Byrne and Mr Shields by the Deputy DPP.

Since that time there has been continuing media interest in the matter, with comments made by the lawyers for Mr Volkens, the Complainants, and various politicians, academics and lawyers.

ROLE OF THE CMC

The CMC's role was to find out whether there was any misconduct in the handling of the initial police investigation, or in the processes that led to the

decision by the DPP, including any evidence of political interference.

As the CMC has no authority to disturb or confirm the decision of the DPP to discontinue proceedings against Mr Volkens, it did not question whether the decision was correct or not. However, the basis on which the DPP came to her conclusion is relevant to the CMC's deliberations because it bears upon the question of whether there was any evidence of official misconduct on the part of any officer in the ODPP.

In light of the focus of the CMC's inquiries and the limits of its jurisdiction, it is important to record that the conclusions reached by the CMC are not intended to suggest in any way — express or implied — that Mr Volkens committed any offence. Further, the CMC should not be taken as having formed any favourable or unfavourable view of the allegations made against Mr Volkens by the three Complainants.

CMC RESEARCH REPORT

As a direct result of public concerns arising from the Volkens case, the CMC also considered the following issues:

- 1** The training, expertise and supervision of police officers responsible for the investigation of sexual offences.
- 2** The adequacy of existing guidelines and procedures for the initiation and discontinuance of the prosecution of sexual offenders by police and the DPP.
- 3** The appropriateness of, and the circumstances in which, the publication of identifying information about a person charged with a sexual offence should be suppressed.

On 20 and 21 November 2002 the CMC conducted public hearings regarding the above three issues, and received numerous submissions from government agencies, community organisations, professional bodies and private individuals. *The findings of the public hearings will be published shortly in a separate report.*

WHAT THE COMPLAINANTS ALLEGED

To put the Volkens case in perspective, it is necessary to explain the nature of the original allegations.

The police investigation began when a young woman and her parents approached the police with allegations that Mr Volkens had sexually molested her when she was a child and he her swimming coach. The young woman gave the name of another woman who, she said, had been similarly treated by Mr Volkens. Police approached that woman, who made a statement in November 2001. A third woman came forward in April 2002, after Mr Volkens's arrest. Of the three women, her allegations were the most serious.

All the incidents were alleged to have happened between 1984 and 1986 when the women were girls aged between 12 and 16 years. There were no eyewitnesses to the alleged incidents, two of which were said to have occurred in Mr Volkens's house, one in his car, two in a massage room near the pool where the girls trained, and two in Mr Volkens's caravan, also near the pool. An eighth charge was dropped early on for insufficient grounds on which to proceed.

CONCLUSIONS

Regarding the police investigation

The CMC investigation did not disclose any evidence of misconduct on the part of any officer of the QPS. However, it makes the following observations.

Some Taskforce Argos officers were under the misapprehension that there was a policy that alleged offenders accused of committing sexual offences must be arrested (rather than serving a less intrusive notice to appear). The QPS should ensure that all officers are fully aware that they must adopt a case-by-case approach to the decision to arrest alleged offenders, as required by section 198 of the Police Powers and Responsibilities Act.

The State Crime Operations Command assessment highlighted some concerns about the thoroughness and standard of the police investigation. These concerns mainly relate to poor supervision and the inexperience of the arresting officer, which the QPS proposes to address managerially. However, many other criticisms about the police investigation — such as the failure of police to interview at least two important witnesses — were unfounded. In any event, these matters did not raise evidence of police misconduct or official misconduct.

Regarding the handling of the case by the ODPP

The CMC investigation did not disclose any evidence of official misconduct on the part of any officer of the ODPP. However, it makes the following observations.

In the CMC's view, the process leading to the decision not to continue with the prosecution of any of the charges against Mr Volkens was unsatisfactory. This was reflected in the fact that there is room for doubt about the principal reasons that motivated the decision.

The decision by Mr Rutledge to accept statements proffered with a view to persuading him that the charges could not be upheld, on the basis that use of the statements was restricted, was a mistake.

There are obvious dangers in permitting lawyers to submit statements to the prosecution in this way. Here the situation was aggravated by the circumstances that disagreement quickly arose as to the basis on which the statements were to be used; this led to a threat of litigation by the lawyers for Mr Volkens, which undoubtedly put pressure on the officers of the ODPP. Although there is evidence from the DPP and Mr Rutledge that the content of the statements had very little to do with the ultimate decision, it is hard to accept that the statements did not influence the decision. Such a conclusion should not be taken as meaning that the DPP and Deputy DPP were untruthful in their responses.

Apart from the acceptance of the statements subject to some disputed obligation not to investigate them, other mistakes of lesser importance were made, namely:

- The DPP was under a misapprehension as to the length of time Complainant 3 had said that Mr Volkens was away from the pool.
- Too much was made of the damage supposedly done to Complainant 3's credibility by remarks attributed to Witness K.
- There was little, if any, analysis of the prospects of a successful prosecution of the offences alleged to have occurred in the caravan, including any consideration of whether to proceed on the allegations in respect of the caravan incidents alone.
- Too little attention was given to the possibility that Complainant 3 might simply be believed by a jury.

In short, there were more defects than one would normally expect to find in an examination of a matter of this kind. However, it appears clear that although Mr Rutledge, and to a lesser extent the DPP, can be justly criticised for the way in which they went about their task, the case falls far short of being one of official misconduct.

The DPP should consider developing guidelines in relation to the giving and recording of undertakings to ensure that the situation that occurred in the Volkers case is not repeated.

Given that on a number of occasions, the Complainants expressed their concern at what they perceived to be a lack of communication on the part of the ODPP, the DPP should consider reviewing the adequacy and effectiveness of the ODPP's communication with complainants. *A detailed consideration of the relationship between complainants and the ODPP will be provided in the CMC's forthcoming research report.*

OTHER CRITICISMS AND THE CMC'S CONCLUSIONS

The following is a list of specific criticisms made in relation to this complex case with cross-references to where each matter is discussed in full in the report. Summaries of the CMC's conclusions appear in bold type.

- ***police failing to interview all relevant witnesses (page 8)***

The police investigation was criticised by Mr Byrne, Mr Shields, Mr Bosscher and the ODPP for failing to interview all relevant witnesses, some of whom it was argued would have cast doubt on the credibility of the Complainants' accounts.

The investigating officers concede and the QPS officers who conducted the post-operational assessment conclude that more swimmers should have been interviewed. However, the assessment found no evidence of misconduct in the failure to conduct further interviews. The CMC concurs that there is no evidence of misconduct.

One witness, Witness K, told the police that she was assisting the Defence and did not wish to speak to the police. In these circumstances, it is understandable that the police decided not to attempt to contact this witness again.

- ***police failing to take statements from all witnesses interviewed (page 9)***

Mr Bosscher's submission to the CMC stated that a number of the witnesses to whom Mr Volkers's legal representatives had spoken had provided information that discredited the Complainants. The submission claimed that, although these witnesses were considered and in some cases interviewed by police, statements had not been taken from them.

The reasons for the police not taking statements from some witnesses vary. Suffice to say that in none of these cases was the conduct of the police such that any disciplinary action is warranted.

- ***police failing to consider conflicting testimony (page 12)***

A further issue raised by Mr Bosscher's submission to the CMC concerned the apparent failure by police to identify evidence that would either corroborate the Complainants' evidence or exonerate his client. In the submission for an ex gratia payment, particular

reference was made to evidence provided to police by Complainants 1 and 2. Both women had referred in their statements to a meeting between them at 'Aladdin on Ice' at the Brisbane Entertainment Centre. It was submitted by Mr Bosscher that the correct name of the show was in fact 'Disney on Ice', implying that the shared mistake by the two Complainants was a concoction on their part, which should have alerted police to possible flaws in the case prior to the laying of charges.

CMC inquiries found that newspaper reviews referred to the production as 'Aladdin on Ice'. In the circumstances, the suggestion that police investigating the complaints failed to identify a shared mistake in the statements of the two Complainants, which could amount to evidence of concoction, is without merit.

- ***police failing to obtain and examine Complainants' medical records (page 13)***

Concerns were raised by Mr Byrne's submission to the ODPP, the submission for an ex gratia payment, and the ODPP regarding the failure by investigating police to obtain and properly examine the psychiatric records of the Complainants at an early stage in the investigation. This failure was particularly important in relation to Complainant 1.

If the complete medical history of Complainant 1, including psychiatric records, had been obtained and reviewed by police at an early stage, it could have been taken into account in assessing her credibility. However, given the lack of a directive regarding the obtaining of such evidence, the criticism of police for not obtaining the medical records at an earlier date is unjustified.

The CMC notes the difficulties involved in formulating prescriptive guidelines for the timing of the collection of medical evidence in all cases, as each case turns on its own facts. There will be some cases where medical evidence is quite irrelevant. It may be that earlier consultation on sexual offence cases between the QPS and the ODPP would assist in the earlier identification of the relevance of certain types of evidence. *This issue is canvassed at length in the forthcoming research report.*

- ***police arresting Mr Volkens (page 14)***

Mr Bosscher's submission to the CMC expressed concern regarding the actions of the police in arresting Mr Volkens rather than issuing him with a notice to appear. The submission stated that Mr Volkens was arrested in a way so as to 'cause maximum embarrassment and discomfort' to Mr Volkens.

There is no basis to conclude that Detective Senior Constable Shepherd (the arresting officer) did not believe that it was reasonably necessary in this particular case to arrest Mr Volkens, albeit that this was in line with his invariable practice in relation to sexual offences. The QPS should, however, ensure that all officers are fully aware that they must adopt a case-by-case consideration of the decision to arrest alleged offenders, as required by section 198 of the Police Powers and Responsibilities Act. The CMC has already written to the QPS about this issue.

- ***police giving Courier-Mail journalists a ‘tip-off’ (page 17)***

Mr Bosscher’s submission also suggested that the *Courier-Mail* had received a ‘tip off’ about Mr Volkers’s imminent arrest.

There is evidence that two police officers associated with the Volkers investigation did enter into an arrangement with the *Courier-Mail*, contrary to guidelines set down in the Operational Procedures Manual. The CMC supports the ESC’s recommendation that disciplinary action for misconduct be considered against these two officers.

- ***senior police failing to supervise the arresting officer (page 17)***

Mr Bosscher’s submission to the CMC contended that senior police failed to supervise the arresting officer properly, resulting in the matter proceeding in a less than even-handed manner.

The post-operational assessment of the police investigation concluded that there had been poor quality control and supervision, neither of which, however, amounts to official misconduct or police misconduct.

- ***arresting officer failing to show objectivity (page 18)***

Concerns were also raised by Mr Byrne and Mr Shields about the evidence given by Detective Senior Constable Shepherd during the committal before the Magistrates Court. They submitted that the evidence was misleading in a number of respects and was patently incorrect about the assertion that Mr Volkers had made admissions to some of the offences with which he was charged.

There is no evidence to suggest that the answers provided by Detective Senior Constable Shepherd were a deliberate attempt to mislead the Defence or the court, or that they demonstrated a lack of objectivity on his part.

- ***use of a blackboard (page 54)***

Complainant 3 said that she was concerned that the DPP must have questioned her credibility because she appeared to disbelieve her evidence that there was a blackboard at the pool. She said that she gave a photograph to Mr Davies that proved that there was a blackboard at the pool. She believed that witness statements provided by Mr Byrne and Mr Shields said there was not a blackboard.

Complainant 3 relies on the photograph that she produced to prove that there was a blackboard at the pool. However, proof of the existence of the blackboard is irrelevant because no-one has said that it did not exist. Those people who provided statements to Mr Shields and addressed this issue merely say that Mr Volkers did not use one, not that one did not exist. Neither Mr Davies nor Detective Sergeant Marsh told Complainant 3 that witnesses had said that there was no blackboard, but that ‘some people said he never used a blackboard’. Complainant 3 said he did not use a blackboard very often.

- ***Inconsistency of evidence over type of floor coverings (page 56)***

The Shadow Minister for Police and Corrective Services, Mr Johnson, expressed concerns about alleged comments made by Mr Rutledge in a meeting with Complainant 3 on 26 September 2002. Those comments related to an alleged inconsistency in the evidence of Complainants 1 and 2 relating to the type of floor coverings at the former residence of Mr Volkens. (Complainant 1 alleged that the house had polished floors while Complainant 2 alleged that the house had grey carpet.) Mr Rutledge allegedly said that this inconsistency constituted ‘yet another reason why the charges against Mr Volkens could not proceed to trial.’

Mr Johnson further stated that he has been informed that the current owner of the Volkens residence told Mr Jason Davies and Detective Sergeant Marsh that Volkens had installed grey carpets over the top of the polished floors on 17 September 1986. Mr Johnson said that this information ‘would appear to more than adequately cater for Mr Rutledge’s concerns regarding the allegedly inconsistent recollection’ of Complainants 1 and 2. He further stated that he had received information that:

- Mr Davies and Detective Sergeant Marsh were informed of these facts by the owner of the residence
- Mr Davies and Detective Sergeant Marsh took photographs of the interior of the residence showing the grey carpet over the floorboards.

Mr Johnson raised concerns that Mr Rutledge failed to acknowledge these facts in his meeting with Complainant 3.

There is evidence that Mr Davies was aware of the issue of the floor coverings and, at the direction of the DPP and the Deputy DPP, he and Detective Sergeant Marsh conducted inquiries.

He could not recall being told by the current owner of the precise date on which the coverings were laid (the owner told the CMC that she did not tell them the date on which the carpet was laid as it was, and still is, unknown to her). Because the date of installation could not be established, it meant that there was a potential inconsistency in Complainant 1’s evidence.

In any event, Mr Davies did not consider that it was a significant issue in the DPP’s decision to discontinue proceedings in respect of either Complainant 1 or Complainant 2. In the interviews with the CMC, it was never referred to by the DPP or the Deputy DPP as being relevant to their considerations.

In the CMC’s view, any potential inconsistency was of little, if any, significance to the DPP’s considerations. Even if the inconsistency had been taken into account by the DPP, it was not a matter that could constitute official misconduct.

- ***TV program’s prior knowledge of discontinuance (page 60)***

The Leader of the Opposition asked the CMC to find out why the television program ‘60 Minutes’ was informed of the discontinuance by an employee of a public relations firm representing Mr Volkens weeks before the DPP had made her decision.

There is no evidence that any employee of the public relations firm acting for Mr Volkens knew about the DPP’s actual decision, though certainly the employee knew about the possibility of such a decision. It is clear from the evidence that the DPP had determined that no-one, including Mr Volkens, would be advised of her decision until after all three Complainants had been notified.

- ***The selection of Detective Sergeant Marsh (page 61)***

In correspondence to the CMC, the Opposition brought to the CMC's attention, 'potential political interference [relating to] Ms Leanne Clare's selection of Detective Marsh to investigate the "new" evidence supplied by the defence following public criticism of Detective Shepherd by Mr Shields'. The Opposition said that it has been informed that Detective Sergeant Marsh went to school with Mr Shields and did not tell the DPP at the time of his selection. The Opposition went on to say that he had been sidelined from any further investigations by the QPS in the Volk's matter because of concerns that he would leak information to Mr Shields. The Opposition called for scrutiny of the DPP's decision to select Detective Sergeant Marsh.

In the CMC's view, the approach by the DPP to the QPS seems perfectly sensible and appropriate. Detective Sergeant Marsh was the arresting officer's supervisor and had knowledge of the investigation. On the basis of this analysis, there was no reason for Detective Sergeant Marsh to be excluded from conducting these inquiries and there is simply no evidence that he acted improperly or was asked by any person to act improperly.

- ***Media advice of discontinuance (page 62)***

Mr Volk's legal representatives were concerned that the media appeared to know about the decision to drop the charges against Mr Volk's before the Defence did.

By the time that Mr Byrne was advised of the DPP's decision, the three Complainants, some officers of the QPS, and the relevant officers of the ODPP had already, and quite properly, been informed. It is not surprising, therefore, that the media heard 'rumours as to what was going on'. There is no evidence that anyone leaked information of the decision to the media.

- ***Failure to appoint an experienced prosecutor (page 63)***

Mr Bosscher expressed the opinion that, had an experienced prosecutor being appointed to the Volk's case at an early stage, the decision to discontinue criminal proceedings would have been made earlier.

Prior to the committal on 25 July 2002, the brief of evidence had been briefly reviewed by a case officer and then by an experienced crown prosecutor, Mr Pointing. There is no reason to think that a consideration of that same evidence by a 'more experienced prosecutor' would have led to the criminal proceedings against Mr Volk's being discontinued at an earlier stage.

- ***Removal of senior prosecutor (page 64)***

All three Complainants were disturbed by the apparent removal of a senior prosecutor from the case, namely Mr Salvatore Vasta.

Mr Vasta did provide some advice to police on the Volk's case, but was never assigned the case and, therefore, was never removed from it.

The DPP is in the process of formulating guidelines to regulate the provision of advice to police by prosecutors prior to cases being formally referred to the ODPP. The CMC supports this initiative by the DPP.

- ***Confiscation of material (page 64)***

The Complainants expressed concern that documents and tapes in relation to the investigation were taken away from Detective Senior Constable Shepherd after the decision to discontinue criminal proceedings against Mr Volkens.

There was nothing untoward in the removal of this material. After the charges against Mr Volkens were dropped, a post-operational assessment of the investigation was ordered by the QPS and the reviewing officers were authorised to obtain access to all relevant material.

- ***Decision made 'in haste' (page 65)***

The Complainants suggested that the fact that Mr Volkens was wanting to apply for a coaching position with the Australian Institute of Sport may have been the reason for the speed of the decision.

The mere fact that the decision not to prosecute was made within twelve days of the submission being made to the ODPP, and two days after the DPP was advised of Mr Volkens's job application, is not evidence of official misconduct. Ms Clare made it clear to the ODPP that she would not be influenced by the timing of the job application. Senior Sergeant Marsh had been seconded to the ODPP for the week and Ms Clare had advised the QPS that she intended to have the investigations completed before 19 September 2002, pending her going on leave. There is no evidence that the decision to move promptly on this matter and communicate the decision once it was made was improperly motivated or constitutes official misconduct.

- ***Communication of the discontinuance to Complainants 1 and 2 (page 65)***

The Leader of the Opposition criticised the way the ODPP informed the Complainants, particularly Complainant 1, of the decision to discontinue the Volkens prosecution, describing the ODPP as having 'no appreciation ... of the level of sensitivity required in the handling of these matters'.

There is no evidence of official misconduct in relation to the manner in which the ODPP communicated the decision to Complainants. Mr Davies told the CMC that prior to seeing Complainant 1 he spoke to her treating doctor to determine the best way to advise her of the DPP's decision.

- ***Prosecutor's 'disinterested' attitude (page 66)***

Complainant 3 said she believed the prosecutor assigned to prosecute the committal hearing appeared 'disinterested' in her complaint. She based this perception on her contact with the Crown Prosecutor, Mr Pointing, at the meeting on the day before the committal and during the committal itself. She felt that he had little empathy for her.

Mr Pointing rejected this description of him and explained that it was his duty as a prosecutor to prosecute matters dispassionately; to be firm but fair. The perceived attitude of the Crown Prosecutor could not amount to official misconduct, and any concerns of this nature are a matter for consideration by the DPP.

- ***Distressful comment by the Deputy DPP (page 67)***

Complainant 3 related her distress over a comment alleged to have been made to her and her solicitor by Mr Rutledge during the meeting regarding the media furore that resulted from the DPP's dropping of the charges, namely: ' I didn't believe I would have had to waste as much time on this as I have — maybe I would have been better to have gone to trial'.

The alleged comment, if accurately reported, does not of itself indicate official misconduct by Mr Rutledge.

- ***The 'selectivity' of the Defence statements (page 68)***

According to Complainant 3, in a radio interview on 24 September 2002, Mr Shields had said that he had collected 30 statements in relation to the Volkers case. Given that Mr Shields actually gave the Deputy DPP 20 statements, Complainant 3 said that she was concerned that the statements provided to the Deputy DPP were selective and were not all the statements in the possession of Mr Volkers's lawyers.

There is conflicting evidence as to whether Mr Shields agreed to provide all of the statements in his possession to the Deputy DPP or merely a representative sample of them. This conflict could not be resolved by the CMC. In any event, the circumstances could not constitute official misconduct.

- ***Alleged political involvement***

The Opposition asked the CMC to consider the role of government members in the Volkers case to ensure that no impropriety or conflict of interest had occurred.

The CMC found no evidence of outside interference in the decision-making process of the DPP by any member of government or any other person. Both police and ODPP officers involved in the investigation and prosecution of Mr Volkers were categorical in their assertions that no undue influence was brought to bear on them by any person over the Volkers case.

CATALYST FOR THE CMC INVESTIGATION

This chapter gives an overview of the facts of the Volkerts case and explains the reasons for the CMC's involvement and the scope of that involvement. It also outlines the CMC's assessment of the case and the investigative methodology adopted.

OVERVIEW

On 26 March 2002, following a police investigation that began in August 2001, internationally renowned swimming coach Scott Volkerts was arrested on charges of indecent dealing with children under the age of 16 years. The arrest received extensive media coverage with reporters photographing Mr Volkerts as he arrived at Police Headquarters after his arrest.

The police brief of evidence was sent to the Office of the Director of Public Prosecutions (ODPP) on or about 4 June 2002. Medical evidence from one Complainant was provided to the ODPP and Mr Volkerts's legal representatives on 22 July 2002. On 25 July 2002, Mr Volkerts was committed to stand trial on seven charges of indecently dealing with a child under the age of 16 years in relation to three complainants.

On 6 September 2002, Mr Volkerts's legal representatives — Mr Peter Shields, solicitor, of Messrs Ryan & Bosscher Lawyers and Mr Michael Byrne QC, Barrister-at-Law — approached the DPP to discuss Mr Volkerts's case. A meeting was held with Mr Byrne and Mr Shields and several ODPP officers, including Deputy DPP Paul Rutledge, at which a written submission was presented. The submission argued that consideration be given to discontinuing the prosecution against Mr Volkerts. Mr Shields later gave the Deputy DPP statements in support of the submission, but subject to him giving an undertaking as to how they could be used.

On 18 September 2002, the ODPP notified the three Complainants and Mr Byrne that the prosecution against Mr Volkerts would be discontinued.

This decision received extensive media coverage.

On 20 September, Mr Bosscher of Messrs Ryan & Bosscher Lawyers made a submission to the Attorney-General on behalf of Mr Volkerts seeking an ex gratia payment¹ for the expense and hardship suffered by Mr Volkerts as a result of the charges against him.

Also on 20 September 2002, Mr Shields made comments in the media, indicating that the new evidence presented to the DPP proved that the alleged incidents could not have taken place and suggesting that Mr Volkerts might bring defamation actions against the Complainants. On 21 September 2002, Mr Shields further commented to the media, this time questioning the thoroughness of the police investigation.

¹ An ex gratia payment is one made as a favour and not as a legal obligation.

Between 24 and 25 September 2002, comments were reported in the media by various politicians, academics and lawyers regarding the police investigation and the appropriateness of the undertaking given by the Deputy DPP.

Complainant 3 was reported on 26 September 2002 as having concerns regarding the decision to drop the charges and the alleged undertaking given to Mr Byrne and Mr Shields by the Deputy DPP.

Since that time there has been continuing media interest in the matter, with comments made by the lawyers for Mr Volkens, the Complainants, and various politicians, academics and lawyers.

Assessment

As a result of the public interest in the handling of the Volkens case, on 24 September 2002 the CMC began gathering material to assess whether there was any information that gave rise to a reasonable suspicion of official misconduct on the part of any person. Also, on 24 September 2002, the Premier's Office sent the CMC a transcript of a television interview with Mr Beattie held on 19 September 2002, during which the Premier expressed the opinion that the matter should be looked at by the CMC. On 26 September 2002, the CMC received a letter from the Leader of the Opposition that contained information from the Complainants and raised concerns about the prosecution process.

On 27 September 2002, the CMC publicly announced that it would inquire into aspects of the handling of the case, and, in furtherance of its research function, would conduct public hearings into the procedural issues raised by the matter.

After assessing all of the material to hand, the CMC determined on 10 October 2002 that there was sufficient material to warrant an investigation.

Given the high profile of the officials involved, the suggestion of political interference and the extensive media coverage the matter had already received — and in light of the principles contained in section 34 of the Crime and Misconduct Act — the CMC considered it was the appropriate body to conduct the investigation.

ISSUES FOR THE CMC

Misconduct

The circumstances surrounding Mr Volkens's arrest and the subsequent discontinuance of proceedings were examined by the CMC to determine whether there was sufficient evidence of official misconduct or police misconduct to recommend disciplinary or other action. These aspects of the matter were considered:

- 1** Whether there was sufficient evidence of official misconduct or police misconduct in the initial investigation by the Queensland Police Service (QPS) to warrant the CMC recommending disciplinary or other action.
- 2** Whether there was sufficient evidence of official misconduct by officers of the ODPP in their handling of the matter, both in terms of the committal proceedings and the subsequent decision to discontinue prosecution of the charges, to warrant the CMC recommending disciplinary or other action.
- 3** Whether there had been any political interference in the decision not to proceed with the charges.

It must be emphasised that the CMC has no authority to disturb or confirm the decision of the DPP to discontinue proceedings against Mr Volkens. It follows that the CMC did not turn its mind to the question of whether the decision to discontinue proceedings was the correct one or not. However, the basis on which the DPP came to her conclusion is relevant to the CMC's deliberations

because it bears upon the question of whether there was any evidence of official misconduct on the part of any officer in the ODPP.

In light of the focus of the CMC's inquiries and the limits of its jurisdiction, it is important to record that the conclusions reached by the CMC are not intended to suggest in any way — express or implied — that Mr Volkens committed any offence. Further, the CMC should not be taken as having formed any favourable or unfavourable view of the allegations made against Mr Volkens by the three Complainants.

Research

At the same time, as a direct result of public concerns arising from the Volkens case, and following a reference from the Premier under section 52(1)(c) of the Crime and Misconduct Act, the CMC considered the following issues in the discharge of its research function:

- 1 The training, expertise and supervision of police officers responsible for the investigation of sexual offences.
- 2 The adequacy of existing guidelines and procedures for the initiation and discontinuance of the prosecution of sexual offenders by police and the DPP.
- 3 The appropriateness of, and the circumstances in which, the publication of identifying information about a person charged with a sexual offence should be suppressed.

On 20 and 21 November, the CMC conducted public hearings regarding the issues outlined above, and received numerous submissions from government agencies, community organisations, professional bodies and private individuals. Its findings will shortly be published in a separate report.

CMC INVESTIGATION OF MISCONDUCT

Legislative basis

Section 34 of the *Crime and Misconduct Act 2001* gives the CMC the responsibility of ensuring that a complaint about, or information or matter involving, misconduct is dealt with properly. Section 46 of the Act gives the CMC the authority to investigate complaints of misconduct.

Misconduct is defined in schedule 2 of the Act as: 'official misconduct or police misconduct'. *Police misconduct* is defined (also in schedule 2) as conduct (other than 'official misconduct') that:

- is disgraceful, improper or unbecoming an officer
- shows unfitness to be an officer, or
- does not meet the standard of conduct reasonably expected by the community of an officer.

Official misconduct is defined in section 15 of the Act as:

Conduct that could, if proved, be —

- a) a criminal offence; or
- b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.

Conduct is defined in section 14 as:

- a) for a person, regardless of whether the person holds an appointment — conduct, or a conspiracy or attempt to engage in conduct, of or by the person that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial performance of functions or exercise of powers of:

- (i) a unit of public administration; or
- (ii) any person holding an appointment; or
- b) for a person who holds or held an appointment — conduct, or a conspiracy or attempt to engage in conduct, of or by the person that is or involves —
 - (i) the performance of the person’s functions or the exercise of the person’s powers, as the holder of the appointment, in a way that is not honest or is not impartial; or
 - (ii) a breach of the trust placed in the person as the holder of the appointment; or
 - (iii) a misuse of information or material acquired in or in connection with the performance of the person’s functions as the holder of the appointment, whether the misuse is for the person’s benefit or the benefit of someone else.

Section 14 also provides that to ‘hold an appointment’ means to hold an appointment in a unit of public administration. A person holds an appointment in a unit of public administration if the person holds any office, place or position in the unit, whether the appointment is by way of election or selection.

Section 20 defines a ‘unit of public administration’ as including:

- (i) the Legislative Assembly, and the parliamentary service;
- (ii) the Executive Council;
- (iii) a department;
- (iv) the police service;
- (v) a corporate entity established by an Act or that is of a description of a corporate entity provided for by an Act which, in either case, collects revenues or raises funds under the authority of an Act;
- (vi) a non-corporate entity, established or maintained under an Act, that —
 - (i) is funded to any extent with State moneys; or
 - (ii) is financially assisted by the State;
- (vii) a State court, of whatever jurisdiction, and its registry and other administrative offices;
- (viii) another entity prescribed under regulation.

When assessing how to perform its misconduct functions, the CMC is to have regard to the principles outlined in section 34:

1. Cooperation
 - a. To the greatest extent practicable, the Commission and units of public administration should work cooperatively to prevent misconduct.
 - b. The Commission and units of public administration should work cooperatively to deal with misconduct.
2. Capacity building

The Commission has a lead role in building the capacity of units of public administration to prevent and deal with cases of misconduct effectively and appropriately.
3. Devolution

Subject to the cooperation and public interest principles and the capacity of the unit of public administration, action to prevent and deal with misconduct in a unit of public administration should generally happen within the unit.
4. Public Interest
 - a. The Commission has an overriding responsibility to promote public confidence —
 - (i) in the integrity of units of public administration; and
 - (ii) if misconduct does happen within a unit of public administration, in the way it is dealt with.

- b. The Commission should exercise its power to deal with particular cases of misconduct when it is appropriate having primary regard to the following —
 - (i) the capacity of, and the resources available to, a unit of public administration to effectively deal with the misconduct;
 - (ii) the nature and seriousness of the misconduct, particularly if there is reason to believe that misconduct is prevalent or systemic within a unit of public administration; and
 - (iii) any likely increase in public confidence in having the misconduct dealt with by the Commission directly.

The CMC does not have the legislative power to make findings of guilt, and merely assesses the sufficiency of evidence against an individual to determine if a report should be made under section 49 of the Crime and Misconduct Act to an appropriate body to consider criminal and disciplinary proceedings.

Section 4A of the *Director of Public Prosecutions Act 1984* provides:

- (1) There is to be a Director of Public Prosecutions.
- (2) An office called the Office of the Director of Public Prosecutions is established.

As stated above, section 20 the Act provides that units of public administration include a non-corporate entity, established or maintained under an Act that is:

- (i) funded to any extent by State moneys; or
- (ii) is financially assisted by the State.

Section 36 of the *Acts Interpretation Act 1954* defines 'entity' as including a person and an incorporated body.

In the CMC's view, both the position of DPP, and the ODPP are units of public administration as they are non-corporate entities established under an Act and are entirely funded by State moneys.

The QPS is specifically defined in the Crime and Misconduct Act as a unit of public administration.

Methodology

During the course of the investigation, the relevant files from the ODPP, the QPS and the lawyers for Mr Volkens were obtained and reviewed. Numerous interviews were held with the Complainants, officers of the QPS, officers from the ODPP, Mr Byrne, Mr Shields, and potential witnesses in the case against Mr Volkens. Interviews were also held with media persons and the Queensland Attorney-General.

On 17 October 2002, Mr Bosscher forwarded a submission to the CMC that highlighted the concerns that Mr Volkens and his legal representatives had regarding the handling of his case.

The State Crime Operations Command of the QPS (SCOC) conducted a post-operational assessment of the extent and quality of the initial QPS investigation into the allegations against Mr Volkens. The assessment was provided to the CMC for its information. This report refers to the findings of the SCOC assessment.

The QPS also investigated allegations of an improper release of information to the media by QPS officers prior to Mr Volkens's arrest. The investigation report was reviewed by the Ethical Standards Command of the QPS (ESC) and provided to the CMC for further review.

THE COMPLAINANTS' ALLEGATIONS

Before considering the allegations against, and the criticisms of, the ODPP and the QPS, this chapter outlines the allegations made by each of the Complainants against Mr Volklers.

All the incidents were alleged to have happened between 1984 and 1986. The Complainants at the time of the alleged offences were between 12 and 16 years of age. There were no eyewitnesses to the alleged incidents.

COMPLAINANT 1

Complainant 1 alleged three counts of indecent dealing (Mr Volklers was not committed on one of these charges). The first incident was said to have occurred at Mr Volklers's residence. Complainant 1 said that Mr Volklers told her he was going to give her a massage and that she felt his hands go up inside her shorts and between her legs while she was lying on the lounge room floor. She further said that when Mr Volklers drove her to swimming training on two occasions, he taught her how to change the gears of the car while she was sitting in the passenger seat. It was then, she said, that he rubbed her legs and vagina.

Complainant 1 also noted in her statement that she had met Complainant 2 at a showing of 'Aladdin on Ice' at the Boondall Entertainment Centre in 1997, where they had discussed, in a veiled way, the fact that Mr Volklers had sexually interfered with them.

COMPLAINANT 2

Complainant 2 alleged one count of indecent dealing. She alleged that she had been to Mr Volklers's house only once, going there with Witness G. She said that while she was in the lounge room having a massage from Mr Volklers, Volklers stuck his tongue in her ear, rubbed her breasts and caressed her nipples. She also recounted that she and Complainant 1 met at a showing of 'Aladdin on Ice' at the Boondall Entertainment Centre in 1997. Her recollection of the conversation was similar to that of Complainant 1.

COMPLAINANT 3

Complainant 3 alleged four counts of indecent dealing. She was one of the swimmers contacted by police in the wake of allegations made by Complainants 1 and 2. In her sworn statement on 30 April 2002, she alleged that on two occasions, during evening training sessions at Ferguson Martins swimming pool, she was asked by Mr Volklers to go to the sauna, which she did. She was later joined there by Mr Volklers who asked her to go to the massage room (next to the sauna) where the alleged offences occurred. On each occasion she alleged that he rubbed her on her breasts, once through her togs, and on the other occasion after he had told her to lower her togs to her waist. She stated that the only other person she saw go into the sauna and massage room with Mr Volklers was Witness K.

Complainant 3 further alleged that on two occasions Mr Volkers asked her to accompany him to his caravan, which was at the swimming pool complex, where he asked her to lie on a bed. He massaged her back, moving his hands between her legs. She alleged that on the first occasion he rubbed her clitoris and vagina, bringing her to orgasm, and on the second occasion he stopped when she protested. Her allegations led to Mr Volkers being charged with further offences on 17 June 2002.

CRITICISMS OF THE POLICE INVESTIGATION

This chapter details the CMC's investigations of complaints made by Mr Volk's legal representatives and the ODPP about the standard of the police investigation conducted by Taskforce Argos in the Volk's case and the conduct of the arresting officer. It should be noted that the Complainants told CMC investigators during their interviews that they were satisfied with the conduct of the police investigation.

TASKFORCE ARGOS

The investigation of the complaints against Mr Volk's was undertaken by Taskforce Argos, which was established on 1 February 1997 to investigate allegations of paedophilia within Queensland.

Taskforce Argos is under the control of Detective Superintendent John Riley and has a staff of investigators and intelligence officers. Its primary objectives are to:

- 1** investigate organised paedophile activity and sexual paedophile offences throughout Queensland in conjunction with police from other regions
- 2** provide specialist assistance to regional investigators, using intelligence support, training, investigative assistance or investigative control
- 3** profile convicted section 19 offenders (i.e. those who have current *Criminal Law Amendment Act 1945* section 19 Orders in Queensland), and make that information available to the regions.

The principal officer assigned to the Volk's investigation was Detective Senior Constable Shepherd. His immediate supervisor was Detective Sergeant Marsh, who in turn was supervised by Detective Senior Sergeant Soppa and later Detective Senior Sergeant Rouse. The supervising commissioned officer in charge of Taskforce Argos at the time was Detective Inspector MacDonald.

THE STANDARD OF THE INITIAL POLICE INVESTIGATION

Failure to interview all relevant witnesses

The police investigation was criticised by Mr Byrne, Mr Shields, Mr Bosscher and the ODPP for failing to interview all relevant witnesses, some of whom it was argued would have cast doubt on the credibility of the Complainants' accounts. The criticisms by Mr Shields were reported in the media on a number of occasions.

Witness K

Both Mr Byrne and Mr Shields argued that one witness, Witness K, should have been interviewed because she had information that was crucial to the case.

Complainant 3 had said that she was taken out of training sessions by Mr Volk's, during which time two of the offences occurred. On these occasions, the offences were alleged to have taken place in a massage room. Mr Byrne and Mr Shields expressed concern that police had not interviewed Witness K, whom

Complainant 3 said was the only other person she had seen going into the massage room with Mr Volkens. Mr Shields advised that he had interviewed Witness K. Her statement to Mr Shields contained the following line:

I did not on any occasion remember going into the massage room with Scott as contained in the statement of [Complainant 3].

The CMC investigation found that Detective Senior Constable Shepherd *had* considered Witness K as a potential witness. She was one of 23 swimmers who had been identified as training under Mr Volkens at the same time as Complainants 1 and 2, and whom the police wished to interview. According to the QPS running sheet, on 5 April 2002, Detective Senior Constable Shepherd had spoken to Detective Inspector MacDonald about interviewing Witness K. That day Detective Inspector MacDonald contacted Witness K and sought an interview with her. Witness K advised that she had already contacted Mr Volkens's lawyers, was going to give them a statement and did not wish to speak to the police about the matter. Detective Senior Constable Shepherd was advised by Detective Inspector MacDonald not to attempt to contact Witness K again.

At the end of April 2002, Complainant 3 was interviewed for the first time and Witness K's relevance was immediately obvious to the QPS. However, the police knew by then that Witness K did not wish to speak to them and indeed was assisting Mr Volkens's lawyers. In the circumstances, the QPS position was justifiable, and any criticism of the officers for not interviewing Witness K is not supported by the evidence.

Other witnesses

The investigating officers concede, and the QPS officers who conducted the SCOC assessment conclude, that more swimmers should have been interviewed. The SCOC assessment found that the failure to do so was due, in part, to Mr Volkens's premature arrest. However, the SCOC assessment found no evidence of misconduct in the failure to conduct further interviews. The CMC concurs that there is no evidence of misconduct.

Failure to take statements from certain witnesses

Mr Bosscher's submission to the CMC stated that a number of the witnesses to whom Mr Volkens's legal representatives had spoken had provided information that discredited the Complainants. The submission claimed that, although these witnesses were considered and in some cases interviewed by police, statements had not been taken from them. These were Witness K, to whom reference has already been made, and Witnesses W, G and B.

Witness W

In relation to Witness W, it appears that she was not interviewed, despite an earlier belief that the police had spoken to her. The only police record of Witness W is in the form of handwritten notes, which read:

Keeps in touch with [Complainant 3]. Was too young.

This is a record of a statement made by Complainant 3 to police and the investigating officers decided that Witness W was not a relevant witness.

It follows that no statement could have been taken by police from Witness W as she had not been interviewed. In light of the information provided by Complainant 3 regarding Witness W, it was reasonable for the police to decide not to interview her.

Witness G

Mr Byrne's submission to the ODPP, dated 3 September 2002, addressed, among other things, the evidence of Complainant 2, who alleged that Witness G was present at Mr Volkens's residence when the offence allegedly occurred.

It is instructive to set out the relevant paragraphs of Mr Byrne's submission in full:

Further, although the police confirmed at committal that they had spoken to [Witness G], a statement was not taken from her because she 'had no information that would assist the prosecution (committal, p. 12, l.40).

[Witness G] has since been spoken to by a legal representative of Mr Volk's and has said that she had no recollection of going to Mr Volk's home with [Complainant 2].

The legal representative was Mr Shields, who had spoken to Witness G by telephone.

Mr Bosscher, in his submission to the CMC dated 17 October 2002, was critical of the police for their inaction in this regard because, in his view, Witness G did have relevant evidence that tended to contradict Complainant 2 in one respect — she had no recollection of going to Mr Volk's house with Complainant 2.

Mr Shields confirmed to CMC investigators that the failure by police to take a statement from Witness G was of concern to him.

Before considering this issue, it should be observed that the first paragraph of the submission to the ODPP quoted above suggests that the police officer was specifically asked why a statement was not taken from Witness G. This was not the case. The answer that has been quoted from the committal proceedings was in response to a general question asked by Mr Byrne about an unspecified number of witnesses. Detective Senior Constable Shepherd was asked whom he spoke to during the investigation, in response to which he named 22 people, one of whom was Witness G. The following exchange then occurred:

- Now, there are a number of names there that aren't reflected in statements that form part of at least the brief I have, and why is that?
- They had no information that would assist the Prosecution.

Regarding the decision by the police not to obtain a statement, the facts are as follow:

Detective Senior Constable Shepherd had contacted Witness G in November 2001. He prepared typewritten questions for Witness G (which appeared to be formula questions for all potential witnesses) and made handwritten notes of her answers next to each typed question. These questions and answers formed part of the tasking sheet. The conversation was not tape recorded.

Of relevance to this issue was the question and answer:

Did they ever go to his residence at Bald Hills. If so, who with and why?

Yes — can't recall. Lots of girls many times.

At the bottom of the sheet, Detective Senior Constable Shepherd noted:

No info — visited Volk's residence too many times — does not want to be involved

Refused to provide statement. Visited with many girls. Surprised & short.

In the CMC's view, the police were correct to conclude that it was unnecessary to obtain a statement from Witness G and, in any event, she had refused to provide one.

At first glance, Witness G's information to the police may appear inconsistent with her recollection as submitted by Mr Byrne. However, on one view, Mr Byrne's submission inaccurately reflected the information provided by Witness G to Mr Shields.

The CMC was provided with a file note prepared by Mr Shields concerning his telephone conversation with Witness G. In the file note Mr Shields recorded:

I asked [Witness G] if she remembered [Complainant 2] being with her at Scott Volkers's house. She said she did not. When I asked her whether she would give evidence that [Complainant 2] was never with her at Scott Volkers's house she stated that it was that long ago she just couldn't remember.

The first part of the file note accords with the summary of Complainant 2's evidence as contained in Mr Byrne's submission. However, the submission did not include what might be read as a qualification, which suggests that Witness G was neutral on the issue because she simply could not recall whether or not she had been there.

When interviewed, Mr Shields said that he specifically recalled Witness G's comment that she did not remember Complainant 2 being with her at Mr Volkers's house. He did not agree that Witness G qualified this statement. Rather, he viewed her subsequent comment (about the incident being so long ago) as merely a reflection of her unwillingness to get involved in the case.

According to Mr Shields's file note, he arranged to see Witness G in the presence of her husband on 5 August 2002. That day Mr Shields received a letter from Witness G (dated 5 August 2002) in which she wrote:

I am writing this letter regarding our conversation about the Volkers court case approximately 1½ weeks ago. As stated during this conversation I cannot recall any information about whom or what occurred at this residential address.

Mr Shields said he did not read the letter literally, but as one written by someone who did not want to get involved in the case. He was comfortable relying on Witness G's former statement that she did not recall being at Mr Volkers's house with Complainant 2.

Mr Shields argues that Witness G's information should have been pursued by the police. However, he knew that she had stated that she had no recollection of the matter at all and not that, as was submitted to the ODPP, 'she had no recollection of going to Mr Volkers's house with Complainant 2'. There is no basis for suggesting that police should have pursued a witness in these circumstances.

At the time that the submission to the ODPP was made and when criticising the police conduct to the CMC, Mr Shields also knew that the police were aware of Witness G's memory of events because she stated in her letter to him that she was forwarding a copy of it to the police (which she did the same day).

It should also be noted that on 5 August 2002, but prior to forwarding her letter to Detective Senior Constable Shepherd, Witness G rang him. He made the following notes of his conversation with her:

[Witness G] not happy — [Witness G] reiterated that she didn't know anything — was too young and it was so long ago — did not want to provide a statement.

[Witness G] told that it was a matter for her. [Underlining Shepherd's]

Mr Shields would also have been aware that Witness G did not wish to have any further involvement in the matter, because she wrote in her letter to him:

For this reason I do not wish to be contacted or have any further involvement in the matter. Please respect this request of mine and do not persist or harass me with any further phone calls.

I will be forwarding this letter to the Investigating Police Officer also for his information.

In view of the information provided to the police, Mr Shields's, Mr Byrne's and Mr Bosscher's criticisms of the police for not obtaining a statement from Witness G are unwarranted. The police had been told twice by Witness G that she did not wish to provide a statement, and they had of a copy of the letter she wrote to Mr Shields in which she said that she did not wish to have any further involvement in the matter.

Witness B

Mr Bosscher's submission for an ex gratia payment referred to the evidence of Witness B. The submission stated that Witness B, along with others, had provided Mr Volk's lawyers with a signed statement indicating that he had trained under Mr Volk at the same time as the Complainants. Witness B's statement indicated that he had trained with Complainant 3 and found her allegations regarding her removal from the pool as 'incredulous'. Mr Shields, in his interview with CMC investigators, alleged that Witness B had provided this information to the police, which they had chosen to ignore.

On 8 May 2002, police recorded a telephone interview with Witness B and questioned him regarding Complainant 1, but not Complainant 3. Witness B confirmed that he had trained with Complainant 1, but had little contact with her because he was a few years older. He said that Complainant 1 had not made any complaints to him about Mr Volk's behaviour, nor had he witnessed any 'suspicious behaviour' by Mr Volk towards any female swimmer. He indicated that Mr Volk would give his swimmers 'rub downs' generally before a competition, but to his recollection all coaches did this, as the squads did not have separate physiotherapists or sports doctors. Witness B was asked generally about the sauna at the swimming complex, of which he had a recollection.

Police interviewed other swimmers trained by Volk at the time, for two purposes:

- to obtain admissible evidence of other offences
- to obtain admissible evidence or information that might support, or cast doubt on, the evidence of the Complainants.

Witness B provided a statement to Mr Shields concerning Mr Volk's training methods and in particular whether, in his opinion, Complainant 3 would have been directed from the pool by Volk, as alleged by Complainant 3. Witness B says in his statement:

I have no recollection of [Complainant 3] leaving in the middle of it and then rejoining it. I do not believe this allegation to be true as I have drawn a mud map and handed it to Scott's solicitor, which shows that the parents used to sit outside the pool area, but with an unobstructed view of what was happening in the pool. I find it incredulous to believe that Scott leaving the pool deck during squad training would not be noticed by some person.

While the investigating police may be criticised for not asking him questions about Complainants 2 and 3 specifically, in the circumstances it is not surprising that they did not take a statement from Witness B. That is not to say that his information was 'ignored', as alleged by Mr Shields. There is always information in the hands of police during an investigation that is not admissible and not reduced to a statement. Nevertheless, this type of information can be used to inform the police and assist them in assessing the strengths and weaknesses of their case.

There is no evidence to conclude that the police deliberately withheld Witness B's information or otherwise conducted themselves towards Witness B in a way that warrants disciplinary action.

Failure to consider conflicting testimony

A further issue raised by Mr Bosscher's submission to the CMC concerned the apparent failure by police to identify evidence that would either corroborate the Complainants' evidence or exonerate his client. In the submission for an ex gratia payment, particular reference was made to evidence provided to police by Complainants 1 and 2. Both women had referred in their statements to a meeting between them at 'Aladdin on Ice' at the Brisbane Entertainment Centre. It was submitted by Mr Bosscher that the correct name of the show was in fact 'Disney on Ice', implying that the shared mistake by the two Complainants was a concoction on their part, which should have alerted police to possible flaws in the case prior to the laying of charges.

CMC officers made inquiries at the Brisbane Entertainment Centre to confirm the name of the production referred to in the Complainants' statements. Those inquiries confirmed that the correct title of the relevant production was 'Walt Disney's World on Ice — Aladdin'. Indeed, newspaper reviews referred to the production as 'Aladdin on Ice'.

In the circumstances, the suggestion that police investigating the complaints failed to identify a shared mistake in the statements of the two Complainants, which could amount to evidence of concoction, is without merit.

Failure to obtain medical records of Complainants

Concerns were raised by Mr Byrne's submission to the ODPP, the submission for an ex gratia payment, and the ODPP regarding the failure by investigating police to obtain and properly examine the psychiatric records of the Complainants at an early stage in the investigation. This failure was particularly important in relation to Complainant 1.

Notes taken during an outpatient counselling session in 1998 recorded that:

[Complainant 1] reports no significant sexual behaviour other than his [Mr Volkler's] suggestive comments and touches. (not intimate)

While in 2001, in a triage assessment notice, it was asserted that:

[Complainant 1] can't distinguish between reality/not reality.

In November 2001, Detective Senior Constable Shepherd stated that, as a result of information he had received from Complainant 1 and her parents, he was of the view it was important to explore Complainant 1's psychiatric condition and treatment. He contacted the Mental Health Centre and the Hospital Mental Health Unit, which Complainant 1 attended, and spoke to her treating doctors. None of these doctors had made the above notes in the medical records. The doctors advised that Complainant 1 was credible and displaying signs that she had been sexually abused. At least one doctor had made notes of disclosures by Complainant 1 that were consistent with her evidence to police.

Detective Senior Constable Shepherd said he believed the doctors had made their statements with access to the relevant psychiatric records. He did not ask for copies of the records at that time, as it was usual practice to await a request from the ODPP to do so, or the doctors would simply bring the records with them to the court when they gave evidence.

Mr Jason Davies (the ODPP case lawyer) confirmed that it was not normal practice for the police to include medical records on the brief until the ODPP requested them, as in many instances the information is not relevant.

There is no directive by either the Commissioner of Police or the ODPP that requires police to obtain such medical or psychiatric records as part of the investigation process, either before or after an arrest.

On 17 June 2002, Mr Byrne asked the ODPP to provide a copy of the medical and psychiatric records of Complainant 1. This request was forwarded to Detective Senior Constable Shepherd on 4 July 2002. Because the records were held under subpoena in the Family Court, it took until 22 July 2002 for them to be obtained and provided to both the ODPP and the legal representatives for Mr Volkler.

The committal hearing was held on 25 July 2002. The issue of Complainant 1's apparently inconsistent reporting of her interactions with Mr Volkler to medical practitioners was not canvassed at the committal. However, the issue of Complainant 1's mental health was generally canvassed. Detective Senior Constable Shepherd was asked:

Did it come to your attention that any one of those [complainants] was under long-term psychiatric treatment?

He responded:

There was one suggestion that [Complainant 1] may have been and I subsequently conducted enquiries to establish if that was fact, and in fact it was false ... to my knowledge that was incorrect ... she was not suffering psychological problems.

When a review of the medical records was completed, the doctor's notes outlined in the submission to the ODPP were located, as were details of other allegations made by Complainant 1 of sexual abuse by other people. Therefore, it became apparent that Complainant 1's credibility became more significant, which, in turn, raised the question of whether a prosecution of her complaint would be successful.

If the complete medical history of Complainant 1, including psychiatric records, had been obtained and reviewed by police at an early stage, it could have been taken into account in assessing her credibility. However, given the lack of a directive regarding the obtaining of such evidence, the criticism of Detective Senior Constable Shepherd for not obtaining the medical records at an earlier date is unjustified.

The CMC notes the difficulties involved in formulating prescriptive guidelines for the timing of the collection of medical evidence in all cases, as each case turns on its own facts. There will be some cases where medical evidence is quite irrelevant. It may be that earlier consultation on sexual offence cases between the QPS and the ODPP would assist in the earlier identification of the relevance of certain types of evidence. This issue is canvassed at length in the forthcoming research report.

THE ARREST

Arrest v. notice to appear

Mr Bosscher's submission to the CMC expressed concern regarding the actions of the police in arresting Mr Volkens rather than issuing him with a notice to appear. The submission stated that Mr Volkens was:

... arrested at night time and with no warning. There was never any issue of his fleeing the jurisdiction or failing to surrender by appointment. His view is that he was arrested at that time and at that location so as to cause maximum embarrassment and discomfort.

The *Police Powers and Responsibilities Act 2001* (PPRA) has standardised and modified police powers relating to arrest. Section 198 provides that a person may now be arrested without a warrant in relation to any offence that the officer reasonably believes is being or has been committed, provided that it is reasonably necessary for one of the following reasons:

- (i) to prevent the continuation or repetition of the offence or the commission of another offence;
- (ii) to make inquiries to establish the person's identity;
- (iii) to ensure the person's appearance before a court;
- (iv) to obtain or preserve evidence relating to the offence;
- (v) to prevent harassment of, or interference with, a person who may be required to give evidence relating to the offence;
- (vi) to prevent the fabrication of evidence;
- (vii) to preserve the safety or welfare of any person, including the person arrested;
- (viii) because the offence is an offence against section 444 or 445 (offence to assault or obstruct police officer; offence to contravene direction or requirement of police officer);
- (ix) because the offence is an offence against the *Domestic Violence (Family Protection) Act 1989*, section 80 (Breach of an order or conditions);
- (x) because of the nature and seriousness of the offence.

In addition, a person who is suspected of committing an indictable offence may be arrested for the purpose of questioning or investigation. In all other cases, police have a duty to proceed by way of notice.

Detective Sergeant Marsh explained that it was normal procedure for officers attached to Taskforce Argos to arrest persons rather than issue a notice to appear, due to the seriousness of the offence and also to enable bail conditions to be imposed prohibiting contact with the complainants. The following exchange sets out Detective Sergeant Marsh's explanation:

CMC investigator: Can I just visit that particular point, the PPRA Act. By the way it's worded [it] seems [it] has a desire if possible [that] people shouldn't be arrested — notices to appear should be served on them?

Marsh: That's right.

CMC investigator: Would you accept that as a ... position?

Marsh: Yeah, absolutely. That's why the watchhouse is empty most of the time.

CMC investigator: Okay. Now, in the case of sex offences, is that policy not adopted — in the sense you said that most, if not all, sex offenders are arrested .. are there things peculiar to sex offences that makes that decision? Is that the policy?

Marsh: Unless there's extenuating circumstances, that is, whether the person is incapacitated to such an extent that he doesn't pose a threat by age or whether he's, like, interstate or something like that, no threat to the complainant .. no immediate threat, we'll notice to appear on summons, but the policy is — if they're there they're breathing and they walk, they go to the watchhouse.

CMC investigator: Now, is that a written policy?

Marsh: No.

CMC investigator: Is that an understanding?

Marsh: An understanding from the nature of the work and an interpretation of the Act I suppose ... You know when to charge people and when not to ... when taking them to the watchhouse and when not at Argos. You could argue that, well, you know, what are [you] arresting someone for? Is it to deter them from the offence? Well, how can they be deterred? It happened 20 years ago. Is it to prevent further offences? Well, you can't really show if there's any further offences in 20 years. Is it in the public interest to have him booked for the watchhouse instead of notice to appear? Well, the argument has always been that our public is the complainant — all of the public. It's this particular offence of ... and I'd argue if it was a GBH [grievous bodily harm] you'd take them to the watchhouse. It's a physical offence against someone else, you know, you go to the watchhouse and get bail restrictions that he can't have contact with that person because he's already shown a propensity to do physical assault or violence to someone else, to the complainant, give him notice to appear and say: look turn up in court in two weeks' time and just don't go near the complainant.

CMC investigator: See, one criticism that's been levelled ... was why was Volkens arrested when clearly it could be argued that he should have just been served with a notice to appear?

Marsh: Well, I'd say two reasons. One seriousness of the offence — the fact that it's an offence against a child by a coach, by any adult it's an offence against a child ... and secondly, protection of the witness.

CMC investigator: Okay. And would you also suggest then that the fact of arresting him isn't in your experience an unusual practice?

Marsh: No.

Detective Senior Constable Shepherd also stated that he believed that the decision to arrest Mr Volkens was based on the severity of the offences and the necessity to protect the complainants and witnesses by having bail conditions imposed. In this regard, Detective Senior Constable Shepherd's evidence is:

- CMC investigator: In your experience at Taskforce Argos, were there occasions where accused persons were served with notices to appear as opposed to being arrested?
- Shepherd: I have never served a notice to appear in relation to sexual assault matters. I've always arrested and charged them and taken them through the watchhouse.
- CMC investigator: Now, has that been your practice generally, or is that just been your practice whilst at Taskforce Argos?
- Shepherd: Just in relation to sexual offences because of the severity of the offences.
- CMC investigator: Okay.
- Shepherd: I've just never done it. I've certainly served notices to appear working in the region on other matters but not whilst I've been performing duties at Taskforce Argos.
- CMC investigator: Was there any policy within Taskforce Argos during the time that you were there ... [were you] told the policy was you will arrest people?
- Shepherd: Well, it's the severity of the offences and the fact that you have to protect your witnesses and complainants.
- CMC investigator: Right — even though you would accept that those offences are generally substantially historical — some 15 to 20 years old?
- Shepherd: Yeah, but once again I've never served a notice to appear on anyone.
- CMC investigator: Okay. So, the fact that he was arrested in itself wasn't an unusual practice?
- Shepherd: No.
- CMC investigator: That's fine. And you wanted to impose bail conditions?
- Shepherd: Yes, I certainly did.
- CMC investigator: And that was, I assume, to protect the complainants from possible contact with the accused?
- Shepherd: And also the witnesses and their families.

The key question in this case is whether the arresting officer, Detective Senior Constable Shepherd, had formed the belief that it was reasonably necessary in this particular instance to arrest Mr Volkens. There was no evidence to suggest that Mr Volkens was continuing to commit any criminal offence, the offences for which complaints had been received were historical in nature, and there was no evidence of threats to the Complainants. On the other hand, the alleged offences were of a serious nature and there is always the potential for harassment or interference with witnesses and complainants in such cases.

In support of the explanations given by Detective Senior Constable Shepherd (and Detective Sergeant Marsh), a specific bail condition was imposed: 'no contact directly or indirectly with either of the two complainants or their families'. In the circumstances, there is no basis to conclude that Detective Senior Constable Shepherd did not believe that it was reasonably necessary in this particular case to arrest Mr Volkens, albeit that this was in line with his invariable practice in relation to sexual offences.

The legislation clearly requires that the individual arresting officer hold the belief that the particular arrest is reasonably necessary in the circumstances for section 198 of the PPRA to be enlivened. To do otherwise would be unlawful.

The Assistant Commissioner of Police responsible for Taskforce Argos, Peter Swindells, advised the CMC that the vast majority of suspects investigated by Taskforce Argos were arrested. He stated that there was no policy or direction that a person was to be arrested as a matter of course. He explained that each case was considered on its individual merits. He further explained that in almost all cases there were two reasons to arrest.

- 1 The necessity to prevent harassment of, or interference with, a person who may be required to give evidence relating to the offence. In those circumstances, he explained, it was necessary to arrest in order to have bail conditions imposed to ensure that the offender did not seek to interfere with the witnesses.
- 2 The nature and severity of the offences involved. There was a community interest to bring most cases before a court as soon as possible for the court to determine what bail conditions should be imposed.

He explained that, in the case of Mr Volkens, he understood that it was both the serious nature of the offence and the potential for harassment or interference with witnesses and complainants that acted upon the mind of the investigators to arrest.

In view of the explanations of Detectives Marsh and Shepherd, the QPS should ensure that all officers are fully aware that they must adopt a case-by-case consideration of the decision to arrest alleged offenders, as required by section 198 of the PPRA.

The CMC has already written to the QPS about this issue.

Release of information to the media

Because a *Courier-Mail* journalist and photographer were present when Mr Volkens arrived at Police Headquarters after his arrest, Mr Bosscher's submission to the CMC suggested that the *Courier-Mail* had received a 'tip off' about Mr Volkens's imminent arrest.

This aspect of the matter was investigated by the QPS, with oversight by the ESC and the CMC. Section 1.10 of the QPS Operational Procedures Manual (OPM) governs the release of information by police officers and prohibits the release of information except in designated circumstances.

The QPS investigation revealed evidence that two officers associated with the investigation had entered into an arrangement with the *Courier-Mail*, contrary to OPM guidelines.

The CMC supports a recommendation of the ESC that disciplinary action for misconduct be considered against the two officers.

THE ARRESTING OFFICER

Supervision

Mr Bosscher's submission to the CMC contended that senior police failed to supervise the arresting officer properly, resulting in the matter proceeding in a less than even-handed manner.

Detective Senior Constable Shepherd graduated from the Police Academy in May 1995. He completed his first year of service in Cairns, during which time he relieved in the Criminal Investigation Bureau. He transferred to Logan Uniform and was seconded to the Crime Squad within six months, where he commenced plain-clothes duties in December 1996. In December 1999 he was transferred to State Crime Operations Command, and was assigned to the Child and Sexual Assault Investigation Unit.

He completed all three phases of Detective Training, received an Advance Diploma in Investigative Practices, and was appointed Detective in April 2000.

He was then seconded to Operation Javelin for 12 months, where he investigated historical sex offences by suspects who had been identified by fingerprint experts. He commenced with Taskforce Argos in June 2001.

Detective Senior Constable Shepherd said that during the course of the Volkert investigation he was ‘continually reporting to his bosses’ and that they took a daily interest in the investigation.

The post-operational assessment of the extent and quality of the initial police investigation conducted by State Crime Operations Command (SCOC) noted that the current QPS supervision policies have no apparent application to investigations in relation to historical sexual complaints and, therefore, they are not appropriate to the Volkert investigation. The assessment further noted a number of instances where officers in the Volkert investigation failed to comply with requirements of the OPM. These breaches of the OPM — such as the failure to have the contents of the QP9 checked by a qualified brief checker or shift supervisor, and the failure to have the full brief checked by a qualified brief checker — are evidence of poor supervision.

The SCOC assessment (see page 20) highlighted substantive defects in the investigation and preparation of the brief of evidence, which indicated poor quality control and supervision. None of these matters could amount to police misconduct or official misconduct.

The SCOC assessment recommended that:

- the risk management plan of the Sexual Crimes Investigation Unit be reviewed to include appropriate strategies to ensure the requirements of the OPM are met in relation to all prosecutions initiated by staff
- at a managerial level, Detective Senior Constable Shepherd and Detective Sergeant Marsh be made aware of the deficiencies in their investigation and that Detective Sergeant Marsh be made aware of the importance of his role as a supervisor.

In any event, the assessment did not raise evidence of official misconduct or police misconduct.

Objectivity

Concerns were also raised by Mr Byrne and Mr Shields, in their interviews with the CMC, about the evidence given by Detective Senior Constable Shepherd during the committal before the Magistrates Court. They submitted that the evidence was misleading in a number of respects and was patently incorrect about the assertion that Mr Volkert had made admissions to some of the offences with which he was charged.

The relevant evidence from the committal has been extracted from the transcripts and is set out below. The exchange took place between Detective Senior Constable Shepherd and Mr Byrne regarding the issue of whether Mr Volkert made any admissions regarding the offences in a series of tape-recorded pretext phone calls and a meeting with Complainant 1.

- | | |
|-----------|---|
| Byrne: | He [Volkert] did clearly deny it [any sexual interference] during the course of those private conversations between her and him? |
| Shepherd: | I wouldn't say that he clearly — I wouldn't say that he clearly denied it. It's a matter for having to go through — there's a lot of things said in the pretext call. |
| Byrne: | We can play words, if you like, but I [sic] certainly made no admissions as to any indecent dealing with her? |
| Shepherd: | It's an interpretation, isn't it really? |

Detective Senior Constable Shepherd was further cross-examined and asked to identify the evidence he believed amounted to an admission by Mr Volkens of criminal conduct. Eventually, Detective Senior Constable Shepherd conceded that there were 'no straight out admissions' by Mr Volkens. Mr Byrne continued his cross-examination by asking the officer to concede that Mr Volkens made no admissions during the course of the pretext phone calls or a subsequent meeting with Mr Volkens. In response to this proposition, Detective Senior Constable Shepherd stated:

He made no admissions. However, he corroborates the complainant on certain areas of her complaint.

Mr Byrne sought to have the officer particularise those aspects of the pretext telephone call and meeting that he believed corroborated Complainant 1's evidence. It would appear, from the officer's responses to the cross-examination by Mr Byrne, that the officer lacked an understanding as to the nature of evidence that may be said to corroborate any sexual offence as alleged by Complainant 1. The essence of this lack of understanding is best reflected in the following passage:

Bench: Mr Byrne, what's the point of this line of cross-examination, as to what this witness might consider corroborates and doesn't?

Byrne: It's to — if the allegation is to be carried forward by the prosecution, then I'd like to have identified what they say constitutes corroboration.

Bench: Yes. I understand why you want to pursue that with the witness, but why are you pursuing the point as to whether or not it does constitute corroboration? That's not a matter for this witness to determine, is it?

Byrne: That's probably quite true. So I'm asking you and His Worship probably — properly — reminds me, for you to identify passages which you say corroborate?

Shepherd: In what parts of the complainant's statement are you referring to? If you're referring to the actual rubbing of the vagina, I've already explained to you — I've already stated several times now that I agree with you, that there are no direct admissions made by the defendant as to doing that. The corroboration simply related to other things that she says to us, the version she supplies, the leading up to her involvement with the defendant, the swimming, in the car, changing gears, having her leg rubbed, it all goes to her credibility. That's what I'm referring to.

Byrne: So that's as high as you — that's all you're saying to me?

Shepherd: That's all I'm saying to you, yes.

Mr Shields and Mr Byrne asserted in their interviews with the CMC that the attitude and responses of Detective Senior Constable Shepherd to questions asked in cross-examination led them to form the opinion that he was less than objective in his assessment of the evidence against their client. Such an assessment was based on the apparent inability of Detective Senior Constable Shepherd to concede issues under cross-examination.

A further example provided by Mr Byrne to highlight the suggested lack of objectivity of the arresting officer was his apparent resistance under cross-examination to the suggestion that Complainant 1 had been the subject of ongoing psychiatric treatment for some years. This resistance was extraordinary, said Mr Byrne, given that the officer had spent some days obtaining her medical and psychiatric records.

However, in the CMC's view, it would appear that there was no resistance from Detective Sergeant Shepherd but a misunderstanding between him and Mr Byrne, as the following passage from the committal proceeding demonstrates:

Byrne: Did it come to your attention that any one of (the

Complainants) had — was under long-term psychiatric treatment?

Shepherd: There was some suggestion that [Complainant 1] may have been and I subsequently conducted inquiries to establish whether that was fact, and in fact it was false.

Byrne: You say it's ...?

Shepherd: From what I had been told.

Byrne: ... to your knowledge?

Shepherd: Well, that's — to my knowledge that wasn't incorrect.

Byrne: I'm sorry?

Shepherd: To my knowledge that's incorrect, that she was not suffering from psychological problems.

Byrne: And she was not under any psychiatric treatment?

Shepherd: That was what I was informed, yes, by a psychiatrist.

Byrne: Who informed you that?

Shepherd: Dr Jonathon Rainders and a Dr Lyndel Jones.

Byrne: Did you make inquiries with [Complainant 1] about that?

Shepherd: Yes, I did.

Byrne: And she told you that was — that she wasn't under any treatment or counselling?

Shepherd: She was seeing these people. That was in relation to another matter, in relation to a Family Court matter.

Byrne: All right. Perhaps I didn't state the question clearly. Was she seeing psychiatrists at the relevant time and had been seeing psychiatrists for a long period?

Shepherd: Oh, she'd been seeing psychiatrists, yes, prior to me speaking with her.

Byrne: And did she tell you that?

Shepherd: Yes, she told me that, yes.

Byrne: And did you inquire with her parents about that?

Shepherd: They had informed me that, yes, when I spoke to them.

Further questions were then directed to Detective Sergeant Shepherd during which he said that Complainant 1's parents had given him some details about her counselling and that she had been consulting psychiatrists for 'a number of years'. He said that on 17 December 2001 he conducted formal inquiries (at the Prince Charles Hospital Mental Health Unit) concerning her psychiatric treatment, although prior to that he was aware that she was undergoing such treatment.

Detective Sergeant Shepherd's statement refers to his inquiries at the Prince Charles Hospital Mental Health Unit on that date. The statement had been provided to the Defence prior to Detective Sergeant Shepherd giving evidence.

There is no evidence to suggest that the answers provided by Detective Senior Constable Shepherd were a deliberate attempt to mislead the Defence or the court.

THE QPS ASSESSMENT OF THE POLICE INVESTIGATION

The SCOC assessment found that important investigations were not undertaken — investigations that were likely to have provided supporting evidence for each complaint. It concluded that the failure to carry out these further inquiries was as a result of the investigating police:

- overlooking the extent to which it was possible to obtain supporting evidence
- failing to associate the places at which the offences were alleged to have occurred as crime scenes and obtain relevant evidence from them
- failing to ask relevant questions when confronted with conflicting evidence, which led to a failure to consider possibilities for further investigation
- considering the complaints as one case rather than as individual matters, which appears to have caused them to consider that there was substantially more evidence than there may, in fact, have been.

However, the matters disclosed in the assessment did not provide evidence of police misconduct or official misconduct.

Brief not checked by a qualified brief checker

In light of the concerns expressed about the sufficiency of the police investigation and the failure of material to be included in the brief, questions arose as to whether the brief of evidence was adequately prepared.

This matter was reviewed in some detail by the SCOC assessment, which noted that the brief of evidence was not checked by a qualified brief checker before being submitted to the ODPP.

The SCOC assessment noted that there were a number of supporting particulars that were not obtained during the investigation, such as:

- the registration details of vehicles mentioned in the complaints
- residential addresses with details of the time frames in which relevant individuals resided there
- official records of the dates for school holidays and swimming competitions in relevant years
- diagrams and other information about the swimming venues where the alleged incidents took place.

The assessment expressed the view that such information would have clarified the time frames for the alleged incidents and may have resulted in information that would have helped locate further witnesses.

The assessment also found that the precise evidence, particularly the charge details, was not consistent with some of the charges laid and there were no copies of the bench charge sheets for one of the Complainants. Many of the deficiencies in the brief, and perhaps the investigation, may have been considered earlier had the brief of evidence been checked by a qualified brief checker prior to being delivered to the ODPP.

CONCLUSION

In the wake of the decision to discontinue criminal proceedings against Mr Volkens, criticism was levelled at the QPS by the ODPP and the legal representatives for Mr Volkens, with much of it receiving media coverage.

The SCOC assessment also highlighted concerns over the thoroughness and standard of the police investigation. Such concerns are in the main attributed to poor supervision and the inexperience of the arresting officer, which the QPS proposes to address managerially. However, other criticisms of the police investigation — such as the failure of police to interview at least two significant witnesses — were unfounded.

The issue for the CMC was whether there was evidence to suggest official misconduct or police misconduct on the part of any officers of the QPS in relation to the Volkert investigation.

Reference has already been made to the release of information to the media, which is the subject of consideration for disciplinary action. Leaving this matter aside, for the reasons set out above, the evidence does not establish police misconduct or official misconduct on the part of any officer of the QPS.

INVOLVEMENT BY THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

The criticisms of the handling of the Volkert case were not limited to the police investigation. Concerns were also raised by the Complainants, the legal representatives for Mr Volkert, and others about the conduct of the DPP and officers of the ODPP. This chapter examines those concerns.

CRITICISMS OF THE ODPP

Central to the criticisms of the DPP's decision to discontinue criminal proceedings against Mr Volkert are two issues:

- 1 The appropriateness of an undertaking given by the Deputy DPP to Mr Byrne and Mr Shields concerning what use the Deputy DPP could make of written material they had given him.**
- 2 The basis on which the DPP made the decision to discontinue criminal proceedings.**

Role of the CMC

Under the Act, if, in making her decision to discontinue the prosecution of Mr Volkert, the DPP's conduct was not honest or impartial, or involved a breach of the trust placed in her as the holder of her office, or involved a misuse of information or material acquired in or in connection with the performance of her office, such action could constitute 'conduct' that, if proved, would be a disciplinary breach providing reasonable grounds for terminating Ms Clare's services.

It must be emphasised that the CMC has no authority to disturb or confirm the decision of the DPP to discontinue proceedings against Mr Volkert. It follows that the CMC did not turn its mind to the question of whether the decision to discontinue proceedings was the correct one or not. However, the basis on which the DPP came to her conclusion is relevant to the CMC's deliberations because it bears upon the question of whether there was any evidence of official misconduct on the part of any officer in the ODPP.

In light of the focus of the CMC's inquiries and the limits of its jurisdiction, it is important to record that the conclusions reached by the CMC are not intended to suggest in any way — express or implied — that Mr Volkert committed any offence. Further, the CMC should not be taken as having formed any favourable or unfavourable view of the allegations made against Mr Volkert by the three Complainants.

In considering the DPP's decision not to prosecute Mr Volkert, the CMC spoke to the DPP and other ODPP staff. Subsequently, the DPP was one of several people who provided written submissions to the CMC. These were provided after the CMC had given draft copies of the relevant sections of this report to them in the discharge of the duty to afford procedural fairness. The DPP said that when she was interviewed she understood that there was no issue about the sufficiency of the reasons to discontinue or the correctness of the decision. She told the CMC in her written submission that, had she been aware that the merits of the

decision were under review, she would have systematically set out the reasons behind the decision and been more precise with the expressions she used.

1. THE APPROPRIATENESS OF THE UNDERTAKING

Deputy DPP Paul Rutledge has been criticised by the Complainants and the Opposition for giving the undertaking alleged by Mr Byrne and Mr Shields. He also has been criticised by Mr Byrne and Mr Shields for allegedly breaching the undertaking.

Both Mr Shields and Mr Byrne asserted during interviews with CMC investigators that Mr Rutledge undertook to receive material from them on the basis that it was for the eyes of ODPP officers only and was not to be the subject of any further investigation. The material was provided to support their submission that the DPP should discontinue charges against Mr Volkens. Mr Byrne and Mr Shields contend that the undertaking was breached. Officers of the ODPP disagree as to the nature of the undertaking.

The material provided to the Deputy DPP consisted of:

- the submission
- photographs
- 20 statements, some signed and some not
- a file note by Mr Volkens's solicitor, Mr Shields, concerning a conversation he had with a potential witness.

No character witness statements were provided to the ODPP, but Mr Byrne's written submission stated that national and international identities had provided written testimonials regarding Mr Volkens's reputation and character. In a conversation between Mr Byrne and Mr Rutledge, probably on 16 September 2002, Mr Rutledge was given the names of several of those people, all of whom, Mr Byrne said, were prepared to give evidence on Mr Volkens's behalf.

As discussed below, the CMC is of the view that it would have been wrong of the Deputy DPP to have received the statements under the terms of the undertaking alleged by Mr Byrne and Mr Shields — namely, that he would receive and consider the statements when evaluating the prosecution case, but not investigate them in any way. It would have been wrong of the Deputy DPP to have excluded the option of investigations being conducted by ODPP officers as a result of reading the statements, as it may have been necessary to analyse and test the statements before relying on them, not merely accept them at face value.

It could be argued that, in the circumstances of this case, the giving of an undertaking of this nature could have amounted to a breach of the trust placed in Mr Rutledge as the holder of an appointment in a unit of public administration — namely, that of Deputy DPP — if it was given for an improper or dishonest purpose.

The meeting

On 6 September 2002, Paul Rutledge met Michael Byrne and Peter Shields (representing Mr Volkens), and Richard Pointing and Jason Davies (of the ODPP).

The purpose of the meeting was to provide Mr Byrne and Mr Shields with an opportunity to speak to their written submission, in which they argued that the prosecution of Mr Volkens should be discontinued.

Mr Byrne and Mr Shields had arranged to meet with the DPP, Ms Clare, but as she was detained in Court Mr Rutledge (the Deputy DPP) took her place. Other than what he had read in the media, Mr Rutledge said he had no knowledge of the Volkens case prior to the meeting.

A conference of this type is not unusual. The CMC does not regard a meeting between the ODPP and the lawyers for the defence as suggestive of misconduct or in any way suspicious. Pre-trial discussions, either in person or over the telephone, often occur between defence lawyers and the DPP over a range of issues, including the charges to be proceeded with, the prospects of success of the Crown case, the admissibility of evidence, or the likely penalty that will be sought by the Crown in the event the accused is convicted.

Mr Byrne's submission to the ODPP referred to, and in part relied on, a number of witness statements that were not provided with the submission. Consequently, Mr Byrne and Mr Shields were asked to produce them subject to the Deputy DPP undertaking to limit the extent to which the statements were used. They did not readily agree to do so because they said they were concerned about the objectivity of the arresting police officer and what might be done with the statements.

Later that day, Mr Shields agreed to hand over the Defence statements, with identifying particulars erased, subject to the undertaking discussed during the meeting earlier that day.

The nature and extent of the undertaking is now the subject of considerable disagreement because, when the statements were provided by Mr Shields, no-one set out in writing the basis upon which the statements were provided.

Mr Rutledge's view of the undertaking

Mr Rutledge said he undertook not to 'track down the witnesses [on whom the Defence relied] and seek to interview them', but was of the view that the ODPP was not prohibited from making further inquiries. He agreed that the arresting officer was not to access the statements, but denied that there was any such restriction on other police.

Mr Byrne has a different understanding.

Mr Byrne's view of the undertaking

Mr Byrne said that he argued that the circumstances in which the offences were alleged to have occurred were inherently improbable and that the statements were submitted with a view to enabling the ODPP to assess the likelihood of the allegations. Mr Byrne stated that he and Mr Shields accepted Mr Rutledge's offer that they would be provided for 'their eyes only', which he took to mean for the eyes of ODPP officers, not the police, and not for the purpose of preparing witnesses or the Complainants by disclosing the statements to them.

Views of others present at the meeting

The CMC interviewed the other participants at the meeting, but this did not resolve the matter one way or the other. Mr Davies and Mr Pointing had a similar recollection to Mr Rutledge while Mr Shields's recollection accorded with Mr Byrne's. The only common ground was that it was agreed the arresting officer would not be shown the Defence statements.

Mr Davies's memorandum

In a memorandum dated 11 September 2002, Mr Davies referred to the 6 September 2002 meeting, noting that 'the Deputy-Director undertook not to provide a copy of the statements to police at this stage'. Mr Davies told the CMC this meant that the Deputy DPP was not to give the statements to the arresting officer.

The primary purpose of Mr Davies's memorandum was to assess the strengths and weaknesses of the charges against Mr Volkens. Regarding Complainant 3, Mr Davies recommended that she 'should be consulted in relation to the factors raised by the Defence statements, before any decision is made'. Clearly, the

action recommended by Mr Davies was contrary to the undertaking as said to be understood by Mr Byrne and Mr Shields.

On 13 September 2002, Mr Davies presented his memorandum to the DPP, the Deputy DPP and Mr Pointing, as a result of which all four people met to discuss the future direction of the matter. It was agreed some further inquiries would be made and that Mr Davies would question Complainant 3 in general terms about the contents of the Defence statements.

Record of the meeting

Ultimately, a 'Charge Discontinuance' form, which is used in the ODPP, was filled out to reflect what occurred over a period of days, culminating in the meeting. The draft was begun by Mr Davies on 20 September 2002 and completed on 24 September 2002, after it had been settled by Mr Rutledge. The form was, therefore, completed after Mr Byrne had challenged the ODPP about its further inquiries and threatened to seek a stay of the prosecution. This development is referred to below.

Mr Davies has written in the Charge Discontinuance form that the Ms Clare, Mr Rutledge, Mr Pointing and Mr Davies decided that further investigations were required 'to test the veracity of the Defence submissions and the statements provided by the Defence'. He also records that Mr Rutledge said that 'the witnesses should not be shown the statements'. According to the note, Ms Clare contacted the QPS and had Detective Sergeant Marsh seconded to the ODPP for one week to assist Mr Davies in conducting the inquiries.

The further investigations, and the disclosure of the material to Detective Sergeant Marsh, would have been contrary to the undertaking as said to be understood by the Defence. All three ODPP officers who were at the meeting with the Defence were present when this decision was made.

Threat of legal action

Mr Byrne said that he learned on 16 September 2002 that Complainant 3 had been questioned by the ODPP. On that date, he rang Mr Davies to confirm that the undertaking given by the Deputy DPP was that the statements were only to be used by ODPP officers for the purpose of assessing the submission.

Mr Davies recorded in the Charge Discontinuance form that he told Mr Byrne:

as far as I was aware the undertaking given by the Deputy DPP was that the statements would not be provided to the QPS (in particular AO [arresting officer] Lee Shepherd). I told him that the statements would not be provided to the witnesses. I said that the undertaking did not prevent the Crown from raising issues, taken from the statements, with witnesses in order to test their veracity.

According to the file note by Mr Davies, Mr Byrne asked for the statements back and advised that he would be seeking a stay of the indictment because the defence case had been revealed to the witnesses.

Mr Davies reported these developments to the DPP and Deputy DPP.

The DPP stated in her written submission to the CMC that her first reaction was to send the statements back, but the Deputy DPP wanted time to sort that matter out with Mr Byrne, so she deferred consideration of them to focus on the circumstances that the prosecution could ascertain for itself. She stated that this did not mean that any issue raised by the Defence submission should be ignored, but rather that any evaluation would be limited to material in the depositions and the Crown's extended investigation.

The DPP and Deputy DPP told Mr Davies that there was no merit in the threat to seek a stay and ordered the investigation to continue. This too would have been contrary to the undertaking as understood by Mr Byrne and Mr Shields.

Later that day, Mr Rutledge contacted Mr Byrne to advise him that Complainant 3 had been told of the contents of the statements and other swimmers in training were to be approached to test the statements. Mr Byrne said he told Mr Rutledge that this was not his understanding of the undertaking, to which Mr Rutledge responded that the only restriction on the use of the statements (apart from not pursuing the witnesses who had made the statements) was that he could not give them to the arresting officer.

Mr Byrne threatened to go to Court to seek a stay of proceedings based on the breach of the undertaking.

When asked by CMC investigators about his response to the possibility of stay proceedings being instigated by the Defence, Mr Rutledge said:

Oh yeah, it became really clear to me that there were diametrically opposed views as to, you know, what we were supposed to be doing, and it became clear to me that if we were going to proceed with the prosecution — they'd be bringing all sorts of stay arguments which we thought were groundless. But we thought, but I thought, no wait a sec., we better do this step by step and position ourselves properly, now that we know. Because now they're telling us, telling us directly, you know. But before this time, we had a different view from them [and] that was unknown to us. Now we had — now they were telling us what their view was, and I could see an interesting argument developing, but I thought well it's best, we'll do it step by step. We'll stay away from this argument. We'll just do the other investigations and see what flows from the other investigations and, if need be, we'll come back and go back to the argument.

Mr Rutledge explained to the CMC that even though he was very comfortable with his understanding of the agreement, he did not want to expose the DPP to an unnecessary stay argument, which would stop them proceeding to trial.

According to Mr Davies's file note, he was contacted later in the afternoon by Mr Rutledge and told not to have any further contact with witnesses. After further discussion, some limited inquiries were approved by Mr Rutledge. This occurred after Mr Rutledge's conversation with Mr Byrne.

Discussion

Alleged breach of the undertaking

According to Mr Byrne and Mr Shields, the ODPP breached the undertaking in two ways: by providing the statements to a police officer and by confronting a complainant with the content of the statements.

Indeed any action by the Deputy DPP other than a consideration of the issues 'on the papers' would have breached the Deputy DPP's undertaking as understood by Mr Byrne and Mr Shields. Furthermore, it was conduct that would inevitably have been discovered by the lawyers for Mr Volkens, as indeed it was.

However, there is no evidence that the DPP or her officers consciously sought to breach the undertaking. Moreover, three officers of the ODPP deny that the undertaking was as argued by Mr Byrne and Mr Shields.

In the CMC's view, it would have been wrong for the ODPP to give an undertaking of the kind described by Mr Byrne and Mr Shields — that is, to use and rely on the statements to assist in a consideration of the prosecution case but not to test them in any way. It was acknowledged by Ms Clare that such an undertaking would be of 'concern'.

It must always be open for the ODPP in such circumstances to analyse and test submitted statements and not merely accept them at face value. This should not be taken as a negative reflection on the reliability of defence lawyers, but an acknowledgment of the defence's responsibility to put their client's case in the best possible light. In addition, it may be that the people on whom they rely are

not objective or truthful witnesses. The ODPP is entitled to examine these issues before coming to a decision. There is, after all, no property in witnesses — that is, one party cannot ‘own’ a witness and object to the other party speaking to the person.

Mr Rutledge agrees with this:

If at the end of the day the statements are going to be significant in your decision process — you would not take them at face value ... If they’re going to be significant then you’ve got to take a look at ... the contents of those statements when clearly they’re in issue.

The undertaking that Mr Byrne and Mr Shields assert was given by the Deputy DPP would have amounted to an abrogation of that responsibility.

Exact nature of the undertaking

In the CMC’s view, it is impossible to determine the exact nature of the undertaking because of the divergence of opinion and absence of any means by which to independently and objectively come to a conclusion on this issue.

This view should not be seen as rejecting Mr Byrne and Mr Shield’s recollection of the undertaking on the one hand, or the officers of the DPP’s on the other. Parties to the same conversation do sometimes disagree about what was said and agreed to.

Given that the CMC is unable to clarify the terms of the undertaking, it must conclude that there is insufficient evidence to substantiate any complaint of official misconduct against officers in the ODPP in respect of the terms of the undertaking. Nevertheless, the CMC reiterates its view that undertakings that prevent statements being the subject of investigation should never be given.

Agreement not to interview witnesses

While the precise terms of the undertaking cannot be determined, Mr Rutledge has acknowledged that he agreed not to interview the witnesses on whom Mr Volkers’s lawyers were relying. He argued that the provision of the statements even under this condition gave him an ‘opportunity to get a closer understanding of what the nature of the defence case was going to be’ and there was nothing to be lost by it. He said if it had proved necessary to interview the witnesses, it may have become an issue, but that stage was ‘never reached’.

The CMC is satisfied that the undertaking went at least as far as Mr Rutledge recalled, insofar as it concerned the undertaking not to interview witnesses. Mr Rutledge was in the position where he had the opportunity to see the statements but only if he gave the undertaking. If he refused, the statements were not going to be handed over. According to him, this placed the ODPP in a better position than it would have been had he not accepted them at all.

In a written submission to the CMC, he argued that the statements could have been tested without the need to speak to the witnesses. He stated that it was perfectly possible to check Mr Volkers’s training methods by speaking to any number of the many swimmers whom Mr Volkers would have been training at that time.

The difficulty with this argument is that he could not have been certain that there would not be any need to speak to the witnesses when he gave the undertaking because he had not seen the contents of the statements for himself. He had only the Defence submission, which was obviously not enough to convince him because he asked to see the statements.

The CMC considers that the agreement to receive the statements of the witnesses on the basis that they would not be interviewed was a mistake because it limited his ability to test the statements. However, it is clear that such an undertaking could not constitute official misconduct in the

circumstances of this case because it was not entered into for an improper or dishonest purpose.

The exclusion of police

ODPP officers were also criticised by the Opposition, Complainants and police for agreeing to exclude any involvement by the police. The CMC is satisfied that there is evidence that Mr Rutledge agreed to exclude the arresting officer from further investigation. While some may disagree with that approach, the CMC is clearly of the view that no disciplinary issue arises from that decision.

Importance of recording all agreements

The issue of the terms of the undertaking could have been resolved had the agreement been reduced to writing and signed by both parties.

The Queensland Law Society advises its members (solicitors) in these terms:

An undertaking is a promise either to do or refrain from doing something. It is a very serious matter which should never be taken lightly.

You must be particularly careful to ensure that the undertaking you give is clear and precisely expressed and is not capable of misinterpretation because there may be more than one meaning for the expression used.²

The CMC agrees with this advice.

Discussions frequently occur between parties to criminal cases about a range of issues and they can occur up to and even during the trial. However, in many circumstances it could be unnecessary to commit those discussions and agreements to writing.

It is imperative that those who represent the ODPP and the defence can trust one another to fulfil any promises that they may make during the course of the conversations.

It is desirable that, where practicable, a contemporaneous note of discussions between the parties be made, to avoid any possibility of misunderstanding. In situations such as this case, there was no reason that precluded the undertaking being recorded in writing, and there was ample time to do so.

In his written submission, the Deputy DPP concluded:

I also accept that the better course would have been to reduce the undertaking to writing. Both the prosecution and the defence, in not reducing our understandings of the undertaking to writing, did not recognise the divergent views as to its nature until after the process of testing the statements had begun.

2. THE DPP'S DECISION NOT TO PROSECUTE

The CMC was required to consider whether there was any evidence of official misconduct on the part of any officer in the ODPP. (See page 3 for a definition of 'official misconduct'.)

The critics of the DPP's decision — i.e. the Opposition and the Complainants — point to a number of aspects of the matter that they regard as improper or questionable. These aspects may be summarised as follows:

- the DPP took into account the Defence statements, which had not been sufficiently investigated
- the DPP relied on irrelevant and/or erroneous considerations.

2 Queensland Law Society, Practice Management Course handbook, Study Guide 1, Unit 3, pages 30 and 31.

This section examines the reasons for discontinuing the Volk's prosecution, including whether the Defence statements were of any relevance to the DPP's consideration of the merits of the prosecution case. This is a significant issue. There has been criticism that the Defence statements, which were untested, influenced the DPP's decision to discontinue the prosecution. This belief was the subject of comments in the *Courier-Mail* that:³

The charges were dropped after Mr Volk's defence team presented the DPP with new evidence and suggested police should have investigated more thoroughly before laying charges.

The Defence statements were of enough concern to warrant a decision by the DPP on 13 September 2002, in consultation with the staff involved, to conduct further investigations and to second a police officer (Detective Sergeant Marsh) for that purpose. The question is whether they influenced the DPP's decision to discontinue the prosecution, even though those investigations had been called off before they had been completed.

It should be noted at the outset that, while the case lawyer and the Crown Prosecutor involved in the committal and the Deputy DPP expressed views as to the strengths and weaknesses of the case, the decision not to prosecute was ultimately one for the DPP alone.

The challenge to the DPP's further investigation and the threat of court action by Mr Byrne to stop the prosecution based on an alleged breach of the undertaking were of considerable concern to the Deputy DPP, Mr Rutledge.

Mr Rutledge thought of the whole matter that 'it was getting really messy'. He said that he decided not to pursue investigations arising from the Defence statements or further debate the nature of the undertaking.

Ms Clare stated that it was not the threat of litigation that stayed the investigation into the statements, but the impossible situation of an accusation that reflected on the integrity of the office and the absence of any means of resolving it.

Mr Rutledge directed Mr Davies to conduct other investigations and he decided that he would only return to the Defence statements if he thought it was necessary. This decision was made on 16 September 2002. The decision not to proceed with the prosecution of Mr Volk was made less than two days later, on the morning of 18 September 2002.

Analysis of the DPP's decision

Complainant 1

The DPP, Ms Clare, said she was aware of an alleged prior inconsistent statement contained in Complainant 1's medical records — where Complainant 1 had said, in 1998, that she had not been sexually interfered with by Mr Volk.

Ms Clare said this inconsistency was not her sole concern with the evidence of Complainant 1. She was also worried about the witness's 'competence' in giving essential evidence and her history of making 'preposterous allegations against various people'. Complainant 1's psychiatric history was extensively recorded in Mr Davies's memorandum of 11 September 2002 in which he referred to a letter by the Complainant's former General Practitioner, who had referred to the Complainant's 'preposterous' sexual allegations against two people. In her written submission, Ms Clare explained that her use of the word 'preposterous' was based on the doctor's note and was not a reflection of her personal judgment.

3 *Courier-Mail*, 21 September 2002, 'In Deep Water'.

In her interview with the CMC, Ms Clare spoke of her views concerning the significance of a number of conversations between Mr Volkens and Complainant 1, which were covertly recorded by the police during the investigation. These tapes concerned an allegation by Complainant 1 that Mr Volkens had touched her on the leg while she was with him in his car. Mr Volkens was charged with an offence arising from this allegation, but it was dismissed at the conclusion of the committal proceedings.

During these covertly recorded conversations, Complainant 1 accused Mr Volkens of attempting to 'finger' her while she was with him in his car. Mr Volkens denied on several occasions that he had attempted to do so. He said that he remembered rubbing her legs because they were talking about her having tight legs and he said he 'was rubbing where the groin muscle comes up on both sides there'. Later in the conversation he said:

maybe I did it without knowing with a different part of my hand or something, I don't know but, I'm not saying you're a liar but I'm telling you that I didn't try to finger you ...

Ms Clare said that during one pretext telephone call, Mr Volkens admitted:

although he didn't put it as an indecent touching, that he had, in effect done what could be considered as sexual touching whilst she [Complainant 1] was sitting in the car with him.

However, Ms Clare said that the date of the alleged offence needed to be established in order to prove the age of the Complainant at the time, and, if the Complainant was over 16, the absence of consent also had to be proved by the Crown. This could only be done through the Complainant, and the DPP questioned her competence to give evidence.

Ms Clare said she was aware that police had put forward the name of another female, Witness N, who it was thought may have been able to give evidence of being touched on the leg by Mr Volkens in his car (but who had refused to provide a statement). She said she considered this evidence because it may have constituted similar fact evidence in respect of the alleged incident in the car with Complainant 1 and may also have constituted another complaint on which Mr Volkens should have been prosecuted. However, Ms Clare later discovered:

she [Witness N] was in fact ... thought she was about 17, and it's in the context of teaching how to drive.

Ms Clare said that this was significant because Witness N's experience was in quite different circumstances to Complainant 1's, involving a complainant over the age of consent (16 years). Accordingly the incident (Ms Clare said) could not have been pursued and was not of any assistance in the prosecution of Complainant 1's case.

In her written submission, the DPP said:

I was originally reluctant to discontinue this matter because it was the only one with evidence of a complaint made within a limited time of the last episode. It was also the only case with potential corroboration.

If the prior inconsistent statement to the psychologist had been the only weakness, the prosecution would have continued. The inconsistency was counterbalanced by the taped statements of Mr Volkens.

However, at its highest, the tape went to sexual contact. To establish an offence, the Crown required further evidence to prove that either:

- (i) the complainant was under 16 years of age; or
- (ii) the complainant did not consent.

Sadly, the complainant's longstanding psychiatric history presented a serious problem for her reliability, if not her competency.

I instructed that further inquiries ought to be made in respect of her psychiatric

state and possible similar fact evidence. Police had advised that another swimmer had been touched in a similar way in the car. It transpired that this swimmer, who did not wish to make a complaint, had been touched on the pretext of a driving lesson after she had turned 16 years.

The complainant had also alleged that her incident had occurred when Mr Volkens was instructing her on the use of the gear sticks. Consequently, there were clear similarities with the experience of the other swimmer, but that did not assist on the issue of age or consent. In fact, the context of driving instruction strengthened the possibility that the incident took place after the complainant had turned 16.

Similarly, the complainant had denied previous intimate contact when she spoke to the psychologist after her 16th birthday.

While recognising that the complainant's psychiatric frailty may well have related to Mr Volkens's abuse of her, I formed the view that it would be unsafe to rely upon this witness.

Complainant 2

Regarding Complainant 2, Ms Clare concluded that there was a prima facie case, but that the evidence related to a single episode that was uncorroborated and was not of a serious nature — namely, touching the breast on the outside of clothing.

Ms Clare also thought that the prosecution was open to criticism because of some 'cutting and pasting' that had been done when the police drafted the statements of Complainants 1 and 2.

Ms Clare was asked to comment on the assertion that the use of the words 'Aladdin on Ice' in the statements of both Complainants 1 and 2 was evidence of concoction because of the alleged common mistake. Ms Clare rejected this assertion, stating the issue of possible concoction was not one that weighed greatly on her mind when reaching her decision. She had been to that show and similar ones and knew that they were referred to variously as, for example, 'Disney on Ice — Snow White' and 'Disney on Ice — Wizard of Oz'.

This is consistent with Mr Davies's file note of the meeting of 13 September 2002:

The DPP observed that the difference between the statements of [Complainants 1 and 2] in relation to the 'Aladdin on Ice' issue could be easily explained by the fact that the theme of that particular Disney Ice production was 'Aladdin on Ice' (the DPP took her own children to the show).

In her written submission, the DPP stated:

My view was that this was not a matter which would warrant a prosecution on its own.

- It was a single charge of low-level conduct.
- A complaint was not made until many years later.
- It was uncorroborated.
- A jury would be given a Longman⁴ warning against conviction.
- In the unlikely event of a conviction, the punishment would be nominal.

Complainant 3

In the case of Complainant 3, Ms Clare said that two issues ultimately weighed on her mind in considering whether to continue the prosecution of that complaint, namely:

⁴ *Longman v. The Queen* [1989] 89 ALR 161.

- 1 The improbability of the offence occurring, as outlined by Complainant 3, in circumstances where there were parents present and Mr Volkens would have had to have been absent for some time.
- 2 The apparent willingness of Complainant 3 to change her evidence when told the evidence of Witness K.

Regarding the first issue, Ms Clare said:

In the case of [Complainant 3], what it ultimately came down to was the general cause. There's two kinds of conduct — one was the massages during the swimming and the other [was in his caravan] .. When you looked at the specific circumstances of this case where we have [Complainant 3] saying, you know, sometime, it was a full body massage, sometime shorter than an hour, that's a fair chunk out of a swimming, a swimmer's swimming training session, and just the general knowledge that there were parents at these sessions and he was the one that they were paying their money to and expecting the children to be trained by meant that even though .. the fact that it happened twice .. 15 years ago, people are not likely to remember anyway. There is still the question of the burden of proof on us and that idea of improbability or implausibility had to be figured into the equation.

In her written submission, Ms Clare said she was surprised she used the term 'sometime shorter than an hour' and asked the CMC to check the accuracy of the above quotation. If it is accurate, she said, the term 'an hour' was a 'slip of the tongue', which she would have corrected had it been brought to her attention (by the CMC). The CMC has checked the tape and the quotation is accurate.

Ms Clare implied in her interview that she took little notice of the Defence statements in which the witnesses said that the offences could not have occurred in the manner alleged because such statements were 'a normal sort of defence line so it's hardly surprising'. In her written submission, she said that she did not rely upon the statements for her decision.

During her interview with the CMC, she summarised her view in this way:

I would say that the statements really had no real impact on the decision simply because ... the quality of them was fairly ordinary ... even if they were signed and we had those people there — even if they could be proved — if someone comes and says he's a good bloke — so what. Someone comes and says 'it would be very hard [to commit the offences] — he would be noticed if he wasn't at the pool' ... it's speaking the obvious if you like.

The DPP said that she had never read the statements:

I never really read the material that the defence handed over. I saw that they were unsigned and at that point because we were just going to explore them and the other material, I just thought .. I'll wait till we find out how the investigation is going. So .. I've never read them, and I may have skimmed through a couple of them and I know from discussions with the others that it was really about character evidence and just the nature of training sessions.

Asked by CMC investigators whether in his opinion Ms Clare placed significant weight on the contents of the statements, Mr Davies said that the DPP:

subsequently said to him that she didn't place a great deal of weight on the statements themselves.

He could not recall when she said that to him.

Regarding the second issue, Ms Clare said she was concerned that Complainant 3 'backtracked' when confronted with Witness K's evidence.

This is a reference to Complainant 3 having said in her statement to police that 'the only person I ever saw go into the sauna and massage room with Scott was [Witness K]'. On 16 September 2002, it was put to Complainant 3 by Mr Davies that Witness K had provided a statement to Mr Shields saying:

I did not on any occasion remember going into the massage room with Scott as contained in the statement of [Complainant 3].

In response, Complainant 3 then said that she recalled Witness K getting out of the pool and walking towards the sauna and then seeing her walk back with Mr Volkens, but she did not know if they actually went into the sauna.

The DPP said in her interview that she was of the view that Complainant 3 would not be a very good or particularly strong witness and that:

given that there were obvious deficiencies in her; there were points for attack, clear attack where a lot of ground could be made, that she was probably going to be badly destroyed in the witness box. Essentially that was it, that she was going to be torn to shreds.

According to Ms Clare, Mr Davies also told her that Complainant 3's 'ability to deal with those sorts of legitimate issues in relation to her evidence caused her a lot of difficulty in answering'.

In summary, according to Ms Clare the 'new evidence' as presented by Mr Byrne and Mr Shields to the Crown, apart from the statement of Witness K insofar as Complainant 3 was concerned, had little if no impact on her decision to discontinue criminal proceedings against Mr Volkens.

In her written submission, the DPP stated:

I was aware from the first briefing that these offences were said to have occurred more than 15 years prior to the disclosure to police, they were uncorroborated, and depended wholly on the word of the complainant.

I was also aware that Mr Volkens had no criminal history and that evidence of good character was likely to come from some high-profile female swimmers, who had indicated support through the media. Whilst the combination of these things meant the case was not strong, I remained of the view that a jury could still reasonably accept the complainant's allegations and convict.

On Monday 16 September I was told that the complainant had accepted that her observations of [Witness K] and Mr Volkens had been overstated in her statement. I recognised that this was another factor that would be used to discredit her, but I did not consider it to make the prosecution impossible. My recollection is that Mr Rutledge had a different view of the cumulative weaknesses. There was some force in what he said but my view was that the matter must still come down to the jury's assessment of the complainant.

The significant change for me was on Wednesday 17 September, when I came to understand that, on the Crown case, in respect of at least one of the offences at the pool:

- (i) the offence was one that lasted for a substantial period of time; and
- (ii) [the offence] took place in an area accessible to anyone at the swimming complex, and where swimmers visited frequently.

These two features combined with the overtly sexual nature of the allegations (with the complainant half naked and exposed) to create a serious question about the plausibility of the risk said to be undertaken by Mr Volkens.

Prior to Wednesday, the issue had only been put to me in terms of the absence of Mr Volkens. I understood that the weight of the defence statements was that Mr Volkens never left the poolside during training sessions. As a matter of commonsense, it was impossible for any person to reliably assert, more than 15 years later, that Mr Volkens was not absent from the pool for a period on two occasions. I considered that even if such evidence was admitted at trial, its weight would be negligible. Mr Rutledge had pointed out practical difficulties for a swim coach to be absent for an extended period. (I tried to point out to [the CMC officer] this distinction between reliance upon the defence statements and the application of logic to the objective facts.)

By Wednesday I understood that the complainant had described the assault as substantial and prolonged, in a fairly public area. She had described it as one where swimmers could be expected to come and go all the time. This put the matter in a different light. I concluded that when the improbability of the risk

allegedly undertaken was combined with other weaknesses, particularly the lengthy delay in complaint and the absence of any supportive evidence, the matter was deprived of any reasonable prospect of a conviction. This assessment was made knowing that a jury would be warned against the danger of convicting on the complainant's evidence in accordance with *Longman v. The Queen*. In such circumstances there was no realistic chance of satisfying twelve jurors of guilt beyond reasonable doubt.

With respect, the views that the DPP expressed in her interview as to the key issues involved in Complainant 3's case are not compatible with those contained in her written submission.

In her interview she said that she was concerned firstly about the presence of parents at the pool and the fact that Mr Volkens would have been absent from the pool in order to commit the alleged offences. These were features of the Crown case that were attacked in the Defence statements.

In her written submission, she stated that on 17 September 2002 she came to understand — it seems for the first time — that for at least one of the alleged offences at the pool (in the massage room) the offence lasted for a considerable period of time in an accessible and frequently visited area. She wrote that this was a substantial change for her because, together with the overt nature of the alleged offence, it heightened the risk taken by Mr Volkens. Prior to that, the issue 'had only been put to [her] in terms of the absence of Mr Volkens'. She thought the weight of this evidence, if admitted, was negligible.

In summary, the absence of Mr Volkens was said to have a negligible effect, but when she was first interviewed about the matter the DPP said it was one of the features that influenced her decision. The issue of risk — one which concerned Mr Rutledge — did not feature at all during her interview with the CMC.

Similarly, the DPP first told the CMC that the change in Complainant 3's evidence as a result of Witness K, together with other deficiencies in her evidence would have contributed to Complainant 3 'being torn to shreds' .

Yet in her written submission, she stated that although the change in Complainant 3's evidence was another factor that would be used to discredit Complainant 3, she did not think that it would make the prosecution impossible.

One explanation for the apparent differences may lie in the DPP's admitted misunderstanding of the purpose of the CMC investigation. It will be recalled that she stated in her written submission:

It now appears that the merits of the decision are under review. If I had been aware that this was likely, I would have systematically set out the reasoning behind the decision and been more precise with the expressions used. A review of my interview should show that issues relevant to the decision were raised in an informal manner rather than in any comprehensive way.

However, even if one accepts the DPP's position as stated, it is difficult to understand how her views on these issues could have changed so significantly.

The Deputy DPP's recommendation

Mr Rutledge said in his interview that he read the Defence statements and formed the opinion that there was not much in them. Mr Rutledge said:

The only real significant statement in the whole lot was actually a signed statement by [Witness K] ... [Witness K] was really very lethal as far as one of the complainants is concerned.

[Witness K] had provided a statement which as well as saying that she thought Volkens was fantastic, had said that she had absolutely no memory of ever going into the massage room and we actually had [Complainant 3] spoken to and when [Complainant 3] became aware of [Witness K], [Complainant 3] actually varied her memory and that was a very significant blemish.

According to Mr Rutledge, the statements were irrelevant:

At the end of the day the decision wasn't based on the statements. The statements were put to one side ... If, in fact, the statements had had something particularly lethal in them that needed to be tested — well that would have raised another issue altogether. That we might've had to go back to them about.

Like the DPP, he was dismissive of the evidence of good character contained within the Defence statements. He said:

It was obvious that [good] character sort of defence would be led and indeed in a practical sense it had already been led in the media. And so we didn't need to possess ... the character evidence because we knew that was coming.

In respect of Complainant 3, Mr Rutledge said that there were two sets of allegations, one involving alleged incidents in the massage room and one involving alleged incidents in the caravan. However, in this regard, he said:

Now in my mind the way I rationalise it ... you had two separate incidents. You had the caravan incidents and you had the massage room incidents .. You couldn't divorce them and look at them separately .. because .. if there was a doubt that could be thrown on the massage room incidents, it had logically to infect the .. caravan incidents.

He said that in his view he would have had difficulty in convincing a jury that Mr Volkens got her out the pool, sent her to the massage room and then indecently assaulted her. He said that the risk of discovery while committing the indecent assault was too great and he would not be able to convince a jury otherwise, especially against the background that thousands of other swimmers had not made a similar complaint.

Mr Davies said that in his conversations with Mr Rutledge, the Deputy DPP had also raised the issue of improbability and relied in part on his own experience. Mr Davies said:

The Deputy Director had children and indeed he had taken them to a number of training sessions and the way they function there were always a great number of people around ... the view was that if a prepubescent girl had been taken off for any length of time into the massage room by a coach it would've been the subject of gossip amongst the swimmers and the parents who were in attendance. Now I had certain views about the likelihood of all of this as well, but in the end the Director accepted the Deputy Director's view.

The Complainants were critical of Mr Rutledge for relying on his recent experience in assessing what would have occurred at an elite swimming class 17 years ago. He responded to that criticism in this way:

If I was sitting there as a parent ... I would notice if the person that was doing the training abandoned — that I am paying for — abandoned the girls to swim up and back in the pool by themselves and disappeared into the massage room. Now that's the only point I'm trying to make ... Anything in life is ... influenced by your own experiences of life — but that's not a significant element. You know it'd be a joke to say that that was a significant element in it ... it was more a way of just saying... it's part of that element that leads into him exposing himself to that risk ... he knows that when he goes into that massage room, people will know he's in that massage room. That's the only point I'm trying to make about that ... I've done this myself ... [if] I want to speak to a trainer or whatever — I wait till they're free ... if you see someone go into the massage room — well, you know that he's off the pool deck and ... someone could say to themselves — oh, look they've seen him go in, I'll just go in and ask him this question ... and he knew he was exposing himself to that.

This answer demonstrates that, while Mr Rutledge focused on the risk of Mr Volkens getting caught in the massage room, he was also influenced by the heightened risk Mr Volkens took in abandoning his swimmers and disappearing into the room — that is, the fact that he would be missed from the pool deck.

The DPP confirmed this in her written submission to the CMC in which she said that Mr Rutledge had pointed out the practical difficulties for a swim coach to be absent for an extended period.

On 26 September 2002, Mr Rutledge met Complainant 3, her husband and her solicitor, Mr Tolhurst. Complainant 3 said that during that meeting the question was asked of Mr Rutledge 'If these statements had never been received would you have proceeded to go to Court?' to which he allegedly responded 'Yes, it would have gone to Court'.

Mr Tolhurst kept notes of the meeting and insofar as this comment is concerned he recorded:

Statements

- would not have proceeded with [Complainant 1] (psych)
- would have continued with — [Complainant 2] [Complainant 3]
- [Witness K] was that she had no recollection of being in the rooms with Volkens
- sauna — contradicted [Complainant 3's] statement

Ms Muller, a victim support officer with the DPP's office, was also present at the meeting. She made the following handwritten notes:

Paul advised [Complainant 1] would have been discontinued. Couldn't say re others. If didn't know re [Witness K] Cr would have proceeded re [Complainant 3].

When asked about his alleged comments, Mr Rutledge referred to the notes of the meeting made by Ms Muller and said that he recalled the question but:

... it wasn't susceptible to me saying straight out — no. The statements had absolutely no effect because the reason for that in my mind was Witness K. If it wasn't for us having the statements, we never would've known about Witness K and if we hadn't known about Witness K, we wouldn't have put it to Complainant 3 and she wouldn't have changed her story ...

Ms Muller made other notes of the meeting which touched upon the issue of the statements as follows:

- some statements included people he had known for 20 years who hadn't heard anything re inappropriate conduct
- sowing seeds of doubt — statements made. [CMC's underlining]

And later:

- [Complainant 3] can't understand why we didn't look at the big picture when discontinuing. 20 people made statements. 20 people from similar families. Eg [Witness K] statement and she bets her sister and father also made one.
- [DDPP] advised that it comes down to reasonable doubt.

Complainant 3 also said that Mr Rutledge told her he accepted the Defence statements as fact because they were provided by fellow lawyers who have a higher duty to the Court. While Mr Tolhurst's notes do not contain any reference to such comments, Ms Muller has noted:

Paul stated that he had complete faith in what Mike Byrne tells him.

Complainant 3's recollection of the meeting was put to Mr Rutledge by CMC investigators. Mr Rutledge stated:

You know she asked me some sort of question I think you know do you trust what he tells you. And I said yes. Now when I answered that question I'm thinking about the sorts of concepts such as how many statements do you hold and such like. I'm not thinking about these evidentiary issues. You know if Mike Byrne says to ... me, the witnesses say that [Complainant 3] is a liar, right. I don't accept that on face value. If Mike Byrne says to me ... you know, the statements you have are all the statements I've got. I accept that on face value.

Finally, Mr Davies said that in his opinion Mr Rutledge placed a great deal of weight on the statements.

The record of the decision

There are two documents that purport to record the DPP's decision:

- 1 Charge Discontinuance form
- 2 Letter to Complainant 2 from Mr Rutledge.

Charge Discontinuance form

Mr Davies extracted paragraphs from his memorandum of 11 September 2002, in which he had assessed the merits of the Crown case, and placed them into the Charge Discontinuance form. It will be recalled that after the memorandum of 11 September 2002 was submitted to the DPP, Mr Rutledge and Mr Pointing, and discussed, a decision was made to conduct further investigations based on the Defence statements.

Mr Davies made a number of observations in the memorandum — which are repeated in the Charge Discontinuance form — concerning the effect of the Defence statements. One in particular, about Complainant 3, was very strong:

The Defence statements may well ruin any prospect for a conviction in relation to the offences in the sauna room (particularly [Witness K]). If that is the case then the Crown will not have any prospects of success in relation to the counts involving the accused's caravan. [Underlining Mr Davies's]

In this regard, Mr Davies said in his interview that the statements:

talked about the training sessions that were relevant to [Complainant 3] were, and this is the Deputy Director's view, were relatively consistent in the way the training sessions were conducted, the type of people who attended, the way, generally the way sessions were conducted and he was of the view that that .. gelled correctly and that made the complainant's version unlikely.

Under the heading 'Decision to No True Bill', the DPP's reasons for discontinuing the prosecution are recorded by Mr Davies as follows:

A further meeting was held with the DPP, D/DPP, D/Sgt Geoff Marsh and I on 18/9/02. After reviewing the above material, the DPP accepted the D/DPP's view that:

1. The prosecution of the complainants [*sic*] made by [Complainant 1] had no reasonable prospects of success because of the complainant's lengthy psychiatric history, and the inconsistency in the accounts she had provided initially to (a psychologist) and then to subsequent therapists and police. Her evidence appears to have transmogrified and could not be said to be reliable.

The DPP formed the view that the admission made by the accused (in pretext conversation) would have been sufficient to particularise an offence upon which the Crown could prosecute BUT FOR the fact that it would have been impossible to confirm the alleged time frame of the offence with sufficient particularity to rule out the possibility that the offence happened after the complainant's 16th birthday.

2. The prosecution of the complaints made by [Complainant 3] had no reasonable prospect of success because of the effect of the 'alibi' statements by the defence AND the complainant had changed her story slightly after being questioned further in relation to the denial supplied by [Witness K]. The D/DPP said that the complaints had a 'smell' about them and his own experience of taking children swimming training did not support the complainant's version.
3. The DPP accepted that the prosecution of the complainant (*sic*) made by (Complainant 2) should not proceed on the basis that its true criminality was of a lower magnitude (being a single incident of rubbing on the breast), that it was a very stale incident (15 years old), that the prospects of success in this matter were also significantly reduced as a 'flow-on' effect of the purported 'character' witness evidence, and there was no prospect of any significant punishment in the unlikely event of a conviction which would justify proceeding to trial. [Underlining CMC's]

It will be immediately obvious that, according to this document, certain aspects of the Defence statements were recorded as being relevant to the DPP's decision — namely, the effect of the 'alibi' statements by the Defence, and the 'flow-on' effect of the purported 'character' witness evidence.

These statements are at odds with the statements by the DPP and the Deputy DPP about the extent to which they relied on the Defence statements. It is therefore necessary to analyse how the document was prepared.

Mr Davies prepared and signed this document. He was the case officer but was significantly junior to the other prosecutors involved in this matter. Mr Davies said that he started preparing the document on 20 September 2002 and completed the first draft on 23 September 2002. When asked about the reasons noted for discontinuing proceedings Mr Davies said:

I could probably shorten the process by saying that all of the reasons outlined were canvassed over a number of days. For example, at that meeting on the 18th we didn't sit down and formally say, set out a series of reasons. Those reasons are culled from the total assessment of the Crown case, but it's fair to say that they're the principal reasons for the discontinuance.

When asked if the notation as to the reasons for discontinuance were exhaustive, Mr Davies stated that they were all the reasons he 'considered to be relevant when [he] made the note'.

In a subsequent written submission, he stated that the form was not intended to be a verbatim record of the reasons for discontinuing — just a 'nutshell' record of those reasons.

Mr Rutledge was asked to comment on the apparent difference between the reasons he stated for discontinuing the matter and those found on the Charge Discontinuance form. He stated he was shown a draft by Mr Davies that contained the words, 'because of the effect of the alibi statements by the defence'. He told Mr Davies that this was not correct and that the issue was that Witness K had changed her story. He said that Mr Davies revised the document. Mr Rutledge said he thinks, but is not certain, that the balance of the sentence — 'AND the complainant had changed her story slightly after being questioned further in relation to the denial supplied by [Witness K]' — had been added. This must have occurred on 23 or 24 September 2002. The evidence from Mr Rutledge on this point was:

Some time after that the charge discontinuance form turned up and I remember glancing at the form and I saw and when it — and check with Jason about this — if indeed you haven't already. Where is it in the form um, I saw this bit about — 'because the effect of the alibi statements by the defence'. Now check with Jason with my exact words. But that wasn't right. And I said to Jason, well it's really ... the fact or something like this — keep in mind I'm talking it's six months now. It, it's really the fact that [Witness K] changed her, her story, you know, something like that. And I go back to him and at some time after that, he delivered it back in to my room. And quite frankly at this distance in time, I don't remember — I can't say that I ever actually looked at that revised document until your investigation started, right. And I note that the way it's in there reads that, 'the effect of the alibi statements by the defence and the complainant has changed her story slightly are being questioned further in relation to the denials supplied by [Witness K]'. Now that bit, and check with Jason, but that bit came in, in the second version after I'd spoken to him, right and said, words to the effect of, you know — it's really the effect — it's really [Witness K] changing the statement. Now I must admit I — there were some comments in there that — and I never got back to that document to revise it. As I say, I don't know whether I actually looked at that document.

When the CMC spoke to Mr Davies, he said he could not recall any such amendment being made but could not say with certainty that it had not. He could not say whether Mr Rutledge read the document after it had been amended, as Mr Davies merely forwarded the final version, signed by him (Davies), to Mr Rutledge.

Mr Rutledge said that he questioned Mr Davies about another word used in the document — namely, that the Complainants had a ‘smell’ about them. In this regard he said:

Actually I remember asking Jason [Davies] did I really use that word and he said ‘yes’ and ‘smell’ is actually a word I do use on occasion and basically, it ... meant this believability factor.

Mr Davies’s recollection accorded with Mr Rutledge’s.

Mr Davies also recalled that Mr Rutledge asked him to amend the document in relation to paragraph 3, as a result of which he added the words concerning the flow-on effect of the purported character witness evidence. This he described as ‘a global assessment of the whole case’. He told the CMC investigator:

The character evidence was always a factor ... It was always a factor which made, in the Director, in the Deputy Director’s mind at least, it was a pretty important factor.

The CMC questioned the DPP about the contents of the Charge Discontinuance form. She said that there were unusual features in the present case. Firstly, it occurred just prior to her going on holidays and she had a large workload. Secondly, the matter was complicated by Mr Byrne and Mr Shields’s providing statements (some signed, some not), but saying that the DPP could not use them. This set it apart from normal cases where, for example, there are:

a number of points of contradiction between certain pieces of evidence or ... a retraction by a witness or somebody’s missing ... or a break down at committal hearing.

The DPP subsequently clarified this matter in her written submission to the CMC, in which she said:

I was intending to distinguish between those cases where weaknesses are evident on the face of the depositions and those where fresh facts are alleged. In the case of the latter, there needs to be some means of assessing reliability before those further facts can be considered in any decision-making process.

The DPP distanced herself from the reasons for discontinuance as recorded in the form when she said:

So those sorts of things are generally fairly easy to identify and work through and — I’m not going to justify anything that’s on here other than to say of course it’s my decision — it was my decision to discontinue and I can — and perhaps that explains why when he’s [Mr Davies] written, when he’s made this note that he’s taken it a bit too far.

Ms Clare confirmed that the Charge Discontinuance form was principally used as a record-keeping document. In such cases where a charge is discontinued, a second form is normally completed. This second form records the basis for the decision to discontinue a prosecution. Ms Clare advised that if it was her decision to discontinue a prosecution she would complete the second form.

In the Volkens case, the second form was not completed. Ms Clare said that this was ‘regrettable’. She put it down to the fact she was in the process of going on holidays and there may have been some confusion with Mr Rutledge as to who was going to complete the second form. Ms Clare further advised that while on holiday she unsuccessfully attempted on two occasions to obtain a copy of the relevant Charge Discontinuance form; she was unable to receive the document because of problems with the fax machine. Following her return, she decided not to pursue the matter, given the CMC investigation.

Letter to Complainant 2

The second document in which reasons are given for discontinuing the prosecution is a letter written by Mr Rutledge to Complainant 2. In the letter, he advised her:

As I explained when we met on 19 September there were a number of factors involved in the decision not to present an indictment.

The offence alleged was a single incident involving touching alleged to have occurred about 15 years ago.

There was no corroboration of your account or complaint by you shortly after the touching. Whilst such evidence is not essential, its absence by no means strengthened the case.

The case was also not strengthened by the fact that both you and [Complainant 1] both referred in your initial statements to meeting at 'Aladdin on Ice' in 1997. Whilst on one view this is a minor issue, the common misdescription of the name of the production did not assist; particularly in view of other issues impacting directly on the acceptance of [Complainant 1's] account.

In essence the complaint is one of one incident of touching about 15 years ago by an accused who has trained in excess of a thousand young swimmers over many years without any complaint to police until recent times.

Having regard to the nature of the offence alleged and the strength of the evidence it was considered not appropriate to present an indictment.

It is important to recognise that this decision by no means indicates a finding that you are untruthful. It is based upon an objective assessment of the nature of the allegation and the evidence to support it against the background of the fact that the Crown must prove its case beyond reasonable doubt.

[CMC's underlining]

Letters were not written to the other Complainants.

Ms Clare said that she placed no reliance on any suggested concoction based on an alleged common misnaming of the Disney show by two Complainants. As stated above, Mr Davies noted that at the meeting of 13 September 2002 Ms Clare said the statements of the Complainants in this regard could be easily explained.

Mr Rutledge was asked to explain the reference to the 'Aladdin on Ice' show and he did so in this way:

At the end of the day ... perhaps it wasn't an issue at all in [Ms Clare's] mind, in her decision process and at the end of the day I put it down in that letter simply because ... I wanted to be careful of putting everything down, but I refer to it as a minor issue because ... it was minor.

Further inquiries by the ODPP

Mr Rutledge was asked whether he considered giving a written requisition to the QPS to conduct further investigations. Mr Rutledge advised that in the case of an 'average' prosecution, a case officer/prosecutor would review the evidence as contained in the brief and if further lines of inquiry were identified a written requisition would be forwarded to the QPS for further attention.

In the Volkens case, the review of evidence was undertaken by Mr Davies after receiving Mr Byrne's submission and the Defence statements on 6 September 2002. His meeting with the DPP, Mr Pointing and Mr Davies on 13 September 2002 identified a number of further lines of inquiry — namely:

- a further interview with the psychologist
- location and interview of Witness N (referred to at page 31)
- location and inspection of Mr Volkens's former residence
- interview of witnesses to test the veracity of the Defence statements.

Mr Rutledge stated that, as a result of identifying those further lines of inquiry, the DPP contacted the QPS to have a police officer (Detective Sergeant Marsh) made available to assist in such further inquiries. Mr Rutledge said there was no reason to provide written requisitions because the process adopted (that is the assessment of evidence by Mr Davies and the identification of issues for further investigations) had achieved the same result.

Mr Rutledge stated that at the time of identifying these other issues, no other matters were identified as requiring further investigation. When asked about whether further statements should have been obtained from other swimmers, Mr Rutledge said that the central issue in considering the prosecution of Mr Volkens, in so far as Complainant 3 was concerned, was the issue of the risk of detection that Mr Volkens took, and that obtaining statements from other swimmers on issues such as training methods or the use of a blackboard would not have assisted the Crown case.

Discussion

'Aladdin on Ice'

As already stated, the only written records of the DPP's reasons for discontinuing the Volkens prosecution are the letter to Complainant 2 from Mr Rutledge and the Charge Discontinuance form.

Insofar as the letter to Complainant 2 is concerned, it will be recalled that she was advised, among other things:

The case was also not strengthened by the fact that both you and [Complainant 1] both referred in your initial statements to meeting at 'Aladdin on Ice' in 1997. Whilst on one view this is a minor issue, the common misdescription of the name of the production did not assist; particularly in view of other issues impacting directly on the acceptance of [Complainant 1's] account.

In the CMC's view, this alleged common misnomer was of no consequence and the CMC has no hesitation in accepting the DPP's evidence that it did not influence her decision. Mr Davies's record of her view on the subject in the Charge Discontinuance form reflects this, and Mr Rutledge agreed that 'perhaps it wasn't an issue at all in [Ms Clare's] mind'.

There is no reference to the issue under the heading 'Decision to No True Bill' on the Charge Discontinuance form.

In these circumstances, it is difficult to understand why Mr Rutledge chose to include it in his correspondence.

He says it was a minor issue and so it was. He even described it as such in his letter. However, because it was one of the explanations given for not proceeding, it assumed far more significance than a minor issue.

He says that he chose to include it because he 'wanted to be careful of putting everything down'. Yet he omitted to say two things which were recorded under the heading 'Decision to No True Bill' — that is, that the prospects of success were significantly reduced by the 'flow-on' effect of the purported 'character' witness evidence, and that there was no prospect of a significant punishment in the unlikely event of a conviction.

A full and accurate letter would have better informed the Complainants.

How the discontinuance was recorded on the Charge Discontinuance form

The Charge Discontinuance form in the Volkens case is actually a compilation of another document together with some original work in its conclusion. It was written by the case officer, Mr Davies, at Mr Rutledge's suggestion. Mr Rutledge told the CMC that after the meeting on 18 September 2002, when he advised Mr Davies of the decision to discontinue, 'I said almost this off hand to [Mr Davies] — oh can you do a charges discontinuance form?'

Because he was absent the next day, Mr Davies started writing on Friday 20 September 2002, two days after the decision to discontinue was made and communicated to the Complainants.

On Saturday 21 September 2002, the *Courier-Mail* ran a feature story in which it questioned the basis on which the charges were dropped. In referring to the Defence statements, the author wrote:

In particular, the spotlight will focus on new evidence presented to the DPP earlier this month by Shields and Volkens' barrister Michael Byrne QC, evidence of such compelling force that Clare said 'it would prevent a jury from being satisfied of guilt beyond reasonable doubt'.

The article also questioned the competency of the police if such evidence had not been obtained during the investigation.⁵ The DPP denies saying what is attributed to her in the article.

On Sunday 22 September 2002, the *Sunday Mail* carried a front page story concerning the alleged involvement by the Minister for Justice and Attorney-General, Mr Welford, in the Volkens case.⁶

These publications, no doubt, made it clear to those involved in preparing the Charge Discontinuance Form (Mr Rutledge and Mr Davies) that the decision to discontinue proceedings against Mr Volkens was important, and hence the contents of the document were important. Mr Davies denies that the media coverage altered the way in which he recorded the decision not to prosecute — either to be more careful or less careful in his recollection, or more favourable or less favourable to any party.

Mr Davies completed the first draft on Monday 23 September 2002. It includes a record of Mr Davies's view of the issues he 'considered to be relevant when [he] made the note', which he had gleaned from discussions at which he had been present over the previous weeks. These can be found under the heading 'Decision to No True Bill'. He explained that the Charge Discontinuance Form was not intended to be a verbatim record of the reasons for discontinuing — just a 'nutshell' record of those reasons.

Mr Davies sent the draft to the Deputy DPP, Mr Rutledge, who suggested some changes to the section 'Decision to No True Bill'. The precise changes will never be known because Mr Rutledge's and Mr Davies's memories of the changes differ, although both admit that their memories may be incomplete.

Mr Rutledge has no memory of reading the document again after he suggested those changes and does not believe that he did. Mr Davies said that after making the suggested amendments he sent the original document back to Mr Rutledge, but he cannot say whether or not Mr Rutledge read it.

On 23 September 2002, the CMC announced that, in view of the serious concerns raised by the Premier in the previous week into matters relating to the Volkens case, it had sought and would continue to gather information from relevant parties. This was reported in the *Courier-Mail* the next day.⁷

After the document was settled, it was signed by Mr Davies on 24 September 2002. There is provision in the document for the following signatures: 'Authorising Crown Prosecutor', 'Leanne Clare Director of Public Prosecutions', 'Paul Rutledge Deputy-Director of Public Prosecutions'. None of these signatures was on the document.

The DPP — the person whose decision it purports to record — was never consulted about the document, made no contribution to it, did not read it and did not sign it. Perhaps not surprisingly, she does not entirely agree with its contents.

5 *Courier-Mail*, 21 September 2002, 'In Deep Water'.

6 *Sunday Mail*, 22 September 2002, 'Volkens asked to call Welford'.

7 *Courier-Mail*, 24 September 2002, 'Volkens demands "hardship" compo'.

The purpose of such a document is twofold: to ensure accountability and transparency in the decision-making process, and to create a permanent record that will endure long after memories fade and personnel have gone.

At the very time the Charge Discontinuance form was being drafted, questions were being asked in public about the DPP's decision and the investigation, especially the contents and impact of the Defence statements.

According to both Mr Davies and Mr Rutledge, on 23 September 2002 they discussed the contents of the draft and the Deputy Director suggested amendments to the section 'Decision to No True Bill'. This demonstrates Mr Rutledge's interest in the matter and the fact that he read the contents of that section at some stage.

The CMC is of the view that, given the climate at the time and the identity of the defendant, together with the evidence that Mr Rutledge had read the document (at least in its first-draft form), it must be viewed as a reliable record of the Deputy DPP's understanding of the reasons for discontinuing the prosecution of Mr Volkens. It is also noted that the reasons for discontinuing are described in the form as the ones given by Mr Rutledge and accepted by the DPP.

However, because Ms Clare had no involvement in its drafting the CMC cannot rely on the document when considering Ms Clare's reasons for her decision.

Some may question the relevance of coming to any conclusion about Mr Rutledge's thinking, given that he was not the person who made the decision to discontinue. However, he played an influential role in this matter, in that he advised the DPP.

The CMC is troubled by the inconsistencies between the reasons stated in the Charge Discontinuance form and those given by Mr Rutledge in his conversations with Complainant 3, in his letter to Complainant 2, and in his interviews with the CMC.

Foremost of these is the significance or otherwise of the Defence statements.

Weight given to Defence statements

It will be recalled that Mr Rutledge said of the Defence statements:

At the end of the day the decision wasn't based on the statements. The statements were put to one side ...

Yet the Charge Discontinuance form states that:

The prosecution of the complaints made by [Complainant 3] had no reasonable prospect of success because of the effect of the 'alibi' statements by the defence AND the complainant had changed her story slightly after being questioned further in relation to the denial supplied by [Witness K].
[Underlining CMC's]

Mr Rutledge told the CMC that he told Mr Davies that the section underlined was wrong. Mr Davies does not recall this. It seems unlikely, given the sensitivity of the matter and the publicity that was being generated, that Mr Davies would not have accurately reflected Mr Rutledge's instructions. In addition, Mr Davies later sent the document back to Mr Rutledge in its final form.

Some support for the view that the words concerning Witness K were added after discussions between Mr Davies and Mr Rutledge can be found in the use of upper-case font for the word 'and'. This appears nowhere else in the section. But, rather than qualify the preceding words, the word 'and' implies that the Witness K issue was relevant to the decision as well as the Defence statements.

The CMC considers that it is more likely than not that while Mr Rutledge directed Mr Davies to include a statement concerning the relevance of Witness K, he did not ask him to remove the reference to the 'alibi' statements provided by Mr Shields.

It would appear to follow that, on the evidence, Mr Rutledge was influenced by the so-called alibi statements and that this was one of the reasons he did not think that the prosecution should proceed.

Mr Rutledge does not agree with this conclusion. In his written submission, he stated that his file note of 16 September 2002 of his conversation with Mr Byrne supports his argument. In his file note, he wrote:

After some discussion .. were we supposed to accept the claims without our further investigation? I agreed that I would tell Jason Davies not to speak to any further witnesses. I rang Mike Byrne back a little after 5:00 and confirmed that we would not speak to the witnesses — but re-emphasised, how were we to judge the strength of this without checking with the Crown witnesses re the accuracy of their statements?

Mr Rutledge asked the question:

Is it to be suggested that I was a party to setting in train a process of testing the statements, later emphasise to the defence the problem of acting on the statements without testing them, but then change my whole approach and decide to give weight to the statements without testing them?

He told the CMC that he did not rely on the defence statements to form the view that the prosecution of Mr Volkens should be discontinued.

After receiving the relevant section of the CMC's draft report, Mr Rutledge said that he recalled that he had had a meeting with the DPP on either 16 or 17 September 2002 during which he said to her words to the effect, 'We don't have to rely on the statements to reach our conclusion in this matter'.

The DPP has not mentioned this conversation with the Deputy DPP in her interview or written submission, although she did state in her written submission that:

To my mind there was never any issue of relying on [the statements]. Based on my conversations with the Deputy Director at the time, I find inconceivable any proposition that he held a contrary view or that he was in any way confused about my attitude to the statements.

Further support for the CMC's conclusion that Mr Rutledge was influenced by the statements can be found from the notes of the conversation between Mr Rutledge, Complainant 3, her solicitor (Mr Tolhurst), and the victim support officer, Ms Muller.

It will be recalled that Ms Muller made these notes:

- some statements included people he had known for 20 years who hadn't heard anything re inappropriate conduct
- sowing seeds of doubt — statements made. [CMC's underlining]

And later:

- [Complainant 3] can't understand why we didn't look at the big picture when discontinuing. 20 people made statements. 20 people from similar families. Eg [Witness K] statement and she bets her sister and father also made one.
- [DDPP] advised that it comes down to reasonable doubt.

It will also be recalled that Complainant 3 attributes to Mr Rutledge a statement that the Crown would have proceeded on all of the complaints had it not been for the Defence statements, although neither her solicitor nor Ms Muller entirely support that. They say that the Deputy DPP told them that the Crown would not have proceeded with Complainant 1 in any event because of her psychiatric history.

However, neither the notes by Mr Tolhurst nor Ms Muller say that Mr Rutledge unequivocally rejected or disregarded the Defence statements. Mr Tolhurst has noted that without the statements the DPP:

would have continued with — [Complainant 2] [Complainant 3]. [Witness K] was that she had no recollection of being in the rooms with Volkens — sauna — contradicted [Complainant 3's] statement. [Underlining CMC's]

Ms Muller noted that in the absence of the statements, Complainant 1 would have been discontinued, but Mr Rutledge:

Couldn't say re others. If didn't know re [Witness K] Cr would have proceeded re [Complainant 3].

Mr Rutledge explained this by saying that, had the statements not been supplied, the DPP would not have known about Witness K and Complainant 3 would not have changed her evidence.

He stated in his written submission that the notes are consistent with his view that the significance of the statements was the change that Witness K's statement caused in Complainant 3's evidence. He wrote:

The notes of that meeting, made by Ms Sonia Muller ... demonstrate that what was considered significant by me was not the defence statements going to the proposition that Mr Volkens could not leave the pool deck, but the change in [Complainant 3's] account when she became aware of [K's] account. See page 1 of the notes where the following entries appear:

[K] was prepared to say she wasn't in room at time in court. [Complainant 3] gave a slightly different explanation in her evidence.

The notes also indicate that the issue of the defence statements re Volkens's training methods (i.e. the proposition that Volkens would not be able to leave the pool) was not one that attracted weight in my explanation to [Complainant 3]. Indeed exactly the opposite is demonstrated. See particularly page 2 where amongst the group of highlighted notes the following note appears:

Paul advised that no one is saying that it isn't possible that [Complainant 3] was in the room with Volkens.

The following note indicates the real concern in my mind — 'anyone could have walked in'.

You will also note that immediately following the note '[Complainant 3] can't believe 20 people have this effect on a case' is the note '[K] is significant'. That is, amongst all the statements only [K]'s statement (or more particularly the change in [Complainant 3's] account flowing from that statement) had significance in my mind.

You will also note that in answer to question 2 asked at the end of the meeting;

[Complainant 3] asked if Crown had not received statements what would have happened.

Paul advised that the case re [Complainant 1] would have been discontinued and couldn't say re others. If we didn't know re [K], Crown would have proceeded with [Complainant 3's] charges.

In other words the significance in the statements was in the change [K]'s statement caused in [Complainant 3's] account.

The notes kept by [Complainant 3's] solicitor which are referred to at page 35 of your report also support this. Immediately following the note:

— would have continued with — [Complainant 2] [Complainant 3]

is the note that:

[K] was that she had no recollection of being in the rooms with Volkens — sauna — contradicted [Complainant 3's statement]

The question, posed at the meeting with [Complainant 3], whether the Crown would have proceeded if it had not received the defence statements, in my mind, was not susceptible to being simply answered 'No'. Whilst the defence statements (particularly those referring to what would happen if Mr Volkens left

the pool deck) were not a factor in the final decision; if we had not known about [K] we would not have put her memory to [Complainant 3] and [Complainant 3] would not have varied her account. In that sense and in that sense alone, in my mind, the defence statement from [K] had significance.

There is a further reference to the Defence statements in the Charge Discontinuation form, which concerns the ‘flow-on effect’ of the purported character witness evidence. While in the strict sense this is an acknowledgment of the influence of the Defence statements, there were no character witness statements provided to the ODPP in this regard. Furthermore, the CMC agrees that the ODPP was right to expect that Mr Byrne would call influential witnesses to attest to Mr Volkers’s good character. Investigations into that aspect of the Defence case were unnecessary.

However, there is another compelling reason for concluding that the statements were of significance to Mr Rutledge. It will be recalled that one of the things that concerned him was that Mr Volkers risked discovery by allegedly committing the offences in the sauna. In this context he said:

If I was sitting there as a parent ... I would notice if the person that was doing the training abandoned — that I am paying for — abandoned the girls to swim up and back in the pool by themselves and disappeared into the massage room.

The probability of the offences occurring in the circumstances described by Complainant 3 was clearly a legitimate consideration for Mr Rutledge. It is also a legitimate issue on which he could form his own views based on both logic and personal experience.

Many of the Defence statements contained information in this regard. They refer to the fact that Mr Volkers would not have been able to leave the pool deck with one of the girls because of the parents who were there. Furthermore, many said that he did not leave instructions on a blackboard but instead issued them orally. Two people signed statements saying there would be chaos if Mr Volkers left the pool area.

However, the DPP could not accept these statements at face value and that is why, on Friday 13 September 2002, after consulting with her staff, including Mr Rutledge, a decision was made ‘to test the veracity of the Defence SUBC [submission] and in particular the statements provided by the Defence’.⁸

Detective Sergeant Marsh was seconded to assist from the following Monday.

The investigation got no further than confronting Complainant 3. She disagreed with much of the contents of the statements (which were put to her in general terms), but she changed her evidence in one respect as a result of Witness K’s statement.

Later that day the controversy about the undertaking arose and no further investigations into the statements were conducted.

A number of other inquiries were conducted that day and, as is now well known, the decision to discontinue was made on 18 September 2002.

Mr Rutledge said that:

The only real significant statement in the whole lot was actually a signed statement by [Witness K].

However, the statements had the potential to confirm the very concerns that he held about the probability of the offences in the massage room occurring in the way described by Complainant 3. The first investigation of the statements led to the change in Complainant 3’s evidence in respect of which Mr Rutledge said:

8 Mr Davies’s Charge Discontinuance form, page 6.

when [Complainant 3] became aware of [Witness K], [Complainant 3] actually varied her memory and that was a very significant blemish.

In respect of Complainant 3, Ms Clare said she was also concerned about the inherent improbability of the offences occurring in the massage room at the pool and the apparent willingness of Complainant 3 to change her evidence. She said of the first concern:

But the significance of that particular allegation really lies in the test that's on the Crown and it's proof beyond reasonable doubt and to be able to when you, when you identify that, you've got parents everywhere of these people who are not just ordinary backyard sort of swimming training session either — it's fairly high powered training that's going on here with parents who have got all their hopes and dreams resting on their children with this man they're paying a reasonable amount of money to train their children for — his opportunity to slip away is going to be fairly slim and it he would have to come up with some sort of reason for it at the time. So when we hear someone saying that — a period of time which is lengthy but less than an hour — it makes it, you know, it's another burden for the Crown to get over when you're looking at prospects of success.

As with Mr Rutledge, the probability of the offences occurring in the circumstances described by the Complainant is clearly a legitimate consideration for the DPP and one on which she could form her own views based on both logic and personal experience.

Again, many of the Defence statements contained information in this regard.

Ms Clare said that the Defence statements had no real impact on her decision and that she did not rely on them; yet only five days earlier they were sufficient to warrant investigation. She described them as fairly ordinary and as 'stating the obvious'. However, as with Mr Rutledge, the statements had the potential to confirm the very concerns that she had expressed in her interview with the CMC about the probability of the offences in the massage room occurring in the way described by Complainant 3. The first investigation of the statements led to the change in Complainant 3's evidence, which Ms Clare said would contribute to Complainant 3 being 'torn to shreds' . Once again it is difficult to accept that Ms Clare did not rely on the Defence statements at least to some extent.

It will be observed that this conclusion is at odds with the evidence of the DPP and the ODPP. Such a conclusion should not be taken as meaning that they were untruthful in their responses.

Capacity of Complainant 3 to give evidence

The other issue of concern for the DPP was Complainant 3's capacity to give evidence.

'Backtracking' of evidence. In the days following the committal, the Crown Prosecutor who saw Complainant 3 give evidence, Mr Pointing, told Ms Clare that there was enough evidence to justify continuing. Ms Clare said:

[Mr Pointing] did come to me, he came and talked to me after the committal and he did give an account, a general account of how witnesses had gone, and at that stage he thought, I understood at that stage he thought, that there, you know, that there was enough to justify continuing.

Neither Ms Clare nor Mr Rutledge interviewed Complainant 3 prior to the decision to discontinue.

When first interviewed, the DPP expressed the view that Complainant 3 would not be a very good or particularly strong witness. The DPP said that Complainant 3 'backtracked' when confronted with Witness K's evidence. She changed her evidence from seeing Mr Volkens go to the sauna with Witness K to recalling that Witness K got out of the pool and walked towards the sauna and was later seen walking back with Mr Volkens.

Mr Rutledge also regarded the change in Complainant 3's evidence as significant. He said that:

The only real significant statement in the whole lot was actually a signed statement by [Witness K] ...Witness K was really very lethal as far as one of the complainants is concerned. He then said that 'when Complainant 3 became aware of Witness K, Complainant 3 actually varied her memory and that was a very significant blemish'. [Underlining CMC's]

Mr Rutledge also mentioned the change in Complainant 3's evidence to her, Mr Tolhurst and Ms Muller.

In the Charge Discontinuance form under the heading 'Decision to No True Bill' Mr Davies has written:

the complainant had changed her story 'slightly' after being questioned further in relation to the denial supplied by [Witness K].
[Underlining CMC's]

This was the sentence that Mr Rutledge says was inserted in the document after he raised it with Mr Davies.

Time spent away from pool deck. The DPP's stated understanding as to the time that Complainant 3 and Mr Volkens were away from the pool deck was inaccurate. She now says that this was a slip of the tongue.

The length of time that Complainant 3 and Mr Volkens were away from the pool became a complex issue and so it is appropriate to discuss it here in some detail. Complainant 3 was critical of the DPP in this regard. She said that the DPP incorrectly assumed that she was away from the pool deck with Mr Volkens for 15 to 20 minutes. Complainant 3 said that this was incorrect and she had never said this. She also said that the DPP mistakenly assumed that Mr Volkens went with her to the sauna.

Ms Clare told the CMC:

It was a full body massage, sometime shorter than an hour — that's a fair chunk of time out of a swimmer's swimming training session and just the general knowledge that there were parents at these sessions and he was the one that they were paying the money to.

As was referred to above, Ms Clare also told the CMC:

So when we hear someone saying that — a period of time which is lengthy but less than an hour — it makes it, you know, it's another burden for the Crown to get over when you're looking at prospects of success.

In Complainant 3's statement to the police she did not give a time in which the alleged offences occurred. In reference to the first occasion that Mr Volkens was alleged to have massaged her breasts in the massage room at the pool she stated:

I can recall that this all took a long time but I really can't be sure how long it took.

In reference to the second occasion that Mr Volkens was alleged to have massaged her breasts in the massage room at the pool she said:

It felt like he was doing this for a long time, but I am not really sure how long it went for.

In respect of the other two incidents, which were alleged to have occurred in Mr Volkens's caravan, she gave no time frame at all in her statement.

However, under cross-examination at the committal hearing, Mr Byrne attempted to clarify the time with Complainant 3. The transcript of this is as follows:

Byrne: You say you went into the sauna with Mr Volkens?

Complainant 3: Yes, that's correct.

Byrne: You were in there, you say, for a long time?

Complainant 3: In the sauna.

Byrne: In the sauna, what's that mean? 15, 20 minutes, half an hour? What does that mean?

Complainant 3: It could have been ... I'm not sure of how long. I mean, I didn't have a watch and there was certainly no clock around, so I mean, obviously enough, I remember I was quite hot from being in the sauna, body temperature, so I would imagine a fair time.

Byrne: So would 15, 20 minutes be ...

Complainant 3: Yes, that would be.

It will be observed that Mr Byrne put to Complainant 3 that she went into the sauna with Mr Volkens and she accepted that suggestion. In her statement, however, she merely said that Mr Volkens:

approached me and asked me to go into the sauna. I went to the sauna. There was no other person in the sauna. I recall that Scott came into the sauna to check on me.

It is unclear from the statement whether he did or did not accompany her to the sauna. However, given her evidence at the committal proceeding it was not surprising that the DPP was of the view that Complainant 3 was accompanied to the sauna by Mr Volkens.

It would appear that Mr Byrne was under the misapprehension that the alleged offences occurred in the sauna whereas Complainant 3 had said in her statement that she was told by Mr Volkens to go from the sauna to the massage room where the alleged offences occurred. Complainant 3 clarified this aspect of her evidence after which the following exchange occurred:

Byrne: We're at cross purposes. So Scott got you out of the pool?

Complainant 3: Yes.

Byrne: And walked with you and put you in the sauna?

Complainant 3: Yes, Yes.

Byrne: And, well, I was saying you were in the sauna for 15, 20 minutes?

Complainant 3: Yes.

Byrne: And then Scott got you out of the sauna?

Complainant 3: Yes, that's right.

Byrne: And got you in the massage room?

Complainant 3: Yes. Whether it was labelled as a massage room, but there was a table there and that was in the sauna area.

Subsequently, the following exchange occurred:

Byrne: This massaging when the two of you were in there, you say, massaging him [sic]?

Complainant 3: Yes.

Byrne: Did that take, what, 15 minutes again?

Complainant 3: I, it could. I don't know the time frame.

Byrne: But, I think you say it was a long time again in your statement.

Complainant: Yeah, but — yeah.

In summary, the evidence to this point was that Complainant 3 was in the sauna for 15 to 20 minutes and then went into the massage room. She did not say how long she was in the massage room.

Later in the proceedings she was cross examined about the second of the incidents, which allegedly occurred in the massage room, as follows:

Byrne: You went to the sauna again?
Complainant 3: Yes.
Byrne: You were in there for about the same time?
Complainant 3: I would say.
Byrne: And then you went outside into the massage room?
Complainant: Yes, that's correct.
Byrne: You say again he massaged your breasts again at that time?
Complainant 3: Yes.
Byrne: You say this is for a long time that. Would be similar to what we discussed before 15, 20 minutes?
Complainant 3: Yeah.

Although a time frame had not been agreed to by the witness for the first alleged incident, she agreed with Mr Byrne's suggestion that Mr Volkens massaged her breasts for 15 to 20 minutes on the second occasion. On the analysis of the above evidence, the maximum time Complainant 3 was absent from the pool deck was 40 minutes (20 minutes in the sauna and 20 minutes in the massage room).

Subsequently, Mr Byrne's written submission to the ODPP also addressed this issue in the following terms:

Central to [Complainant 3's] allegations is that Mr Volkens, on two occasions, called her out of the pool, during evening training sessions and took her into the sauna/massage room (alone) where he massaged her breasts.

That is to say, she alleges that whilst a number of swimmers were being coached and supervised by Mr Volkens, by himself, he left the pool area with a 13 year old girl. In addition, she alleges that he was gone with her for 'a long time' which she confirmed to be 15 to 30 minutes.

It is not obvious from where Mr Byrne obtained the time frame.

In Mr Davies's written advice dated 11 September 2002, he stated:

The defence submission asserts that the incidents involving massages during training sessions could not have happened because of the length of time of each incident coupled with the number of people who attended training and the way the accused ran his training sessions.

It was asserted that the complainant confirmed that the massage incidents could have lasted 15 to 20 minutes each. I have set out the passage referred to by the defence below (at p. 39):

- So what time frames are we talking? 15 minutes, half an hour, an hour?
- No, I wouldn't say an hour and I wouldn't [say] longer than half an hour, but I couldn't say precisely the time. I do know that he started massaging from my shoulders and worked all the way down my back and then to my legs, hamstrings, so I would imagine it's a fair time.

The Defence submission also indicated that the swimming sessions were attended by parents of swimmers who would closely monitor proceedings. At the meeting with the Deputy Director Mr Shields also indicated that the accused did not use a blackboard to give instructions to his swimmers (verbal only) and accordingly a 15–30 minute absence would not have been possible or the sessions would have degenerated into chaos.

The extract from the evidence that Mr Davies included in his advice, and that he subsequently included in the Charge Discontinuance form, refers to Complainant 3's account of what happened in the caravan and not to what happened in the massage room, which was the subject of Mr Byrne's submission. This may have added to the confusion concerning the time frames involved.

As can be seen from the above, since the committal proceedings there have been misunderstandings about the time in which the offences were allegedly committed by Mr Volkens in the massage room.

Alleged offences in the caravan

One final aspect is the Prosecution's consideration of Complainant 3's allegations about what occurred in the caravan where Mr Volkens lived. The caravan was at the same site as the pool.

It is noteworthy that Mr Byrne made no submission whatever concerning the offences in the caravan.

In her statement Complainant 3 said:

I recall in early January 1985 I was still 13 years old and it was just before my 14th birthday. I was training during a lunch time. I was training during this time because it was the school holidays. I can remember that it was during the State Titles and I had not been swimming as well as I had been before. The State Titles go for about ten days. I can recall that it was week day because I had swum heats during the weekend and qualified for the finals. I was swimming in the final the following night, and Scott had approached my mother asking for me to swim before the final that night.

I recall that Scott asked me to meet him at his caravan. I was dropped off at swimming by my mother who went home. I went to Scott's caravan.

I can recall that Scott and I had a conversation, which was words to the effect of: Scott said, 'Go up to my bed and I'll give you a massage.' I recall that I thought his request to be unusual. However, I did what he told me.

I went inside his caravan and went to his bed. His bed was up at the end of the caravan on the right from the front door.

She then went on to describe the massage that she said Mr Volkens gave her and the alleged sexual interference. At the committal proceedings she said that there was no-one at the pool during this time.

Two days later, she said, she again had swimming training. Mr Volkens asked her to go his caravan before training, which she did. She said that he told her to take off her shirt and lay down on her stomach. She said that she went to his bed and lay down on her stomach. She says that she stopped Mr Volkens from massaging her as his hands moved up between her legs under her shorts.

There is no reference to the caravan allegations in the Charge Discontinuance form under the heading 'Decision to No True Bill'.

Mr Rutledge took the view:

.. you had two separate incidents. You had the caravan incidents and you had the massage room incidents .. You couldn't divorce them and look at them separately .. because .. if there was a doubt that could be thrown on the massage room incidents, it had logically to infect the .. caravan incidents.

The CMC acknowledges that issues of credibility relating to the massage room allegations could be considered when assessing the caravan incidents, but does not agree that any 'infection' was necessarily fatal to the caravan incidents.

After receiving the CMC's draft extracts from the report, Ms Clare provided the following analysis in her written submission:

It is, with respect, misleading to use this terminology, when the issue to be determined was 'reasonable prospects of success'.

There are of course cases where a complainant's unreliability in respect of one allegation does not preclude proof of other allegations by the same witness. But the present example comes very close to the all or nothing category. It is the sort of case the New South Wales Court of Appeal considered should warrant a direction to that effect: *Markuleski* (2001) 52 NSWLR 82.

The prosecution case for each charge rested solely on [Complainant 3's] credibility. There was no basis for distinguishing between the quality of her credibility in respect of the massage room or the caravan incidents. Her credibility in respect of the massage room was damaged by objective circumstances. It was not a difficulty that arose by virtue of a date or other peripheral circumstances about which the complainant could be mistaken without detracting from the core allegation. Rather it was analogous to the problem in *Jones v The Queen* (1997) 191 CLR 439 described by the majority at 435:

There is nothing in the complainant's evidence or the surrounding circumstances which give any ground for supposing that her evidence was more reliable in relation to those counts than it was in relation to the second count.

Therefore an objective weakness in the core allegation of one offence became relevant to the credibility of all of the complainant's allegations. The High Court found that the two convictions against *Jones* were rendered unsafe by the jury's acquittal on a third count.

The issue in the *Jones* appeal was the safety of the verdicts: i.e. whether it was open to the jury to be satisfied of guilt beyond reasonable doubt on only some of the charges. The exercise of the prosecutorial discretion is broader: it requires a pragmatic evaluation of the evidence for prospects of success at both trial and on appeal.

However, this analysis, and the Deputy DPP's view, does not appear to give any consideration to prosecuting the caravan incidents alone, something which, in the CMC's view, should have been considered. Also, it is by no means uncommon for juries to convict on fewer than all the charges based on a single complainant's evidence.

In the CMC's view, the circumstances in which the offences allegedly occurred in the caravan were very different from those in the massage room in that:

- they allegedly occurred in the privacy of Mr Volk's caravan, rather than at the pool where there were many other people nearby
- there was less risk of Mr Volk's being seen committing the alleged offences and no risk that either Complainant 3 or Mr Volk's would be missed by other swimmers who were training or their parents
- the alleged conduct in the caravan was much more serious than that alleged against Mr Volk's in the massage room.

Also, the DPP appears to have confused the alleged offences during her deliberations. She told the CMC:

.. there's two kinds of conduct — one was the massages during the swimming and the other [was in his caravan] .. When you looked at the specific circumstances of this case where we have [Complainant 3] saying, you know, sometime, it was a full body massage sometime shorter than an hour, that's a fair chunk out of a swimming, a swimmer's swimming training session and just the general knowledge that there were parents at these sessions and he was the one that they were paying their money to and expecting the children to be trained by meant that even though .. the fact that is happened twice .. 15 years ago people are not likely to remember anyway. There is still the question of the burden of proof on us and that idea of improbability or implausibility had to be figured into the equation.

The issues relating to the length of time and the presence of parents were not directly relevant to the caravan incidents, just as the notion of a full body massage was not directly relevant to the massage room incidents. Complainant 3 did not allege a full body massage occurred in the massage room.

In her written submission, the DPP said that in the interview she confused the description of conduct in the caravan with that in the massage room, but was not misled at the time of making her decision. She said this should be obvious from the briefing memoranda and that the significance of the type of conduct in

the massage room was its obviously sexual nature, which would be apparent to any person who happened up on the incident: the Complainant's togs were pulled down so that she was naked above the waist, and she was on her back while Mr Volkens massaged her breasts.

Other issues concerning the decision not to prosecute

These related to:

- 1 Complainant 3's contention that Mr Volkens sometimes used a blackboard to instruct swimmers, thus allowing him to absent himself from the side of the pool during training
- 2 inconsistency in the evidence of Complainants 1 and 2 relating to the type of floor coverings they recalled were in Mr Volkens's house at the time of the allegations.

Use of a blackboard

Complainant 3 said that she was concerned that the DPP must have questioned her credibility because she appeared to disbelieve her evidence that there was a blackboard at the pool. She said that she gave a photograph to Mr Davies that proved that there was a blackboard at the pool. She believed that witness statements provided by Mr Byrne and Mr Shields said there was not a blackboard.

Mr Byrne regarded this issue as important because it could be argued that it was impossible for Mr Volkens to leave the pool area as he gave all his instructions orally. He did not use a blackboard.

In three of the Defence statements provided to the Deputy DPP, references were made to the fact that Mr Volkens did not use a blackboard to write down instructions to his swimmers. These comments were:

Further, Scott never used a whiteboard or a blackboard to write out his training instructions for the session. He would always verbally give instructions.

Whilst I was swimming under Scott and Ferguson's Marlins, I am willing to give evidence that Scott gave verbal directions to his squad, he never utilised the services of a whiteboard or blackboard.

Furthermore the swimmers would have noticed if Scott wasn't there as Scott always gave verbal commands; he never used a blackboard or a whiteboard and therefore if he wasn't there, there would have been chaos.

On 16 September 2002, Mr Davies and Detective Sergeant Marsh had the following discussion with Complainant 3 about how Mr Volkens gave instructions to his swimmers

Davies:	All right. How did he run the sessions? How did he give instructions to swimmers?
Complainant 3:	He stood out on the pool deck.
Davies:	All right. Did he always give oral commands?
Complainant 3:	Yeah, I think at one time he might have tried it on a blackboard, you know things that sort of at the start of the session, you would know what you were doing but it didn't last very long, so he always gave oral instructions as to what sets we were actually doing.
Davies:	How often did he use the blackboard?
Complainant 3:	Not very often.
Davies:	Not very often?
Complainant 3:	No, no. Certainly I .. more so Scott would tell us rather than .. I think you know as he was going as a coach and as he was learning, I think that was some of the things that he tried to do.

...

Davies: Now the general view is of their ... and I can't say that you actually disagree with this because I've asked you about this already, the general view of how the sessions were run was he would run the session with verbal commands.

Complainant 3: Yes.

Davies: Would .. some people said he never used a blackboard, but that's possibly because they were not at every single session. [Underlining CMC's]

Complainant 3: That's true.

Davies: All right. That it would have been impossible for him to have left a session, this is their words, impossible for him to have left a session for any lengthy period of time because the sessions wouldn't have been able to function without him.

Complainant 3: I'd love to know where those people were, I'd love to know because I can ... I can recall many times we'd finish a session and we'd still be waiting for Scott to come back from somewhere.

Davies: Would you know where he used .. where he'd go?

Complainant 3: Well he could have chatted to the parents, because his caravan .. and he lived on site so I mean he could have gone there.

When interviewed by CMC investigators on 13 December 2002, Complainant 3 again raised the issue of the blackboard. She said:

Well probably the next thing I would like to .. which to me it particularly relates to my side of the case, is that on 16 September, Jason Davies asked me about my recollections of how Volkens actually gave his swimming instructions and I went on to say that he gave his instructions most of the time verbally, but I do remember him using a blackboard. In the course of the conversation he asked me things like did you remember Scott having a pet possum and then do you know where the .. did you used to go into the shower .. so he was sort of like, was really trying to work out what was my actual memory, then he proceeded to tell me that I'm ... out of those twenty statements, I'm the only person who remembers a blackboard, that everyone else can only remember Scott ever giving verbal instructions.

Now it .. just from my notes here, just making sure I get it all right, he also .. they also told me that because there wasn't a blackboard, well people don't remember a blackboard, if Scott had left the pool deck then it would have been in absolute chaos. So Jason Davies then asked me, did I have any photos of the pool and I said yeah actually I do have one ... this is the photo that I presented to the DPP on 16 September, prior to the charges being dropped. There's the blackboard. [Underlining CMC's]

The only other conversation regarding the blackboard on the tape of the interview on 16 September 2002 is a conversation between Detective Sergeant Marsh and Mr Davies in the absence of Complainant 3 (it would appear she left the company of Mr Davies and Detective Sergeant Marsh to find a letter) in which the following was said by Detective Sergeant Marsh, possibly when discussing the contents of one of the 20 Defence statements:

This mainly just talks about ... Obviously as she says if there's 35 kids at training and there's no blackboard. That's what the Defence has raised.

During the interview with CMC investigators, Complainant 3 also said:

Now I know one of the girls in that photo was asked by Peter Shields, because I know her because we're still friends, and he asked her do you remember a blackboard and a whiteboard and did Scott ever use that. She said no, I don't remember a blackboard being there. Well there she is in a photo with a blackboard in the background.

Complainant 3 said that the girl in the photograph was Witness W.

Witness W's statement provided to Mr Shields states:

I never recall Scott ever leaving the swimming during training and I do

remember Scott always giving the orders verbally and that he never used a whiteboard or a blackboard.

When Mr Rutledge was asked about this matter, he said that he was not aware of the photograph, but stated that he did not view the existence of the photograph, or, the fact of the blackboard, as significant in respect of the decision to discontinue the charges arising out of Complainant 3's allegations. He said that the alleged offences in the sauna involved 'an amazing amount of risk'. He then said:

... Anyone, anyone could've walked in, without warning — and seen what was going on, right. And there wouldn't have been any innocent explanation for it. All right ... That, that is nothing to do with whether he um, ah used a whiteboard or a blackboard, right. It focuses in on this issue of selling to the jury that he was prepared and did take this risk. Now it may be that others would form different views on selling it, all right, but ultimately at the end of the day in my mind with my experience — it's a scenario that in this context couldn't be sold, right. It, it may well have happened, I'm not, I'm not making any judgments about whether something did or did not happen. I'm making judgments about the ability to persuade a jury at the end of the day that they should have no reasonable doubt ...

Complainant 3 relies on the photograph that she produced to prove that there was a blackboard at the pool. However, proof of the existence of the blackboard is irrelevant because no-one has said that it did not exist. Those people who provided statements to Mr Shields and addressed this issue merely say that Mr Volkens did not use one, not that one did not exist. Neither Mr Davies nor Detective Sergeant Marsh told Complainant 3 that witnesses had said that there was no blackboard, but that 'some people said he never used a blackboard'. Complainant 3 said he did not use a blackboard very often but 'more so [Mr Volkens] would tell us [what to do]'.

Inconsistency of evidence over type of floor coverings

By letter to the CMC dated 20 February 2003, the Shadow Minister for Police and Corrective Services, Mr Johnson, expressed concerns about alleged comments made by Mr Rutledge in a meeting with Complainant 3 on 26 September 2002. Those comments related to an alleged inconsistency in the evidence of Complainants 1 and 2 relating to the type of floor coverings at the former residence of Mr Volkens.

Complainant 1 alleged she was indecently dealt with by Mr Volkens at his residence in 1985 and that the house had polished floors. Complainant 2 alleged that she was indecently dealt with by Mr Volkens in 1987, and that the floor covering in the house was grey carpet.

The letter stated that during the course of his meeting with Complainant 3, Mr Rutledge said that this inconsistency constituted 'yet another reason why the charges against Mr Volkens could not proceed to trial'.

The letter from Mr Johnson further stated that he has been informed (source not identified) that the current owner of the Volkens residence told Mr Jason Davies and Detective Marsh that Volkens had installed grey carpets over the top of the polished floors on 17 September 1986. It was submitted by Mr Johnson that this information 'would appear to more than adequately cater for Mr Rutledge's concerns regarding the allegedly inconsistent recollection' of Complainants 1 and 2.

Mr Johnson further stated that he had received information that:

- Mr Davies and Detective Sergeant Marsh were informed of these facts by the owner of the residence on 17 September 2002
- Mr Davies and Detective Sergeant Marsh took photographs of the interior of the residence showing the grey carpet over the floorboards.

Mr Johnson raised concerns that, notwithstanding Mr Rutledge should have been in possession of the photographs, Mr Rutledge failed to acknowledge these facts in his meeting with Complainant 3.

When interviewed by CMC investigators on 8 October 2002, Mr Davies was asked whether he had identified the issue of the floor covering at Mr Volk's former residence as an important issue. He said:

For example, the looking at the Bald Hills house only became apparent to me when I noticed, I just happen to read the um, Michael Byrne's cross examination and he raises this issue of the floor covering and I thought well why is he doing that, have we ever looked at the house, at that's when I said to Geoff well, um let's go and have a look at the house, I want to see, I want to get some crime scene photos because we never had those. Lee said he thought the house had burnt down. He'd been told by somebody that the house had burnt down. Perhaps he should have checked, you know we would have, we would have found out in any event.

Mr Davies was re-interviewed by CMC investigators on 28 February 2002. Mr Davies confirmed that his review of the committal transcript revealed a potential inconsistency in the evidence of Complainant 2 in that her recollection of the floor covering at Mr Volk's former residence was different from that of Complainant 1's. Mr Davies asked Detective Senior Constable Shepherd whether the police had sought to inspect the house and was told that no attempt had been made to inspect the residence because it was believed the house had burnt down.

Mr Davies brought this to the attention of the Deputy DPP and DPP, who agreed that Mr Davies and Detective Sergeant Marsh should make inquiries to see if the residence still existed and, if so, visit it and take photographs of its interior.

Mr Davies stated that on 17 September 2002 he, Detective Sergeant Marsh and a police photographer went to the house. Upon arrival, the owner allowed them to enter and take photographs. Mr Davies told CMC investigators that he believed that in discussions with the owner he was told the grey carpet was at the residence when she purchased it. Mr Davies stated he had no recollection of the owner being able to give an exact date when the grey carpet was installed.

The owner told the CMC that she did not tell them the date on which the carpet was laid as it was, and still is, unknown to her.

Mr Davies stated that he also spoke to a next door neighbour who told him that his father had been living next door for many years and might be able to help him in his inquiries. As the father was not home at that time, Mr Davies left a number for the father to contact him or Detective Sergeant Marsh. Mr Davies stated that the father later telephoned Detective Sergeant Marsh. The results of that telephone conversation were included in an e-mail that Mr Davies said he sent to both the Deputy DPP and DPP advising them of the outcome of his inquiries. A review of the ODPP file has discovered a copy of that e-mail, which is recorded as having been sent at 10:07 a.m. on 18 September 2002. The e-mail contained the following notation:

In relation to [Complainants 1 and 2] — Geoff and I also visited Volk's old residence at Bald Hills. We took photos of the residence. The grey carpet which was on the floor of the residence was taken up by the new owner, exposing the floorboards (we obtained photos of the old carpet). We also inspected the site where the in ground pool used to be (now a garage) and the owner showed us the pergola which used to go over the pool (now part of the garage roof).

Geoff spoke to Mr [named person] (a next door neighbour, has continuously lived next to the address for 30 years). Mr [named person] had been inside Volk's house and said that he remembered when Volk's first took over the house he laid grey carpet in the living room.

You should note that the carpet is consistent with Complainant 2's evidence — however, it is potentially inconsistent with Complainant 1's evidence (depending on whether she was there before or after the carpet was laid).

The visit to Mr Volk's former residence by Mr Davies and Detective Sergeant Marsh on 17 September 2002 is recorded in similar terms in the Charge Discontinuance form at page 8.

Mr Davies stated that he was present when the issue of the possible inconsistency in the evidence between Complainants 1 and 2 was discussed. He stated he believed the issue was discussed over a period of days between 13 and 18 September 2002.

Mr Davies said that the inconsistency between Complainants 1 and 2 was discussed in the context of a possible inconsistency that may affect the credibility of Complainant 2. He said that it was not really an issue insofar as Complainant 1 was concerned as the medical evidence was the important issue in her case.

Regarding the photographs taken at the residence by the police photographer, Mr Davies stated that they were never developed as the issue of the floor coverings was not ultimately relevant in the DPP's decision to discontinue the proceedings in respect of Complainant 2.

Mr Davies was of the opinion that the possible inconsistency had little, if no, impact in the final decision by either the Deputy DPP or the DPP to discontinue the proceedings in respect of Complainant 2.

In conclusion, there is evidence that Mr Davies was aware of the issue of the floor coverings and, at the direction of the DPP and the Deputy DPP, he and Detective Sergeant Marsh conducted inquiries.

He could not recall being told by the current owner of the precise date on which the coverings were laid. Because the date of installation could not be established, it meant that there was a potential inconsistency in Complainant 1's evidence.

In any event, Mr Davies did not consider that it was a significant issue in the DPP's decision to discontinue proceedings in respect of either Complainant 1 or Complainant 2. There is no reference to the issue in any documentation except in the references by Mr Davies referred to above. In the interviews with the CMC, it was never referred to by the DPP or the Deputy DPP as being relevant to their considerations.

In the CMC's view, any potential inconsistency was of little, if any, significance to the DPP's considerations.

Even if the inconsistency had been taken into account by the DPP, it was not a matter that could constitute official misconduct.

CONCLUSION

The process leading to the decision not to continue with the prosecution of any of the charges was unsatisfactory. This is reflected in the fact that there is room for doubt about the principal reasons that motivated the decision.

The decision by Mr Rutledge to accept statements proffered with a view to persuading him that the charges could not be upheld, on the basis that use of the statements was restricted, was a mistake. There are obvious dangers in permitting lawyers to submit statements to the prosecution in this way. Here the situation was aggravated by the circumstances that disagreement quickly arose as to the basis on which the statements were to be used; this led to a threat of litigation by the lawyers for Mr Volk's, which undoubtedly put pressure on the prosecutors. Although there is evidence that the content of the statements had nothing to do with the ultimate decision, it is hard to accept that the statements did not influence it.

Apart from acceptance of the statements subject to some disputed obligation not to investigate them, other mistakes were made, of lesser importance, namely:

- The DPP was under a misapprehension as to the length of time Complainant 3 had said Mr Volkens was away from the pool.
- Too much was made of the damage supposedly done to Complainant 3's credibility by remarks attributed to Witness K.
- There was little, if any, analysis of the prospects of a successful prosecution of the offences alleged to have occurred in the caravan, including any consideration of whether to proceed on the allegations in respect of the caravan alone.
- Too little attention was given to the possibility that Complainant 3 would simply be believed by a jury.

There were more defects than one would ordinarily expect to find in an examination of a matter of this kind. However, it appears clear that although Mr Rutledge, and to a lesser extent the DPP, can be justly criticised for the way in which they went about their task, the case falls far short of being one of official misconduct.

It must also be kept in mind that staff of the ODPP and, in particular the DPP herself, have a heavy workload and would not ordinarily be in a position to spend a great amount of time and effort on any particular group of complainants.

FURTHER CONCERNS WITH THE ODPP

This chapter examines further concerns raised, mainly by the Complainants but also by the legal representatives for Mr Volkens and by the Leader of the Opposition, regarding the handling of the Volkens case by the ODPP.

CONCERNS RAISED

From the Leader of the Opposition:

- ▶ the television program '60 Minutes' appearing to know of the discontinuance weeks before it occurred
- ▶ possible political interference in the selection of Detective Sergeant Marsh

From Mr Volkens's legal representatives:

- ▶ the media knowing about the decision to drop the charges against Mr Volkens before the Defence did
- ▶ the apparent failure to appoint an experienced prosecutor.

From the Complainants:

- ▶ the removal of a senior prosecutor prior to the committal
- ▶ the confiscation of documents and tapes in relation to the investigation
- ▶ the apparent haste in deciding to drop all charges
- ▶ the way the ODPP broke the news of the discontinuance to Complainants 1 and 2.

From Complainant 3 in particular:

- ▶ the prosecutor's apparently 'disinterested' attitude
- ▶ the failure of the ODPP to keep her informed
- ▶ a distressful comment by the Deputy DPP
- ▶ the 'selectivity' of the Defence statements.

TV PROGRAM'S PRIOR KNOWLEDGE OF DISCONTINUANCE

During the investigation, CMC officers become aware of an allegation that a person acting on Mr Volkens's behalf had approached the '60 Minutes' current affairs program some two weeks prior to the decision to discontinue proceedings. This allegation was also raised by the Leader of the Opposition, who had spoken with Mr Lincoln Howes, the producer of '60 Minutes'.

When CMC investigators asked Mr Howes about this matter, he told them that a Melissa Toomey, whom he believed worked for Spin Public Relations, contacted him and advised him that she represented Scott Volkens. He said that Ms Toomey told him Mr Volkens's lawyers had advised her that it was very likely the charges against Mr Volkens would be dropped in the coming weeks and so she was

ringing to inquire whether '60 Minutes' would be interested in running a story on the Volkens prosecution.

Mr Howes said he believed this first phone call took place a number of weeks before the charges were dropped with the initial contact by telephone being followed with an e-mail. On Monday 9 September 2002, Mr Howes advised Ms Toomey that '60 Minutes' would not pay for the story, and he e-mailed advice on 12 September that '60 Minutes' could not pay the amount requested.

Mr Howes said that he found the original approach by Ms Toomey unusual in that he did not believe the charges against Mr Volkens would be dropped after he had been committed for trial. Due to this concern, Mr Howes said he had asked Ms Toomey how she could be so confident that the charges would be discontinued. He said that Ms Toomey told him she would have to consult with lawyers to see how much she could tell him. Mr Howes said that when Ms Toomey called back, she said Mr Volkens's lawyers were making an application to the DPP and they believed that the new evidence was so compelling that it would result in the dropping of the charges. Mr Howes stated that there was a feeling at '60 Minutes' that they should not enter into a deal until the charges against Mr Volkens had actually been discontinued. Mr Howes stated that he then received a telephone call from Ms Toomey late on 18 September 2002, advising him that the charges had been discontinued.

When interviewed, Mr Shields confirmed that neither he nor Mr Byrne were aware of the decision of the DPP until after receiving a telephone call from Mr Rutledge at Mr Byrne's Chambers on 18 September 2002.

However, prior to the decision to discontinue the proceedings against Mr Volkens, at least one media entity had been told by persons associated with Mr Volkens that Mr Byrne and Mr Shields were seeking to have the prosecution dropped and that there was compelling new evidence to support this course of action.

There is no evidence to support the contention that any employee of the public relations firm acting for Mr Volkens, Mr Byrne, Mr Shields or Mr Volkens had any advance knowledge of the DPP's *actual* decision to discontinue the prosecution of Mr Volkens prior to the Complainants being advised. Indeed, it is clear from the evidence that the DPP had determined that no person, including Mr Volkens, would be advised of her decision until after all three Complainants had been notified.

THE SELECTION OF DETECTIVE SERGEANT MARSH

In correspondence to the CMC, the Opposition brought to the CMC's attention:

potential political interference [relating to] Ms Leanne Clare's selection of Detective Marsh to investigate the 'new' evidence supplied by the defence following public criticism of Detective Shepherd by Mr Shields.

The Opposition says that it has been informed that Detective Sergeant Marsh went to school with Mr Shields and did not tell the DPP at the time of his selection. The Opposition went on to say that he had been sidelined from any further investigations by the QPS in the Volkens matter because of concerns that he would leak information to Mr Shields. The Opposition called for scrutiny of the DPP's decision to select Detective Sergeant Marsh.

The Opposition concerns are that, on the one hand, there was possible political interference by Ms Clare in the selection of Detective Sergeant Marsh, and, on the other, Detective Sergeant Marsh failed to declare to her his association with Mr Shields.

Insofar as the CMC has been able to establish it, the position is this: Mr Davies told the CMC that when the decision was made to conduct further investigations, he said that he needed help from a police officer. He asked the

DPP to contact the QPS to arrange for help. He said that she immediately rang the Prostitution Enforcement Taskforce where Detective Sergeant Marsh then worked. Mr Davies said that he did not want Detective Senior Constable Shepherd (the arresting officer) because he did not want that to become an issue later (in view of the discussions with the Defence). Arrangements were made to have Detective Sergeant Marsh seconded to the ODPP for the investigation.

In the CMC's view, the approach by the DPP to the QPS seems perfectly sensible and appropriate. Detective Sergeant Marsh was the arresting officer's supervisor and had knowledge of the investigation.

Detective Sergeant Marsh told the CMC that he went to the same schools as Mr Shields from 1976 to 1983 and that he had declared this association to his superiors in the QPS and to Mr Davies. He described his relationship with Mr Shields as a purely professional one.

Mr Davies told the CMC that he could not specifically recall Detective Sergeant Marsh telling him that he had gone to school with Mr Shields. However, he could not rule out that he did tell him. Mr Davies thought that he did not regard the information as important. He thought that he and Detective Sergeant Marsh 'went pretty hard' and it was not as if he had doubts about Detective Sergeant Marsh's performance.

In a reference to the DPP and the Deputy DPP, Mr Davies said that 'no-one upstairs knew' of the association between Detective Sergeant Marsh and Mr Shields.

Mr Davies was asked by the CMC whether the information came as a surprise to him and he said that it seemed to 'ring a bell', but that he could be getting confused with the association between the Attorney-General and Mr Volkens (who had also been to school together).

On the basis of this analysis, there was no reason for Detective Sergeant Marsh to be excluded from conducting these inquiries and there is simply no evidence that he acted improperly or was asked by any person to act improperly.

MEDIA ADVICE OF DISCONTINUANCE

Mr Volkens's solicitors and Mr Byrne raised concerns that they had been contacted by the media about the decision not to prosecute Mr Volkens, prior to being officially advised of the decision by the Deputy DPP.

The decision to discontinue the prosecution against Mr Volkens was made by the DPP on the morning of 18 September 2002. Mr Jason Davies and Detective Sergeant Marsh were tasked with advising the Complainants personally of that decision, before the legal representatives for Mr Volkens or the media were told.

Mr Rutledge organised with Mr Byrne to telephone Mr Byrne's Chambers at 3 o'clock that afternoon, to let him know the DPP's decision. Mr Byrne stated that while in Chambers awaiting that advice, Mr Shields received a telephone call from the media on his mobile phone concerning 'rumours as to what was going on'.

It is clear that by the time that Mr Byrne was advised of the DPP's decision, a number of people already knew that the criminal charges would be dropped against Mr Volkens. Those people included the three Complainants, some officers of the QPS and the relevant officers at the ODPP.

FAILURE TO APPOINT AN EXPERIENCED PROSECUTOR

In his submission to the CMC, Mr Bosscher expressed the opinion that, had the brief of evidence been assigned to an experienced prosecutor at an early stage, the decision to discontinue criminal proceedings would have been made earlier.

The brief of evidence was provided to the ODPP on or about 4 June 2002. At that time, and in accordance with the practice of the ODPP, the file was assigned to a case officer in the Committals Work Section. This officer, often a junior lawyer, is responsible for reviewing the file prior to committal and acts as the central liaison point between the ODPP, police and the defence. The nominated case officer in the Volkens prosecution was Mr Jason Davies.

When interviewed, Mr Davies said that from his early conversations with Mr Byrne and Mr Shields it was clear that the prosecution of Mr Volkens was going to be defended. He went on to say that, due to an early listing for the committal hearing and the fact that he was to undergo surgery on the day of the committal, he did not review the material in detail.

Mr Davies explained his review of the brief of evidence as:

[I] had formed the view that at that very early stage probably some of the material we had wasn't strictly relevant, you know really what it boiled down to was ... the complainants' word against the accused. The issue of joinder really hadn't been considered at that stage. It wasn't being contested at the committal. There was always the view that we should run all three at committal and then, and even at some stage prior to the committal, I had another conversation with Peter Shields where he said, where he intimated, that joinder at trial wouldn't be an issue either. So none of those issues were really ever gone into at that stage. I had a discussion with Richard [Pointing] where I said, look I've had a look at it, I think these four or five people are the most important people for you to conference prior to the committal.

The committal hearing was on 25 July 2002, with Mr Richard Pointing, an experienced Crown Prosecutor, assigned to appear for the Crown. When asked for his opinion of the strengths or weaknesses of the case against Mr Volkens after he read the brief of evidence, Mr Pointing expressed the following opinion:

Well I'd seen the covertly taped interview with — conversation at least — between [Complainant 1] I think it was and Volkens during which he made an acknowledgment of his having touched her inappropriately on the upper thigh — to use his words 'in the groin area' — when she mentioned this business of he picking her up to go to swimming training years ago — over a fairly lengthy period. So that certainly would have been of some use to us at the time. But other than that, the statements themselves were, I suppose, represented as strong a case individually or collectively as many others that come to us. There is no corroboration of anything they say. No support of one another.

It is clear that prior to the committal on 25 July 2002, the brief of evidence had been briefly reviewed by a case officer and then by an experienced Crown Prosecutor. While conceding that the case was one that would ultimately turn on whether a jury accepted the evidence of the Complainants or Mr Volkens, both Mr Davies and Mr Pointing formed the view that a prima facie case existed.

There is no reason to think — based on the material available to the case lawyer and the Crown Prosecutor who reviewed the brief of evidence prior to committal — that a consideration of that same evidence by a 'more experienced prosecutor' would have led to the criminal proceedings against Mr Volkens being discontinued at an earlier stage.

REMOVAL OF A SENIOR PROSECUTOR

The Complainants allege that a senior prosecutor, Salvatore Vasta, was removed from the prosecution.

During the CMC's interview with Detective Senior Constable Shepherd, he said that he often contacted Mr Salvatore Vasta, an ODPP Crown Prosecutor, for advice during the investigation. This contact is reflected in notations on the running sheet.

Detective Senior Constable Shepherd said that he regarded Mr Vasta as a good prosecutor and that he had provided him with assistance in the past. Due to this association, Senior Constable Shepherd prepared a report to his superiors asking that the QPS formally request that Mr Vasta be retained by the ODPP to prosecute the matter. He received advice that Acting Assistant Commissioner Swindells had considered his report and had determined that it would, in the circumstances, be inappropriate to make such a request of the DPP.

The DPP and the Deputy DPP made it clear that at no time during the investigation or prosecution did they know that Mr Vasta had been providing ad hoc advice to Detective Senior Constable Shepherd. Mr Rutledge advised that the first he became aware of Mr Vasta's involvement in the matter was when he was told by Mr Davies, after the decision to discontinue proceedings had been made, that Mr Vasta's name was mentioned in the QPS investigation running sheet. They stated that Mr Vasta had never been assigned to the prosecution, nor was there any approach, either formally or informally, to the ODPP to have Mr Vasta assigned to the Volk's prosecution.

The DPP told the CMC:

the prosecutor, Mr Pointing, was a Senior Crown Prosecutor and an acting Legal Practice Manager. He was both senior [to] and more experienced than Mr Vasta, a base-grade prosecutor.

Mr Vasta confirmed that he had provided some advice to Senior Constable Shepherd in relation to the investigation into Mr Volk's, but he had not been assigned to the case at any stage.

There is no evidence to show that Mr Vasta was removed as the prosecutor responsible for the prosecution of Mr Volk's. Indeed, at no time was Mr Vasta ever assigned the brief of evidence in respect of the prosecution. It is clear, however, that Detective Senior Constable Shepherd had expressed a desire to have Mr Vasta assigned as the prosecutor, and that his superiors deemed such a request to the ODPP inappropriate. It should be noted that the DPP is in the process of formulating guidelines to regulate the provision of advice to police by prosecutors prior to cases being formally referred to the ODPP. The CMC supports this initiative by the DPP.

CONFISCATION OF MATERIAL

The Complainants expressed concern that documents and tapes in relation to the investigation were taken away from Detective Senior Constable Shepherd after the decision to discontinue criminal proceedings against Mr Volk's.

Following the decision to discontinue criminal prosecutions against Mr Volk's, a post-operational assessment of the investigation was ordered by the Acting Assistant Commissioner for State Crime Operations Command. In order to ensure that a thorough review was conducted, the reviewing officers obtained access to all relevant material, including documents and tapes from the investigation. As such, there is nothing untoward in the removal of the investigation material from Detective Senior Constable Shepherd.

DECISION MADE 'IN HASTE'

The Complainants suggested that the fact that Mr Volkens was wanting to apply for a coaching position with the Australian Institute of Sport may have been the reason for the speed of the decision.

Mr Davies notes that on 17 September 2002 Mr Rutledge advised him and Ms Clare that he had been told by Mr Byrne that Mr Volkens wanted to apply for the position of Australian Head Swimming coach, which closed on 19 September 2002. Ms Clare is recorded as saying that she would not take that into account, but since she had given advice (to the QPS) that the investigation would be completed before 19 September 2002 she wanted the current investigations completed as soon as possible.⁹

The mere fact that the decision not to prosecute was made within twelve days of the submission being made to the ODPP, and two days after the DPP was advised of Mr Volkens's job application, is not evidence of official misconduct. Ms Clare made it clear to the ODPP that she would not be influenced by the timing of the job application. Senior Sergeant Marsh had been seconded to the ODPP for the week and Ms Clare had advised the QPS that she intended to have the investigations completed before 19 September 2002, pending her going on leave. There is no evidence that the decision to move promptly on this matter and communicate the decision once it was made was improperly motivated or constitutes official misconduct.

COMMUNICATION OF THE DISCONTINUANCE TO COMPLAINANTS 1 AND 2

Complainant 1

In his submission to the CMC, the Leader of the Opposition referred to the manner in which the ODPP informed Complainant 1 of the decision to discontinue the Volkens prosecution. The Leader of the Opposition suggested that it demonstrated:

No appreciation on the part of the DPP of the level of sensitivity required in the handling of these matters, particularly in relation to complainants like [Complainant 1] who has suffered mental illness as a result of these matters.

Complainant 1 told the CMC that she had been admitted to hospital on 1 September 2002 for observation and was still a patient on 18 September 2002 when the officers from the ODPP informed her of the decision to drop the case. She stated that she was advised by nursing staff that two gentlemen wished to speak to her about the 'Volkens prosecution'. She said she was told, in the presence of a nurse, that the charges against Mr Volkens were going to be dropped due to lack of evidence. Complainant 1's father confirmed that when he later visited his daughter in the hospital, nursing staff gave him the name and telephone number of Mr Rutledge should his daughter or any member of her family or an associate wish to contact him. Complainant 1 advised that while it may have been better for someone she was familiar with to have told her the news, she was generally happy with the manner in which she was informed that the charges were to be dropped.

During the interview, Complainant 1 said that she had no complaint against the ODPP, except the lack of regular communication to update her on the progress of the matter. However, Complainant 1's mother said that her daughter was disappointed that she was not told of the DPP's decision earlier.

Mr Davies told the CMC that prior to seeing Complainant 1 he spoke to her treating doctor to determine the best way to advise her of the DPP's decision. He was told that face to face was the best option. He said he then spoke to the

9 Mr Davies's Charge Discontinuance form, pages 7-8

ward nurse to see if Complainant 1 was in a suitable state to be given the news. Mr Davies said that prior to this there was no other information to impart and that she was given the decision with the utmost speed.

There is no evidence of official misconduct in relation to the manner in which the ODPP communicated to Complainant 1 her decision to discontinue the charges against Mr Volkens.

Complainant 2

The principal concern raised by Complainant 2 was the distress caused to her as a result of the decision of the DPP not to proceed with the charges against Mr Volkens.

She said that on the morning of 18 September 2002, she received a telephone call from Detective Senior Constable Shepherd who told her that a Crown Prosecutor needed to speak to her urgently. She left her place of employment and travelled home, where Detective Sergeant Marsh and Mr Davies met her. She said that Mr Davies told her that the DPP would be discontinuing the charges against Mr Volkens. She said that she became upset at hearing the news and that this affected her ability to understand what was being explained to her at the time. She later received a letter from the Deputy DPP explaining the reasons for the decision to discontinue criminal proceedings against Mr Volkens. The letter has been referred to in chapter 4 of this report.

COMPLAINANT 3'S CONCERNS

Complainant 3 clearly expressed the view that the decision of the DPP to discontinue proceedings against Mr Volkens was wrong and raised many concerns about the conduct of the DPP and her officers, namely:

- the Prosecutor's 'disinterested' attitude
- the failure to keep her informed
- a distressful comment by the Deputy DPP
- the selectivity of the Defence statements.

Prosecutor's 'disinterested' attitude

Complainant 3 said she believed the prosecutor assigned to prosecute the committal hearing appeared 'disinterested' in her complaint. She based this perception on her contact with the Crown Prosecutor, Mr Pointing, at the meeting on the day before the committal and during the committal itself. She felt that he had little empathy for her.

Mr Pointing rejected this description of him and explained that it was his duty as a prosecutor to prosecute matters dispassionately; to be firm but fair.

The perceived attitude of the Crown Prosecutor could not amount to official misconduct, and any concerns of this nature are a matter for consideration by the DPP.

Failure to keep her informed

Complainant 3 also said that the ODPP had failed to keep her informed of matters relating to the prosecution. In particular, she said she was led to believe — from conversations she had with the prosecutor and the victim support officer after the committal hearing — that the matter would be going to trial in the new year. Complainant 3 stated that from the date of the committal (17 June 2002) to 16 September 2002, she had no feedback from the ODPP as to the status of the prosecution.

Both Mr Davies and the DPP point out that all three Complainants were given a letter dated 31 July 2002 in which they were advised of the future direction of

the prosecution and invited to contact the writer (Ms Muller) if they wished to discuss the matter.

On 16 September 2002, she was interviewed by Detective Sergeant Marsh and Mr Davies. It was during this interview that she became aware of the existence of some twenty statements provided to the ODPP by the lawyers for Mr Volkens. Although she saw the statements in the possession of Detective Sergeant Marsh and Mr Davies, she was not shown them directly, merely being asked questions in relation to her swimming training under Mr Volkens.

Complainant 3 was upset that she was not fully informed about the significance of the questions being asked of her and was only told at the end of the meeting by Detective Sergeant Marsh that further inquiries were to be carried out and a decision to continue or discontinue the proceedings would be made in the upcoming two to three weeks.

Mr Davies told the CMC that there were no significant decisions between the committal and 16 September 2002 and, therefore, there was nothing to tell Complainant 3.

Mr Davies said that he believed that he had, in fact, advised Complainant 3 that the DPP was considering whether she would continue the prosecution. He confirmed that he did not show Complainant 3 the contents of the twenty statements and that the questioning was deliberately oblique as he did not wish to be criticised at a later stage for attempting to coach her on the evidence to give at trial. His concerns in this regard were understandable.

Complainant 3 indicated that the next contact she had with the ODPP was the morning of 18 September 2002, when she was advised by Mr Davies and Detective Sergeant Marsh that the DPP had decided to discontinue proceedings against Mr Volkens, and that she could contact Mr Rutledge to discuss the matter if she wished. She said the speed at which the DPP made her decision was of concern to her, as she believed Mr Volkens had been planning an overseas trip and that his legal representatives had requested the DPP to make a decision before their client went overseas. She confirmed that she was told by Mr Davies that the decision not to prosecute Mr Volkens would not be communicated to his legal representatives or the media until after the three Complainants had been advised.

The DPP supplied details of contact between her office and the Complainants, but, with the exception of those contacts referred to above, they all concerned contact prior to the committal.

The alleged failure to keep Complainant 3 informed could not constitute official misconduct.

However, in light of the concerns raised by two of the Complainants regarding the level of communication by the ODPP, the DPP should consider reviewing the adequacy and effectiveness of the ODPP's communication with complainants.

Distressful comment by the Deputy DPP

Complainant 3 related her distress over a comment alleged to have been made to her and her solicitor by Mr Rutledge during the meeting regarding the media furore that resulted from the DPP's dropping of the charges, namely:

I didn't believe I would have had to waste as much time on this as I have — maybe I would have been better to have gone to trial.

The comment is not recorded in either Mr Tolhurst's or Ms Muller's notes of the meeting. Mr Rutledge indicated that he does not think he would have said anything like that.

The alleged comment, if accurately reported, does not of itself indicate official misconduct by Mr Rutledge.

The 'selectivity' of the Defence statements

According to Complainant 3, in a radio interview on 24 September 2002, Mr Shields had said that he had collected 30 statements in relation to the Volkens case. Given that Mr Shields actually gave the Deputy DPP 20 statements, Complainant 3 said that she was concerned that the statements provided to the Deputy DPP were selective and were not all the statements in the possession of Mr Volkens's lawyers.

Mr Rutledge told the CMC that during a telephone conversation with Mr Byrne on 17 September 2002, he asked whether he had been provided with all the statements and not just a select group. Mr Rutledge said he was advised by Mr Byrne that he had been provided with all of the statements.

When CMC investigators interviewed Mr Shields, he said that he had collected a total of 27 statements. He said he provided 20 statements and a file note to the Deputy DPP. Of the seven statements that were not provided, three were from high-profile members of the swimming community and related to character evidence for Mr Volkens, two were from people who were trained by Mr Volkens, and two from parents whose children were trained by him. Mr Shields said there was nothing in those statements that would have had a negative impact on Mr Byrne's submission.

When asked why those statements were not provided to the Deputy DPP, Mr Shields said that he gave statements to the Deputy DPP that he considered to be a fair and accurate representation of the material that had been collated and intended for use in the subsequent criminal trial. Mr Shields denied that the statements were culled because they contained comments that may have been potentially harmful to the Defence case.

Mr Byrne was asked by CMC investigators whether he had any recollection of any conversations with Mr Rutledge concerning the provision of the Defence statements.

Mr Byrne said that after the statements had been provided to the Deputy DPP, he received a telephone call from Mr Rutledge. Mr Byrne said he recalled Mr Rutledge inquiring whether he or Mr Shields had any other statements that were inconsistent with contents of the statements provided to him or, put another way, whether all the statements in his or Mr Shield's possession were consistent in their content concerning Complainant 3. Mr Byrne said he did not recall Mr Rutledge asking him whether he and Mr Shields had provided all the statements they had in their possession to the Deputy DPP.

Mr Byrne further stated that, rather than responding to Mr Rutledge immediately, he first contacted Mr Shields to confirm that all of the statements in his possession were consistent in content as they related to Complainant 3. Upon being told this was the case Mr Byrne advised Mr Rutledge accordingly.

When Mr Byrne was told by CMC investigators that Mr Shields had indicated to them that four statements in his possession had not been provided to the Deputy DPP, Mr Byrne said he had no knowledge of these statements. However, he said he had never asked Mr Shields whether the statements presented to the Deputy DPP were all of the statements that had been received, but only whether Mr Shields had any statements that were inconsistent with the contents of the statements provided to the Deputy DPP.

As with the terms of the undertaking, there is some disagreement as to the conversation between Mr Rutledge and Mr Byrne, the detail of which cannot be resolved. In any event, on either version, the circumstances could not constitute official misconduct.

CONCLUSION

While the CMC acknowledges that the Complainants are unhappy with the decision of the DPP not to prosecute Mr Volkers, and the overall way the ODPP handled the matter, the CMC has concluded that there is no evidence of official misconduct on the part of any officer of the ODPP.

It should be noted again that under the present criminal justice system the prosecutor is not an advocate for the complainant, nor should the prosecutor strive to achieve a conviction at all costs.

The issue of the relationship between complainants and the ODPP and the communication between them is considered further in the CMC's forthcoming research report.

ALLEGED POLITICAL INVOLVEMENT

This chapter responds to a request put to the CMC by the Opposition to consider the role of government members in the Volkens case to ensure that no impropriety or conflict of interest had occurred.

RESPONSES FROM POLICE

Detective Senior Constable Shepherd and Detective Sergeant Marsh said that they were never contacted by anyone, from within the QPS or outside, who tried to influence their investigation improperly. Detective Sergeant Marsh said that there was never any interest shown in the investigation from any person from outside the QPS and that he was never asked to prepare a briefing note or a ministerial note on the investigation until after the arrest of Mr Volkens.

Detective Sergeant Marsh said that he recalled that when Mr Volkens was arrested and asked if he wanted to contact a solicitor, Mr Volkens mentioned that he was a friend of Mr Rod Welford, the Attorney-General. Detective Sergeant Marsh advised Mr Volkens that he did not believe the Attorney-General would assist him and arrangements were made for another legal representative to attend.

RESPONSES FROM THE ODPP

Mr Rutledge said that he was never contacted by the Attorney-General about the Volkens prosecution. He further stated no person from the Attorney-General's office sought to contact him or influence him in his decision to recommend the discontinuance of charges against Mr Volkens. As noted by Mr Rutledge:

No. The reality with the Volkens case is that, other than the fact of the individual involved — the name — this was a very ordinary exercise of the discretion to prosecute. That's the brutal reality of this thing, okay.

Ms Clare denied that any person in authority sought to influence her decision to discontinue proceedings against Mr Volkens. Regarding the Attorney-General, she also said that it would be very unusual for her and the Attorney-General to discuss a current prosecution, and it did not happen in this case. Further, she said that Mr Welford had never had any influence on, or tried to influence a decision in relation to, a prosecution.

ALLEGED PHONE CALLS FROM ATTORNEY-GENERAL'S OFFICE

On 10 October 2002, Ms Doneman of the *Courier-Mail* contacted the CMC regarding the investigation of the Volkens matter. Ms Doneman said that she had received information that, on the morning after the arrest of Mr Volkens, a phone call was made from the Attorney-General's office to the Acting Police Commissioner seeking copies of the QP9s, the names of the Complainants and the nature of the charges.

In his letter to the CMC, dated 20 February 2003, Mr Johnson stated that the Opposition had received information that the Attorney-General allegedly made

telephone calls to the Boondall Police Station/District during the course of the initial investigation in order to ascertain the status of the investigation.

Inquiries established that, as at 27 March 2002, former Deputy Commissioner McGibbon was the Acting Commissioner of Police. Mr McGibbon was interviewed by the CMC. He advised that he had had no conversation with the Attorney-General, nor had any of his staff. Mr McGibbon stated that he had only spoken to the Attorney-General on a limited number of occasions and these occasions were always police-orientated. He advised he was never approached by the Attorney-General personally or by anyone from his office about the Volkens investigation.

The Attorney-General was interviewed by the CMC. He said that he had been a former school friend of Mr Volkens and would speak to him on an irregular social basis. Mr Welford advised that he would renew contact with Mr Volkens every six or so months, but had never provided any legal advice to him. Mr Welford denied that he or any member of his office sought to improperly interfere either in the police investigation or the decision-making process of the DPP with respect to the Volkens prosecution. The Attorney-General denied that either he or any member of his staff made a phone call to the Deputy Commissioner of Police or other police officers regarding the investigation. This denial is consistent with the evidence from the police officers, the DPP, and the Deputy DPP that no person in authority sought to influence them improperly.

In the absence of any evidence of an attempt by the Attorney-General or his staff to interfere with the investigation or prosecution of Mr Volkens, the CMC did not consider there was any justification for examining telephone records for telephone calls associated with Mr Welford, his office, or staff.

CONCLUSION

On the basis of the information outlined above, there is no evidence of outside interference in the decision-making process of the DPP by any member of government or any other person. Both police and ODPP officers involved in the investigation and prosecution of Mr Volkens were categorical in their assertions that no undue influence was brought to bear on them by any person over the Volkens case.

CONCLUSIONS

The CMC investigation did not disclose any evidence of official misconduct on the part of any officer of the QPS or the ODPP, or any other person. There was also no evidence of political interference in the handling of the Volkens case.

POLICE INVESTIGATION

The State Crime Operations Command assessment highlighted some concerns about the thoroughness and standard of the police investigation. These concerns mainly relate to poor supervision and the inexperience of the arresting officer, which the QPS proposes to address managerially. However, many other criticisms about the police investigation — such as the failure of police to interview at least two important witnesses — were unfounded. In any event, these matters did not raise evidence of police misconduct or official misconduct.

There is evidence to suggest an unauthorised disclosure to the media of the imminent arrest of Mr Volkens. This matter is already the subject of consideration by the QPS for disciplinary action.

Some Taskforce Argos officers mistakenly believed that there was a policy that alleged offenders accused of committing sexual offences must be arrested. The QPS should ensure that all officers are fully aware that they must adopt a case-by-case approach to the decision to arrest alleged offenders, as required by section 198 of the PPRA.

HANDLING OF THE CASE BY THE ODPP

The process leading to the decision not to continue with the prosecution of any of the charges against Mr Volkens was unsatisfactory. This was reflected in the fact that there is room for doubt about the principal reasons that motivated the decision.

The decision by Mr Rutledge to accept statements proffered with a view to persuading him that the charges could not be upheld, on the basis that use of the statements was restricted, was a mistake.

There are obvious dangers in permitting lawyers to submit statements to the prosecution in this way. Here the situation was aggravated by the circumstances that disagreement quickly arose as to the basis on which the statements were to be used; this led to a threat of litigation by the lawyers for Mr Volkens, which undoubtedly put pressure on the officers of the ODPP. Although there is evidence from the DPP and Mr Rutledge that the content of the statements had very little to do with the ultimate decision, it is hard to accept that the statements did not influence it. Such a conclusion should not be taken as meaning that they were untruthful in their responses.

Apart from the acceptance of the statements, subject to some disputed obligation not to investigate them, other mistakes of lesser importance were made, namely:

- The DPP was under a misapprehension as to the length of time Complainant 3 had said that Mr Volkens was away from the pool.
- Too much was made of the damage supposedly done to Complainant 3's credibility by remarks attributed to Witness K.
- There was little, if any, analysis of the prospects of a successful prosecution of the offences alleged to have occurred in the caravan, including any consideration of whether to proceed on the allegations in respect of the caravan alone.
- Too little attention was given to the possibility that Complainant 3 might simply be believed by a jury.

There were more defects than one would normally expect to find in an examination of a matter of this kind. However, it appears clear that although Mr Rutledge, and to a lesser extent, Ms Clare, can be justly criticised for the way in which they went about their task, in the CMC's view, their conduct falls well short of being official misconduct.

Issue for consideration by the DPP

The DPP should consider developing guidelines in relation to the giving and recording of undertakings to ensure that the situation that occurred in the Volkens case is not repeated.

On a number of occasions, the Complainants in the Volkens case expressed their concern at what they perceived to be a lack of communication on the part of the ODPP. A detailed consideration of the relationship between complainants and the ODPP will be provided in the CMC's forthcoming research report.

Issue for consideration by the DPP

In light of the concerns raised by the Complainants regarding the level of communication by the ODPP, the DPP should consider reviewing the adequacy and effectiveness of the ODPP's communication with complainants.