

# SEEKING JUSTICE

AN INQUIRY INTO HOW SEXUAL OFFENCES  
ARE HANDLED BY THE QUEENSLAND  
CRIMINAL JUSTICE SYSTEM

JUNE 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 *Seeking Justice: An Inquiry into how sexual offences are handled by the Queensland criminal justice system*. The Commission has adopted the report.

Yours faithfully



**BRENDAN BUTLER SC**  
Chairperson



# FOREWORD

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The investigation, prosecution and discontinuance of charges against swimming coach Scott Volkens in September 2002 generated widespread public interest in the way sexual offences were being handled by the Queensland criminal justice system. It especially brought under scrutiny the transparency of decision-making processes by the police and the Office of the Director of Public Prosecutions (ODPP).

The criminal justice system is a linchpin of our society: continued public confidence in it demands robust processes. The nature of sexual offences and their impact on victims and the community make the handling of allegations of sexual offences particularly sensitive and challenging.

The police investigation of the Volkens case and the ODPP's decision to drop charges were investigated by the CMC through our complaints process. (The results of that investigation are presented in our recently released report *The Volkens Case: Examining the conduct of the police and prosecution*.) The public's interest in the broader, systemic issues involved in the handling of reported sexual offences led to the CMC's decision to conduct a formal Inquiry. This report documents the findings of that Inquiry. The report does not limit itself to child sexual abuse, but looks at all sexual abuse in our society, affecting both adults and children.

How the criminal justice system handles sexual offences is a vast and controversial topic. A single Inquiry could not do justice to all aspects of the topic. Even though the Inquiry was limited to just three terms of reference, the size and scope of this report illustrate the complexity of the issues surrounding sexual offences and the array of concerns from all quarters — the public, victims of sexual abuse and their representatives, the accused and their representatives, and a range of legal organisations with, sometimes, very different perspectives.

Having reviewed the findings, the Commission makes 23 recommendations for reform of the criminal justice system, plus a final recommendation that in two years' time the CMC review the implementation of the recommendations. Our recommendations support many of those already made in previous reports to government on this topic.

In addition to addressing the terms of reference, the report flags other issues raised in the submissions to the Inquiry. As it was not possible to examine all of these issues within the ambit of the present report, the CMC encourages the key players in the criminal justice system to recognise the urgency of examining and resolving these matters, particularly those relating to resourcing, victim support and the committals process.

I believe that this report will make a worthwhile contribution to the continuing process of ensuring that our criminal justice system confronts the scourge of sexual offending within our community.

**Brendan Butler SC**  
Chairperson



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Sexual offences are difficult for all involved, but none more so than the victims of abuse and those accused of such offences, some falsely so. The CMC is most grateful to the 39 individuals who sent us their stories and recommendations for reform, and the numerous others who told us their stories by telephone: we appreciate how very difficult that must have been for them and would like to thank them for taking the time to raise the issues with us for the betterment of others.

Research and Prevention staff of the CMC were particularly dedicated to the Inquiry. Mr Ray Bange, Ms Zoe Ellerman, Ms Lisa Evans, Ms Rebecca Lowndes, Ms Julie Butner, Dr Samantha Jeffries and Ms Laurie Cullinan provided considerable assistance with the collection, coordination and writing of the information that appears in this report. Other CMC officers such as Ms Emma Oettinger, Mr Peter Lyons, Mr John Callanan, Inspector Sue Dawson and Ms Theresa Hamilton also provided valuable assistance. The report was prepared for publication by the CMC's Publications Unit.

The project was given considerable direction and guidance by the Chairperson of the CMC, Mr Brendan Butler SC, and the Director of Research and Prevention, Dr Paul Mazerolle.

Dr Margot Legosz, Senior Research Officer for the CMC, was the project manager for the Inquiry and had primary responsibility for preparing this report.

## ABBREVIATIONS

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ABA	Australian Broadcasting Authority	LAQ	Legal Aid Queensland
ABS	Australian Bureau of Statistics	MEAA	Media Entertainment Arts Alliance
ADPP	Australian Directors of Public Prosecutions	NAPCAN	National Association for the Prevention of Child Abuse and Neglect
AIC	Australian Institute of Criminology	NESB	Non-English-speaking background
ALRC	Australian Law Reform Commission	NICHD	National Institute of Child Health and Human Development
APC	Australian Press Council	NTA	Notice to Appear
APS	Australian Psychological Society	ODPP	Office of the Director of Public Prosecutions
CAFSA	Citizens Against False Sexual Allegations Inc.	OESR	Office of Economic and Statistical Research
CCTV	Closed Circuit Television	OIC	Officer in Charge
CEAVAW	Coordinating Efforts to Address Violence Against Women	OPM	Operational Procedures Manual (QPS)
CIB	Criminal Investigation Branch	OPR	Operational Performance Review
CJC	Criminal Justice Commission	PACT	Protect All Children Today
CMC	Crime and Misconduct Commission	PPR	<i>Police Powers and Responsibilities Act 2000 (Qld)</i>
COVA	<i>Criminal Offence Victims Act 1995 (Qld)</i>	QAI	Queensland Advocacy Incorporated
CSAIU	Child and Sexual Assault Investigation Unit	QAILS	Queensland Aboriginal and Torres Strait Islander Legal Service
DPP	Director of Public Prosecutions	QCC	Queensland Crime Commission
EMDR	Eye Movement Desensitisation and Reprocessing	QPS	Queensland Police Service
ESC	Ethical Standards Command	QPUE	Queensland Police Union of Employees
FOI	Freedom of Information	RMT	Recovered Memory Therapy
FPQ	Family Planning Queensland	SAVI	Sexual Assault and Violence in Ireland
GAFATC	Griffith Adolescent Forensic Assessment and Treatment Centre	SCAN	Suspected Child Abuse and Neglect
GOC	Government-owned corporation	SCIU	Sexual Crimes Investigation Unit
ICARE	Interviewing Children and Recording Evidence	VLO	Victim Liaison Officer
JAB	Juvenile Aid Bureau	VLS	Victim Liaison Service
JAG	Department of Justice and Attorney-General	VSS	Victim Support Service

# LEGISLATION

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## **Australian**

*Child Protection Act 1999* (Qld)  
*Children's Court Act 1992* (Qld)  
*Crimes Act 1900* (NSW)  
*Commission for Children and Young People Act 2000* (Qld)  
*Coroners Act 1958* (Qld)  
*Corrective Services Act 2000* (Qld)  
*Crime and Misconduct Act 2001* (Qld)  
*Criminal Code* (Qld)  
*Criminal Law Amendment Act 1945* (Qld)  
*Criminal Law Amendment Act 1997* (Qld)  
*Criminal Law Amendment Act 2000* (Qld)  
*Criminal Law (Sexual Offences) Act 1978* (Qld)  
*Criminal Offence Victims Act 1995* (Qld)  
*Director of Public Prosecutions Act 1973* (Tas.)  
*Director of Prosecutions Act 1984* (Qld) now the *Director of Public Prosecutions Act 1984* (Qld)  
*Director of Public Prosecutions Act 1986* (NSW)  
*Director of Public Prosecutions Act 1990* (ACT)  
*Director of Public Prosecutions Act 1991* (NT)  
*District Courts Queensland Act 1967* (Qld)  
*Evidence Act 1929* (WA)  
*Evidence Act 1929* (SA)  
*Evidence Act 1971* (ACT)  
*Evidence Act 1977* (Qld)  
*Evidence Act 2001* (Tas.)  
*Evidence (Protection of Children) Amendment Bill 2003*

*Family Law Act 1975* (Cwlth)  
*Health Act 1937* (NSW)  
*Judicial Procedures Reports Act 1958* (Vic.)  
*Justices Act 1886–1982* (Qld)  
*Justices Act 1902* (NSW)  
*Justices Act 1902* (WA)  
*Justices Act 1959* (Tas.)  
*Juvenile Justice Act 1992* (Qld)  
*Magistrates Court Act 1921* (Qld)  
*Magistrates Court Act 1989* (Vic.)  
*Penalties and Sentences Act 1992* (Qld)  
*Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld)  
*Police Powers and Responsibilities Act 2000* (Qld)  
*Police Service Administration Act 1990* (Qld)  
*Prostitution Act 1999* (Qld)  
*Sexual Offences (Protection of Children) Amendment Act 2003* (Qld)  
*Sexual Offences (Evidence and Procedure) Act 1983* (NT)  
*Summary Procedures Act 1921* (SA)  
*Victims Rights Act 1996* (NSW)

## **Overseas**

*Criminal Law (Rape Act) 1981* (Ire.)  
*Contempt of Court Act 1981* (UK)  
*Criminal Justice Act 1985* (NZ)  
*Criminal Justice Act 1991* (UK)  
*Sex Offender Act 2000* (Ire.)  
*Victims' Rights Act 2002* (NZ)



# EXECUTIVE SUMMARY

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## Background

During the last decade, cultural and societal change has started to remove the veil of secrecy surrounding sexual abuse, encouraging more victims to come forward to report their experiences than in the past. It is, therefore, important that the criminal justice system responds appropriately to allegations of sexual abuse — the process must be seen both to encourage victims of abuse to come forward to report sexual abuse, and to help prevent the occurrence of such abuse.

Sexual offence matters now pose considerable demands on the criminal justice system in Queensland. On average, 6500 allegations are reported to the police every year, the majority relating to offences perpetrated against children and a substantial proportion (about 20 per cent) taking place more than five years before being reported.

While the data are difficult to track, some estimates suggest that just over one-half of these reported offences reach the Magistrates Courts, about one-quarter reach the higher courts and about one-fifth result in a conviction (see Chapter 5 of this report for more details).

There are a number of stages in the criminal justice system where cases can be withdrawn, dismissed or discontinued, and a broad range of reasons why this happens. Victims themselves may choose not to continue their case for a host of reasons including the very nature of the process itself. On the other hand, decisions to discontinue the case on legal grounds are often made by a magistrate, the Office of the Director of Public Prosecutions (ODPP) or the higher courts, again for a wide range of reasons including a lack of witnesses or corroborative evidence. The nature of many sexual offences and the circumstances in which they are committed do not easily translate into a criminal offence that can be readily prosecuted through the criminal justice system in the usual way.

## The catalyst for the Inquiry

The difficulties surrounding the handling of sexual offence matters by the Queensland criminal justice system became a matter of public attention in 2002 during the investigation, prosecution and discontinuance of charges against Mr Scott Volkens. While this matter was considered separately by the Crime and Misconduct Commission (CMC) through its complaints process, public concern about the issues raised by the Volkens case prompted the CMC to conduct a general Inquiry into how the criminal justice system deals with sexual offences. The Inquiry did not limit itself to child sexual abuse, but included all forms of sexual abuse in our society whether perpetrated against children or adults.

## Inquiry methods

In September 2002, the CMC sought a reference from the Premier, the Honourable P. Beattie MP, to conduct an Inquiry and in October the Commission resolved to hold a public hearing with these terms of reference:

- 1 the training, expertise and supervision of police officers investigating 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 ODPP

- 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.

In October 2002, the CMC called for submissions to the Inquiry. Written submissions were received from 8 government departments and agencies, 10 legal organisations, 10 community organisations, 2 media groups, 3 academic groups and 39 individuals. Most of the individual submissions received were from people with first-hand experience of the criminal justice process, either as victim or alleged perpetrator of sexual abuse. In addition, CMC research staff spoke personally to 75 individuals who called to discuss their experiences with the criminal justice system, and conducted 20 consultations with a range of academic, community, government and legal agencies (including the judiciary) and individuals.

Two days of public hearings were held in November 2002, where the views of a range of organisations and individuals were publicly presented for examination. CMC researchers also reviewed local and international literature relevant to the terms of reference and analysed police and court data to assess recent trends in Queensland.

## Structure of the report

This report is divided into two sections.

**Part I** provides background material relevant to the major issues raised by the Inquiry. The bulk of this material was drawn from the research conducted for the Inquiry and consists of:

- recent research findings about the extent and impact of sexual abuse, the nature of disclosure, interviewing techniques and the videotaping of evidence
- current sexual offence legislation in Queensland
- a description of the current responses to reported sexual offences in Queensland by the police, the ODPP and the courts, including references to recent reviews of these organisations
- the stages involved in the decision-making process to prosecute sexual offences, including the most recent data available on the numbers of cases that progress through each stage of the criminal justice system.

**Part II** documents the major issues raised by the submissions to the Inquiry, the public hearings and the consultations. Chapter 6 describes some general concerns that crossed all three terms of reference, while Chapters 7, 8 and 9 address each term of reference individually. Chapter 10 explores other approaches to the handling of sexual offences, and Chapter 11 summarises the major issues and lists the recommendations.

## Major issues

How the criminal justice system handles sexual offences is a vast and controversial topic. Even though this Inquiry was limited to three terms of reference, the size and scope of this report illustrates the complexity of the issues surrounding sexual offences and the array of concerns from all quarters — the public, victims of sexual abuse and their representatives, the accused and their representatives, and a range of legal organisations representing, at times, very different perspectives.

The recommendations made by the Commission aim to address, holistically, the concerns that were raised by all three terms of reference, as well as concerns about how the criminal justice system deals with sexual offences more

generally. The recommendations aim to:

- improve the collection and dissemination of evidence, including interview material, for the prosecution of sexual offences
- reduce the stress associated with the criminal justice process for victims and the accused
- enhance the timeliness of the decision-making process to discontinue or continue matters
- enhance community confidence in the fairness and objectivity of the process
- enhance court proceedings by having better prepared police briefs and earlier legal advice.

## General issues

The following general issues were raised at the Inquiry:

- ▶ *how the disclosure of sexual abuse occurs, how that information is received and recorded and the general implications of disclosure within a legal framework*

To enhance understanding of the full implications of the disclosure of sexual abuse, the Commission recommends specialist sexual offence training for all officers working in the police sexual offence units and for police prosecutors and brief checkers/managers who work with sexual offences.

Recommendations are also made for more broadly based training about the nature of sexual offending for legal staff and Victim Liaison Officers (VLOs) of the ODPP. A review of the content of the courses provided by the Queensland Police Service (QPS) by an interagency/cross-departmental working party, convened by the QPS, is also recommended.

- ▶ *whether there should be a statute of limitations for the prosecution of historic sexual offences*

Despite many concerns raised at the Inquiry about the value of the prosecution of historic sexual offences through the criminal justice system, the Commission does not support the introduction of a statute of limitations period for the initiation of sexual offence prosecutions. Rather, it trusts that improvements in police training and supervision and enhanced communication strategies between the QPS and the ODPP may improve the decision-making processes about historic sexual offences (these issues are explored more fully in Chapters 7 and 8, which relate to the first two terms of reference).

- ▶ *concerns about the committal process in general, and, more specifically, whether committal proceedings should be conducted by police prosecutors or the ODPP*

While there was a great deal of support for making the committal process more effective than it currently is, there were conflicting views about:

- the nature of the test applied (prima facie test or reasonable prospects)
- the importance of costs
- the value of the Committals Project — that is, the pros and cons of police versus ODPP representation at the committal hearing
- whether the committals process should be retained at all.

These arguments cannot be resolved without an accurate evaluation of the effectiveness of the current situation in Queensland and a broader examination of the processes currently operating in the other States of Australia and overseas. This may be a matter for the government to take forward.

- ▶ *the time taken for matters to progress through the criminal justice system and the potential impact of these delays on victims and accused alike*

The Commission feels that implementation of the recommendations contained in this report should improve the timeliness of the response by the ‘front end’ of the criminal justice system (the QPS and the ODPP) to sexual offences generally. Court processes were not within the terms of reference of the Inquiry.

- ▶ *the need for more victim support throughout the criminal justice process*

The Commission has made a range of recommendations to address this concern, including training for specialist police and ODPP staff, a review of the regional response by the QPS to sexual offences, formal communication strategies between the QPS and the ODPP to enhance communication between agencies and with complainants, a review of the role of ODPP VLOs and implementation of a formal complaints-handling process by the ODPP.

- ▶ *the adequacy of the resources of the criminal justice system to handle sexual offences.*

While limited resourcing was raised as a significant impediment to the ability of the QPS and the ODPP to handle sexual offence matters more effectively, the Commission identified a number of management issues (see Chapters 6, 7 and 8) that, if dealt with appropriately, may overcome some of the concerns raised.

## **First term of reference: Training, expertise and supervision of police**

### **Training**

Turning to the first term of reference, the major concerns about police training related to:

- the limited availability of, and poor access to, specialist sexual offence training by officers working in the specialist sexual offences units
- the restrictive prerequisites for access to certain courses, which may act as barriers to appropriate training opportunities for officers working with sexual offences
- low participation rates of the officers working in the specialist squads in the training courses overall
- concerns about the content of training courses
- the need for ongoing or refresher training in the area, given constant changes in legislation, policies and procedures and what is known more generally about sexual offences.

As discussed previously, the Commission recommends specialist sexual offence training for all officers working in the specialist sexual offence units and for police prosecutors working with sexual offences, and the formation of an interagency/cross-departmental working party to assess desirable improvements to course content.

### **Expertise**

Concerns raised about police expertise covered a broad range of actions, behaviours and attitudes, mainly related to:

- police communication skills, including concerns about negative attitudes towards sexual offence victims by some police, especially those working in the regions
- questionable interviewing techniques

- concerns about interview protocols for special needs and Indigenous complainants
- the lack of privacy in the interviewing environment
- questionable or inadequate investigative techniques, especially in relation to the gathering of evidence and the use of pretext calls
- a range of legal matters, including:
  - the timeliness of legal advice
  - application of the prima facie test by police
  - police prosecution at committal
- the arrest process
- human resource issues for officers working in the specialist sexual offences squads, such as:
  - recruitment and rotation
  - succession planning
  - career advancement
- victim support and the need for specialist services
- regional variability in service provision.

The Commission believes that the recommendations for training for all specialist officers will enhance their expertise in each of these areas of concern. The Commission recommends that the QPS review both the human resourcing issues of the specialist sexual offence units and the current statewide demands made by sexual offences on the Service. Given the high rates of reported sexual offences in Far Northern Region, for example, establishment of a specialist sexual offences squad in that region may need to be given priority. To provide clarity for officers working in the area, the Commission also recommends that the QPS Operational Procedures Manual (OPM) be rewritten to clearly distinguish between the three decision-making processes relevant to police prosecution.

Given the number of submissions to the Inquiry that suggested that additional support be provided by the QPS to victims of sexual abuse, the Commission encourages the QPS to consider the allocation of appropriately trained support staff within the specialist sexual offence squads.

## Supervision

Sexual offence investigation is complex and sensitive; it is therefore important that police officers receive ongoing internal and external supervision. Concerns raised about the quality of supervision were noted at the Inquiry and the Commission recommends:

- further training of brief checkers and brief managers
- the reinstatement of regular meetings to discuss the progression of sexual offence matters under investigation and before the courts by senior managers of the QPS and the ODPP
- an expansion of the role of the Prosecution Review Committee to include all sexual offence matters that fail at committal, are discontinued by the ODPP or fail before the higher courts, and a review of the investigation and police prosecution in all matters.

## Second term of reference: Decision to prosecute or discontinue

Many of the concerns about police involvement in the initiation and discontinuance of sexual offence prosecutions were related to their training, expertise and supervision. As the previous term of reference addressed these concerns, most of the issues raised here refer to the decision-making processes of

the ODPP. These were as follows:

- the need for specialist expertise in sexual offences at the ODPP
- the need for better case management practices for sexual offences, especially regarding:
  - case preparation
  - continuity of case representation
  - briefing out practices
- concerns about the transparency of the decision-making process
- the need for better communication strategies:
  - between the ODPP and the QPS
  - between the ODPP and complainants
  - between the QPS and the ODPP in their communication with complainants
- the need for greater transparency in dealings with the defence, including:
  - pre-trial and trial disclosures
  - defence submissions to withdraw
  - charge bargaining
- concerns about resourcing and workload
- victims' rights, including:
  - the role of VLOs
  - the need for a complaints process in the ODPP.

While acknowledging their legal expertise in the prosecution of sexual offences, the Commission recommends that all ODPP legal staff and VLOs receive additional training in other aspects relevant to sexual offending, such as the nature and extent of sexual abuse, child development, the disclosure and reporting of abuse, interviewing techniques and historic cases. Although the formation of a specialist sexual offences squad at the ODPP is not favoured, the Commission encourages individual staff with a particular interest and aptitude in this area to apply for greater involvement in the prosecution of such cases.

In addition, the Commission recommends that the ODPP develop written policies and protocols for formal communication with police investigators and their supervisors, complainants and the defence about all sexual offence matters, including the preparation of written reasons for the discontinuance of cases. The ODPP is also advised to implement procedures that will ensure that all decision-making processes are supported by relevant documentation and completed by the responsible officer.

To enhance the response of the ODPP to complainants in sexual offence matters, the Commission recommends that the Department of Justice and Attorney-General review the role and function of VLOs.

Further, the Commission recommends that the ODPP implement a complaints-handling process according to established guidelines such as those provided by the Queensland Ombudsman (2003).

### **The QPS and the ODPP**

Clearly, the implementation of the recommendations outlined above regarding the first two terms of reference, will require close and ongoing liaison between the QPS and the ODPP, as well as the development, implementation and review of mutual policies, protocols and procedures to enhance the prosecution of sexual offence matters.

According to many submissions to the Inquiry there may have been some antagonism between the two organisations, which may have had a detrimental

effect on shared procedures, and on complainants and accused alike. A longer-term view would also suggest that this may be detrimental to the willingness of victims of abuse to report their experiences. The Commission strongly recommends, therefore, that the two agencies make every effort to overcome these difficulties.

### Third term of reference: Publication of names

The third term of reference, regarding the publication of the identity of the accused, prompted the following questions:

1. Should the identity of a person charged with a sexual offence be suppressed?
2. If it is accepted that the identity of a person charged with a sexual offence should be suppressed, is the existing prohibition on publication found in the *Criminal Law (Sexual Offences) Act 1978* (Qld) adequate?
3. The prohibition on the publication of names in the *Criminal Law (Sexual Offences) Act* applies only from the time an accused is charged: the legislation does not prohibit the publication of the name of a person who is under police investigation. Is there an argument for closing this gap in the legislation?
4. The prohibition on publication contained in the *Criminal Law (Sexual Offences) Act* applies only until an accused is committed for trial or sentence. Should the prohibition be extended to a later time, such as indictment, the start of a trial, the date of a conviction or after any appeal?

The Commission recommends:

- retention of the current provisions in the Act that restrict the publication of the identity of a person charged with a sexual offence
- replacement of the definition of a 'prescribed sexual offence' contained in section 3 of the Act with a new definition modelled on the definition of a 'sexual offence' that appears in section 4 of South Australia's *Evidence Act 1929*
- amendment of section 10(3)(b) of the Act to include a prohibition on naming a person who is under investigation by the police, with the proviso that identifying information about a suspect can be released if it is necessary to ensure the safety of an individual or the general community and/or to help locate the suspect or a complainant or otherwise assist the investigation
- amendment of sections of the OPM and the Police Media Guidelines so that they are consistent with the prohibition on naming a defendant in the Act
- no change to the current prohibition on publishing the identity of a person charged with a 'prescribed sexual offence' contained in the Act, which applies only until a person has been committed for trial or sentence.

## The next step

**The Commission strongly encourages the key players in the criminal justice system to act upon the recommendations in this report. To assess progress, the Commission proposes that it review the implementation of the recommendations in two years' time.**

## LIST OF RECOMMENDATIONS

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**1** — That specialist sexual offence training be required for all officers working for Taskforce Argos, the SCAN (Suspected Child Abuse and Neglect) teams, the Child and Sexual Assault Investigation Unit, the Criminal Investigation Branch and the Juvenile Aid Bureau in Brisbane and in the regions, and for police prosecutors working with sexual offences.

**2** — That ICARE (Interviewing Children and Recording Evidence) training be required for all officers working in the specialist child sexual offence squads.

**3** — That the Queensland Police Service convene an interagency/cross-departmental working party (including representatives from the Office of the Director of Public Prosecutions, the Department of Families and Queensland Health) to assess desirable improvements to sexual offence course content.

**4** — That the Queensland Police Service's Operational Procedures Manual be rewritten to distinguish clearly between the three decision-making processes relevant to police prosecution: (i) the initial decision to lay charges, (ii) summary prosecutions and (iii) the prosecution of committal hearings for indictable matters.

**5** — That the Queensland Police Service review the recruitment, selection and rotation policies of all specialist sexual offence squads, ensuring that adequate supervision and command structures are in place and that career opportunities are provided for officers working in these squads.

**6** — That the Queensland Police Service review succession-planning processes and policies for all sexual offence squads.

**7** — That the Queensland Police Service review the statewide demands made by reported sexual offences on the Service to assess the most appropriate regional response. Given the high rates of reported sexual offences in Far Northern Region, establishment of a specialist sexual offence squad in that Region may need to be given priority.

**8** — That it be a requirement for brief checkers and brief managers of the Queensland Police Service to undergo additional relevant legal and sexual offence training, as recommended for police officers working in the specialist sexual offence units.

**9** — That senior managers of the Queensland Police Service and the Office of the Director of Public Prosecutions reinstate regular meetings to discuss the progression of sexual offence matters under investigation and before the courts.

**10** — That the Queensland Police Service work closely with the Office of the Director of Public Prosecutions to expand the role of the Prosecution Review Committee. The role should include a review of:

- all sexual offence matters that fail at committal (whether it be the responsibility of the police or the ODPP at that stage)
- all sexual offence matters that are discontinued by the ODPP
- all sexual offence matters that fail before the higher courts (including the Court of Appeal)
- the role of the investigating/arresting officer in the matters
- the role of the police prosecutor in the matters.

**11** — That all legal staff and Victim Liaison Officers at the Office of the Director of Public Prosecutions receive training in aspects relevant to sexual offending, such as the nature and extent of abuse, child development, the disclosure and reporting of abuse, interviewing techniques and historic cases.

- 12** — That the Office of the Director of Public Prosecutions implement procedures to ensure that all decision-making processes are supported by relevant documentation and completed by the responsible officer.
- 13** — That, in collaboration with the Queensland Police Service, the Office of the Director of Public Prosecutions develop written policies for formal communication with police investigators and their supervisors about all sexual offence matters. The policy should include the provision of a written summary of the reasons for decisions that are made about each case prepared by a senior legal officer of the ODPP.
- 14** — That the Office of the Director of Public Prosecutions develop formal policies for communicating with complainants in sexual offence matters. As part of these formal policies, a senior legal officer of the ODPP should be required to prepare a written summary of the reasons for decisions that are made about the case.
- 15** — That the Queensland Police Service and the Office of the Director of Public Prosecutions develop and agree to formal protocols that identify who will contact the complainant about the decisions that are made in every sexual offence matter.
- 16** — That the Office of the Director of Public Prosecutions develop and enhance written protocols and procedures for communicating with the defence in all sexual offence matters.
- 17** — That the Department of Justice and the Attorney-General formally review the role and functions of Victim Liaison Officers employed by the Office of the Director of Public Prosecutions with a view to enhancing the response of the Office to complainants in sexual offence matters.
- 18** — That the Office of the Director of Public Prosecutions implement a complaints-handling process. In so doing, consideration should be given to established guidelines such as those developed by the Queensland Ombudsman (2003).
- 19** — That the current provisions in the *Criminal Law (Sexual Offences) Act 1978* (Qld) that restrict the publication of the identity of a person charged with a sexual offence be retained.
- 20** — That the definition of a ‘prescribed sexual offence’ contained in section 3 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) be deleted and replaced with a new definition modelled on the definition of a ‘sexual offence’ that appears in section 4 of South Australia’s *Evidence Act 1929*.
- 21** — That section 10(3)(b) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) be amended to include a prohibition on naming a person who is under investigation by the police, with the proviso that identifying information about a suspect can be released if it is necessary to ensure the safety of a person or the community and/or to help locate the suspect or the complainant or otherwise assist the investigation.
- 22** — That the Queensland Police Service amend the references in paragraph 1.10.11 (xix) of the Operational Procedures Manual that relate to the name of a defendant being disclosed ‘following an appearance in open court’, so that they are consistent with the various prohibitions on naming a defendant set out in the *Criminal Law (Sexual Offences) Act 1978* (Qld). Paragraph 1.10.11 (xix) should therefore read: ‘Members are not to supply information to the media that identifies a defendant charged with a “prescribed sexual offence” prior to the defendant being committed for trial or sentence’. A similar amendment should also be made to the Queensland Police Media Guidelines.
- 23** — That there be no change to the current provisions within the *Criminal Law (Sexual Offences) Act 1978* (Qld) that prohibit the publication of the identity of a person charged with a ‘prescribed sexual offence’ until the person has been committed for trial or sentence.
- 24** — That the Crime and Misconduct Commission review the implementation of the Commission’s recommendations arising from the Inquiry into the Handling of Sexual Offence Matters by the Criminal Justice System, and report to Parliament in two years’ time.

# **PART I: BACKGROUND**

## THE INQUIRY

***This chapter explains the events that led to the Inquiry and the role of the CMC in conducting the Inquiry.***

### CATALYST FOR THE INQUIRY

The investigation, prosecution and discontinuance of charges against swimming coach Scott Volkens in September 2002 generated widespread public interest in the way sexual offences were being handled by the Queensland criminal justice system. It especially brought under scrutiny the transparency of decision-making processes by the police and the Office of the Director of Public Prosecutions (ODPP).

The police investigation of the Volkens case and the ODPP's decision to drop charges were investigated by the Crime and Misconduct Commission (CMC) through its complaints process. The results of that investigation are presented in the CMC's recently released report *The Volkens Case: Examining the conduct of the police and prosecution* (CMC 2003). The summary of that report is enclosed as Appendix I of this report.

Essentially, the CMC investigation did not disclose any evidence of misconduct on the part of any police officer. The investigation did, however, raise some concerns about the arrest process, the thoroughness of the police investigation and supervision processes, and the inexperience of the arresting officer. Similarly, the CMC investigation did not disclose any evidence of official misconduct on the part of any officer of the ODPP. However, in the CMC's view, the process leading to the decision to drop all charges against Scott Volkens was unsatisfactory. The CMC outlined several areas of concern, especially about the relationship between the ODPP and Mr Volkens's defence team.

Media interest in the Volkens case stimulated public interest in the broader, systemic issues involved in the handling of sexual offences by the criminal justice system. This report documents the findings of an Inquiry that reviewed these broader, systemic issues.

### ROLE OF THE CRIME AND MISCONDUCT COMMISSION

The CMC has a legislative responsibility to combat and reduce the incidence of major crime, including criminal paedophilia (s. 4[1][a] and s. 23 of the *Crime and Misconduct Act 2001*).

The CMC also conducts research into policing issues and promotes continuous improvement of the police service (s. 52[2]). It can, at the request of the Premier, undertake research into the administration of criminal justice (s. 52[1][c]).

Each of these roles led to the CMC's decision to conduct a formal Inquiry into how the criminal justice system in Queensland deals with sexual offences.

## THE TERMS OF REFERENCE

On 27 September 2002 the CMC sought a reference from the Premier, the Honourable P. Beattie MP, to examine aspects of how the criminal justice system was dealing with reported sexual offences, pursuant to section 52(1)(c) of the *Crime and Misconduct Act 2001*.

On 3 October 2002, the Commission resolved:

1. To hold a hearing in relation to:
  - (a) the training, expertise and supervision of police officers investigating sexual offences
  - (b) the adequacy of existing guidelines and procedures for the initiation and discontinuance of the prosecution of sexual offenders by police and the ODPP, and
  - (c) the appropriateness of, and the circumstances in which, the publication of identifying information about a person charged with a sexual offence should be suppressed.
2. That closing the hearing would be contrary to the public interest.

Further, the Commission resolved to approve that the hearing be a public hearing.

## INQUIRY METHODS

To address the terms of reference, the CMC:

- called for, and reviewed, written and oral submissions from a range of key individuals and organisations
- conducted public hearings
- held wide consultation with stakeholders, and
- undertook broad-based research and data analysis.

Each of these is discussed further below.

### Submissions

Following the release of a discussion paper in October 2002 (CMC 2002a — see Appendix 2 of this report), the CMC called for submissions regarding the terms of reference by way of media releases, advertisements in most Queensland newspapers and letters of invitation to representatives of relevant government agencies and concerned interest groups.

Written submissions were received from 8 government departments and agencies, 10 legal organisations and representatives, 10 community organisations, 2 media groups, 3 academic groups, and 39 individuals, including:

- complainants in cases of sexual abuse
- men who claimed to have been falsely accused of a sexual offence (some of whom remain incarcerated)
- partners or spouses of complainants and accused
- a number of people who work professionally with complainants and accused, such as lawyers, psychiatrists, psychologists and educationists
- interested community members.

Appendix 3 provides a full list of the submissions received.

CMC research staff also spoke personally to 75 individuals who called to discuss their experiences with the criminal justice system.

The three complainants involved in the Volkens case agreed to have the transcripts of their interviews with CMC investigators used for the Inquiry. Mr Volkens also made a written submission to the Inquiry through his lawyers.

## Public hearings

Public hearings were held over two days: 20 and 21 November 2002. The hearings provided an opportunity to examine, publicly, the systemic issues involved in the handling of sexual offences by the criminal justice system. The Commission felt that it was important to consider the views of those organisations most closely associated with the issues, along with the collective views of individuals who had made independent submissions to the Inquiry regarding their own experiences of the criminal justice process.

Seventeen witnesses appeared at the hearing, including the Commissioner of Police and the Chief Superintendent in charge of the specialist sexual offences area of the Queensland Police Service, the Director and Deputy Director of Public Prosecutions in Queensland, the Commonwealth Director of Public Prosecutions, and the Queensland Public Defender. The hearing schedule is documented in Appendix 4 of this report.

The full transcripts of the hearings (CMC 2002b) and a number of the written submissions by organisations are available on the CMC website at <[www.cmc.qld.gov.au](http://www.cmc.qld.gov.au)> for a limited period.

## Consultation

Members of the Inquiry project team consulted:

- senior members of the judiciary from the major state courts in Queensland (the Magistrates, District and Supreme Courts and the Court of Appeal)
- regional representatives of the QPS and the ODPP
- regional representatives of sexual assault and victims of crime agencies
- regional representatives for the defence, including members of Legal Aid Queensland (LAQ) and the private bar
- a range of Brisbane-based community, legal and government agency representatives, and
- a number of concerned individuals.

These meetings — in total, 20 consultations — provided an opportunity for key parties to present their views about the issues raised by the Inquiry's terms of reference.

## Research

To gain further knowledge of the areas covered by the Inquiry's three terms of reference, a team of CMC legal and social science researchers:

- reviewed local and international research literature for material relevant to the terms of reference
- collated information about current policies and procedures for handling sexual offences in Queensland and other jurisdictions, both interstate and internationally
- analysed recent Queensland police and court data to determine relevant trends.

The research information collected in this way has been incorporated throughout this report, and contributes significantly to the recommendations.

## OUTLINE OF THE REPORT

The report is divided into two parts:

### **Part I provides background material relevant to the major issues raised at the Inquiry:**

**Chapter 2** describes the extent and impact of child and adult sexual assault as indicated by the research, including recent trends in prevalence. The chapter then explores the nature of disclosure of sexually abusive experiences and recent research in interviewing techniques and the videotaping of evidence. These topics are relevant to the terms of reference for this Inquiry because police and prosecutorial interviewing and communication techniques were raised as important issues.

**Chapter 3** documents current and proposed sexual offence legislation in Queensland. The chapter also explores the rights of victims.

**Chapter 4** describes how the criminal justice system (the QPS, the ODPP and the courts) currently responds to reported sexual offences, and highlights a number of previous reviews.

**Chapter 5** describes each stage involved in the decision to prosecute an offence in Queensland. The most recent data available on the number of matters that progress through each stage of the criminal justice system are presented and comparative data from other Australian States and overseas are provided.

### **Part II documents the major issues raised by the submissions to the Inquiry, the public hearings and the consultation process:**

**Chapter 6** documents general concerns raised across all terms of reference.

**Chapter 7** documents the major issues raised for the first term of reference: the training, expertise and supervision of police officers investigating sexual offences. Recommendations for reform are listed throughout the chapter.

**Chapter 8** documents the major issues raised for the second term of reference: the adequacy of existing guidelines and procedures for the initiation and discontinuance of the prosecution of sexual offenders by police and the ODPP. Recommendations for reform appear throughout the chapter.

**Chapter 9** documents the major issues raised for the third term of reference: the appropriateness of, and the circumstances in which, the publication of identifying information about a person charged with a sexual offence should be suppressed. Recommendations for reform appear throughout the chapter.

**Chapter 10** discusses other approaches to handling sexual offences than the criminal justice system.

**Chapter 11** summarises the major issues and list the recommendations.

## SEXUAL OFFENCE RESEARCH

***Consistent research evidence suggests that sexual abuse is a common event and that its physical, mental and social consequences place considerable demands on society — especially the criminal justice, social and health systems.***

***The research literature also reveals considerable advances in the understanding of the nature of disclosure of sexually abusive experiences and the most effective ways to interview victims.***

***To sensitise the reader to the concerns that are raised in this report, this chapter explores the research in these areas.***

### SEXUAL OFFENCES

International research indicates that between 15 and 30 per cent of females experience some form of unwanted sexual attention during childhood (Fergusson & Mullen 1999). An estimated 22 to 34 per cent of women will experience sexual abuse as an adult (Layman, Gidycz & Lynn 1996; Koss, Gidycz & Wisniewski 1987). Fewer males report abuse, but the prevalence is still significant: the most recent Australian population estimates suggest that about 4 per cent of males and 12 per cent of females have experienced an unwanted penetrative sexual event before the age of 16 years (Dunne, Purdie, Cook, Boyle & Najman, in press).

The actual estimate of the prevalence of abuse will depend, however, upon methodological issues such as the questions asked, the group surveyed, the cultural and legal mores of time or place (Laumann, Gagnon, Michael & Michaels 1994) and whether the victim chooses to disclose the event. Sexual abuse is an event that can rarely be validated by sources other than the victim.

Many criminologists and social scientists accept that there are qualitative differences between various criminal events, but sexual abuse is considered by many to be unlike any other crime: 'both in the way it transpires and in the way the criminal justice system responds to it' (Hecht-Schafran 1993, p. 1015).

While victims of crimes such as car theft or home burglary tend to hasten to report to police in an attempt to speed the recovery of stolen goods and begin the process of making insurance claims, sexual abuse victims often do not report the event to authorities or even to friends or relatives. The reasons for this reluctance are complex. The crime experienced by sexual abuse victims is more than an assault. The sexual nature of the act adds a highly complex dimension — not only is the victim assaulted, but the private physical and psychological boundaries of the person are invaded. As with victims of burglary or mugging, sexual assault victims are often confronted with feelings of anger, outrage and frustration. In addition, they face shame, guilt, confusion, embarrassment, self-blame and self-recrimination.

## Characteristics of sex offenders

As relatively few sex offenders are apprehended or convicted, an accurate characterisation of them is difficult. Just as there are many different types of abuse, so too are there many different types of offenders. Many studies overemphasise psychopathology because they are based on studies of unrepresentative samples (i.e. convicted sex offenders who may be the most compulsive, blatant and extreme in their offending).

However, it is well established that sexual abuse is primarily perpetrated by males (Finkelhor & Russell 1984; Goldman & Goldman 1988; Moran 1993; Fergusson & Mullen 1999; CJC 1999; QCC & QPS 2000a), who may be of any age (most being 21 to 40 years [CJC 1999]) and known to their victim in some way, many being relatives (CJC 1999).<sup>1</sup> Fergusson & Mullen (1999) note, however, that the majority of child molesters are not members of the victim's immediate family (such as parents or brothers). Most frequently reported perpetrators are acquaintances of the victim, spanning a wide range of people including family, friends and neighbours.

## RECENT TRENDS

Recent research in Australia and overseas indicates that there may have been significant reductions in the incidence of child sexual abuse in recent years, even though the overall prevalence of sexual abuse remains relatively high.<sup>2</sup> Brisbane researchers, Dunne et al. (in press) for example, reported several positive signs of change in the research that they conducted of a random sample of more than 4000 Australian adults aged 18–59 years:

- younger males and females reported significantly lower rates of child sexual abuse than their older counterparts
- women aged less than 16 years during the 1960s and 1970s (now aged over 40 years) were considerably more likely than contemporary women to say that they were an unwilling partner on their first occasion of sex (35 versus 8 per cent).

One possible explanation for this trend is that it reflects a decline in the incidence of sexual abuse: evidence, perhaps, that the investment in public awareness campaigns, prevention programs, criminal justice interventions and treatment during the 1980s and 1990s can work effectively to protect children from sexual abuse (Jones & Finkelhor, in press).

## THE IMPACT OF SEXUAL ABUSE

There is consistent evidence that sexual abuse can have serious physical, mental and social consequences for those who experience it, including increased risks for criminal behaviour and social disadvantage (see, for example, Finkelhor & Browne 1986; Fergusson & Mullen 1999; Dunne & Legosz 2000; Seigel & Williams 2003). Innovative research involving approximately 2000 pairs of twins by Brisbane and American researchers (Nelson, Heath, Madden, Cooper, Dinwiddie, Bucholz, Glowinski, McLaughlin, Dunne, Statham & Martin, in press), for example, documented significant risks of depression, attempted suicide, disordered conduct, alcohol and/or nicotine dependence, social anxiety, rape after the age of 18 years and divorce among twins who had been sexually abused, the highest risks being associated with abuse involving intercourse.

Another Brisbane study of a random sample of 400 women attending a family planning clinic compared the health of women who reported experiences of sexual abuse to those who did not (Legosz 2001). The research found many statistically significant associations between experiences of sexual abuse and poor general health or negative health behaviours (such as experiences of hospitalisation, medication usage, smoking, alcohol dependency and illicit drug

use). Also correlated with reported sexual abuse in that study were mental health problems such as depression, eating disorders and post-traumatic stress disorder and adverse social functioning, sexual practices and revictimisation (once abused, for example, women were more likely to report later experiences of sexual abuse and other forms of violence). Analysis of the data also suggested that childhood sexual abuse seems to have a greater impact on the victim's mental health, while adult sexual abuse seems to be more directly related to health behaviours (such as smoking and drug or alcohol abuse), physical health and social functioning. Most of the analyses also indicated that the more severe the abuse (such as penetrative experiences), the more likely the negative consequences.

A recent paper released by the Australian Institute of Criminology (Mayhew 2003) estimated the average financial costs for each sexual assault, *excluding* the costs of the criminal justice system response to the assault (the police, the ODPP, victim assistance and trial), to be in the vicinity of \$2500 per assault. It is clear, therefore, that the financial, legal, medical and social costs associated with sexual abuse are significant and warrant attention by the relevant agencies.

## THE DISCLOSURE OF SEXUAL ABUSE

Victims rarely report sexual abuse to official agencies and only infrequently to friends or family. According to surveys of crime victims, as few as 28 per cent of victims of sexual offences will report their victimisation (ABS 1999, p. 66). There may be a number of reasons for this, including the failure to recognise or label an experience as sexual abuse, forgetting or minimising experiences, feelings of guilt, responsibility, embarrassment or shame (Fleming 1996), or fear of reprisal by the perpetrator or revictimisation by the criminal justice system (Eastwood & Patton 2002).

Not only do relatively few victims disclose their abuse, a substantial proportion who do tell someone delay disclosure for significant periods of time, often until they reach adulthood. Factors such as the victim's age (younger than 16 years) and gender (males), the intrusiveness, severity, duration or frequency of the offence (particularly for penetrative offences) and the relationship of the offender to the victim (particularly for relatives) appear to play a major role in the complainant's decision to delay reporting the offence (CJC 1999, p. vii).<sup>3</sup>

It is important to understand the difficulty that children, in particular, have in disclosing abuse. They may be reluctant to say what has happened because of the inherent power relationship and the secrecy involved in the abuse and because of the way in which perpetrators select and groom children to accept such behaviour. Most perpetrators know the children they abuse well and, although they rarely use violence, they may use emotional blackmail, bribes, threats and other forms of manipulation to encourage compliance and prevent children from telling others. Observational and experimental studies have illustrated that children may be induced not to tell the truth in order to avoid punishment (Bussey 1992), keep a promise (Wilson & Pipe 1989; Peters 1991), protect someone they love (Bottoms, Goodman, Schwartz-Kenney, Sachsenmaier & Thomas 1990), or to avoid shame, guilt or embarrassment (Bussey 1992; Saywitz, Goodman, Nicholas & Moan 1991). In many cases, children do not disclose at all and the abuse is often discovered as the result of a suspicion by someone else (Sauzier, cited in Bussey & Grimbeck 1995).<sup>4</sup> Furthermore, disclosure is often followed by denial and then only fully revealed in a staged process with time and support being the key elements.

The process of disclosing sexual abuse can prove to be highly traumatic for many individuals and can itself be implicated in the long-term effects of the initial abuse. An important factor in minimising the negative effects has been shown to be the level of maternal support at the time of disclosure (Bussey & Grimbeck 1995).

The recently released *Sexual Assault and Violence in Ireland (SAVI)* report (McGee, Garavan, de Barra, Byrne & Conroy 2002), for example, indicated that 41 per cent of the participants who reported having been abused as a child had never told anyone about the abuse until they were asked about their experiences for the study, and just over one-third of those who reported being sexually assaulted as an adult (34 per cent) had never before disclosed the abuse.<sup>5</sup> Research in Brisbane has made similar findings (Legosz 2001). When asked why they had never revealed their experiences, the most common response in both studies was one of shame and embarrassment, although many said that 'no one had ever asked before'.

In the context of this Inquiry it is important to understand that in some cases of alleged sexual abuse, the victim can either retract allegations or can be inconsistent in the information imparted about the abuse (some estimates suggest, for example, that about 75 per cent of children initially deny being sexually abused when questioned about it after the initial allegation: see Sorenson & Snow 1991). Indeed, there is now well-established psychological research indicating that, in repeated telling of events, people will remember new details and omit others that they had previously reported (Westcott & Page 2002; Fivush 2002; Baker-Ward & Ornstein 2002).

Further, contrary to the view that false or malicious allegations are common, research indicates that in many cases victims deny or belittle their experiences. Sjöberg (2002), for example, undertook a unique review of police interviews with 10 children who had been sexually abused by the same man on 102 occasions. Videotapes of the actual abuse of the children were found by police in the home of the suspect. The nature and extent of the videotaped abuse was compared to the children's reports of the abuse. The author found that there was a significant tendency among children to deny or belittle their experiences. Some children simply did not want to disclose their experiences; some had difficulty remembering them. Sjöberg came to the conclusion that 'failure by children to disclose their experiences may have diverse explanations' (p. 312).

Professional, lay and legal attitudes vary, however, about the underlying assumptions of the nature of disclosure, retractions and inconsistencies in reports of sexual abuse. At one extreme are those who distrust the reliability of such reports and do not doubt the willingness of people to make malicious accusations. At the other extreme 'lie views which see retractions, inconsistencies, staggered disclosure and so on, not as weaknesses in the evidence but as strong pointers towards what is known about the victimology of sexual abuse' (Tully 2002, p. 95). Somewhere in the middle are more scientifically based doubts about allegations where a child is young and subjected to extreme prejudicial and suggestive inquiries by lay or professional investigators.

Such diversity of opinion poses problems for the criminal justice system as 'it is not uncommon for criminal proceedings to collapse if they are relying on a child's initial evidence' (Tully 2002, p. 94). The nature of how allegations of sexual abuse are disclosed, therefore, needs to be considered by all people who work in the criminal justice system, including police and prosecutors, the defence and members of the judiciary.

## **Recovered memories**

As discussed above, there is much evidence that experiences of abuse can be forgotten. In a landmark prospective validation study by Williams (1994a; 1994b; 1995), for example, 38 per cent of women, for whom the abuse during childhood had been reported to police and confirmed at the time, could not recall the episode 17 years later as adults.

Memory per se and recovered memories constitute different concepts, however, and the validity of the latter has been the focus of a 20-year controversy within the criminal justice system. Before 1995, many accused persons in the United

States were convicted of child sexual abuse on the basis of recovered memories alone. According to a number of submissions to the Inquiry, this has also happened in Queensland.

During 1995, however, the tide began to turn in the United States with some major court decisions being handed down declaring that recovered memories had no validity unless supported by independent evidence. Indeed, in the United States there have been a number of successfully prosecuted cases in which client-victims of Recovered Memory Therapy (RMT) have sued their therapists, with financial settlements often exceeding a million dollars.<sup>6</sup> At a meeting of the American Psychiatric Association in 2002, a team of panellists declared the RMT controversy dead, but they said that psychiatry still needed to help the main victims of RMT: those accused of heinous crimes that never happened (Robinson 2002).

In Australia, given the controversial nature of the topic, the Australian Psychological Society (APS) developed ethical guidelines for psychologists working with clients who report memories of abuse (APS revised May 2000). The guidelines make it clear that the percentage of child sexual abuse experiences that are (a) recalled for the first time during therapy and (b) are the subject of litigation is very small compared to those that are remembered but unreported, and whose effects may or may not require treatment. Nevertheless, the guidelines emphasise that reports of abuse long after the alleged events are difficult to prove or disprove in the majority of cases, and that child sexual abuse should not be retrospectively assumed solely on the basis of presenting symptoms. The guidelines suggest that, although clinical observations offer some support for the possibility of repressed memories, experimental research on memory is inconclusive.<sup>7</sup> The guidelines also stress that psychologists should be alert to the different demands of the therapeutic and legal contexts and that caution should be exercised when responding to questions from clients about legal action. Should psychologists be required to assist in obtaining evidence that is reliable in forensic terms, the guidelines stress that they should restrict themselves to procedures that increase reliability (such as the cognitive interview), and avoid techniques that are known to reduce reliability (such as hypnosis or leading questions).

In 1994, the then Queensland Director of Public Prosecutions, R.N. Miller QC, advised the QPS, the Bar Association, the Queensland Law Society, Crown Prosecutors, the Registrar of the Psychologists Board of Queensland, and the Chairman of the Royal Australian and New Zealand College of Psychiatrists (Queensland Branch) by letter (provided to the Inquiry by the ODPP 16.4.03) that he would not seek to tender evidence of a 'recollection' of a witness that emerged for the first time during or after hypnosis unless the following guidelines were satisfied:

1. The hypnotically induced evidence must be limited to matters which the witness has recalled and related prior to the hypnosis — referred to as the 'original recollection'. In other words evidence will not be tendered by the Crown where its subject matter was recalled for the first time under hypnosis or thereafter. The effect of this restriction is that only detail recalled for the first time under hypnosis or thereafter will be advanced as evidence.
2. The substance of the original recollection must have been preserved in written, audio or video recorded form.
3. The hypnosis must have been conducted with the following procedures:
  - (a) the witness gave informed consent to the hypnosis;
  - (b) the hypnosis was performed by a person who is experienced in its use and who is independent of the police, the prosecution and the accused;
  - (c) the witness's original recollection and other information supplied to the hypnotist concerning the subject matter of the hypnosis was recorded in writing in advance of the hypnosis; and
  - (d) the hypnosis was performed in the absence of police, the prosecution and the accused, but was video recorded.

The fact that the witness has been hypnotised will be disclosed by the

prosecution to the defence, and all relevant transcripts and information provided to the defence well in advance of trial in order to enable defence to have assistance of their own expert witness in relation to that material.

In 1995, Mr Miller included evidence obtained by the process called Eye Movement Desensitisation and Reprocessing (EMDR) within these guidelines.

There are no data available identifying how many cases of accused or incarcerated sexual offenders in Queensland included RMT, hypnosis or EMDR in their prosecution.

## False allegations

As sexual offences are often difficult to investigate, the perceived credibility of the alleged offender and the victim is important. However, how credibility is judged can be susceptible to social forces. Historically, women's accusations of rape tended to be ignored or downplayed, both by society at large and by the criminal justice system. Since the 1970s, when women's groups challenged the treatment of female rape victims, societal views of rape have changed and, as a result, so too has the criminal justice system's response to rape and other sexual offences. Thus, in Australia today, police guidelines for dealing with sex offending often state that the victims of sexual abuse (usually women) should be believed. For example, the Victorian Police Code of Practice for the Investigation of Sexual Assault (Victoria Police 2002) tells officers 'to never presume that an allegation of sexual assault is false'. While such an instruction can be seen as a triumph for women, there have been concerns raised about false allegations. More worrying are concerns that, at times, certain police investigative techniques — such as 'trawling' (usually in cases of historical allegations of sexual abuse) and the use of leading and suggestive questioning — could be generating false allegations (Home Affairs Committee 2002).<sup>8</sup>

Citizens Against False Sexual Assault Allegations Inc. (CAFSA), for example, believe that there are at least 80 Queensland men who claim to have been falsely accused, 35 of whom are currently in prison (this information was provided to the Queensland Forum on Justice in Sexual Abuse Allegations in December 2002).<sup>9</sup> Jenkins (2002) has also reported that a 'Forum relating to men' in Perth in 1998 was told that the Family Court in Western Australia 'is being overrun by malicious allegations of sexual abuse by mothers against fathers'.

However, empirical studies of child sexual abuse allegations in custody disputes contradict this position (Humphreys 1999). Recent reviews of thousands of domestic violence, family and criminal court proceedings by researchers in the United States have, for example, indicated that within custody disputes only about 2 per cent involve allegations of sexual abuse, and in less than half (48 per cent) the mother accuses the child's father of sexual abuse. These studies suggest an under-reporting of abuse, rather than the reverse (Thoennes & Tjaden 1999; McIntosh & Prinz 1993).

Reviews of Family Court proceedings in Australia have indicated similar results, whereby only a comparatively small proportion of cases contained allegations of child sexual abuse (about 1–2 per cent) and, again, mothers were the source of the allegation in only 42 per cent of the cases (see Jones & McGraw 1987; Bordow 1987; Hume 1996; Young 1998; Humphreys 1999) suggesting that reports of child sexual abuse in Family Courts are rare. However, in a review of Family Court matters in South Australia, Brown (1998) teased out the data to reveal that, although the proportion of such cases within the court's total workload was small — some 5 per cent of all children's matters — it was extremely significant to the court in terms of its workload. For, while the cases started at 5 per cent of the total, they grew, as a proportion of cases, to 50 per cent at the possible mid-point of proceedings (the pre-hearing conference), and then diminished to 25 per cent at the end point (at trial). Thus, they did not resolve in the same way that other cases did — that is, without much intervention from the court. Rather

the reverse; they resolved only after considerable intervention, much of which was counterproductive.

It is also important to note that much of the literature supports the notion that false allegations happen in only a small proportion of total allegations of sexual abuse. A recent review of false allegations of sexual abuse in the Family Court in South Australia, for example, determined that approximately 9 per cent of allegations were, indeed, false (Brown 2003). Therefore, the conclusion has been drawn by many that 'the most likely explanation for a report of sexual abuse from a child is that the abuse occurred' (Berliner & Conte 1993) and that the danger of a child making up events was quite minimal (Parkinson 1990) because it has been shown that 'children cannot fabricate detailed accounts of sexual activity unless they have been involved or witnessed it' (Kempe 1977). As Young (1998, p. 11) concludes 'the picture of rampant false allegations is not only a myth but ... the existence of the myth serves to maintain a status quo that protects sexual abusers at the expense of children'.

The consequences of a false allegation can be catastrophic, however, for both the accused and their families. In a 'worst case scenario', the accused will be convicted and sentenced to a lengthy term in prison. The experiences of the falsely accused include having to live with the allegations hanging over them for a long time, possible suspension from employment while the investigation is being carried out, subjection to publicity, and permanent staining of their character — all of which will have an adverse impact on their family and work life (Home Affairs Committee 2002).

### **Interviewing victims of abuse**

Victims of sexual abuse are often the only available sources of information about their experiences. Considerable research efforts have been made, therefore, to understand how a person's testimony can be as useful and reliable as possible. The research has resulted in surprisingly broad international consensus regarding optimal interviewing practices.

It has been argued that children's reporting of accurate and truthful information is as much a function of the types of questions they are asked and the context in which the disclosure occurs as it is of their own memory of the experienced event. The disclosure process is difficult and by focusing exclusively on children's vulnerabilities, without questioning the methods and procedures used by those who interview child witnesses, it is unlikely that the reliability of children's evidence will be increased (Bussey 1995, p. 192).

It has also been found that accuracy is improved by the use of open-ended questions that elicit narratives about the events that have occurred. Unfortunately, agreement regarding the manner in which interviews should be conducted has not been paralleled by changes in how interviews are actually conducted in the field (Lamb, Sternberg, Orbach, Hershkowitz, Horowitz & Esplin 2000; Sternberg, Lamb, Orbach, Esplin & Mitchell 2001). However, researchers at the National Institute of Child Health and Human Development (NICHD) in the United States have recently demonstrated that it is possible to effect major improvements in the quality of forensic interviewing when interviewers are trained to follow a very detailed and specific interview protocol and are given continuing supervision and feedback on simulated and actual forensic interviews over time (Sternberg et al. 2001). In other words, ongoing training, supervision and feedback, rather than a single intensive training session, appear to be crucial. This form of training and supervision is costly, but researchers have yet to identify any less costly techniques that are equally effective. It should also be remembered that the costs associated with the progression of a case through the criminal justice system are also high and can be wasted if the matter fails or is withdrawn due to inadequate or inappropriate police interviewing.

## Videotaping interviews

Hearsay is typically defined as an out-of-court statement made by one person (the declarant) that is presented in court by someone other than the declarant (the hearsay witness) as proof of the fact asserted. Any out-of-court statements are considered as hearsay, including pre-trial interviews with child witnesses. Hearsay testimony is inadmissible unless it falls within an established set of exceptions. However, most jurisdictions in the United States have begun allowing hearsay testimony under special child-abuse hearsay exceptions, and there is evidence that they are used frequently (Warren, Nunez, Keeney, Buck, & Smith 2002). But despite its increasing use, hearsay evidence remains controversial and concerns have been raised about its impact on the outcome of trials.

Preliminary studies using both mock and actual trials in England<sup>10</sup> and the United States indicate that (a) children who testify via videotaped interviews are less anxious than children who testify in court and (b) interviewers who question children on videotape are more accommodating and more supportive than attorneys who question children in court. Importantly, the percentage of trials that result in a guilty verdict is basically the same, regardless of whether a child's testimony is presented in person or via video (Redlich, Myers, Goodman & Qin 2002; Warren et al. 2002).<sup>11</sup>

There may be significant downstream effects should the videotaping of evidence be used: it may overcome concerns raised by prosecutors, juries and others regarding the consistency of evidence and it may reduce the stress on victims by eliminating the need for multiple interviews. Videotaping also creates an objective record of the child's version of events and may reduce the need for further interviews, thus limiting the opportunity for inconsistencies to creep into the evidence.

While legal procedures have been modified to assist complainants, particularly child complainants, the effects of these changes on child complainants, the perceptions of jurors, and the likelihood of conviction, are just beginning to be studied. The effects of the implemented measures, which aim to accommodate children's needs, also need to be assessed for their effects on defendants' rights (videotaped forensic interviews have often been viewed as a threat to the defendant's right to face their accuser, for example). The extent to which such evidence reduces stress on the victim and the longer-term impact on jury decisions also need to be determined. While there appears to be some evidence that videotaped evidence is better for the victim with little impact on the occurrence of guilty or not guilty verdicts, it is important to be sure of the longer-term effects of such changes and innovations.

## SUMMARY

While there is some evidence that the incidence of sexual abuse has been declining in recent years, the prevalence of abuse remains high and there are many unreported offences that may, eventually, find their way into the criminal justice system. Given the upsurge in research into all aspects of sexual offences in recent years, the need to understand how disclosure of sexually abusive experiences actually occurs has reached prominence and there are now well-established techniques for talking to, and interviewing, victims. This research clearly has implications for how the criminal justice system responds to victims of sexual abuse who decide to report the offence, and how sexual offences may best be processed by the system. In practical terms, however, the process remains problematic. Issues about the disclosure of abuse, police interviewing techniques and how the prosecution and defence might use the process of disclosure during the prosecution of a sexual offence are raised in the second part of this report, which explores the concerns raised by submissions to the Inquiry about the current situation in Queensland.

Recent concerns about recovered memories and false allegations of sexual abuse have also led to research that has:

- identified potential tools that may be used to assess the validity of allegations of sexual abuse,
- developed guidelines for psychologists who treat victims of abuse, and
- developed legal restrictions such as those imposed in Queensland in 1994 by the Director of Public Prosecutions, Mr Royce Miller QC.

Again, these issues were raised by many submissions to the Inquiry regarding the Queensland situation during the last decade and are explored further in Part II of this report.

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## ENDNOTES TO CHAPTER 2

- 1 'Known' refers to an acquaintance or friend (including a girlfriend or boyfriend); 'relative' could include mother, father, stepmother/stepfather, sister, brother, half sister/brother, daughter/son, daughter-/son-in-law, sister-/brother-in-law, mother-/father-in-law, grandmother-/grandfather-in-law, grandmother/grandfather, step-grandmother/father, cousin, step-cousin, cousin-in-law, granddaughter, grandson, grandson-in-law, aunt, step-aunt, aunt-in-law, uncle, step-uncle, uncle-in-law, niece, step-niece, niece-in-law, nephew, step-nephew, nephew-in-law.
- 2 See Jones, Finkelhor & Kopiec (2001) and Jones & Finkelhor (in press) for trends in the USA; Schein, Bideman, Baras, Bennett, Bisharat, Borkan, Figelman, Gordon, Stenmatz & Kitai (2000) for trends in Israel; Trocme, Fallon, MacLurin & Copp (2002) for trends in Canada; and McGee et al. (2002) for trends in Ireland.
- 3 For example, of the offences reported to the QPS between 1994 and 1998:
  - Many offences of wilful obscene behaviour (63 per cent) were reported within the first month, while only 12 per cent of indecent assaults on children and 32 per cent of rapes were reported within the first month.
  - Only a quarter of offences perpetrated by relatives (22 per cent) were reported within the first month, compared to 89 per cent of offences perpetrated by unknown assailants.
  - Many offences committed against adults (63 per cent) were reported within the first month, compared to very few offences (18 per cent) committed against children younger than 16 years.
  - Almost twice as many females (33 per cent) had reported the offence within the first month as males (16 per cent).
- 4 According to the QCC & QPS (2000b, p. 4), in 1998–99 the police investigated about one-quarter of all substantiated notifications of child sexual abuse that were reported to the Department of Families. Parents, guardians, relatives and school personnel provided about one-half of the notifications. The only people required by legislation to report suspected or alleged child sexual abuse in Queensland are:
  - medical practitioners (s. 76K of the *Health Act 1937* [Qld]);
  - the Commissioner for Children and Young People (s. 20 of the *Commission for Children and Young People Act 2000* [Qld])
  - Family Court personnel, a family and child counsellor, a family and child mediator and an arbitrator (*Family Law Act 1975* [Cwlth] ss. 67Z and 67ZA)
  - employees of licensed residential care services and Department of Families officers and employees (s. 148 of the *Child Protection Act 1999* [Qld]).
- 5 Other similar findings were reported by Finkelhor & Dziuba-Leatherman (1994), Anderson, Martin, Mullen, Romans & Herbison (1993) and the QCC & QPS (2000a).
- 6 RMT is a form of counselling that involves suggestive forms of therapy such as hypnotism, guided imagery and dream analysis. It concentrates on the recovery of repressed memories from the past.
- 7 Professor Peter Sheehan AO, Vice-Chancellor of the Australian Catholic University in Brisbane, reported to the Queensland Forum on Justice in Sexual Abuse allegations in December 2002, that:

the research data indicate, not surprisingly perhaps, that memories of distant events, and particularly memories of early childhood, are especially susceptible to distortion and error ... memory is far less literal and prone to error than we think ... [and] one

must look closely at [its] validity. We need to find ways of separating verbal reports that we can trust from ones that we can't. We need to find ways of assessing validity that separates conviction from fact ... it is the issue of memory consistency or reliability ... that goes to the heart of the question of whether information elicited through reports of abuse can stand up in court.

- 8 The term 'trawling' refers to the process where police go further and contact potential witnesses who have not been named or even mentioned in initial allegations. For example, when allegations of a sexual nature have been made against someone in an institutional setting, the police will 'trawl' by contacting all, or a proportion of, those who were residents at that institution during the period when the abuse was alleged to have occurred. The concern with trawling is that it is an 'absolutely unregulated process and it is a process which is almost tailor-made to generate false allegations' (Home Affairs Committee 2002, p. 5).
- 9 CMC researchers attended this forum. The forum resolved to report to the Queensland Parliament in February 2003. At the time of publication of this report, that report had not been released.
- 10 Under the Criminal Justice Act 1991 (UK), videotapes of forensic interviews with children under 14 years of age are admissible in criminal cases.
- 11 Although one study indicated that alleged perpetrators in cases where disclosures had been videotaped were more likely to plead guilty (Henry 1999).

## SEXUAL OFFENCE LEGISLATION

***Sexual abuse is recognised as a criminal offence in Queensland law. There have been some major changes in sexual offence legislation in recent years and more are proposed for the near future. While victims' rights have been recognised, there may still be room for refinement.***

***This chapter continues to set the scene for the issues and recommendations arising from the Inquiry by:***

- ***outlining the relevant legislation for dealing with sexual offences in Queensland***
- ***documenting some proposed legislative changes relevant to sexual offences, and***
- ***examining the relatively controversial area of victims' rights.***

### QUEENSLAND LEGISLATION

Most criminal offences are set out in the *Criminal Code* (Qld). There are two main categories of sexual offences:

- 1 offences committed against children (where consent is not considered to be an issue)
- 2 more general offences that can be committed against children or adults.

The Criminal Code contains a number of offences committed against children under a specified age, being 16 years, 18 years, or 'the prescribed age'. The offence of indecent treatment of a child under 16 (s. 210) is the most frequently charged of the child sex offences.<sup>12</sup> This offence can be committed in a number of different ways, including: indecent dealing with a child; procuring a child to commit an indecent act; permitting oneself to be indecently dealt with by a child; exposing a child to an indecent act; exposing a child to indecent material (such as a photo) without a legitimate reason; and taking indecent photos or videos of a child without a legitimate reason. Other child-specific offences include:

- carnal knowledge of a child under 16 years (s. 215)
- sodomy<sup>13</sup>
- maintaining a sexual relationship with a child, which requires proof of three or more sexual offences (s. 229B)<sup>14</sup>
- knowingly enticing or recruiting a person under the age of 18 years to engage in carnal knowledge (s. 217)
- selling or publicly displaying obscene publications depicting a child under 16 years (s. 228[2]).

Other sexual offences that may be committed against children or adults include:

- incest (s. 222), which is carnal knowledge with or of the person's offspring or other lineal descendent or sibling, parent, grandparent, uncle, aunt, nephew

## LEGISLATION REFERRED TO IN THIS CHAPTER

<i>Child Protection Act 1999</i> (Qld)	<i>Director of Prosecutions Act 1984</i> (Qld) now the <i>Director of Public Prosecutions Act 1984</i> (Qld)
<i>Commission for Children and Young People Act 2000</i> (Qld)	<i>Evidence Act 1977</i> (Qld)
<i>Corrective Services Act 2000</i> (Qld)	<i>Evidence (Protection of Children) Amendment Bill 2003</i>
<i>Criminal Code</i> (Qld)	<i>Penalties and Sentences Act 1992</i> (Qld)
<i>Criminal Law Amendment Act 1945</i> (Qld)	<i>Penalties and Sentences (Serious Violent Offences) Amendment Act 1997</i> (Qld)
<i>Criminal Law Amendment Act 1997</i> (Qld)	<i>Prostitution Act 1999</i> (Qld)
<i>Criminal Law Amendment Act 2000</i> (Qld)	<i>Sexual Offences (Protection of Children) Amendment Act 2003</i> (Qld)
<i>Criminal Law (Sexual Offences) Act 1978</i> (Qld)	<i>Victims Rights Act 1996</i> (NSW)
<i>Criminal Offence Victims Act 1995</i> (Qld)	
<i>Dangerous Prisoners (Sexual Offenders) Bill 2003</i>	

or niece (the offence also applies to relationships of an adoptive, half or step nature, including de facto and foster relationships; consent is immaterial)

- rape (s. 349), which is carnal knowledge with or of another person without their consent, including vaginal or anal penetration
- procuring sexual acts by coercion (s. 218)
- conspiracy to induce a person by fraud or false pretences to permit a person to have carnal knowledge with or of them (s. 221)
- assault with intent to commit rape (s. 351)
- indecent assault or procuring another person, without the person's consent, to commit an act of gross indecency or to witness an act of gross indecency (s. 352)
- prostitution (ss. 229C–229O), including procuring a person to engage in prostitution, being found in, or leaving, a place suspected of being used for prostitution by two or more prostitutes; participating in the provision of prostitution; having an interest in premises used for the purposes of prostitution — the *Prostitution Act 1999* (Qld), which took effect on 1 July 2000, provides for licensed brothels to operate legally in Queensland; however, the Act maintains strict penalties for any involvement of young people under the age of 18 years.

The *Criminal Law Amendment Act 1997* (Qld) created a number of new offences in the Criminal Code, broadened the operation of some existing offences and increased the penalties for some offences, particularly violent offences and sexual offences. Some of the amendments were as follows:

- replacing the definition of 'carnal knowledge' with a new definition that says carnal knowledge is 'complete on penetration to any extent'
- removing the anomaly between penalties for carnal knowledge of girls and sodomy of boys
- removing the requirement for a judicial warning to be given to a jury about the dangers of acting upon the uncorroborated evidence of witnesses from all of the sexual offence provisions
- widening the types of sexual relationships covered by the offence of incest to include uncles, aunts, nephews, nieces and a limited category of half, step or adoptive relations
- amending the definition of rape to, firstly, make it an offence for either a male or a female to commit rape upon the other and, secondly, to include non-consensual sodomy in the definition
- amending section 93A of the *Evidence Act 1977* (Qld) (under which a videotaped recording of an interview between an investigator and a child

under the age of 12 can be led as evidence) so that it also applies to an intellectually impaired person.

In the same year, the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) amended the *Penalties and Sentences Act 1992* (Qld) by creating a separate sentencing regime for offenders convicted of certain offences defined under the legislation as 'serious violent offences'. Under this separate regime, offenders must serve 80 per cent of the term of imprisonment imposed, or 15 years, whichever is the lesser, before being eligible for parole.

The Criminal Code defines 'serious violent offences' to include:

- unlawful sodomy (s. 208)
- attempted sodomy (s. 209)
- indecent treatment of children under 16 (s. 210)
- carnal knowledge with or of children under 16 (s. 215)
- abuse of intellectually impaired persons (s. 216)
- procuring young person etc. for carnal knowledge (s. 217)
- procuring sexual acts by coercion etc. (s. 218)
- incest (s. 222)
- maintaining a sexual relationship with a child (s. 229B)
- rape (s. 349)
- attempt to commit rape (s. 350)
- assault with intent to commit rape (s. 351)
- sexual assault (s. 352).

The *Criminal Law Amendment Act 2000* made further amendments to the Criminal Code and the Evidence Act in accordance with recommendations contained in the *Report of the Taskforce on Women and the Criminal Code* (Queensland Government 2000a). Some of the key amendments to the Criminal Code were as follows:

- Section 215 (previously headed 'carnal knowledge of girls under 16') was amended to cover women who have sexual intercourse with underage boys.
- Section 228 (headed 'obscene publications and exhibitions') was amended to cover the distribution of obscene computer images.
- A new offence was inserted outlawing the practice of female genital mutilation or female circumcision (see s. 323A).
- A new definition of 'consent' was inserted for rape and sexual assault offences (see s. 348).
- The rape provision was amended so that:
  - the offence of rape includes penetration by the offender of the vagina, vulva and anus of the victim by any body part or object
  - the offence of rape includes penetration of the mouth of the victim by the offender's penis
  - it is clear that rape can be committed by a female.

Some of the key amendments to the Evidence Act were as follows:

- Sections 9 and 9A were amended so that the scheme that allows a child to give unsworn evidence will also apply to any person who does not understand the nature of an oath (for example, a person with an intellectual disability).
- Section 20 was replaced with a new provision allowing the court to disallow — or inform a witness that he or she need not answer — a question as to credit if the court considers an admission of the question's truth would not

materially impair confidence in the reliability of the witness's evidence.

- Section 21 was replaced with a new provision allowing the court to disallow — or inform a witness that he or she need not answer — a question that the court considers is an improper question. An improper question is defined as a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive.
- Section 21A was amended to expand the factors that a court is to take into account in declaring a person to be a 'special witness'.<sup>15</sup> The additional factors are: age, level of understanding, relationship to any party in the proceeding, and the nature and subject matter of the evidence.
- Sections 21L to 21S were inserted to prohibit an unrepresented accused from cross-examining, in person, children, intellectually impaired persons and victims of sexual or violent crime. A court can make an order that Legal Aid Queensland (LAQ) provide the accused with legal assistance for the sole purpose of cross-examining the protected witness.
- Section 93B was inserted to allow certain hearsay evidence to be admitted as evidence in certain criminal proceedings (including rape or sexual assault proceedings).

In addition:

- Section 4 (rule 2) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) was amended so that any questioning of the complainant's sexual activities with the accused would be subject to the court's leave.
- Section 14 of the *Criminal Offence Victims Act 1995* (Qld) was amended to make it clear that it is not a requirement for a victim to give the prosecutor details of the harm suffered by the victim, and the absence of those details at sentence does not of itself give rise to an inference that an offence has had little or no impact on the victim.

The Criminal Law (Sexual Offences) Act is another piece of legislation that is relevant to the prosecution of sexual offences. It contains three types of provisions:

- 1 It sets out some specific rules of evidence concerning sexual offences. For example, it says that 'without leave of the court, evidence shall not be received as to the sexual activities of the complainant with any person' (s. 4 [rule 2(b)]).
- 2 It requires a courtroom to be closed to the public while a complainant is giving evidence in a committal hearing or trial (s. 5).
- 3 It prohibits the media from naming a sexual offence complainant at any time and it prohibits the media from naming a person accused of committing certain sexual offences before the accused is committed for trial or sentence. (This prohibition on naming provisions is dealt with in detail in Chapter 9 of this report.)

## Recent changes

Project Axis was established as a wide-ranging inquiry into child sex offending in Queensland (QCC & QPS 2000a; 2000b; 2000c; 2000d). The Department of Premier and Cabinet (Queensland Government 2002a, pp. 13–14) recently announced that the Attorney-General has developed a package of reforms in response to the Project Axis reports (QCC & QPS 2000a; 2000b) and the report of the Queensland Law Reform Commission (2000), which reviewed the evidence of children in the same year. The first round of reforms is contained in the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld), the relevant provisions of which came into operation on 1 May 2003. Some of the key amendments are as follows:

- An increase in the maximum penalty for the offence of indecent treatment of children under the age of 16, from 10 years to 14 years imprisonment.

- An increase in the maximum penalty for the offence of indecent treatment of children under the age of 12, or where there are other aggravating features, from 14 years to 20 years imprisonment.
- Section 9 (sentencing guidelines) of the Penalties and Sentences Act has been amended so that the principle that ‘a sentence of imprisonment is a sentence of last resort’ no longer applies to an offence of a sexual nature committed against a child under the age of 16 years. Section 9 now contains a separate provision that lists the factors that should be taken into account in sentencing a child sex offender. Some of these factors are:
  - the effect of the offence on the child
  - the age of the child
  - the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another
  - the need to protect the child, or other children, from the risk of the offender re-offending
  - the need to deter similar behaviour by other offenders to protect children
  - the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community.
- The creation of a new offence in the Criminal Code — it is now a crime for an adult to use electronic communication with intent to: procure a person under the age of 16 years to engage in a sexual act; or without legitimate reason, expose a person under the age of 16 years to any indecent matter. Section 218A of the Criminal Code will permit prosecution of offenders where the alleged victim is not in fact a child under the age of 16 years but is another adult — for example, a police officer conducting an operation to detect paedophiles attempting to procure children to perform sexual acts.
- A new version of section 229B (maintaining a sexual relationship with a child) is inserted into the Criminal Code to restore the intended focus of the offence on an unlawful sexual relationship or course of conduct. The requirement to prove three acts of a sexual nature has been removed and instead the offence is established by proof of the relationship (that is, a course of conduct).
- The *Corrective Services Act 2000* (Qld) has been amended so that release to work, home detention and parole orders must now include a condition requiring prisoners to report to a particular police station within 48 hours of their release and thereafter at a frequency, and for a reporting period, decided by the Corrections Board.
- Under section 19 of the *Criminal Law Amendment Act 1945* (Qld), a trial judge or another court could order a child sex offender to report personally to a particular police station within 48 hours of their release from custody and thereafter report (in writing) any change of name or address, again within 48 hours, to a particular police station. Section 19 has been amended and section 19A inserted into the Criminal Law Amendment Act. Under these two sections, a court can now also order a child sex offender to report personally to a particular police station for a particular period of time and frequency.

The second stage of reforms proposed by the Queensland Government is contained in the Evidence (Protection of Children) Amendment Bill 2003 tabled in Parliament on 13 May 2003. The Explanatory Notes (page 1) state that:

A great deal of reputable research has criticised the Queensland criminal justice system’s treatment of child witnesses, particularly child victims of sexual assault. Recent research indicates that children’s experiences in the criminal justice system deter them from making further reports of sexual abuse.

The Bill proposes that a new division be inserted into the Evidence Act (Division 4A), which contains a number of new measures for affected child

witnesses. An 'affected child' is defined to include a child under 16 years of age who is a witness in a criminal proceeding for an offence of a sexual nature. Division 4A will also apply to a 16- or 17-year-old who satisfies the definition of a 'special witness' in section 21A of the Evidence Act.

The key features of the new division are as follows:

- In general, children will no longer be required to give evidence at a committal hearing; instead, their evidence will be constituted by an out-of-court written or recorded statement such as a recording of an interview with a police officer (which is admissible under section 93A of the Evidence Act).<sup>16</sup>
- There is a presumption in favour of prerecording a child's evidence (for use during the trial) at a preliminary or pre-trial hearing. The preliminary hearing will be presided over by a Judge and will involve the taking of a child's evidence-in-chief and any cross-examination and re-examination. The recording of the child's evidence will then be played during the trial.
- If a child has to give evidence during a committal hearing or a trial then:
  - closed circuit television (CCTV) facilities or a screen must be used
  - all persons other than 'essential persons' must be excluded from the courtroom
  - the child is entitled to have a support person.

The Bill also proposes these other important amendments to the Evidence Act:

- section 93A (which provides for out-of-court statements to be tendered as evidence) apply to all children under 16 years of age and 16- and 17-year-olds who satisfy the definition of a 'special witness' in section 21A
- removal of the requirement in section 93A for a statement made to someone other than a person investigating to be made soon after the event
- the definition of a 'special witness' in section 21A of the Act apply to all children under 16 years of age
- the court to have the power to limit the questioning of a special witness by time or the number of questions asked on a given issue
- the rules about the giving of evidence by spouses be changed so that spouses are compellable to give evidence on the same basis as other witnesses, and the marital communications privilege is removed
- insertion of a new regime for the disclosure of the prosecution case to the defence.

Two significant amendments to other Acts are as follows:

- a new provision in the Criminal Law (Sexual Offences) Act (s. 4A) that changes the law on the admissibility of evidence about complaints made by a sexual offence complainant (that an offence has been committed). The new provision says:
  - evidence about a complaint is admissible regardless of when the complaint was made;
  - a Judge must not warn or suggest to the jury that a complainant's evidence is more or less reliable only because of the length of time between the alleged offence and any complaint.
- Section 349 of the Criminal Code (which sets out the offence of rape) is amended to make it clear that a child under 12 years of age is incapable of consenting to sexual intercourse or penetration. One of the elements of the offence of rape is the absence of consent: this amendment means that consent will not be a relevant issue in deciding whether or not to prosecute a person for the rape of a child under 12 years of age.

The third and final stage of the reform package will be the development of a vulnerable witness policy by the Department of Justice and Attorney-General

and an invitation to the judiciary to develop guidelines for implementing the new measures contained in the Evidence (Protection of Children) Amendment Bill 2003 (Qld). The department is also upgrading CCTV facilities in the higher courts and installing new facilities in a further 10 courts to be determined on a workload basis.

On 3 June 2003, shortly before this report was published, the Dangerous Prisoners (Sexual Offenders) Bill 2003 was tabled in Parliament. This Bill (if passed) will enable the Attorney-General to apply to the Supreme Court for an order that a serious sexual offence prisoner should not be released at the expiration of their term of imprisonment but should continue to be detained in custody for 'an indefinite term for control, care or treatment' or, alternatively, that the prisoner be released subject to certain conditions, including that the prisoner be under the supervision of a corrective services officer. According to the Explanatory Notes, this Bill responds to growing community concern about the risks associated with releasing convicted sex offenders who are not rehabilitated back into the community without any supervision at the conclusion of their sentence.

## VICTIMS' RIGHTS

Complainants sometimes decide not to proceed with their complaint. This could be for a range of reasons — including factors associated with the court process itself such as the length of time the complainant is likely to be in the witness box during the committal or trial hearings and the likelihood of the complainant having to see the defendant in court.<sup>17</sup> The experience of the committal hearing may also discourage a truthful complainant from proceeding, or the trial date may change many times and this may lead the complainant to feel disillusioned with the process and to no longer be willing to participate. If it is considered important to punish guilty offenders, however, consideration of the rights of victims is vital to the successful progression of matters through the criminal justice system.

A fundamental feature of criminal trials in Australia is that the accused person is regarded as innocent until the Crown can prove *beyond a reasonable doubt* that they are guilty of the particular offence in question. In order to ensure that innocent people are not convicted, the criminal justice system dictates that the right of an accused to fairness during the investigation phase, the course of the trial and during any subsequent appeals is essential (OPM 2002, Chapter 2.12.1). This notion of fairness does not traditionally involve separate consideration of fairness to anyone else, such as the complainant (QPS 2001, p. 30). It is sometimes said that victims are often the forgotten element within the criminal justice system: instead of being treated as an integral part of the criminal justice process, victims often complain that they are made to feel like mere witnesses to a crime. In the Australian criminal justice system, complainants are not a party to criminal proceedings — even though their cooperation and participation are essential to it.<sup>18</sup> As a result, complainants may often participate in the criminal justice system without feeling fully engaged in or fully respected by it.

In 1995, the Queensland Government responded to increasing concerns about the position of victims in the criminal justice system by passing the *Criminal Offence Victims Act 1995* (COVA). The purpose of this Act was twofold:

- 1 To advance the interests of victims of crime by stating some fundamental principles of justice that should be observed in dealings with victims of crime (see s. 4[2] of COVA).

These principles are based on the 1985 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which was adopted by the Queensland Government prior to the enactment of COVA.

- 2 To relocate (and amend) the provisions governing the making of victim compensation claims against defendants and the Queensland Government from the Criminal Code.<sup>19</sup>

The term 'victim' is defined quite broadly: it is not limited to a person who suffers harm directly as a result of a crime. Section 5 of COVA defines the term 'victim' as a person who has suffered harm from a violation of the State's criminal laws:

- a) because a crime is committed that involves violence committed against the person in a direct way;
- b) because the person is a member of the immediate family of, or is a dependant of, a victim mentioned in paragraph (a); or
- c) because the person has directly suffered the harm in intervening to help a victim mentioned in paragraph (a).

The 12 fundamental principles of COVA are listed on the next page.

## **Who has obligations under COVA?**

COVA imposes obligations on 'public officials' and 'public entities'.<sup>20</sup>

A 'public official' is defined in COVA to mean:

- a police officer
- a prosecutor in a criminal trial
- an officer of the QPS or the ODPP
- an officer or employee of a public entity, or
- (for some purposes only) a corrective services officer.<sup>21</sup>

A 'public entity' is defined to mean:

- the QPS
- the ODPP
- a government department
- the administrative office of a court or tribunal, or
- any entity prescribed under a regulation.

It does not include a government-owned corporation (more commonly known as a GOC) and certain other bodies.

The three public entities in Queensland primarily responsible for responding to the needs of sexual offence victims, and which have significant obligations under COVA, are the QPS, the ODPP and Queensland Health.<sup>22</sup> In November 2001, these three agencies released the *Interagency Guidelines for Responding to Adult Victims of Sexual Assault* (Queensland Government 2001). The guidelines provide a best practice framework for responding to adult victims of sexual assault and help staff from the three agencies understand one another's roles and responsibilities towards victims. A number of recent government reports (Queensland Government 2000a; 2000b; 2002b) have highlighted the need for increased interagency cooperation and coordination in the area of victim services: the guidelines are an initial attempt to respond to this issue.

Under section 8 of COVA, each agency is required to issue internal guidelines explaining how its officers and employees are to 'put the 12 fundamental principles of justice into effect'. The November 2001 interagency guidelines are intended to complement these individual 'section 8 guidelines'. The two internal documents that identify how ODPP officers and employees are to comply with COVA are the draft procedures for implementing the fundamental principles of justice for victims of crime as stated in the Criminal Offence Victims Act (DPP Qld 2000a), and the Director of Public Prosecutions Guideline No. 2 of 2000 (DPP Qld 2000b, currently under review).

## COVA AND THE FUNDAMENTAL PRINCIPLES OF JUSTICE

Part 2 of COVA sets out these 12 fundamental principles of justice for victims of crime:

1. A victim should be treated with courtesy, compassion and respect for personal dignity; and in a way that is responsive to age, gender, ethnic, cultural and linguistic differences or disability or other special need (s. 6).
2. A victim should be given access to the State's system of justice (s. 7).
3. A victim should be given, on request, information about ways to prevent crime (s. 9).
4. A victim's privacy should be protected and any property held for an investigation or as evidence should be returned to the victim as soon as reasonably possible (s. 10).
5. A police officer investigating a crime should make a report of a victim's version of the circumstances as soon as reasonably possible after the crime happens (s. 11).
6. A victim should be afforded all necessary protection from violence and intimidation by a person accused of a crime against the victim (s. 12).
7. The welfare of the victim should be considered at all appropriate stages of the investigation and prosecution of a crime, without prejudice to anyone who is being investigated for the crime or who has been charged with the crime (s. 13).
8. During sentencing of the offender, the prosecutor should inform the court of appropriate details of the harm caused to the victim, but it is not a requirement for a victim to give the prosecutor details of the harm, and the fact that the victim does not provide any such details does not of itself give rise to an inference that the crime caused little or no harm to the victim (s. 14).
9. A victim should, on request, be given information by a law enforcement officer about the investigation of the offence and any resulting charges and proceedings, for example:
  - the name of the person charged;
  - the reasons for anyone's decision not to proceed with the charge or to amend the charge or to accept a plea to a lesser charge;
  - an order releasing the defendant on bail;
  - the fact that the defendant has absconded before trial;
  - details of the place and date of hearing of the charge;
  - the outcome of any proceeding, including appeals;
  - the date of the start and length of sentence imposed on the defendant;
  - the fact that the defendant has escaped from custody while under sentence;
  - eligibility dates for the defendant to have staged release into the community, parole and final discharge for the sentence for the offence (s. 15).
10. A victim of a crime who is a witness in the trial for the crime should be informed by the prosecution about the trial process and the victim's role as a prosecution witness (s. 16).
11. A victim should have access to information about available welfare, health, counselling, medical and legal help responsive to their needs. A victim should also have access to information about victim-offender conferencing services (s. 17).
12. A victim of a crime should have access to information about how the victim may obtain compensation or restitution for injury, loss or damage caused to the victim by the crime (s. 18).

These two ODPP documents detail what information is to be provided to a victim and when and how that information is to be provided. For example:

- The initial letter must include the identity and contact details for the ODPP case lawyer and victim liaison officer (VLO) and must include certain information brochures about the victim's right to compensation, the legal process and victim impact statements.
- Letters to victims should be sent in plain (non-government stamped) envelopes and an ODPP officer who leaves a telephone message for a victim should not say where they work.
- The case lawyer or Crown prosecutor is to hold a conference with the victim before the victim is called as a witness.
- A victim should be informed of basic court procedure and given the opportunity to witness an example of court proceedings prior to being required to give evidence.
- The VLO who notifies a victim about a trial date should ask the victim whether they wish to have court support and, if so, should provide the victim with a referral to an appropriate support agency.
- If a victim enquires about the availability of welfare, health, counselling, medical or legal services, the VLO should provide relevant information to the victim or make an appropriate referral.

In January 1997, the ODPP responded to the enactment of COVA and its obligations under that Act by establishing a Victim Support Service (VSS) unit (now known as the Victim Liaison Service unit). That unit employs VLOs and paralegal clerks to provide information to victims involved in the criminal justice process about the progress of their case and to refer them to other organisations for specialised assistance such as support and counselling.

Chapter 2.12 of the QPS's Operational Procedures Manual (OPM) (QPS 2002) explains how QPS officers and employees are to comply with COVA's fundamental principles. This section of the OPM contains the following types of directives:

- Investigating officers are to pass a victim's contact details on to the relevant ODPP officer as soon as possible after the ODPP takes responsibility for a case.
- Officers and employees should ensure that a victim's well-being is a primary consideration following the commission of an offence, during an investigation, and for a reasonable time thereafter.
- In rape and sexual assault cases, investigating officers should provide victims with relevant information brochures prepared by the Department of Justice and Attorney-General and a sexual assault care kit (put together by the Victims of Crime Association of Queensland).
- Officers should record details of a victim's version of the circumstances of a crime at the first reasonable opportunity.
- Where a victim seeks immediate protection from the person accused of committing a crime against the victim, officers should consider referring the victim to an appropriate support agency (for example, the witness protection section of the CMC or domestic violence welfare organisations).
- Investigating officers should ensure that a prosecutor is fully informed of the effect that a crime has had on the victim.

Unlike the ODPP (which established the VSS unit in 1997), the QPS does not have a special unit dedicated to meeting the needs of victims. Responsibility for complying with the COVA fundamental principles of justice rests with individual investigating officers.

## Problems with COVA

Although COVA sets out some fundamental principles of justice that public officials should comply with when they are dealing with victims of crime, it does not provide a mechanism for implementing or enforcing those principles. In fact, section 4(5) of COVA specifically states that:

the declaration and guidelines made under the declaration (i.e. the fundamental principles of justice) are not enforceable by criminal or civil redress.

Section 4(6) goes on to say that:

Parliament encourages victims of crime to assert the principles in ways that do not involve legal process or proceedings.

The COVA principles are not legally enforceable. The Act does not make it a requirement for public officials and public entities to regard them, because they have been drafted using the word 'should' instead of 'must' (for example, s. 6(a) of COVA says that a victim should be treated with courtesy, compassion and respect for personal dignity). Some of the principles do not apply until the victim has made a request for information. For example, section 15(1)(c) says that:

a victim of a crime should, on request, be advised by a law enforcement officer of the name of the person charged.<sup>23</sup>

In addition, section 4(7) of COVA confirms that it is not compulsory for public officials and public entities to comply with the COVA fundamental principles of justice. That section provides:

public officials and entities are authorised to have regard to the declaration and guidelines and are urged to do so to the extent that it is:

- a) within or relevant to their functions; and
- b) practicable for them to do so.

In July 1998, the Department of Justice and Attorney-General released the discussion paper 'Review of the *Criminal Offence Victims Act 1995* — Implementing the fundamental principles of justice for victims of crime' (JAG 1998). The discussion paper was produced in response to the Attorney-General's request that the department 'review ways to strengthen the rights of victims of crime'. According to the foreword of the discussion paper:

... the review [was] the result of the Labor Government's election commitment to ensure that the fundamental principles of justice affecting victims of crime as set out in the *Criminal Offence Victims Act 1995* will be backed up with regulations requiring law enforcement officers to respect these principles in their dealings with victims of crime.

A number of agencies (including the CJC) prepared submissions to the discussion paper.<sup>24</sup> Some time later, the Taskforce on Women and the Criminal Code also made recommendations about COVA (Queensland Government 2001):

1. That the government undertake community education with respect to the fundamental principles of justice for victims of crime contained in COVA. (Recommendation 36).
2. That any review of COVA include an investigation of amending provisions to provide a definite obligation on public officials to inform victims of crime of their rights, rather than the status quo, which is on request. (Recommendation 37.1).
3. That, as part of a review of COVA, agreement be reached on which criminal justice agency should be responsible for the provision of the information/material referred to in Recommendation 37.1. (Recommendation 37.2).

The Taskforce also recognised:

that the fundamental principles of justice ... will be irrelevant if the public officials charged with the responsibilities referred to in COVA are not adequately resourced to enable them to fulfil their respective functions under the Act or agency guidelines

and recommended that 'those government agencies with responsibilities under

COVA be adequately funded to fulfil those obligations (pp. 71, 73). At the time of writing this report, none of these recommendations had been acted on.

During the course of the Inquiry, concerns were raised about victims' rights and the need for more victim support. These issues, and their relevance to COVA, are examined further in Chapters 6, 7 and 8 of this report.

### **Other responses to victims of crime**

Apart from the enactment of COVA in 1995, there have been a number of other governmental responses to victims of crime in recent years, including significant changes in how the QPS responds to sexual offences — these are discussed in the next chapter of this report.

Volume 2 of the Project Axis reports (QCC & QPS 2000b) documented some of the changes that have taken place in Queensland since 1997 regarding child-sex offending, many of which have a strong emphasis on victims' rights. These include:

- the establishment of the Queensland Crime Commission (QCC) in 1997 (which merged with the CJC in 2000 to form the CMC) with a specific legislative responsibility to investigate criminal paedophilia
- the Commission of Inquiry into the abuse of children in Queensland institutions (the Forde Inquiry) conducted in 1998 by the Minister for Families, Youth and Community Care
- the establishment of the Children's Commission in 1998
- the establishment of the Child Protection Council in 1999
- the enactment and implementation of the *Child Protection Act 1999* (Qld)
- a Law Reform Commission review of the laws relating to the evidence of children in Queensland (2000)
- the enactment and implementation of the *Commission for Children and Young People Act 2000* (Qld), which extended provisions for screening of employees in child-related employment
- increases in funding for the Department of Families
- the provision of \$250 000 per annum for the establishment of an assessment and treatment program for young sex offenders in detention centres and in the community.

Project Axis also found a need 'for better coordination between agencies providing services to victims of child sexual abuse' (QCC & QPS 2000b, p. xiv).

The Taskforce on Women and the Criminal Code (Queensland Government 2000a), which reported in the same year, recommended considering:

- the establishment of a Victim Advisory Unit within the QPS, with a view to enhancing police response and ongoing service delivery to victims/survivors of crime (Recommendation 40)
- funding for the development of models of court assistance, including a training and support unit to provide resources, information and a centralised point of coordination (Recommendation 41)
- the issue of court support for all victims of violent crime with responsibility for it to be taken up by an appropriate agency and coordinated across the State; and the necessity for specialist services and the importance of continuity of care (Recommendation 42).

The interagency guidelines for responding to adult victims of sexual assault released by Queensland Health, the QPS and the ODPP in November 2001 (Queensland Government 2001), already briefly mentioned, warrant further discussion here. The guidelines suggest that quality care for victims depends on good working relationships between departments, and recommends that each

agency establish local procedures to facilitate improved liaison and coordination, including systems for information sharing and conflict resolution between the services (p. 16). The guidelines also recommend that joint training can enhance an understanding of how each service contributes to assisting the victim (p. 16) and discusses the difficulties of dealing with diverse cultural, linguistic and disability issues (pp. 17–18). The document then details Queensland Health, QPS and ODPP procedures that a victim of adult sexual assault would ordinarily face, should they decide to report their experience.

In response to some of the concerns raised earlier by the Taskforce on Women and the Criminal Code, a report released in 2002 by a whole-of-government group for the Coordinating Efforts to Address Violence Against Women (CEAVAW) Project (Queensland Government 2002b) observed that there still remained no clear lead agency to provide information about victims' rights, COVA or the operation of the criminal justice system more generally.<sup>25</sup> This lack of coordination was noted to cause difficulties for women, as victims, in obtaining information about the progression of their matters through the criminal justice system. The report also found that there were no specific services funded for court assistance in sexual assault matters, pointing out that:

the provision of court support for women in sexual matters can be a very time consuming process that may stretch over months as the matter proceeds through the system. It is a crucial service as it is recognised that these matters can be highly distressing for women as complainants.

Queensland Government 2002b, p. 120

Further, the report noted that, although VLOs from the ODPP sometimes provide such support — and although the role of providing court assistance for victims would appear to fit the mandate of the Victim Liaison Service (VLS) — the provision of court assistance was not a formal role and the VLS did not provide this function.<sup>26</sup> CEAVAW proposed the following strategies:

- Forming a working group (across government) to develop proposals for a coordinated response to victims who are engaged in the civil and criminal justice system and to investigate the feasibility of a victim's advisory unit (to be ongoing between 2002 and 2005).
- Forming a working group (across government) to address the provision of court assistance services to domestic violence and sexual assault matters in a consistent manner (to be ongoing between 2002 and 2005).

Research undertaken for the Inquiry revealed that an inter-criminal justice working group was established in August 2002 to address both of these strategies (Department of Premier and Cabinet, Office for Women, Community Engagement Division, personal communication, 12.02.03).

The recently released Cape York Justice Study Report by the Queensland Government (2002c) highlighted how the ODPP, the QPS and LAQ in Cairns have worked closely together to improve coordination for processing court matters for Indigenous populations. For example, the ODPP has recently delivered a training program for QPS officers in the north to improve the presentation of police briefs with the aim of providing both the ODPP and defendants' lawyers with clearer instructions. The report notes that 'this level of integration between the activities of agencies serving the justice system in Cape York is to be encouraged' (p. 192).

## SUMMARY

This chapter has illustrated the complexity of the legislative response to sexual abuse matters in Queensland and how it has changed over the years. There have been recommendations for reform during the last five years and some have recently been implemented by the government's new legislative reform package (and even more are proposed). The views of those providing submissions to the Inquiry about these issues are explored in more detail in Chapters 6 and 9.

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## ENDNOTES TO CHAPTER 3

- 12 Seventy-eight per cent of all child sexual offences reported to the QPS between 1994 and 1998 concerned the offence of indecent treatment of a child under 16 years (QCC & QPS 2000b, p. 28).
- 13 Until 1991, it was an offence for anyone to engage in sodomy, even consenting adults. Amendments to the Criminal Code removed the offence in relation to consenting adults, but it is still an offence to engage in consensual sodomy with a person under the age of 18 years (s. 208). Non-consensual sodomy at any age constitutes rape (s. 349).
- 14 Note that the *Sexual Offences (Protection of Children) Amendment Act 2003* contains a new version of s. 229B. This is discussed in more detail later in this chapter.
- 15 Where a 'special witness' is to give evidence in a criminal proceeding, the court can order that the person charged be excluded from the courtroom; that the special witness give evidence in a room other than the courtroom; and that a videotape of the evidence be viewed and heard in the proceeding instead of direct testimony.
- 16 The Bill extends the application of section 93A to all children under 16, as well as 16- and 17-year-olds who satisfy the definition of a 'special witness' in section 21A of the Evidence Act.
- 17 Despite legislative reforms that allow for the use of screens in court, and for the giving of evidence via CCTV (see s. 21A of the Evidence Act), consultations and submissions made to the Inquiry asserted that inadequate use of these measures occurs in Queensland (consultation with the QPS, Townsville and Cairns, 28.10.02 and 31.10.02). However, further reform is proposed.
- 18 The issue of separate legal representation for sexual offence complainants has recently been considered in several jurisdictions, including Victoria. (See Chapter 10 of this report.)
- 19 These provisions were previously found in Chapter 65A of the Criminal Code. Some of the amendments made to the Code include allowing payments to the families of homicide victims and simplifying the application process. Before the Criminal Offence Victims Regulation 1995 (Qld) was amended in December 1997, a victim of a sexual offence who suffered no physical injury was entitled to claim a maximum of only \$25 000 for nervous shock. A victim of a sexual offence who suffers no physical injury is now entitled to claim a maximum of \$75 000 for 'the totality of the adverse impacts of a sexual offence' (which includes a sense of violation, reduced self-worth or perception, and increased fear or feelings of insecurity).
- 20 Legal Aid Queensland (LAQ) — which is a government-funded provider of legal services that sometimes acts for victims (for example, victims who wish to apply for a compensation order under part 3 of COVA) — does not appear to be subject to COVA. In 1998, the CJC suggested (in a submission to JAG) that consideration should be given to making LAQ a 'public entity' for the purposes of COVA (CJC unpub., p. 9).
- 21 A corrective services officer (employed by the Department of Corrective Services) has obligations under section 15(2) of COVA to provide information to a victim of a sexual offence (on request) about certain events that take place while a defendant is in custody (e.g. eligibility dates for parole, escape from custody and actual release dates). It is possible for a victim to register on the department's 'concerned persons register'. By doing this, a victim is automatically sent information about a defendant's custodial movements.
- 22 The Department of Families is also involved with sexual offence victims where the victim is aged under 18 and the offence has occurred within the victim's home environment or where the victim is living in an approved shared family care placement/residential care facility.
- 23 Some agencies, such as the VLS within the ODPP, provide information to victims without waiting for a request for the information (Queensland Government 2000a).
- 24 In its submission to JAG, the CJC recommended that the Ombudsman be given jurisdiction to deal with victims' complaints about noncompliance with the fundamental principles and that section 4(7) of COVA be amended so that the obligation to comply with the principles is stronger and less ambiguous. Section 7 of the *Victims Rights Act 1996* (NSW), which uses the word 'must', was suggested as a possible model (CJC unpub.).
- 25 The CEAVAW project involved the following key government departments and agencies: the Department of Families, Queensland Health, JAG, the QPS, the Department of Corrective Services, the Department of Housing, Education Queensland, LAQ, the Department of Aboriginal and Torres Strait Islander Policy, the Department of the Premier and Cabinet (Office for Women, Multicultural Affairs Queensland, and the Social Police Division), and Queensland Treasury.
- 26 The ODPP's VLS is discussed in more detail in the next chapter, which explores the current responses to sexual offences in Queensland by the QPS, the ODPP and the courts.

## HOW THE CRIMINAL JUSTICE SYSTEM RESPONDS TO REPORTED SEXUAL OFFENCES

***This chapter describes the current protocols for dealing with sexual offence matters by the QPS, the ODPP and the courts. (The practices and procedures of the Department of Corrective Services, the final stage in the criminal justice system, do not fall within the terms of reference of this Inquiry and are not examined in this report.)***

***Each section of the chapter also refers to relevant reviews conducted in Queensland over the last five years, some of which have called for reform, and highlights some of the recommendations that have been made on how reform might best be achieved.***

### THE QUEENSLAND POLICE SERVICE

The QPS provides the first opportunity for the criminal justice system to respond to allegations of sexual abuse. When an allegation of sexual abuse is made to the police they generally document it and initiate an investigation. If a prima facie case is established at committal, the ODPP progresses the prosecution of the accused.

The QPS provides a range of practical and procedural responses to complaints of sexual abuse. This section briefly describes the work of the specialised units that respond to allegations of sexual abuse, some of the guidelines and protocols that are part of the Operational Procedures Manual (OPM) for handling sexual offences, some of the specialist training courses available to police who work with victims of sexual offences, and the current monitoring and supervision processes.

#### Specialised units

The specialised units within the Queensland Police Service that are dedicated to investigating sexual offences are:

- 1 the Juvenile Aid Bureau (JAB)
- 2 the Sexual Crimes Investigation Unit (SCIU), which comprises:
  - the Child and Sexual Assault Investigation Unit (CSAIU)
  - Taskforce Argos (which investigates all reported incidents of organised paedophilia, institutionalised abuse, child exploitation, Internet pornography and procurement of children for sexual exploitation via the Internet).

The CSAIU and the SCIU operate within the Crime Operations Branch of the QPS. The JAB deals with the special needs of children. Responsibility for the investigation of child sexual abuse, however, rests with the CSAIU in the metropolitan area, excluding the areas covered by Petrie and Inala JAB and where a JAB is established in a district. In areas where there is no JAB or SCIU, officers from the Criminal Investigation Branch (CIB) will ordinarily carry out investigations into sexual offences against children. Police also have

membership of SCAN (Suspected Child Abuse and Neglect) teams<sup>27</sup> and liaise with Aboriginal or Torres Strait Islander advisors. In Brisbane, the CSAIU is responsible for investigating sexual offences against adults, while CIB officers ordinarily carry out these investigations outside the metropolitan area.

## Guidelines and protocols

The QPS's OPM contains guidelines for dealing with rape and sexual assault. These guidelines, which were developed in consultation with the Queensland Women's Health Policy Unit, provide guidance for police when working with people who have been raped or sexually assaulted. The guidelines identify three main police functions:

- 1 to protect and support complainants
- 2 to investigate and establish if an offence of rape or sexual assault has been committed
- 3 to identify, apprehend and prosecute the offender(s).

The guidelines focus on the victim; in particular, how victims of rape and sexual assault are best protected and supported. According to the OPM, officers must treat every complaint as genuine, unless otherwise established during the investigation. They are also expected to be sympathetic, supportive and sensitive to the emotional and physical needs of the complainant. Police are expected to ensure that the complainant is aware of the procedures involved, to ask if the complainant would like a support person to be present while providing a statement, to create an environment of trust, to conduct the interview in a private quiet area, and to keep the complainant informed about the investigation.

Police are advised that it is up to the complainant to make the decision to proceed with a formal complaint or not, and that they are to respect the complainant's decision and provide advice on the availability of assistance, whichever decision is reached. The police are also required to ensure that, where possible, a complainant with a disability or impairment has a representative from the appropriate agency or a support person, or that a qualified interpreter is present for complainants who are either hearing impaired or not conversant with the English language.

The rape and sexual assault protocols provide specific guidance on investigative procedures such as record keeping (for example, all details of the investigation, including any conversation with the complainant, should be recorded and secured), statement taking (regarding accuracy) and false complaints.

In addition to the guidance provided by the OPM, police officers are guided by a set of interagency guidelines for responding to adult victims of sexual assault (Queensland Government 2001). These guidelines, which have been discussed in the previous chapter, identify victim care and support as paramount considerations for police. For example, police officers are instructed to 'demonstrate a willingness to act on the information from the victim and ensure that all decisions are made with the consent of the victim and in the best interests of the victim' (p. 18), offer protection and support; provide information about support services available, provide protection to victims who are at immediate or continuing risk, keep victims fully informed throughout the investigative process about the progress of the matter, and fully explain the court processes. More specific protocols relating to medical examinations, police interviewing and police obligations to victims throughout the criminal justice process are also provided in these guidelines.

Although the guidelines generally mirror the OPM, there are some differences. The QPS is aware of these inconsistencies and is in the process of updating its internal Rape and Sexual Assault Protocols to reflect the interagency guidelines (CMC 2002b, p. 25).

The OPM also contains a set of protocols to direct best police practice in handling cases of child sexual abuse. The OPM (2002) states:

the safety of children is of paramount importance ... officers are to ensure that their actions are directed at the safety and well-being of children, particularly those who are the victims of child abuse. Children who are victims of abuse should not be returned to an environment where, in the opinion of the officer conducting the investigation, abuse is likely to recur.

The QPS also subscribes to a multidisciplinary approach to child abuse investigations. SCAN teams have been established throughout Queensland to ensure a coordinated response to notifications of child abuse. Police officers are required to liaise with the police representative of the local SCAN team and officers from the Department of Families.

More specific guidance is also provided to investigating officers for medical examinations of children, interviewing child witnesses, use of audio and video facilities to record the evidence of a child witness, and preparation of the child witness for court. The QPS provides a Pre-Pubescent Sexual Offences Kit, for example, which contains instructions to a medical practitioner who may have to conduct an examination, together with syringes, storage vessels, slides and swabs that may be required to obtain forensic material for subsequent examination.

Officers conducting interviews with children are encouraged to have an independent person present and are told to ensure that the interview is conducted in a manner that reduces trauma to the child and respects the wishes of the child. Police are to ensure that the interview venue is non-threatening, that age-appropriate language is used, that police jargon and leading questions are avoided, that nonverbal communication is appropriate, and that rapport with the child is established before discussing the sexual abuse. Officers are also instructed to particularise the circumstances of the offence in as much detail as possible and to use video and audio facilities to record the child's statements. The QPS recognises that going to court can be an especially traumatic experience for child victims and officers are required to prepare the child for this experience.

## **Training**

In addition to generalised training, which has a brief component on the investigation of sexual offences, the QPS offers specialised programs in sexual offence investigation and working with children/youth (the JAB and ICARE courses). Sexual offence investigation training is also a component of courses attended by officers as part of their career progression from recruit to Inspector.<sup>28</sup>

The most intensive and specialised training package offered by the QPS is the Sexual Offences Investigation Course (80 hours), which aims to 'provide police officers with specialist skills and knowledge relevant to the investigation of sexual offences'. The JAB course (69 hours) introduces officers to the role of the Bureau by providing training in investigative techniques, information gathering and guidance when conducting investigations with juveniles. More specific areas covered in this training program include references to the OPM, SCAN teams, legislation, interviewing children, pretext telephone conversations and rape and sexual assault protocols.

The ICARE course (40 hours) is conducted jointly by the Department of Families and the QPS. The main focus of the program is to teach participants the necessary skills for using a structured interview process with children who are alleged to have been sexually abused. Similar interviewing protocols for gathering evidence from children have been adopted by many jurisdictions around the world. This program has recently been evaluated and recommendations for reform have been made (Department of Families & QPS 2001). The recommendations are discussed in more detail later in this chapter.

## RELEVANT POLICE TRAINING COURSES

Course	Duration	Aim
Sexual Offences Investigation Course	80 hours	To provide police officers with specialist skills and knowledge relevant to the investigation of sexual offences — includes training in rape and sexual assault protocols, issues of consent, legislation, protocols for interviewing children, historical sexual offence legislation, persons with intellectual and physical disabilities, interviewing suspects, and the role of the ODPP.
JAB Course	69 hours	To introduce officers to the role of the Juvenile Aid Bureau by providing training in investigative techniques, information gathering and guidance when conducting investigations with juveniles.
ICARE Course	40 hours	To teach participants the necessary skills for using a structured interview process with children who are alleged to have been sexually abused.

In 2003, the State Crime Operations Command appointed an additional Inspector to the Sexual Crimes Investigation Unit to enhance the Service's training and investigative standards. This additional position will also serve to strengthen the Service's capacity to address interagency coordination and service delivery issues associated with sexual abuse, particularly child sexual abuse (QPS personal communication 3.6.03).

### Monitoring and supervision

The supervision of police officers investigating sexual offences in Queensland is undertaken according to general management policy and procedures. In cases of suspected child sexual abuse, investigating officers must refer to the police representative on the local SCAN team for supervision by that team.

According to the QPS's submission to the Inquiry, the QPS has a hierarchical command and control management system that places particular responsibilities on officers in charge (OICs) throughout the organisation (pp. 19–21). OICs are responsible for the efficient and effective management of policing within their area of control, including the handling of sexual offences. Where they are not available, shift supervisors or regional duty officers take over supervisory responsibilities.

At the start of a prosecution, a police officer is required to complete correspondence to support the prosecution (a court brief). The supervising officer checks this court brief and, where the provisions of the QPS policy are not complied with, takes action to rectify any defects or errors and notify the prosecutor. Where a supervisor cannot check the court brief, a senior non-commissioned officer will inspect it. Prior to the first mention of the matter in court, a police prosecutor reads the court brief, checks that Service policy has been complied with and, where deficiencies are noted, rectifies them.

Police prosecutors are required to report all instances of late submissions of briefs of evidence to the relevant supervisory officers. There are also protocols for preparing full briefs of evidence where the ODPP conducts committal hearings. Where there is an inconsistency between the contents of the OPM and the protocols for committals prosecuted by the ODPP, the protocols take precedence.

Prosecution Review Committees (consisting of a police prosecutor, a district, regional, or establishment training officer and an experienced officer) review cases in which costs are awarded or those involving the dismissal or withdrawal

of charges (classified as 'failures'). The role of these committees is to examine the processes, policies and procedures involved in each case and to identify areas in which the Service or local procedures may be improved. The committees are not intended as forums for assigning blame or as disciplinary avenues against arresting officers.

The committees classify reasons for 'failure' at the Magistrates Court level in the following ways:

- complainant not wishing to proceed
- a finding that a defendant is not of sound mind
- inadequate investigation
- incorrect charges
- unreliability of witnesses
- unavailability of witnesses
- reasonable doubt by a magistrate
- death of a witness or defendant
- withdrawal of charges to allow for extradition or deportation
- reasonable excuse provided by defendant at hearing after first refusing to answer police questions.

The QPS suggests that Operational Performance Reviews (OPRs) can also assess performance with regard to the investigation of particular sexual offences. The QPS argues that the Ethical Standards Command (ESC) can also provide an independent assessment of management functions and analyse complaints against the police to identify trends and relevant issues.

Early in 2003, the Prosecution Review Database (a statewide database collating all unsuccessful prosecutions) was set up on a six-month trial. It is expected that searches of this database will be able to take place via categories such as location, date, offence type, outcome of prosecution, costs, and reasons for failure. This will improve managerial capacity to identify problems with individual officer performance and/or broader systemic issues. The database will capture only police prosecution matters, but QPS prosecutors plan to meet with the ODPP to determine whether it will be possible to expand the database to include higher court matters.

## **Community involvement**

In recent years the QPS has participated in a scheme to facilitate the exchange of information about suspected paedophiles between the SCIU and a community organisation called Bravehearts.

Bravehearts supports victims of sexual abuse. Persons who are being assisted by Bravehearts are able to provide anonymous information about people they say have committed sexual offences against them. In these cases the victims simply want the names of the alleged perpetrators known to authorities; they do not seek a police investigation. The information reported is recorded on the intelligence system and forwarded to interstate jurisdictions where applicable. In 2001, five reports were received and in 2002, fifteen.

## **Comparative interstate and international protocols**

An audit of other Australian and New Zealand police practices and protocols for handling sexual offences was undertaken for the Inquiry. A separate report documenting those practices will be published by the CMC at a later date.

## **Previous reviews**

In 1997, the QPS and the CJC jointly reviewed the procedures, processes and methods of investigation by the QPS to conduct enquiries into complaints

involving the sexual abuse of children. That project (called Project Horizon) was followed by an examination (known as Project Axis) of a whole-of-government approach to child protection issues conducted by the QPS and the QCC.

The Project Horizon report acknowledged that the expertise of police investigators during the initial intervention and interviewing process, and during the subsequent delivery of support mechanisms, is fundamental to the success of the prosecution of the accused and the rehabilitation of the victim. The report raised these concerns about QPS processes for dealing with sexual offences at that time (1996):

- the nature of the work was perceived to be an impediment to promotion
- many officers performing in this area had no interest in it
- there was an absence of effective specialist training and education programs for those working in this area
- training of investigators in this area had fallen to below acceptable levels
- concerns about the quality of child sexual abuse investigations had been raised by the ODPP
- most investigators had heavy workloads
- there was a lack of support/supervision from experienced officers
- regionalisation of the QPS had had a negative impact on service delivery to child victims of crime — this was caused by the loss of experienced investigators, the assignment of inexperienced supervisors and managers to child abuse investigative areas, the loss of the statewide network, and downgrading of interdepartmental liaison
- there was inconsistency with service delivery in the management of, and response to, child sexual abuse matters
- there was a perception that the Service did not recognise those who work in the area and that such investigations were of low priority.

The Project Horizon report made 47 recommendations. Those of particular relevance to this Inquiry called for:

- enhanced selection and retention processes for specialist staff
- appropriate training frameworks for all officers involved in child protection investigation (including prerequisite ICARE training and greater managerial understanding and expertise with respect to child abuse)
- a coordinated central training system and appropriate marketing strategy for policing in this area
- identifiable career paths for suitably committed and credentialed officers
- recognition of the specialist and unique characteristics of these duties.

Many of the structural recommendations arising from the report had been implemented by the QPS by 1999, including the restructuring of the Crime Operations Branch, the formation of Taskforce Argos, the restructuring of the CSAIU, instigation of the role of Brief Managers, and the formation of Prosecution Review Committees.

A later evaluation of the implementation of Project Horizon by the Inspectorate and Evaluation Branch of the QPS (2000a), however, found that some of the recommendations had not been progressed or finalised because of the impact of subsequent external activities such as the Forde Inquiry, Project Axis, and the Aboriginal and Torres Strait Islander Women's Taskforce on Violence. The evaluation also found that restricted training budgets, staff rotations and turnover were having a direct impact on the number of appropriately qualified and skilled investigators in the field, that the specialist units were understaffed, that the 'train the trainer' processes for ICARE training were no substitute for the full ICARE course, and that there had been a marked reduction in officers' competence to give evidence in court. The evaluation report also noted that

there was a need for more input/interaction between ODPP officers and police investigators to resolve any problems as they arose, including regular committee forums and joint training sessions. The report concluded that there was much room for improvement in both the investigation and prosecution of matters involving sexual offences against children and noted that there was a direct relationship between the quality of investigative processes and the success or otherwise of the prosecution process.

The results of Project Horizon have been made public twice. They were initially published in the *Courier-Mail* on 15 September 1997 (Ware 1997, p. 6), which stated that:

the review was prompted by widespread perceptions that the quality of investigations currently undertaken by the police within their criminal investigative role has diminished to the extent that service delivery was below community expectations.

The article went on to describe further concerns about training, lack of career paths in the area, inappropriate attitudes of officers, insufficient resources and the need for discrete specialist criminal investigation squads.

In 2000, Project Axis (QCC & QPS 2000b) also discussed Project Horizon and made further recommendations, including the need for increased ICARE training and commensurate funding for the QPS and the Department of Families. The report was somewhat critical of the QPS's response to Project Horizon at that point, indicating that, for various reasons (including the resources required for the Sydney Olympics), adequate increases in police training regarding sexual offences had not yet occurred.

The QPS submitted to the Inquiry that some of the Project Horizon recommendations remain outstanding because there:

have always been difficulties exacerbated by geographical factors which invariably impact upon effective law enforcement within this particular field.

CMC 2002b, p. 44

And that, indeed, some of the more specific recommendations such as those regarding career paths:

do not fit within the corporate perception of job descriptions that are currently advanced ... it is against Service policy that people career-path in certain areas.

Personal communication 6.5.03

Thus, it is unlikely that some of the recommendations will ever be implemented, although these are likely to be few.

The report by the Taskforce on Women and the Criminal Code (Queensland Government 2000a), released in the same year, also made strong recommendations for improving the response of police to victims of violent crimes. The Taskforce called for government to ensure that ongoing training was provided to police and persons working in other public sector agencies that were accessed by women victims/survivors of violence and that this training should, among other things, increase the understanding of violence against women, its nature, scale and impact (Recommendation 46.1).

More specifically, the Taskforce recommended that all police officers should receive compulsory training in relation to such issues as gender stereotyping, race, disability, culture, homophobia, sexual assault and domestic violence. Further, it was recommended that this training should be developed by police in conjunction with support services within individual police regions to encourage a more integrated response. Further, the Taskforce recommended that police should receive training in relation to gathering evidence in cases of violence and sexual violence against women and in the identification and impact of intellectual, learning and physical disabilities on complainants (Recommendation 47.2).<sup>29</sup>

A joint internal evaluation and review of the ICARE training program by the QPS and the Department of Families, undertaken in 2001, recommended some improvements to the course content and structure, collaboration between the QPS and the department, and access to training and ongoing training needs. It also pointed out the necessity of ensuring that the interview process was conducted in a professional manner acceptable to the courts and sensitive to the well-being of children.

The report recommended that ICARE training be enhanced to provide participants with up-to-date research and literature about the complexities of child sexual abuse and its investigation, and to provide a better balance between evidentiary requirements and child-protection considerations. It further recommended that sessions should include topics such as the dynamics, causes and effects of child sexual abuse, the prosecution of child sexual abuse cases with an emphasis on children's evidence and testimony, managing child safety and well-being after the interview and interviewing Indigenous children. It recommended that a refresher course be developed and a mentoring process be established for officers working in the area of child protection.

Most importantly, the report recommended that procedural guidelines be developed to prevent, where possible, untrained staff from conducting section 93A of the Evidence Act interviews.<sup>30</sup> Feedback for the evaluation indicated that such interviews can be problematic and distressing for children if interviewers do not possess sufficient skills. The QPS told the Inquiry in a follow-up request for further information that implementation of the review recommendations was taking place progressively.

## THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Until recently, prosecution arrangements at both state and federal levels in Australia:

were little different to those which had evolved in the last century [i.e. the 19th century], with the police having the conduct of most prosecutions before the summary courts and Crown law authorities only becoming involved in indictable matters, and then only once a committal order had been obtained.

Rozenes 1996, p. 2

After a period of substantial criticism of the prosecution process in Australia — not the least of which referred to the lack of transparency and openness of the process (ALRC 1984) — the system was significantly transformed with the establishment of a Director of Public Prosecutions (DPP) in all Australian jurisdictions. On 17 January 1985, the *Director of Prosecutions Act 1984* (Qld) (now the *Director of Public Prosecutions Act 1984* [Qld]) came into operation and established the ODPP in Queensland. Currently, the Queensland DPP has staff at nine locations throughout the State.

The establishment of the ODPP was intended to make the conduct of prosecutions substantially more independent. The Director replaced the Solicitor-General as a Crown Law Officer (under the Criminal Code). The Act removed the prosecution process from the political arena by granting the DPP independent status. Although remaining responsible to the Attorney-General, nothing limits the authority of the DPP in the preparation, institution and conduct of proceedings (see s. 10[2] of the *Director of Public Prosecutions Act*). The DPP may consult with, but may not be limited by, the Attorney-General in the exercise of discretionary powers.

The Act also ensures separation of the investigation and prosecution functions in the state criminal justice system. While the views of the investigating officer are normally sought and considered, once a prosecution is in the hands of the ODPP, the decision to proceed or not with that prosecution is made by the DPP, independently of those responsible for the investigation. As well as the decision to continue or discontinue, once the ODPP assumes control of the matter it is

also responsible for the selection of the charges and for conducting the court proceedings.

The role of the ODPP is to prosecute people accused of indictable offences — that is, offences serious enough to be heard by the District or Supreme Court (such as rape, sexual assault and other serious assault charges). Crown prosecutors prepare cases for the Crown in court: prosecutors conduct the case against the accused on behalf of the State of Queensland. They do not have a 'client' in the usual sense, but act independently in the public interest. Their role is to help the court arrive at the truth and seek justice between the community and the accused according to law and the dictates of fairness.

### **Guidelines for prosecution**

In the 1980s, all Australian Directors of Public Prosecutions (ADPP) agreed on a common set of principles to be used in determining whether or not a prosecution should be commenced or, if commenced, should be permitted to proceed. These principles are regularly reviewed at meetings of the ADPP and are amended periodically. Although the principles are expressed in different languages across the various jurisdictions, in substance they are largely the same (DPP Victoria 2001, p. 24).

The publication by each DPP of a set of guidelines represented a major reform that made the conduct of prosecutions in this country fairer, more open and consistent than in the early 1980s. The guidance provided is not designed to be inflexible, except in limited circumstances, or comprehensive (DPP Queensland 1995).

In Queensland, these principles are contained within the Prosecution Policy of the State of Queensland (DPP Queensland 1995). The DPP has also issued guidelines to Crown prosecutors and other legal staff concerned with the prosecution of offences (under s. 11 of the Act discussed above) that set out the duties of prosecuting counsel. Director's Guidelines on particular matters are issued periodically by the DPP.

### **The decision to indict**

Except in those Magistrates Court jurisdictions where the ODPP has responsibility for conducting committal hearings, the police brief of evidence will be provided to the ODPP after committal. It is the responsibility of the ODPP to present an indictment within six months of the committal (see s. 590 of the Criminal Code). An indictment is the formal document signed by the DPP, Deputy DPP, Crown prosecutor or legal practice manager that contains counts upon which the accused is to stand trial (see s. 560 of the Criminal Code).

The guidelines and procedures that apply to the Queensland ODPP's decision to prosecute or discontinue a prosecution emphasise the following:

- the importance of the decision made by the ODPP
- the importance of the ODPP making its decision as early as possible
- the importance of the ODPP making its decision independently, although consultation should be undertaken
- the importance of the decision involving persons at the highest levels in the ODPP, usually the Director, the Deputy-Director or Crown prosecutors.

A Director's Guideline (number 2/1986) to all Crown prosecutors and other persons acting on behalf of the DPP regarding preparation and presentment of indictments states that the task of deciding whether to present an indictment should not be undertaken lightly:

... as a failure to perform it correctly, apart from causing large and unnecessary expense, may put a citizen who should not be tried at risk of conviction, or set free an offender who should be brought to trial. The task is not limited to reviewing the decision of the committing Magistrate. Not infrequently, it will

include reaching an opinion as to whether discretionary powers not possessed by the investigating police, the committing Magistrate or a trial judge should be exercised.

The Director's Guideline sets out the following guidance for preparing an indictment:

An indictment must not be signed and presented with the intention of putting a person on trial unless:

- a) The person signing it has satisfied himself or herself that, in light of the material on which the committal order was made and any other material that has come to hand, the charge set out in the indictment is the correct charge;
- b) It is believed there is a prima facie case that the person is guilty of the offence;
- c) It is believed all evidence reasonably required to establish the prosecution case can be produced at the trial unless there is no reasonable prospect of it being available within a reasonable time.

Generally speaking, a prosecutor should, at least, read the depositions and the statements of witnesses and examine the important exhibits before making a decision whether or not to indict ... However, there will be cases where, because of their length and time constraints, things will have to be managed differently. In most such cases a prosecutor should, at least, interview the investigating detective or the police prosecutor, or some other person with knowledge of the matter, and obtain a good understanding of the evidence and the issues and read as much of the evidence as time permits before making a decision. Also, there will be cases where the prosecutor will be entitled to rely on the opinion of, for example, another counsel or the prosecutor's clerk who, the prosecutor knows, has made a thorough examination of the matter...

If the prosecutor is in doubt as to whether he or she should present an indictment, or as to the form it should take, or if there is any other difficulty, the relevant witness must be interviewed if that course is likely to resolve the doubt or difficulty.

DPP Queensland 2000b

This Guideline also provides that an indictment should be presented as soon as reasonably practicable during the sitting of the court to which the person was committed. It specifies that 'holding indictments' must not be presented — that is, the ODPP should not present an indictment simply to 'buy time' beyond the six-month time limit for the presentation of an indictment after committal (see s. 590 of the Criminal Code).

Initially, a brief of evidence provided to the ODPP by the police after committal is likely to be dealt with by a legal officer. It is the task of the legal officer to review the material and to draft the indictment or recommend that the matter should not proceed, but continue to prepare the indictment until such a decision is made, as required by the Director's Guideline.

Within the ODPP, authority to sign and present an indictment, make a decision not to present an indictment, or withdraw an indictment that has already been presented (i.e. enter a 'nolle prosequi') is limited (see ss. 560 and 563 of the Criminal Code; see also s. 24 of the Director of Public Prosecutions Act). It is usually the case that the indictment must be signed and presented to the court by the DPP, Deputy DPP, a Crown prosecutor or a legal practice manager. Similarly, only those with particular authority within the ODPP can decide not to present an indictment, or to enter a nolle prosequi once the indictment has been presented.

The guidelines and procedures applying to the ODPP's decision to prosecute emphasise the need for timeliness. The guidelines to the Crown prosecutors and legal staff concerned with the prosecution of offences specify the duty of the Crown to make a full and early disclosure of the Crown case at the earliest possible time (see, for example, DPP Queensland 1995, 145, 501). The guidelines note that the ODPP's conduct in this regard is crucial to both the efficient operation of the courts and to reducing the number of late guilty pleas.

## Previous reviews

An analysis of police and court data in Queensland by the CJC in 1999 highlighted the large number of sexual offences that fail to progress either into the court system or through to trial after committal. The CJC suggested that, in view of these figures, the decisions made to prosecute deserved more study and that there was a need to know what happened at the next stage before the trial began (CJC 1999, p. 44). The report also raised the questions: 'What are the reasons for the high rates of "nolle prosequi" and "no true bill"?', and 'How does this procedure affect the complainant?'. These questions are still relevant to this Inquiry. (A 'nolle prosequi' is a withdrawal by the prosecution of the indictment and can occur either before or during the trial; a 'no true bill' is a withdrawal of the prosecution *before* indictment and therefore before a trial begins.)

A more recent report by the CJC (2001), which reviewed legal aid and public prosecutions funding in Queensland, found that while funding of the ODPP had increased substantially since 1995, the real revenue per matter had declined. The CJC found that the number of criminal matters funded by the Office between 1994–95 and 1999–2000 had increased by 53 per cent, primarily due to large increases in sentences and ex-officio indictments. The CJC also found that fees paid to external counsel were 10 per cent behind those paid by LAQ and that extensive use of inexperienced junior staff by the ODPP was an important issue. It was also reported that available information does not show any significant change in the outcomes of criminal matters by the Committals Project and that the 'ODPP's services to victims are too limited' (p. xiii).

## The Victim Liaison Service

Chapter 3 referred to the role of the ODPP's Victim Liaison Service (VLS) with regard to the implementation of the *Criminal Offence Victims Act 1995* (Qld) (COVA). This section explores that role more fully.

### History

The ODPP has significant obligations under COVA to comply with the fundamental principles of justice in its dealings with victims of crime.

Prior to January 1997, victim support within the ODPP was provided by the Violence against Women Unit and the Victims of Homicide Project. During 1996, the ODPP decided that, in order to respond properly to its obligations under COVA, it would establish a broader-based service that would incorporate the work of the existing victim support units. Accordingly, in January 1997, the ODPP's Victim Support Service (VSS) was formed to provide support and information to all victims of crime (who are covered by the COVA fundamental principles of justice) and to refer them to other organisations for specialised assistance (DPP Queensland 1997, p. 48).

During the 2000–01 financial year, government funding for the services provided by the VSS changed. As a result, the VSS was no longer able to fulfil its court support role (that is, it was no longer funded to accompany victims to court and provide other support functions). It was during this financial year that the VSS was renamed the Victim Liaison Service (VLS) (personal communication, ODPP 25.02.03).

There are currently 16 VLOs located across nine offices of the ODPP. These liaison officers are supported by paralegal clerks. Seven of the VLOs are based in Brisbane and the other nine work in the ODPP's regional offices, all of which now employ at least one VLO.<sup>31</sup> During the 2001–02 financial year, the VLS provided services to 10 000 victims (DPP Queensland 2002, p. 24).<sup>32</sup> The average monthly caseload for VLOs in the Brisbane office is currently between 250 and 300 cases (personal communication ODPP 5.03.03). This figure has increased significantly during the last few years: in 1998, the average monthly caseload for all VLOs was between 50 and 75 cases (JAG 1998, p. 6). In highlighting this increase in workload, it should be acknowledged, however, that

it may not be possible to simply compare the 1998 and 2003 workload figures, as the type of work carried out by VLOs has changed significantly since 1998.

The Victims of Crime Association of Queensland,<sup>33</sup> which is the peak body representing victims of crime in Queensland, made the following comment about the workload of VLOs in their written submission to the Inquiry (p. 4):

... it is important to acknowledge the Victim Support Service within the Queensland Department of Justice. The staff of this unit do the best job they can under the circumstances, however, their numbers are few and the workload is large ... the recent change of title from 'Victim Support Officers' to 'Victim Liaison Officers' highlights the realisation that they could not meet the needs of victims and now act more as an information distribution network.

Another initiative by the ODPP was the establishment of a community outreach program in Cairns during the 1997–98 financial year. The aim of this program (which is still operating) is to improve the ODPP's response during committals and trials to victims of violent crime from Indigenous communities. The program consists of a VLO in the Cairns office and three part-time victim support workers located in Thursday Island, Kowanyama and Aurukun (Queensland Government 2002c, p. 192; DPP Queensland 1998, pp. 51–52).

### **The current role of Victim Liaison Officers**

As soon as an ODPP case lawyer has been allocated to a particular case, a VLO must make contact with any victim who is covered by the COVA legislation (DPP 2000a, p. 6). The initial contact will usually be in writing, unless some other means of contact is more appropriate. The initial letter introduces the victim's designated VLO and case lawyer, encloses a number of information brochures on the criminal justice process (including information about the work of the ODPP and how to make a victim impact statement), and includes information required to be provided to the victim under COVA (for example, the identity of the defendant and the charges laid against the defendant). The initial letter also asks the victim whether they would like to be given further information about the progress of the case against the defendant. Even where the victim does not return the 'request for further information form' to their VLO, the VLO will still keep the victim informed about certain matters, such as trial dates or a discontinuance (DPP 2000a, pp. 9–10).

In addition to providing a victim with information about the progress of the case against the defendant and sitting with a victim during any interview with ODPP legal staff or lawyers from the private bar, a VLO can refer a victim to other organisations that are able to provide welfare, health, counselling and legal help. For example, a VLO can refer a victim who is entitled to make a compensation claim against the defendant or the Queensland Government to LAQ's Victims of Crime Compensation Unit for assistance and legal representation.

A victim may wish to have a support person present while they give evidence or for the duration of the trial. In this case, the VLO will refer the victim to one or more of the community agencies that provide court support for victims, such as the Victims of Crime Association of Queensland, PACT (Protect All Children Today)<sup>34</sup> or the Esther Centre (Centre for Addressing Abuse in Human Services and Faith Communities).<sup>35</sup> Although court support is no longer one of the formal roles of the VLS, a VLO may accompany a victim to court to give evidence if the victim does not wish to seek formal support from one of the community agencies (personal communication ODPP 25.02.03).

### **Previous reviews**

The Taskforce on Women and the Criminal Code stated in its 2000 report that women repeatedly reported in consultations and submissions that victims felt 'left out' of the criminal justice process and did not have a clear understanding of, or adequate information about, the process or the roles of various 'players' in the system.

The Taskforce commented:

Frequently comments to the Taskforce reflected misunderstandings or incorrect expectations of the role or function of those working in the system. An example of this is a victim's ... expectation that the role of a prosecutor is one akin to the victim's ... personal legal representative ... such misunderstandings could be avoided if victims ... were provided with the information at the beginning of their involvement in the process. This would assist in identifying a victim's needs, and which person or service may be able to address those needs. An understanding of the role and function of each person in the system will reduce unrealistic expectations and improve levels of satisfaction with the criminal justice process.

Queensland Government 2000a, p. 72

Under section 8 of COVA, each agency with obligations under COVA (such as the QPS and the ODPP) is required to issue internal guidelines that identify how its officers and employees are to 'put the 12 fundamental principles of justice into effect'. The Taskforce suggested that all agency guidelines issued under section 8 of COVA should require officers and employees to explain to victims the role of the various criminal justice agencies (Recommendation 38).

The report of the recent Cape York Justice Study (Queensland Government 2002c) noted, in relation to the community outreach program, that the ODPP had experienced difficulties in filling the positions of the three part-time victim support workers. The report also raised concerns about the effectiveness of ODPP liaison support services, suggesting (pp. 192–93):

- the service appears to be significantly under-resourced
- the needs of women, especially those subjected to violent crimes, appear to be no longer met by the VLS
- funding to provide training for community workers such as VLOs is deficient.

## THE COURTS

There are two court hearings for most sexual offence charges.<sup>36</sup> The first hearing, the committal hearing, takes place in the Magistrates Court. At that hearing, the magistrate determines whether there is sufficient evidence to justify a trial; if so, the magistrate will commit the accused for trial. The prosecution must then arrange for the matter to be listed for trial in a higher court (either the District or Supreme Court). The prosecution does this by filing an indictment in the higher court. The higher court trial is generally the second court hearing, although in some cases the prosecution may file an indictment when there has not been a committal or the committal hearing was unsuccessful (this is referred to as an ex-officio indictment).

Some minor sexual offence charges can be dealt with summarily and finalised by a magistrate or sometimes an accused will plead guilty during a committal hearing.<sup>37</sup> When this happens the magistrate commits the accused for sentencing and the prosecution lists the matter for sentencing in the higher court. Where it is intended to put a person on trial for an offence, the prosecution must present the indictment no later than six months after the date on which the person was committed for trial, unless the court has granted an extension of time (see ss. 590 and 561 of the Criminal Code).

Committal hearings in most areas in Queensland are conducted by police prosecutors. Once a matter is committed for trial, the police brief will pass to a legal officer at the ODPP. As a result of the Committals Project in Queensland (see CJC 1996a), however, there are three areas within Queensland where committal hearings are prosecuted by staff of the ODPP, usually a person holding the position of legal officer. The Committals Project has been in operation in the Ipswich and Southport Magistrates Courts since 1994, and in the Central Brisbane Magistrates Court since 1995. Police prosecutors, however, continue to handle matters that can be dealt with summarily by the magistrate

on a plea of guilty as provided by section 552B of the Criminal Code in these courts (QPS submission, p. 9).

## Committal

The primary function of the committal hearing is to filter out weak or unmeritorious cases so that no-one stands trial unnecessarily (see *Barton v. R* [1980] 147 CLR 75 at 99). However, it also serves these important functions:

- It acts as an important source of notice and information to the accused, both of the charges and of the evidence. The accused can obtain information about the prosecution's case and cross-examine prosecution witnesses to test their evidence.
- It helps to clarify the issues in dispute and provides the prosecution with an opportunity to test its case. It may be that, faced with a manifestly strong case, an accused will decide to plead guilty.

The committal hearing takes place after the police investigation and the decision of the prosecutor to start proceedings. It is, in effect, the second level of review of the prosecution's evidence in an indictable case. As has been noted:

The responsibility placed upon the DPP to decide whether to proceed with a prosecution is, of course, lessened to the extent that an independent judicial officer is prepared to agree that there is a case fit to go for trial. This is no bad thing.

Weinberg 1990, p. 145

One particular advantage of a committal hearing is said to be that the decision to commit is taken by an impartial and objective judicial officer (i.e. the magistrate). Despite the fact that the ODPP and all involved in the prosecution are required to be fair and objective, it is argued that the ODPP may not be seen as impartial and independent as:

His [or her] role is to prosecute. His [or her] day-to-day contacts with investigating agencies (including the police) make it difficult for the reasonable bystander to be satisfied that the scrutiny which has been brought to bear on the police brief is wholly independent, and without predisposition, even if that be the case.

Weinberg 1990, p. 145

It is important to note that the Magistrate's finding at the committal is not conclusive; it does not fetter the prosecutorial discretion either to proceed with the case or to withdraw. A prosecution can proceed despite a decision by the magistrate not to commit the accused for trial. The prosecution can also commence proceedings for an offence that was not examined at the committal hearing, or for an offence other than that which the magistrate directed that the accused be tried for. On the other hand, the prosecution can decide not to proceed despite a committal for trial.

Indeed, it is not strictly necessary for a preliminary examination to be held at all. Despite the entrenched role of the committal hearing, it is not required by statute. In Queensland the committal is governed by sections 99–134 of the *Justices Act 1886–1982* and section 561 of the Criminal Code regarding ex-officio indictments. A defendant can choose to stand trial without a committal hearing and the prosecution can also simply present the accused for trial. However, the latter course was strongly criticised by the High Court in *Barton v. R*, and is rarely used.

The outcome of the committal hearing is important. It involves the application of a broad test of the evidence in a court-like adversarial procedure, and results in the determination of whether an accused is to be held in custody, provided with bail, or discharged entirely. The decision to commit, with its attendant publicity, is likely to be personally damaging to the accused and the hearing itself may involve detrimental publicity. In Queensland, the length of time

between the committal and when the case is finally resolved at trial can also be considerable.<sup>38</sup>

Committal hearings for the prosecution of indictable offences have been controversial and the focus of significant reforms across Australian jurisdictions for several decades. The traditional committal hearing was one at which the witnesses for the prosecution appeared at the Magistrates Court, gave oral evidence and were cross-examined by the defence. The prosecution had total discretion as to which witnesses it would call at a committal hearing. After the evidence and any submissions made by the parties, the judicial officer decided whether there was a prima facie case against the accused, and, if so, committed the person for trial by judge and jury (Brereton & Willis 1990, p. 5; Sallmann 1990, p. 1).

Reforms of the committals processes across Australian jurisdictions have been prompted by criticisms that committal hearings cause delays, increase costs and complexity, and fail to filter effectively (Brereton & Willis 1990). As a result of reforms, committal hearings are now frequently conducted 'on the papers'. That is, statements of witnesses are exchanged between the parties and then presented to the magistrate for assessment. While the defendant's right to call witnesses to give oral evidence and to be cross-examined has been retained, it is quite common for the committal to proceed without any oral evidence being taken (Brereton & Willis 1990, p. 6). This process by which paper committals can be conducted is referred to as a 'hand-up brief'. Hand-up committals are said to save time and money, but they have also been criticised for contributing to the shifting of today's committal hearing from being judicial and forensic exercises to being more bureaucratic, procedural and administrative (Sallmann 1990, p. 1).

In Queensland, the DPP has previously issued a direction requiring the prosecution to provide the statements of all material witnesses when a hand-up committal is conducted (Brereton & Willis 1990, p. 6). Where the evidence consists solely of written statements, and counsel for the defendant consents to their client's committal, the court must commit without determining whether the evidence is sufficient to put the defendant on trial for the indictable offence (Queensland Law Reform Commission 1984, p. 58; s. 110A[6] of the Justices Act).

Committal hearings in relation to sexual offences are widely recognised as being difficult for the complainant as they can be cross-examined, often at length, in a formal setting, in front of strangers, about very intimate and traumatic details. One particularly relevant area of reform related to committal hearings is the increasing frequency with which jurisdictions have imposed restrictions on the defendant's right to cross-examine prosecution witnesses at the committal hearing. Such reforms aim to reduce the capacity for committal hearings to become very long and expensive, and help protect the complainant from multiple cross-examinations. For example:

- In South Australia victims of sexual assault cannot be cross-examined at the committal unless the court is satisfied that the interests of justice cannot be adequately served except by allowing the cross-examination (*Summary Procedure Act 1921* [SA] s. 106[3]).
- In New South Wales, a provision once existed to allow similar protection of complainants in cases of violent sexual assaults (*Justices Act 1902* [NSW] s. 48EA), but this provision was repealed in 1996 and not replaced.
- In Victoria, a provision exists to allow magistrates to prevent cross-examination (*Magistrates Court Act 1989* [Vic.] s. 16 in Schedule S).
- In Tasmania, the right to hold a contested committal has recently been abolished. Sections 51–53 of the *Justices Act 1959* [Tas.] provide that an indictment can be filed, a summons obtained and the person committed without further examination (s. 56A outlines the procedures for pleading not guilty and to show cause in evidence being given).

In Queensland, the right to cross-examine the complainant at committal continues. At a general level, section 21 of the *Evidence Act 1977* (Qld) provides that a court may disallow, or excuse witnesses from answering, any improper questions that the court considers use inappropriate language or are misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive. This provision has been criticised in Queensland for failing to protect complainants in sexual offence matters from questions in cross-examination at committal that clearly fall within that category.

Members of the judiciary, and other organisations who were consulted for the Inquiry, noted the following:

- That magistrates may not be proactive in monitoring the questions asked by defence counsel and that prosecutors may not be diligent about making objections, particularly when defence counsel are very senior.
- That, due to a lack of training, some magistrates fail to appreciate the sensitivity required for sexual offence complainants.
- That prosecutors involved in committal proceedings are often young and inexperienced (those with more experience are saved for trial). Consequently, they don't object when they should to protect witnesses. It is often left to a magistrate to intervene, therefore, but this may not happen because magistrates are sometimes intimidated by senior defence counsel (consultation with magistrates 25.10.02; consultation QPS Townsville, 31.10.02).
- That there is little effort to protect child witnesses by magistrates (consultation ODPP 31.10.02).
- That police prosecutors are often unaware of the rules of evidence and can sometimes allow defence counsel to harass and intimidate children (consultation ODPP 31.10.02).

As highlighted in Chapter 3 of this report, however, the proposed amendments to the *Evidence Act 1977* will mean that, in general, children will no longer be required to give evidence at a committal hearing.

It should be noted that the Crown may drop a case after committal for reasons unrelated to the strength of the case at the committal hearing. The proceedings for an offence may be dropped because of considerations personal to the accused or the victim, a change in evidence, loss of witnesses, or because it is trivial or stale, without it reflecting at all on the correctness of the magistrate's decision to commit for trial (Brereton & Willis 1990, pp. 12–13). The committal can also act as a screening mechanism: firstly, a matter may be withdrawn in anticipation of a committal hearing and secondly a 'no true bill' may be filed after the committal hearing where a serious flaw in the prosecution case has been revealed at the committal.

### **Previous reviews**

There have been ongoing concerns about whether committal hearings are operating effectively as a safeguard against unnecessary prosecutions. Attempts to make committals a more effective mechanism for filtering out weak cases has led to the reformulation of the test applied by committing magistrates in some jurisdictions.

The traditional test applied at committal by a magistrate is whether there is a prima facie case or whether the evidence is sufficient to put the defendant on trial for an indictable offence. In 1987 in Victoria the test was reformulated to identify whether 'the evidence [is] of sufficient weight to support a conviction' (*Magistrates Court Act 1989* [Vic.] s. 23 of Schedule 5; Brereton & Willis 1990, p. 6). In applying this test the magistrate is required to consider the issue of conviction, as opposed to trial, and is permitted to consider the credibility of witnesses. There is some evidence available from Victoria that shows that the implementation of the new test corresponded with a marked increase in the

discharge rate (Brereton & Willis 1990, p. 11), and previous reviews (Project Pathfinder) suggest that the early detection of pleas is higher with 'flow on benefit[s] for workload, scheduling, and overall throughput of cases' (KPMG 1996, p. 57).

In Western Australia, the committal has recently been abolished altogether (*Justices Act 1902* [WA] ss. 97B–104). In Queensland, on the other hand, the test applied at committal remains at a relatively low level. The Queensland DPP's submission to the Inquiry (p. 2) describes the test applied at committal as 'whether there is at least some evidence of the offence'. It can be otherwise described as 'whether a reasonable jury could convict'.

According to the Cape York Justice Study Report (Queensland Government 2002c, p. 192), major concerns about delays in bringing matters to court in Indigenous communities on the Cape led to the Attorney-General announcing the Fast Track program in October 2000. That program aims to overcome the delays in processing serious sexual and violent offences by way of encouraging early guilty pleas and using ex-officio indictments to reduce the need for committals. It was intended that this would lead to fewer contested matters. The report stated that 'the continuation of this initiative is crucial if the justice system is to respond effectively to sexual and violent offenders in Cape York Indigenous communities' (p. 192).

### **Police prosecution at committal**

There is ongoing debate in Australia as to the desirability of police continuing to conduct prosecutions at committal (save possibly for very minor summary offences). Many other jurisdictions have moved prosecution responsibilities away from police prosecutors more comprehensively than has been the case in Queensland (see Murray 1990; Drew 1990; Rozenes 1996). In Tasmania, for example, the ODPP is responsible for all committal prosecutions (CMC 2002b, p. 32). The Commonwealth DPP noted at the hearings for the Inquiry that such a system must now be considered best practice and while its introduction may seem to require greater resources, and would require a significant resource allocation to begin with, it would produce greater efficiencies in the long run (CMC 2002b, p. 32; s. 12 of the *Director of Public Prosecutions Act 1973* [Tas.]).

Since 1990 the NSW ODPP has progressively taken over the responsibility of conducting committal hearings (see s. 7[1] of the *Director of Public Prosecutions Act 1986* [NSW]), including the prosecution of certain summary offences for the sexual assault of a child (see s. 8[1] of the *Director of Public Prosecutions Act 1986* [NSW]). In South Australia, the Committals Unit of the ODPP conducts prosecutions for all major indictable offences and summary trials where they are complex or sensitive (see s. 7 of the *Director of Public Prosecutions Act 1991* [SA]). In the ACT, the shift in responsibility for the conduct of police prosecutions, including summary prosecutions, to the ODPP occurred in 1974 (Krone 1999, p. 9; s. 6 of the *Director of Public Prosecutions Act 1990* [ACT]). Negotiations between police and the ODPP in the Northern Territory saw the Northern Territory ODPP assume responsibility for police prosecutions, including summary prosecutions, from 1998 (see Krone 1999; ss. 12 and 13 of the *Director of Public Prosecutions Act 1991* [NT]).

Arguments for the removal of the prosecutorial jurisdiction from the police to the ODPP include:

- the need for decisions to be made about the conduct of a prosecution dispassionately and with a degree of detachment from the investigation
- the need for legally qualified prosecutors to deal adequately with complex issues of fact and law
- the involvement of an independent prosecuting authority from the outset will assist with the weeding out of unpromising cases
- an overall saving in resources devoted to the prosecution of offences.

Arguments for the retention of prosecutorial responsibilities by police centre on cost and efficiency, but also include arguments about career opportunities for police and the high standard of many police prosecutors.

## SUMMARY

The QPS appears to have fairly well refined and sensitive policies and protocols for dealing with reported sexual offences, as well as specialist sexual offences squads that are able to respond to such complaints. Indeed, such protocols appear to reflect fairly well the literature and legislation described in the previous chapters. However, training in, and compliance with, those policies, and the adequate monitoring of such, may be issues that require further attention. Such issues are explored in Chapter 7 of this report where some concerns raised in this regard by the submissions to the Inquiry are outlined. However, it is important to note that several reviews of the QPS, and especially internal reviews such as Project Horizon and the recent review by the Department of Families and the QPS (2001), indicate a strong commitment by the QPS for continual improvement and, indeed, illustrate clarity within the organisation about where improvements are needed most.

This chapter indicates that the policies that guide the operation of the ODPP in Queensland are similar to all other States of Australia. Chapter 8 explores submissions made to the Inquiry about the procedures of the ODPP and makes some recommendations for reform.

The operation of the courts does not fall within the terms of reference of this Inquiry, although certain aspects, such as police prosecution at committal, are relevant. The information provided in this chapter about the courts is presented so that the reader can appreciate the full continuum of the processes involved in the handling of sexual offences by the criminal justice system. A fuller appreciation of some of the data presented in the following chapters is also more likely if the information provided in this chapter is used in this way.

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## ENDNOTES TO CHAPTER 4

- 27 There are currently 40 SCAN teams across Queensland, each with authorised members from three core agencies: the Department of Families, the QPS and Queensland Health. SCAN teams provide a forum for case discussion and coordinated approaches to ensure the safety of the child or young person at risk.
- 28 Phase 2 of the detective training program, for example, covers the investigation of sexual offences during lectures on offences against the person and prostitution (4 hours for sexual offences, 2 hours for prostitution). The course covers sexual offence legislation, protocols when dealing with sexual offence complaints (as contained in the OPM) and medical procedures. Additional information regarding corroboration is included in the training material. All work is subject to examination and moderation.
- 29 The report on the implementation of Project Axis by the Queensland Government (2002a) indicated that completion of ICARE training was perceived to enhance the collection of admissible evidence, increase credibility as a competent interviewer in the court process, and ensure the capacity to protect a child's well-being during the police interview.
- 30 Under s. 93A of the Evidence Act certain out-of-court written or recorded statements (such as the recording of an interview with a police officer) can be admitted into evidence. Chapter 3 of this report discusses the Evidence (Protection of Children) Amendment Bill 2003 (Qld), which extends the application of s. 93A.
- 31 The resources for victims services have been significantly increased since the VSS was first formed in January 1997. For example, in 1998 the VSS had staff only in the Brisbane, Townsville and Maroochydore offices (JAG 1998, p. 6).
- 32 This figure includes the support services provided to the victim both at committal and resolution of the matter in the superior courts (i.e. the same victim may be counted more than once in the figure of 10 000) (DPP Queensland 2002, p. 24).

- 33 The Victims of Crime Association of Queensland was established in 1988 by the Department of Families to provide information and practical and emotional support to victims of crime and their families at no cost. The Association aims to: advocate on behalf of victims of crime to help ensure that their rights within the criminal justice system are protected; liaise with other organisations that assist victims of crime; educate victims and their families, related agencies and the general public in victim issues and the impact that crime has on victims, their families and the general community and provide referrals.
- 34 PACT (Protect All Children Today), established in 1985, is a community-based, non-government organisation which has a broad role as advocate for the victims of child abuse and neglect (aged 3–17 years) who have been involved in the criminal justice system. PACT aims to reduce the trauma experienced by children and young people required to give evidence in the criminal courts as victims of, or witnesses to, a crime by providing support and therapy.
- 35 Project Esther was created in 1994 in response to claims of sexual abuse by the clergy. After the Forde Inquiry (1999), the Esther Centre began receiving government funding and was officially launched in April 2002. The centre provides intervention and support for people who have experienced abuse in church institutions, faith communities and human services. Centre staff also help abused people make complaints, either through the criminal or civil justice systems or the internal processes of the churches. The centre promotes strategies for the prevention of future abuse by professionals and carers and seeks to raise awareness within the community of the issue of abuse of power and its impact on people.
- 36 This section of the report is largely based on a summary of the court process that was reported by the CJC in 1999 (p. 26).
- 37 Offence charges can be dealt with summarily if:
  - the offence did not involve circumstances of aggravation
  - the complainant was 14 years of age or over at the time of the alleged offence
  - the accused has pleaded guilty, or
  - the accused does not object to the charge being dealt with summarily.
- 38 Section 590 of the Criminal Code sets the required time from committal to the presentment of an indictment at 6 months.

## PROGRESSION OF SEXUAL OFFENCE MATTERS THROUGH THE QUEENSLAND CRIMINAL JUSTICE SYSTEM

***In the interests of both fairness and the effective use of limited resources, not all suspected offences can be brought to trial. The ‘decision to prosecute’ is not a single decision but a series of decisions made by complainants, police, the ODPP and the magistrate at different stages of the criminal justice process.***

***This chapter:***

- ***describes each stage in the decision-making process***
- ***presents the most recent data on the number of matters that progress through each stage, and***
- ***illustrates comparative data from other Australian States and overseas.***

***Reform is currently under way in Queensland to improve the collection, collation and coordination of data across the criminal justice system (the Integrated Justice Information Strategy), but is not complete. The data presented in this chapter are preliminary, therefore, and may be subject to modification as techniques to conduct these kinds of analyses are enhanced over time.***

### THE DECISION TO PROSECUTE

As illustrated by Figure 1 (next page), the ‘decision to prosecute’ is not a single decision but a series of decisions made by complainants, police, the ODPP and the magistrate at different stages in the criminal justice process. The distinctions between the tests applied at different stages by the police and the ODPP are important. Tension can result when these differences are either misunderstood or the tests are inappropriately applied.

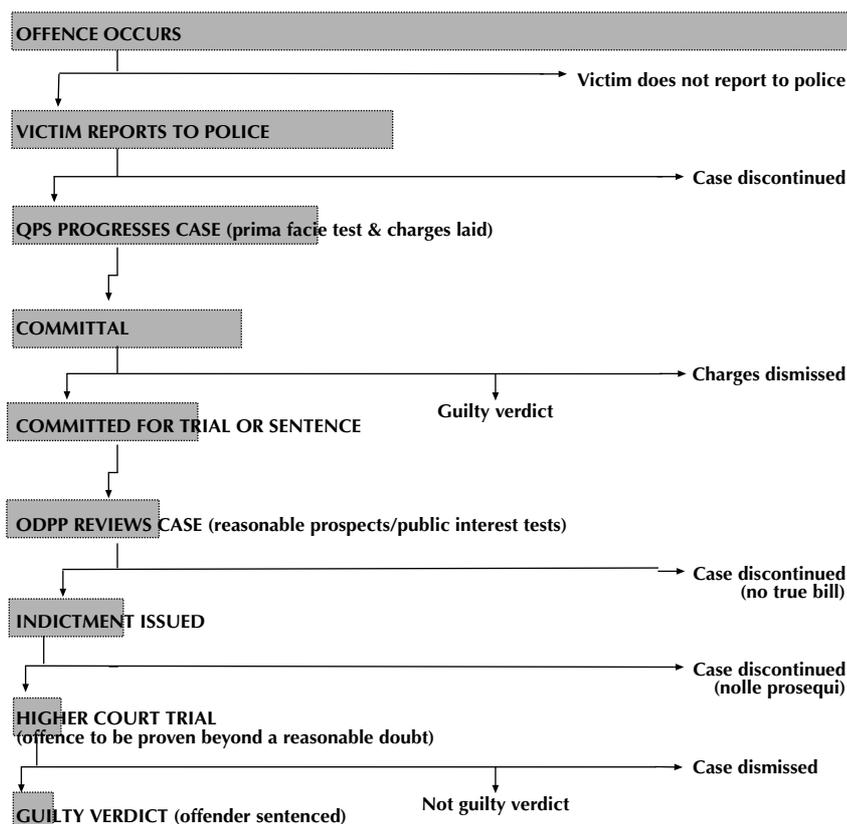
In Queensland there are, in effect, four tests that a matter must satisfy before it can proceed to trial:

- 1 **Laying charges.** A charge is laid when there is sufficient credible evidence identifying a person as having committed an offence. The decision to charge is usually made by police alone. In some cases, due to complexity, sensitivity or some other reason, the police may seek the opinion of the ODPP as to whether a charge should be laid. Chapter 2 of the OPM (the ‘Prosecution Process’) deals with the process involved in instituting a prosecution against a person for any offence. The OPM states (2002, at 3.4.2) that:

The decision to either institute proceedings or desist from doing so initially rests with the arresting officer who, having investigated an offence, must consider instituting proceedings against a person for that offence. Generally, an officer may institute proceedings without seeking further advice, subject to any statutory requirements to obtain approval to prosecute and subject to that officer holding a reasonable belief that the suspect committed the offence. Prior to commencing a prosecution, the arresting officer should be satisfied on

**Figure 1. The progression of sexual offence matters through the criminal justice system**

The shaded boxes denote the passage of offences through the system (e.g. only about a quarter of actual offences are reported to police and only a small proportion of these result in a guilty verdict).



reasonable grounds that:

- i. an offence has been committed;
- ii. the person against whom the prosecution is proposed has committed that offence;
- iii. a statutory authority to prosecute for that offence exists ... ;
- iv. any statutory limitation on proceedings has not expired; and
- v. the elements of the intended charge can be proved.

In instances where officers investigating an offence are of the opinion that although an offence is provable, but in the public interest, or for some other reason the matter should not be prosecuted, they should seek advice from their officer in charge.

Generally, the officer who investigates an offence may lay charges without seeking further approval ... Where the circumstances of a particular case indicate that two or more alternate charges are supportable, the offence carrying the greater penalty is generally preferred, subject to the guidelines of the DPP (State). Charges should not be laid with the intention of providing scope for subsequent bargaining.

- 2 **The prima facie test.** This test is applied by police and magistrates (and sometimes by the ODPP) to determine whether there is evidence available that is capable of establishing each element of the offence (Qld DPP, p. 2), i.e. 'on the available material is there evidence on which a trier of fact *could* conclude beyond a reasonable doubt that all the elements of the offence have been established?'
- 3 **The reasonable prospects test.** This test is applied before a matter can be heard and determined at trial. The test asks 'can it be said that there is a reasonable prospect of conviction by a reasonable jury (or magistrate) properly instructed?'. Or, 'on the available material, is there evidence on which a trier of fact *would* conclude beyond a reasonable doubt that all the

elements of the offence have been established?' This test is usually applied by the ODPP in Queensland, but it is also applied by police prosecutors when they prosecute less serious matters summarily.

Many factors may affect the assessment of whether there is a reasonable prospect of securing a conviction. The Prosecution Policy of the State of Queensland (DPP Queensland 1995, p. 3) states that:

In deciding whether or not the evidence is sufficient to justify a prosecution, the existence of a bare prima facie case is not enough. A prima facie case is necessary; however, a prosecution should not proceed if there is no reasonable prospect of securing a conviction before a hypothetical reasonable jury in jury trials, or a Magistrate in the case of summary proceedings.

The decision to prosecute or not requires a careful and detailed consideration of the strength of the case as it is likely to be when presented in court. This involves weighing up all of the available evidence by a person experienced in weighing available evidence (DPP Queensland 1995, pp. 3–4). The availability, competence and compellability of witnesses and their likely impression on the judge or jury must be considered. Lines of defence are also considered. The policy provides a long list for the consideration of the decision-maker including the following:

- Does it appear the witness is exaggerating, or has a faulty memory ... or may be unreliable in any other way?
- Does a witness have a motive for telling less than the whole truth?
- Are there substantial matters that the defence may properly use to attack the credibility of the witness?
- What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination?
- Could the credibility of the witness be affected by any physical or mental disability?
- If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?

The test cannot be overly prescriptive and must rely on the considered exercise of the prosecution's discretion to weigh all the relevant factors on a case-by-case basis.

The reasonable prospects test itself is not controversial. Several submissions made during the public hearings pointed out that difficulties arise not in relation to the test itself, but in relation to how this test is applied (see, for example, the Public Defender's comments: CMC 2002b, p. 46).

4. **The public interest test.** This test is applied after the reasonable prospects test but before a matter can be heard and determined at trial. It involves ensuring that there is not some discretionary factor — private or objective — that requires the matter not to proceed. Public interest is not synonymous with public curiosity or public expression (Cowdery 2001, p. 2).

The Queensland Prosecution Policy (DPP Qld 1995, p. 5) states that the factors to take into account when deciding whether or not the public interest requires a prosecution will vary from case to case. There are public interest factors that will operate both in favour of and against a prosecution proceeding: a generally applicable principle is that the more serious the offence, the more likely it will be that the public interest requires a prosecution to be pursued.

Prosecution policies across all Australian jurisdictions also contain a uniform list of factors that may **not** be taken into account in deciding whether or not to prosecute. These are:

- a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- b) personal feelings of the prosecutor concerning the offender or the victim;
- c) possible political advantage or disadvantage to the government or any political group or party; or

- d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

The Queensland Prosecution Policy provides a comprehensive, but not exhaustive, list of factors for the prosecution to consider when determining whether the public interest requires a prosecution, including:

- the staleness of the alleged offence
- the prevalence of the alleged offence and the need for deterrence, either personal or general
- the attitude of the victim of the alleged offence to a prosecution
- the likely length and expense of a trial
- the likely outcome in the event of a conviction considering the sentencing options available to the court
- the effect on public order and morale.

ODPP policies in other States of Australia include additional factors that are not in the Queensland policy such as:

- special circumstances that would prevent a fair trial from being conducted (DPP NSW 1998)
- whether or not any resulting conviction would necessarily be regarded as unsafe and unsatisfactory (DPP NSW 1998)
- whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive (DPP NSW 1998; DPP Victoria 2001).

Queensland's policy alone makes a specific provision in relation to the public interest criteria for sexual offences. The Queensland Prosecution Policy (DPP Queensland 1995, p. 10) states that:

Sexual offences such as rape or attempted rape are a gross personal violation and are serious offences. Sexual offences committed upon children should always be regarded seriously. Where there is sufficient evidence to warrant prosecution, there will seldom be any doubt that the prosecution is in the public interest.

## PROPORTION OF CASES THAT PROGRESS THROUGH THE CRIMINAL JUSTICE SYSTEM

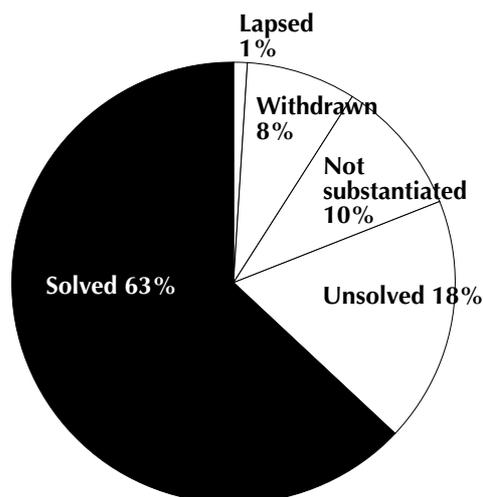
### Police data

The most recent data reported by the QPS (2002b) indicate an overall increase of about 7 per cent in reported sexual offences for the year 2000–01 to 2001–02.<sup>39</sup> The QPS was able to clear most of those matters (75 per cent) during that period.<sup>40</sup> The QPS also said that this growth in reported offences has been continuing since 1992–93. It is important to note, however, that this does not necessarily mean an increase in offending per se, rather the figures reflect increases in the reporting of offences that had occurred many years previously — for example, approximately 20 per cent of offences are alleged to have occurred more than five years before they are reported to the police (CJC 1999).

Figure 2 (next page) represents the outcomes of all sexual offences reported to the QPS for the years 1999–2002 (n = 27 439 offences). About two-thirds of those offences (63 per cent) were classified as 'solved' during that period, in that the investigation of the reported offence led to either an arrest or another action in accordance with the QPS policy (such as the processing of a notice to appear, a caution etc.).<sup>41</sup>

It might be assumed, therefore, that about two-thirds of reported sexual offences progress to a committal hearing, with the exception of a small proportion of cases (about 3 per cent) that are dealt with by way of a caution<sup>42</sup> or community conferencing<sup>43</sup> without a committal hearing when the offender is a child less than 10 years of age.

**Figure 2. Outcome of 27 439 sexual offences reported to the QPS (1999–2002)**



**Source:** Data provided to the Inquiry by the QPS in February 2003.

**Note:** Data include preliminary data for June–December 2002 only. These data may be subject to change.

Figure 2 also shows that, during this period, 18 per cent of reported cases were not solved, 10 per cent were not substantiated, 8 per cent were withdrawn and 1 per cent lapsed. In other words, about 37 per cent of reported offences during that period did not progress to the next stage in the criminal justice system (i.e. committal). There is some evidence to suggest that the application of police discretion may influence the total proportion of complaints that do not proceed to committal, especially the 10 per cent of matters categorised as unsubstantiated.

While Figure 2 presents aggregate data for the period 1999–2002, similar trends were found when data for each of the four years were examined separately. In addition, the data were similar to those reported earlier by the CJC (1999) for the years 1994–1998, giving some indication that police may have been providing a consistent response to reported sexual offences during the last decade.

Although most cases were solved by way of arrest (72 per cent, on average), the profile for actions undertaken by the police differs slightly by offence type. The profile for 1994–1998 was reported by the CJC in 1999. Updated figures for the years 1999–2002 were provided by the QPS to the Inquiry and are illustrated in Table 2. Consistent with the findings reported in 1999 by the CJC, these data indicate a generally higher arrest rate for offences such as rape, attempted rape and incest than for other types of sexual offences.

**Table 2. Police action taken by offence type  
(1999–2002)**

Percentage of offences actioned (n = 27 439 offences)

Offence	Arrest	Caution	Com. conf.	Notice to attend	Notice to appear	Warrant issued	Summons served	Summons issued	Other
Rape	86	2	0	1	7	0	1	1	2
Attempted rape	83	2	2	1	7	1	0	1	2
Indecent assault/adults	68	1	0	2	23	0	0	3	2
Indecent treatment/children	72	5	0	1	15	0	0	3	4
Assault/intent to commit rape	89	0	0	6	6	0	0	0	0
Sexual assaults (other)	52	4	0	8	32	0	0	0	4
Unlawful carnal knowledge	70	9	0	2	15	0	0	1	1
Incest	86	6	0	1	5	0	0	0	2
Sexual offences consent proscribed (other)	90	1	0	0	2	0	0	1	7
Bestiality	38	38	0	0	0	0	0	25	0
Indecent practices between males	50	13	3	0	33	0	0	0	0
Wilful obscene exposure	39	3	0	2	53	0	0	1	2
Sexual offences (other)	54	10	0	2	9	0	0	2	23
<b>Average across all offences</b>	<b>72</b>	<b>4</b>	<b>0</b>	<b>1</b>	<b>16</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>4</b>

Source: Data provided to the Inquiry by the QPS in February 2003.

**Notes:**

- 1 Data exclude offenders aged 10 years or less and not, therefore, comparable to the data presented in Figure 2.
- 2 Data included for June–December 2002 are preliminary only and may be subject to change.
- 3 Com. conf. — community conferencing.
- 4 'Notice to attend' is for juveniles who commit offences or for adults who committed an offence as a child (*Juvenile Justice Act 1992*) 'Notice to appear' (NTA) is an alternative process to an arrest for adults only. The *Police Powers and Responsibilities Act 2000* allows offenders (in certain circumstances) to be issued with an NTA instead of being arrested — the offender must appear at a court within a certain amount of time.

## Progression through the criminal justice system

Data for all sexual offences<sup>44</sup> progressing through the criminal justice system in Queensland were requested from the Department of Justice and Attorney-General, via the Office of Economic and Statistical Research (OESR), for the years 1994 to the present. Data were provided to mid 2001: data for 2002–2003 were not available. Those data are presented in Figure 3, below, in the columns marked Magistrates Court, ODPP and higher courts.<sup>45</sup>

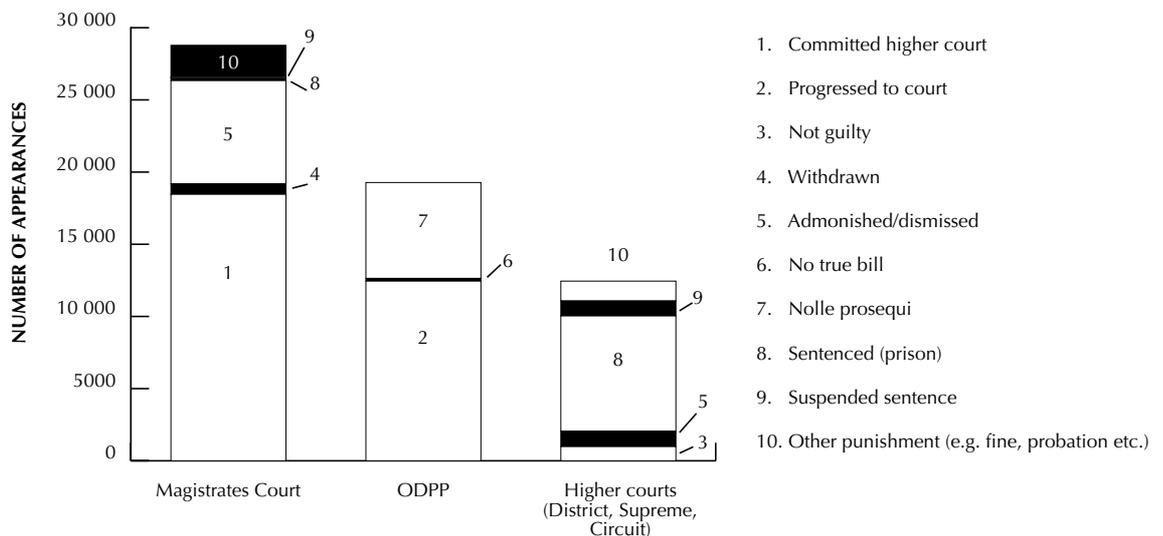
Figure 3 illustrates an estimate of the overall number of finalised sexual offences at each stage of the criminal justice process, including the proportion of cases that are either withdrawn or discontinued at each stage, and the outcomes of those cases that remain in the system to finalisation. It is important to note, however, that these figures are estimates based on the data available.

### Committal

A total of 28 777 appearances for sexual offences at Magistrates Courts were recorded for the period under review. The outcomes of those appearances were as follows:

- 64 per cent of cases were committed to a higher court for trial or sentencing (n = 18 462 appearances)
- 27 per cent of cases were withdrawn or dismissed (including minor matters involving the forfeiture of bail) (n = 7905 appearances)
- 1 per cent of the accused were found guilty and sentenced to prison (n = 159 appearances) or given a suspended prison sentence (n = 103 appearances)
- 8 per cent of the accused (n = 2148 appearances) were found guilty and received another form of punishment such as convicted/not punished, an intensive correctional order, probation, fined/default imprisonment, community service, good behaviour/recognition, compensation or other).

**Figure 3. The progression of sexual offences through the criminal justice system: All sexual offences, all courts (1994–2001)**



Source: JAG and OESR.

**Note:** The sentencing options highlighted in the figure include cases that have gone to trial and cases that have resulted in a guilty plea prior to trial. Therefore, while the results suggest that cases that proceed to the higher courts result in a high proportion of convictions and hence a high proportion of sentencing outcomes, many of these outcomes may be the result of a guilty plea rather than a court trial.

### **Discontinuance of cases committed to a higher court**

The data suggest that about 35 per cent of sexual offence matters that have been committed to the higher courts by a magistrate will be discontinued by the prosecution as either a nolle prosequi (n = 6638 appearances) or a no true bill (n = 187 appearances). A no true bill will occur before indictment and therefore before a trial begins; a nolle prosequi will occur after indictment, but can occur either before or during the higher court trial.

### **Higher court outcomes**

The higher court data include all sexual offence cases that proceeded to the District (n = 12 273 appearances), Supreme (n = 154 appearances) and Circuit (n = 24 appearances) courts for the period 1994–2001 (excluding those matters that resulted in a no true bill or a nolle prosequi, which are accounted for in the previous section).

Of the total 12 451 appearances during that period that resulted in a court outcome, other than a nolle prosequi or a no true bill:

- 8 per cent of the accused were found to be not guilty (n = 986 appearances)
- 9 per cent of the accused were discharged (n = 1064 appearances), and
- 83 per cent of the accused were found guilty (either by trial or plea) and sentenced to prison (n = 7989 appearances), given a suspended prison sentence (n = 1034 appearances) or sentenced to an alternative form of punishment such as probation, community service, a fine, good behaviour/recognisance, convicted/not punished or other (n = 1378 appearances).

### **What do the data mean?**

The data confirm that sexual offences place a heavy burden on the criminal justice system overall, with approximately 6500 offences being reported to the police each year, with increasing trends over time. The data also suggest that at committal about one-quarter of the matters before the courts are withdrawn. Following committal, about 35 per cent of matters that are committed to trial are discontinued by the prosecution either before or during the higher court trial. Once before the higher court system, however, the majority of cases result in a conviction (either by trial or plea) and, again, most offenders who are convicted go to prison.

Looking at the broader picture, however, the figures indicate that approximately 17 per cent of offences that are reported to the police<sup>46</sup> result in a conviction in the higher courts. While the reader is warned of the inexact nature of these data, other research from other States and countries present almost identical figures. These results are reported in the next two sections of this chapter for comparative purposes.

Previous research has indicated that different offences can result in a different range of outcomes. The 1999 CJC publication *Reported Sexual Offences* (p. 41), for example, indicated that conviction rates were lower for rape and higher for identifiable child sexual offences than most other sexual offences. These trends were confirmed by preliminary analysis of the data received for the Inquiry. As these data were not considered central to the terms of reference for this Inquiry, however, they are not reported here and will be reported in a future CMC publication.

It is also possible that there will be differences in the outcomes of charges and appearances over time, although preliminary analyses indicated surprising consistency during the period under review. Again, this issue was not considered central to this Inquiry. These data will, however, be reported in a future CMC publication.

### **Legal Aid representation**

Upon request, LAQ provided the Inquiry with data on matters that it had handled between 1994–95 to 2001–02 where the principal matter was a sexual offence.<sup>47</sup> During that period, LAQ represented 6727 accused (an average of 840 matters per year). However, this figure may be an underestimate due to (a) the non-inclusion of sexual offences that were reported concurrently with other principal matters (such as homicide), or (b) fewer offence types than those reported in the OESR data analysed above. On the other hand, the data were more up to date than the OESR database, and may have included an additional year's worth of cases.

Nevertheless, while these data may not be directly comparable, they suggest that it is possible that about one-half of those accused who come before the courts for sexual offences do so with legal aid representation. Conversely, this means that about one-half must resort to private legal representation or represent themselves, which will include, of course, associated costs.

## **COMPARATIVE AUSTRALIAN DATA**

The Queensland data reported above are similar to those of other Australian States. In South Australia in 1993–95, for example, the National Association for the Prevention of Child Abuse and Neglect (NAPCAN) Working Party Report reported that prosecution had begun on only 13 per cent of reported cases of child sexual abuse to the Department for Family and Community Services for that year, resulting in convictions in only 4 per cent of cases. Similarly, child abuse statistics for 1993 in New South Wales compiled by the Department of Community Services and the New South Wales Criminal Court indicated convictions of only 4 per cent of offenders (NSW Child Protection Council 1996).

A more recent study in South Australia by Hood & Boltje (1998) followed 500 cases of child sexual abuse that had been reported to the Child Protection Services, from the initial report to the child welfare system through the intervention process to criminal prosecution. That study found that only 27 per cent of cases substantiated at the welfare/health level were prosecuted in the criminal courts and that only 17 per cent resulted in a conviction, half of these as a result of guilty pleas. The study indicated that failure to prosecute was not the result of faulty substantiation classification at the health/welfare level:<sup>48</sup> on the contrary, constraints in the legal system that significantly reduced the likelihood of prosecution led to choices being made about whether to proceed.<sup>49</sup>

The most recent Australian figures available were reported by Joy Wundersitz of the Office of Crime Statistics and Research, South Australia, in May 2003 (paper presented to the Australian Institute of Criminology national conference 'Child sexual abuse: Justice response or alternative resolution'). She reported preliminary findings of a current research project that is tracking child victimisations (including sexual abuse) from police incident report to finalisation in court. Wundersitz reported that 16.1 per cent of reported child sexual offences resulted in a successful court prosecution, verifying the general perception that many child sexual assault cases never result in the apprehension of a suspect, and that even fewer proceed to a successful prosecution in court. She also reported, however, that this figure is not dissimilar to the conviction rates for other offences. Her study has indicated, for example, that the conviction rate is 32.9 per cent for major assault, 18.4 per cent for minor assault and 18.4 per cent for 'threat to kill'.

A report by the NSW Child Protection Council (1996, p. 39) also indicated that only 48 per cent of child sexual offenders went to prison. The remainder were given community-based orders involving bonds, fines and periodic detention. In some 60 per cent of cases, the community-based orders did not require any form of supervision.

## COMPARATIVE INTERNATIONAL DATA

Like Australia, other Western countries also experience low reporting and high discontinuance (or attrition) rates for sexual offences in the criminal justice system. For example, a case-flow analysis of the criminal justice outcomes of the prosecution of child sexual abuse allegations in four counties of the United States by Cross, Whitcomb & De Vos (1995)<sup>50</sup> found that only 9 per cent of the total sample of complaints (relating to 552 alleged perpetrators) that were referred for prosecution by the police actually went to trial. The majority of those complaints that went to trial, however, resulted in a conviction and three-quarters of the perpetrators convicted were incarcerated. The authors concluded that 'the best predictor of outcome was simply whether or not cases were accepted, since the great majority of cases accepted for prosecution resulted in guilty pleas' (pp. 1438–9).

Similarly, research conducted in the United States in 1997 indicated a rejection rate of about 41 per cent of matters by the prosecutor (with a further 11 per cent being dismissed at a later point in the proceedings), and a complementary conviction rate (by plea or trial) of 46 per cent. In only 1.4 per cent of matters defendants were not convicted. The authors claimed that these findings 'confirm the importance of the decision to charge or not and suggest that the prosecutor "controls the doors to the courthouse"' (Spohn, Beichner & Davis-Frenzel 2001, p. 228).

In the United Kingdom, the Home Office (2002a) has indicated that about 25 per cent of all rape cases passed by the police to the Crown Prosecution Service are discontinued by the Service. Cases where the alleged complainant is under 16 years at the time of the attack are most likely to proceed to court and the most likely to result in a conviction. The study also indicated that just 9 per cent of suspects were convicted of rape or attempted rape.

In Ireland, the recently released SAVI (Sexual Assault and Violence in Ireland) report by McGee et al. (2002) assessed the prevalence of sexual abuse among a random sample of the Irish population to be high, but also reported that disclosure rates to the Gardai (the Irish police) were strikingly low. Of those who disclosed adult sexual assault, for example, one man (of 98 who reported being assaulted — 1 per cent) reported to Gardai, as did 19 women (of 244 who report being assaulted — 7.8 per cent). Regarding child sexual abuse, 10 men (of the 178 who reported it — 5.6 per cent) and 28 women (of 290 who reported it — 9.7 per cent) had reported their experiences to the police. About one-half of those who had reported were satisfied with the service provided by the police, most dissatisfaction being because they didn't feel that they were given enough information about the process, rather than concerns about police attitudes or responses. Gardai annual report statistics suggested that the attrition rate (i.e. the difference between those events reported to the police and the number of prosecutions that result) was 95.1 per cent. That is, only about 5 per cent of reported offences progress through the system.

In Canada, the Federal Provincial Territorial Ministers Responsible for the Status of Women in Canada (2002) reported that about one-third of sexual assault cases that appeared before the adult court in 1998–99 resulted in a conviction. A higher proportion (just over one-half) of other sexual offences (the majority of which are child sexual abuse cases) resulted in a conviction.<sup>51</sup> According to the authors, attempted murder is the only violent offence in the adult court system with a markedly lower conviction rate than sexual assault. About 6 in 10 of those convicted of sexual assault or other sexual offences in an adult court were sentenced to a period of incarceration. This is lower than the percentage receiving prison terms for crimes of homicide, attempted murder and robbery, but higher than that for crimes of assault and kidnapping/abduction.

## SUMMARY

The data presented earlier in this chapter, if taken in isolation, indicate that the successful prosecution of a sexual offence in Queensland is likely to be limited to a relatively small proportion of reported offences overall. However, as indicated by the comparative interstate and international research, the range of outcomes in Queensland is not dissimilar to other States of Australia or other countries. Indeed, in many ways the Queensland situation appears to be somewhat better. It is probably unreasonable, therefore, to expect that Queensland would be significantly different to other States or countries, given that the Queensland criminal justice system is similar to those illustrated above.

The message taken by victims of abuse who review this data might, therefore, be that the stress of enduring the complexities and difficulties of the criminal justice system by reporting such an offence may not be warranted, given the limited likelihood of achieving a conviction. Thus, under-reporting of offences may continue. Conversely, the message to 'would-be offenders' might be that the likelihood of being caught and convicted of a sexual offence appears slim. Neither response is likely to lead to the prevention of sexual abuse nor enhance the perceptions of the public that the criminal justice system is little more than a legal process, rather than a 'justice' system.

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## ENDNOTES TO CHAPTER 5

- 39 North Coast Region recorded the largest increase in offences since the previous year while Far Northern Region recorded the highest rate of sexual offences overall.
- 40 An offence is deemed to be cleared if it is either solved or withdrawn, including one of the following:
- at least one offender has been arrested or summonsed or issued with a Notice to Appear, or information has been laid to compel an offender's appearance in court
  - action has been taken against at least one offender under the provisions of the *Juvenile Justice Act 1992* (Qld)
  - at least one offender has been dealt with in accordance with QPS policy (e.g. informal counselling of children and elderly persons)
  - the offender has admitted the offence, but there is an obstacle to the proceedings
  - the offender is known and sufficient evidence has been obtained, but the complainant refuses to prosecute
  - the offender is in another jurisdiction and extradition is not desired or not available
  - the offender is serving a sentence and no useful purpose would be served by prosecution
  - the offender has died
  - the offender has been admitted to a mental institution
  - the offender is being offered drug diversion
  - there is some other bar to prosecution
  - the offender is dealt with by ex-officio indictment
  - the offender is being dealt with by another agency
  - the complainant or essential witness has died
  - the complainant has requested police to take no further action.
- 41 Most cases that were solved resulted in an arrest (72 per cent) or a Notice to Appear (16 per cent). The remainder resulted in a range of actions such as cautions (4 per cent), Notices to Attend (1 per cent), summons (2 per cent) or other (4 per cent), whereby the offender is known and sufficient evidence has been obtained but there is a bar to prosecution.
- 42 An official caution can be administered to a child under the provisions of the *Juvenile Justice Act 1992* (Qld) and includes the cautioning of persons over 65 years of age and intellectually disabled persons for minor criminal offences in accordance with official Service policy. The term does not apply to any informal process where a child is spoken to by an officer where the officer is exercising discretion in relation to the child's particular behaviour or actions.

- 43 Community conferencing is the referral of a child under the provisions of the *Juvenile Justice Act 1992* (Qld) to a community conference by a police officer before the start of a proceeding for an offence, or by a court after a finding of guilt is made against a child for the offence.
- 44 These included:
- aggravated sexual assault
  - assault with intent to commit rape
  - attempted rape
  - bestiality
  - carnal knowledge of children
  - censorship offences
  - child pornography
  - incest
  - indecent/wilful exposure
  - maintaining a sexual relationship with child
  - non-aggravated sexual assault
  - non-assaultive sexual offences
  - rape.
- 45 Previous research (see CJC 1999, pp. 28 & 30) has indicated that, on average, most accused come before the courts for an average of two to three charges, although the range can be quite extensive, from just one charge to hundreds of charges. A review of the number of charges associated with the appearances reported in Figure 3 indicated that one appearance in the lower court represented, on average, 4.8 charges (with a range of 1 to 104 charges) and that one appearance at the higher courts represented an average of 11.9 charges (with a range of 1 to 425 charges).
- 46 A conservative figure of 47 000 reported offences for the period 1994–2001 was determined by a review of the data presented in the annual statistical reviews published by the QPS for that period, but this figure is only an approximation based on time trends and the limited data available.
- 47 These offences included:
- sodomy
  - rape
  - attempted rape
  - attempted carnal knowledge
  - incest
  - indecent assault/indecent dealing
  - other sexual offences
  - conspiracy sexual offences
  - publication of indecent matter
  - indecent behaviour
  - wilful exposure.
- 48 Australia-wide data consistently show that more than one-half (54–57 per cent) of the reports of child abuse are ‘not substantiated’ (Australian Institute of Health & Welfare 1990–91, 1991–92, 1992–93, 1993–94, 1994–95).
- 49 Hood & Boltje (1998) identified 32 of 51 cases before the courts that involved children under 7 years of age. In these cases, the children were either not able to give statements that sufficiently described events or specified dates, or were predicted to be unable to repeat the description a second time. However, in some way the information provided by the child or the situation had convinced the doctors, interviewers and police that the allegation was substantiated. In one example, a child of 2 years living in an Aboriginal community had physical signs of sexual assault, but could not say what had happened.
- 50 Erie County (Buffalo), New York; Polk County (Des Moines), Iowa; Ramsey County (St Paul), Minnesota and San Diego County, California.
- 51 Conviction rates include both guilty pleas and conviction after trial.

## **PART II: THE INQUIRY**

## GENERAL ISSUES RELEVANT TO ALL THREE TERMS OF REFERENCE

***This chapter looks at some prevailing attitudes towards the criminal justice system in Queensland, before describing six major issues relevant to all three terms of reference. These relate to:***

- 1 the disclosure of sexual abuse***
- 2 the prosecution of historic offences***
- 3 the committal hearing***
- 4 the time taken for matters to proceed through the criminal justice system***
- 5 victim support***
- 6 adequacy of resources.***

### GENERAL ATTITUDES TO THE CRIMINAL JUSTICE SYSTEM

During the last decade, cultural and societal change has started to remove the veil of secrecy surrounding sexual abuse, encouraging victims to come forward to report their experiences. The data reported in the previous chapters, and comments such as the following, support this perception:

The culture has been changing in the last five years — encouraging victims to come out is a good thing — keeping it hidden reinforces the crime ... thank goodness people are coming forward ... We are trying to work with the police ... because to get the best outcome we need cases to go ahead through the court system — the more likely people are to go to the police, the more likely paedophiles will stop.

Consultation with Hetty Johnson, Director, Bravehearts 28.11.02

However, the majority of submissions to the Inquiry indicate considerable dissatisfaction with the way the criminal justice system handles a report of sexual abuse once proceedings have been instigated — indeed there is dissatisfaction with every step of the process. As one victim of sexual assault said in her submission, ‘the sexual assault was horrific ... but I was to discover the truly awful experience of being a complainant of a sexual assault ... as it turned out it was the biggest challenge of my life, and an experience that has cost me a fortune to get over’. Another submission by a convicted offender, who claimed to have been falsely accused, stated: ‘we enter the legal system and life becomes a nightmare’, while another convicted offender stated that ‘this submission reflects the heartbreak and despair of those who have been failed by the legal system’ (examples from the summary of individual submissions presented to the public hearings, CMC 2002b, p. 51).

Indeed, there was consistency in the concerns raised at the Inquiry and in the suggestions made for reform. Not only did victims and accused have similar concerns, so too did representatives of the criminal justice system itself, such as police, prosecutors, defence counsel and the judiciary.

As indicated earlier in this report (see Chapter 5), only a small proportion of sexual abuse events are actually reported to the police and a significant number

of allegations are withdrawn before they can be properly adjudicated by the courts. The reasons for this are not only associated with the inherent difficulties in translating sexual offences into a legal framework. They are also associated with the criminal justice process itself — especially:

- how victims of abuse and accused are treated by practitioners in the area
- the extensive time required to process cases
- resource limitations
- the limited support and information available to complainants and accused
- the perceived secrecy of, and inability to challenge, decision-making processes that seem to occur behind closed doors.

This report examines those issues further, and suggests some actions that might be taken to address problem areas and, ultimately, encourage more victims of abuse to report such offences.

## MAJOR ISSUES

### Issue 1: The disclosure of sexual abuse

How disclosure about sexual abuse occurs was of direct relevance to the Inquiry because of (a) the number of concerns that were raised about how the police and the ODPP record, interpret and respond to disclosures of sexual abuse (including false allegations and those brought about by recovered memories) and (b) the numerous decisions on whether to prosecute an offence or not, which are based on how and when a complainant discloses information about abuse. Many submissions to the Inquiry suggested that the legal process was not aligned to the realities of the disclosure process.

All people involved need to be trained and to have an understanding about sexual offences/trauma ... they don't understand the impact of the trauma ... how victims are not able to be specific about the assault ... if a woman wants to amend her statement it is assumed that she is lying and the information is [then] misused in court by defence barristers.

Consultation with Family Planning Queensland (FPQ)  
Sexual Assault Service, Cairns 29.10.02

The supervising sergeant in one matter commented:

How many people tell the full details to the first person who assesses them? ... a lot of people that I deal with seek psychiatric treatment — that's how it often comes to light.

Interview with CMC 10.10.02

And a complainant noted:

Looking back on it I didn't actually realise the whole implication of the statement and how, really in detail, it should've been ... I also found too that it's very hard to ... actually say all the intimate details and to be able to put that into words ... it's quite embarrassing.

Interview with CMC 3.10.02

The research about disclosure of abuse described in Chapter 2, and the comments highlighted above, indicate a need for widespread education about how the disclosure of sexual abuse occurs for people who work in the criminal justice system. The next two chapters discuss issues arising out of the first and second terms of reference that are relevant to this topic, especially the training, supervision and expertise of police officers and the response to victims of abuse by staff of the ODPP. Several recommendations are made in those chapters for enhanced training for both police and ODPP staff, including training in the nature and extent of sexual abuse, and the features of disclosure.

## Issue 2: The prosecution of historic offences

Considerable debate about all three of the Inquiry's terms of reference centred on the prosecution of sexual offences that were alleged to have taken place a considerable number of years before being reported to the police.

A number of submissions (including those from LAQ) supported the notion of a statute of limitations for historic cases due to the difficulties of prosecution. For example, the Bar Association of Queensland (pp. 4, 6) submitted:

The 'cultural' approach of investigators is to automatically bring charges against an alleged perpetrator upon a complaint being made, no matter how old that complaint might be. Thus, we routinely see complaints up to 40 years old being litigated in the criminal courts. In many such cases, the accused person has a significantly reduced capacity to defend against such old allegations ... If the ODPP does not discontinue some of these old prosecutions of its own motion, then applications ... are taken for a stay of proceedings on the basis that the accused is prejudiced or embarrassed in his defence. Anecdotally, a number of such applications have been successful in the District Court, and those decisions upheld in the Court of Appeal ... There should be consideration given to not proceeding with complaints made 5 or 10 years after the complainant reaches his/her majority, where there is no corroboration of that complaint. Perhaps the seriousness or otherwise of this 'old' allegation (for example, whether or not the alleged offence involved penetration of the person of the victim) should also be part of the guideline ... Perhaps 'old' cases should be not only the subject of guidelines, but also subject to obtaining the certificate of the Attorney-General, or some other similar safeguard ... In comparison to cases of relatively minor sexual touching, one would not expect a complaint of common assault, made, say 20 years after the event, to proceed to a prosecution.

The Queensland Law Society (p. 6) stated that, in relation to the prosecution of historic sexual offences:

Our members also endorse the submission of the Public Defender in that, it is rare that submissions to the police or the ODPP are successful. Often the prosecutor will concede that the pressure by the complainant or, more significantly, the complainant's family is the ultimate determinative factor in deciding whether or not to proceed.

The data presented in Chapter 5 of this report, and the QPS presentation at the public hearings, suggest that the QPS now receives many more 'historical complaints than in the past, and that they are investigating matters 30 to 40 years old in some cases' (CMC 2002b, p. 8). These figures reflect the greater social awareness about sexual offending that has occurred during the past few decades and the public pressure now brought to bear on police to detain sexual offenders and prevent further abuse. In the light of these recent developments, significant resistance to the concept of a statute of limitations, and indeed widespread support for there being no statute of limitations, was expressed by many submissions to the Inquiry, particularly those from people who work closely with victims of abuse (this is discussed in Chapter 2). For example, Hetty Johnson, the Director of Bravehearts, said in consultation on 28 November 2002:

When I heard ... talk about the 12 year limit I could have cried — this is the kind of attitude that is steeped in ignorance — it's a personal attitude and it's scary ... There is no statute of limitations on an offender.

Dr Christine Eastwood from Queensland University of Technology reported during her consultation for the Inquiry on 4 December 2002 that:

We cannot lose the gains that have been made during the last decade ... comments from a number of people to the Inquiry seem to ignore the significant body of knowledge about the nature, scope and context of child sexual abuse ... where typical features [include] delayed complaints, lack of corroboration and gross under-reporting.

Dr Eastwood also pointed out that a statute of limitations on historic cases would be in direct conflict with the current directions in criminal law, such as the Queensland Evidence (Protection of Children) Amendment Bill 2003, which was tabled in May 2003 (discussed in Chapter 3 of this report), a recent report

released by the NSW Standing Committee on Law and Justice (2002) and the United Kingdom Justice System White Paper (2002), which refers to 'rebalancing in favour of the victim'.

As an alternative, the Queensland DPP suggested:

given the prospects for conviction [of historic cases] ... there may be some real benefit in treating them as a special area of advice ... what I'm inclined toward ... is looking at some procedures for referral of those matters or consultation in relation to those briefs prior to charging.

CMC 2002b, p. 28

While recognising the difficulties associated with the prosecution of historic sexual offences, the Inquiry does not favour a statute of limitations for these matters. Rather, implementation by the QPS and the ODPP of the recommendations for reform made in the following two chapters should enhance the prosecution of historic cases and make it easier to decide whether to pursue or discontinue prosecutions.

### Issue 3: The committal hearing

As discussed in Chapter 4, the committal hearing has been the subject of considerable debate. The issue is of direct relevance to this Inquiry because (a) both the QPS and the ODPP can be involved in a committal and (b) the results of that process can have a significant impact on subsequent decisions made by the ODPP to either proceed with, or discontinue, a prosecution. The committal hearing is also directly relevant to the third term of reference because, if a defendant is committed for trial or sentence at the end of a committal hearing, they can then be named in the media.

An observation that was made to the Inquiry was that:

Many complainants do not understand committals — [or] why they have to go through it all twice.

Consultation with magistrates 25.10.02

Chapters 7 and 8 delve further into the committals process regarding the roles played by the QPS and the ODPP. Chapter 9 discusses the relevance of the legislation and the publication of the names of the accused before, during and after committal.

#### The prima facie test

Proposals were put forward to the Inquiry that the prima facie test, currently used in Queensland for committals, should be stricter. However, some of the following comments indicate the controversial, and at times contradictory, nature of the views expressed about this issue. Some comments implied that the prima facie test is inadequate (consultation with magistrates 25.10.02 and Townsville ODPP and QPS 31.10.02) while others felt that most matters are committed for trial (consultation with Townsville ODPP 31.10.02) and that the committal hearing is too often a 'rubber stamp' (consultation with members of the Supreme Court and the Court of Appeal 19.10.02). The data presented in Chapter 5 of this report, however, indicate that it is not necessarily the case as, on average, about one-third of cases are dismissed at committal.

Suggestions were made that the current prima facie test applied by magistrates should be replaced by the higher 'reasonable prospects test', which is currently applied by the ODPP and the higher courts. The submission by the Queensland Council for Civil Liberties, for example, described the level of evidence required to commit a person to trial in Queensland as 'flimsy' (p. 6), while the views of some complainants, as reported by Hetty Johnson, Director of Bravehearts (consultation 28.11.02), were that:

Maybe the test at committal should be higher — it would be better than going over the first bar and then being trashed.

The Queensland DPP (interview with CMC 17.10.02) also supported this view, 'I think we should review the prima facie test of the magistrate ... I think it's no longer entirely relevant', as did LAQ, with the suggestion that the introduction of 'a reasonable prospects of success test would motivate proper investigation of matters, and proper consideration of the selection of charges by police. This would lead to greater certainty for an accused about the case they face and its strengths and weaknesses, and would, in turn, provide for early resolution of matters' (CMC 2002b, p. 8). The submission by the Queensland Law Society (p. 6) also 'endorse[d] the views of the Director of Public Prosecutions and the Public Defender in their call for reconsideration of the tests applied by committing Magistrates', as did the submission by the Queensland Aboriginal and Torres Strait Islanders Legal Services Secretariat (QAILS) (p. 6).

The Commonwealth DPP, Mr Damian Bugg, wrote in his submission to the Inquiry (p. 4), 'it may be time to consider the adoption of the reasonable prospects test for committing magistrates', although he did comment at the public hearings that the reasonable prospects test that is applied by New South Wales magistrates during committal (see s. 41[6] of the *Justices Act 1902*) can create tension if the prosecution, applying the same test, later decides to discontinue a matter. However, the ODPP could apply the same test as that applied at committal and decide to withdraw the matter later, without the two decisions being in conflict. There may be a number of possible reasons for discontinuation, apart from the test. For example, the full evidence may not have been presented at committal; there may have been another ODPP policy consideration that justified withdrawal of charges, apart from the reasonable prospects consideration; new evidence may have emerged with the passing of time; or a witness may have altered their evidence.

The Council for Civil Liberties suggested that it would be beneficial for all jurisdictions across Australia to use the same test at committal. The Council pointed out that the same historic child sex accusation may be dismissed at committal in New South Wales, with costs, for failing to satisfy the reasonable prospects test, and in Queensland, where a lower test applies, be committed for trial. The submission states (p. 5):

It really is an absurdity in Queensland where a person is committed for trial on the very low Doney test when in many of the other Australian States and Territories, the reasonable prospects test is applied by Magistrates at committal.

### **The Committals Project**

An alternative suggestion made by many submissions was that more committals should be prosecuted by the ODPP, rather than the police, as per the Committals Project currently under way in the Ipswich, Brisbane and Southport Magistrates Courts. The CJC reviewed the Committals Project in its 2001 *Funding Justice* report. Although reporting that the Project was generally thought to have made a worthwhile contribution to the efficiency of the criminal justice process — and was strongly supported by the ODPP, LAQ, the courts and the legal profession — the CJC concluded that it was difficult to determine its true impact for a range of reasons, including the lack of adequate pre-pilot data. However, the CJC stated that the available information did not show any significant change in the outcomes of criminal matters (CJC 2001, p. 82).

Preliminary analysis of the data provided to the CMC for the Inquiry offers a mixed story in this regard (see Chapter 5 for a full explanation of the data source). During the years 1994–2001, just under half (43.5 per cent) of all sexual offence matters in Queensland processed by the lower courts were handled by Committals Project courts (12 375 appearances): all other sexual offence appearances (16 063) were handled by non-Committals Project courts around the State. The data suggest that sexual offence matters dealt with by Committals Project courts (Brisbane, Ipswich and Southport) are more likely either to result in a penalty at committal (although this is most likely to occur in the Brisbane and Southport Courts) or to be dismissed or discharged (predominantly by the

Brisbane Court) than those processed by the non-Committals Project courts. This means that, overall, more sexual offence matters dealt with by the non-Committals Project courts are committed to the higher courts for trial than those dealt with by the Committals Project courts (although, paradoxically, the data for Ipswich Court indicate that it has the highest proportion of sexual offence matters being committed to the higher courts).

Figures 4 to 6 indicate the preliminary results of the data analysed for the Inquiry. Further analysis, taking into consideration a full range of factors (such as funding, training and time requirements for the administration of the Project) is required, however, to place this information within the full context of the criminal justice system and to assess the true strengths and weaknesses of the Project.

With regard to the committals process, some criticisms were levelled at police prosecutors during the Inquiry, with claims that some officers 'may not be aware of the rules of evidence, or may not be experienced or confident enough to ensure that defence counsel do not harass the witness' (consultation with the ODPP Townsville 31.10.02). It was also suggested that there were times when 'police prosecutors [are] overcome' by the defence (consultation with members of the Supreme Court and the Court of Appeal 19.12.02).

The written submission by the Queensland DPP (pp. 9–10) suggested that:

ODPP involvement in sexual offences at the committal stage is invaluable ... in general there is a substantial difference in the quality of evidence from committal hearings conducted by police and those prosecuted by ODPP lawyers ... they are more familiar with the rules of evidence and are generally more capable of ensuring that the complainant is treated fairly ... another benefit from early ODPP involvement is the earlier response to requisitions for further evidence and the faster resolution of matters. Police are more likely to respond promptly to requisitions made prior to the committal hearing. After the matter is committed for trial, they are distracted by other cases. Early consideration of the whole of the available evidence is more likely to result in an early disposition of the case.

Police prosecution at committal is discussed in more detail in the following chapter.

### **Conduct of the defence**

Serious concerns were raised by some submissions about the conduct of some defence lawyers at committals, which 'remain[s] problematic' because 'defence lawyers are still destroying complainants' (consultation with the ODPP 31.10.02). Some also criticised magistrates for failing in their duty to intervene to protect witnesses, particularly complainants (consultation with magistrates 25.10.02).

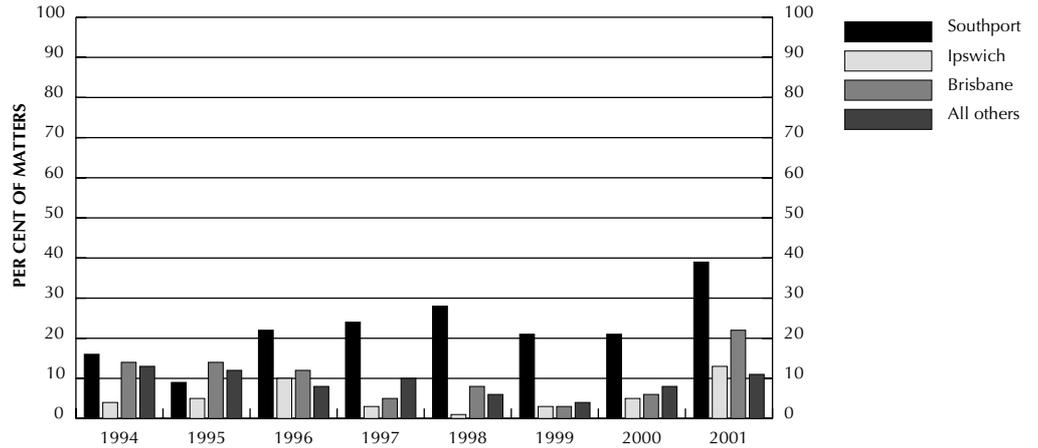
### **Support for committals**

The Inquiry received submissions and other comments that supported the retention of the current committal process, especially by the defence. For example: 'the committal hearing is very important for the defence ... [it] play[s] a vital role in ensuring the process is fair for the accused' (consultation with magistrates, 25.10.02). Members of the ODPP also recognised its importance, for example:

With sex offences you test out one person's word against another — I think the committal is not a bad place to see how that happens ... a good case lawyer should be sitting there like a hawk watching how cross-examination goes and if the defence raise issues that are likely to come up at trial and the witness doesn't cope with them very well or you can see some obvious holes that's where you try to fix them ... frequently we discontinue matters after committal where the complainant hasn't gone very well, they're unable to particularise and they're not going to be able to meet the test set out in Baker and those other cases.

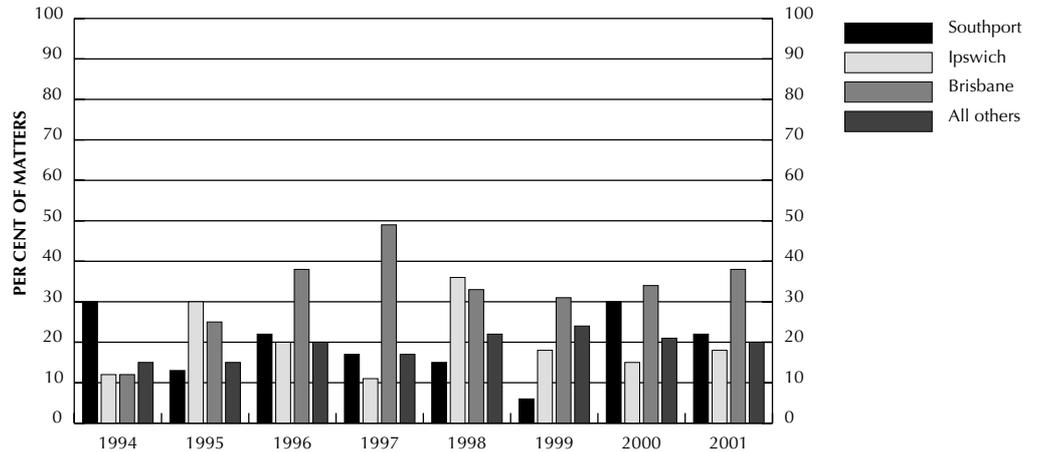
Case lawyer, ODPP. Interview with CMC 8.10.02

**Figure 4: The Committals Project — Proportion of sexual offence matters resulting in a penalty at committal (1994–2001)**



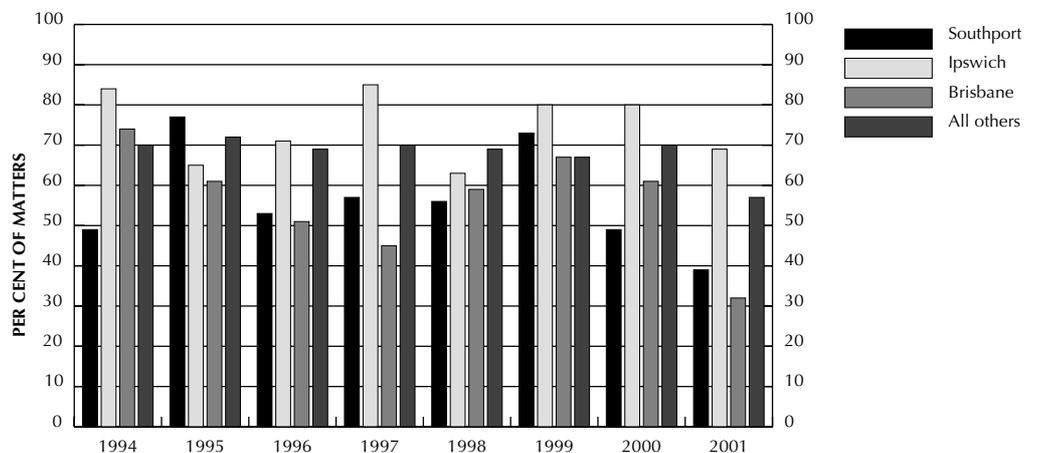
Source: JAG and OESR.

**Figure 5: The Committals Project — Proportion of sexual offence matters dismissed or discharged at committal (1994–2001)**



Source: JAG and OESR.

**Figure 6: The Committals Project — Proportion of sexual offence matters committed to higher court at committal (1994–2001)**



Source: JAG and OESR.

### **Overview of the committals hearing**

While there was a great deal of support for making the committal process more effective than it currently is in Queensland, there were conflicting views about several important issues, these being:

- the nature of the test applied (i.e. whether the test should be the prima facie test or the reasonable prospects test)
- the importance of costs
- the value of the Committals Project; that is, the pros and cons of police versus ODPP representation at the committal hearing
- whether the committals process should be retained at all.

It is the view of the Commission that these arguments cannot be resolved without an accurate evaluation of the effectiveness of the current situation in Queensland and a broader examination of the processes currently operating in the other States of Australia and overseas. This may be a matter for the government to take forward.

### **Issue 4: The time taken for matters to proceed through the criminal justice system**

The time taken for matters to proceed through the criminal justice system was of concern to many and relevant to all three terms of reference of the Inquiry. This issue is not discussed further here as the topic does not appear to be debatable. In view of the pervasive importance of timeliness, recommendations are made in the following three chapters that aim to accelerate the progression of matters through the system. For example, earlier legal advice to the QPS and better training of both QPS and ODPP staff may accelerate the decision-making process about whether to proceed with a prosecution. See Chapters 7, 8 and 9 for more details.

### **Issue 5: Victim support**

During the Inquiry, many criticisms were directed at the response of both the QPS and the ODPP to victims of crime. Concerns were raised about the limited support available for complainants in sexual offence matters. These issues are also of considerable interest to the public more generally and have played leading roles in some of the media coverage about victims' rights in Queensland, in other Australian States and overseas in recent months.

The following chapters discuss the submissions to the Inquiry about victim support, specifically as it applies to the QPS and the ODPP. The recommendations made in those chapters should enhance the response of the police and ODPP staff to victims of sexual offences (recommendations include training, formal and informal communication strategies, and the implementation of a complaints mechanism for the ODPP).

Concerns about the effectiveness of both the COVA legislation (as discussed in Chapter 3) and the committals process (as discussed earlier in this chapter) may also contribute to the stress of victims who report a sexual offence and progress their case through the criminal justice system. As stated previously, these are issues that the government may need to examine and address in the longer term.

### **Issue 6: Adequacy of resources**

The Inquiry heard numerous accounts of inadequate resourcing for each of the primary government agencies involved in the criminal justice system (the QPS, the ODPP and LAQ). Consultation with the judiciary amplified these concerns ('a change in culture and more money are needed': consultation with members

of the Supreme Court and the Court of Appeal 19.12.02) and, as discussed in Chapter 4, these limitations have been a matter of public debate for some time (see the CJC report *Funding Justice*, 2001). Such limitations have the potential to adversely affect the ability of these agencies to conduct their work properly.

In recognition of some of the identified funding concerns, the Department of Premier and Cabinet (Queensland Government 2002a) recently announced that \$0.5 million of the \$1.5 million provided to the Department of Families to implement Project Axis would be directed towards an increase in ICARE training for police and Department of Families officers who work with, and gather evidence about, children who are alleged to have been sexually abused. However, given that resources will always be constrained by economic circumstances and overall community objectives, there are other ways of fostering a responsive criminal justice system through appropriate structures, policies, procedures, management and communication systems. As the discussions in the following chapters reveal, there are numerous ways that the criminal justice system can handle sexual offences better without major funding increases.

## SUMMARY

This chapter has covered six issues relevant to all three of the Inquiry's terms of reference. How disclosure about sexual abuse occurs, victim support and the prosecution of historic sexual offences are particularly sensitive and difficult issues for each stage of the criminal justice system. Part I of this report presented research and recent Queensland data relevant to these issues. This chapter draws out the current concerns raised at the Inquiry about those issues. Specific recommendations for the QPS and the ODPP, and for legislative change, are made in the following three chapters.



## THE FIRST TERM OF REFERENCE

### THE TRAINING, EXPERTISE AND SUPERVISION OF POLICE OFFICERS INVESTIGATING SEXUAL OFFENCES

***During the course of the Inquiry, considerable positive feedback was received about the work done by police with allegations of sexual abuse, both from victims/complainants of sexual offences and from their professional colleagues. However, the way that police currently handle sexual offences was also criticised by various groups and organisations. These concerns are identified, by issue, in the three sections on training, expertise and supervision that follow.***

#### TRAINING — MAJOR ISSUES

At the public hearings of the Inquiry, the QPS maintained that ‘the training, expertise and supervision of members of the QPS is generally of a high standard’ (CMC 2002b, p. 6). In its written submission to the Inquiry, the QPS noted that it had ‘extensive policies and procedures in relation to the handling of sexual offence investigations’ and that (p. 35):

a number of training courses are provided to general duties officers throughout their career that deal with these issues either specifically or as they relate to general policing practice. In addition, specialist officers are provided with more specialised training and specialist units and officers in State Crime Operations Command support the regions by providing high quality and professional investigative services. These processes are underpinned by a strong accountability regime.

The QPS also argued that it ‘is committed to ensuring [that] effective policing techniques are applied and professional investigations conducted with a view to identifying and prosecuting persons who break the law in Queensland’.

The major issues raised during the Inquiry concerning training were:

- the limited availability of specialist training for handling sexual offences
- the restrictive prerequisites for access to certain courses, which may act as barriers to specialist training
- the low proportion of officers working in the specialist squads who have received specialist sexual offence training
- concerns about the content of sexual offence training courses
- the need for ongoing or refresher training.

#### Issue 7: Specialist training for sexual offence investigations

***I complete my tax return — that does not make me a tax specialist ... sex crimes investigators and their supervisors should be specialist trained. (Individual submission to the Inquiry by a sexual assault victim. CMC 2002b, p. 54)***

It is widely recognised that specialised police training in the area of sexual offences is crucial to sound, sensitive and informed investigations. This is reflected by the fact that the majority of police services in Australia and New Zealand require officers to undergo some type of specialised training before working in the sexual offences area. As indicated in Chapter 4, the QPS policy recognises the importance of specialised training and, even though:

[the] sex offences course is not mandatory at Argos ... there are only so many places set aside for the course but if people from the sex crimes unit apply to do it they get on it and others miss out ... that was one course they suggested you do, especially being in the position of team leader.

Sergeant, QPS. Interview with CMC 10.10.02

However, PACT (pp. 2–3) reported to the Inquiry that there can be significant variations in the degree of familiarity held by QPS officers about sexual offence guidelines and procedures and that this may be a training issue. This is especially so for officers based outside the JAB (Juvenile Aid Bureau) and the CSAIU (Child and Sexual Assault Investigation Unit). While the specialist sexual offence units have a statewide brief, it is often the non-trained officer who responds to reports of sexual offences in the regions and this may be where some of the gaps lie. PACT (pp. 2–3) noted, for example, that although ‘QPS guidelines direct that all child sexual assault matters are referred to a multidisciplinary, interdepartmental SCAN Team, officers of PACT have noted that this is not always the case’.

These concerns may indicate a lack of training, which, in turn, may reflect problems with the limited availability of courses, the stringent prerequisite requirements of courses and a low expectation to participate in training (i.e. this may be a management issue). Inadequate monitoring systems may also be a problem. Each of these issues is discussed below.

### **Availability of specialist sexual offence courses**

Concerns were raised during consultation with police officers in the regional areas of Townsville (31.10.02) and Cairns (28.10.02), at the public hearings and in a number of written submissions, that specialist training courses were not sufficiently available. The Queensland Police Union of Employees (QPUE) also advised the Inquiry that police officers are commonly told that ‘the formal specialised training courses are not available and will [only] be run when money becomes available’ (QPUE, p. 4). A lack of courses may have contributed to the low proportion of officers who have participated in specialist training overall, although information about the actual number of specialist sexual offence courses that have been provided by the QPS on an annual basis does not seem to be available. Participation rates are discussed in more detail below.

### **The proportion of officers who have undertaken specialist training**

Despite the recognised importance of specialist training in sexual offences, it became clear during the hearings that the proportion of officers in specialist sexual offence squads who have received specialist training may be low. However, the overall proportion of officers in the Service and/or the proportion of members of the specialist squads who have received specialist training is difficult to assess because the QPS does not appear to have collected comprehensive data in this regard.

Acting Superintendent Barron indicated at the hearings that approximately one-third (or 30 per cent) of staff in the sexual offences squad had been ICARE-trained (CMC 2002b, p. 10), although this training is only considered to be necessary for officers who work with children. In response to a follow-up request by the Inquiry after the public hearings, the QPS explained that 560 plain clothes officers had undertaken the sexual offences lecture (of four hours duration) as part of the detective training program since 1997 (an average of around 93 officers per year) and that, since the inception of the ICARE program on 1 July 1999, 223 officers had undertaken that training statewide. With the

departure of 11 of those officers from the Service, the remaining officers were distributed as follows:

- Sexual Crimes Investigation Unit — 8 officers
- other State Crime Operations Command — 31 officers
- regional Criminal Investigation Branches — 51 officers
- Juvenile Aid Bureau — 92 officers
- police prosecutors — 3 officers
- other general duties and specialist functions — 27 officers.

The QPS also noted that these figures are not indicative of the total number of staff who are ICARE-trained as (a) not all attendees have been recorded since 1997 and (b) a significant number of officers were trained between 1990 and 1997, but that records are difficult to interpret for that period.

The QPS also reported that, since 1997, a number of ICARE ‘train the trainer’ courses had been conducted and that 61 officers had attended those courses. In addition, more officers had been accredited before that period, but exact figures were not available.

The QPS also advised the Inquiry that at least 192 officers had undertaken the Sexual Offences Investigation Course since 1997 (although the actual number is likely to be more) and that, apart from 15 officers who had since left the Service, these trained officers were located in the following areas:

- Sexual Crimes Investigation Unit — 15 officers
- other State Crime Operations Command — 36 officers
- regional Criminal Investigation Branches — 36 officers
- Juvenile Aid Bureau — 43 officers
- police prosecutors — 2 officers
- other general duties and specialist functions — 45 officers.

The QPS also reported that there had been a number of three-day introductory sexual offences investigation courses provided to staff.

The QPS noted that, wherever possible, officers were programmed to attend specialist courses within their first six months of duty in the specialist squads. However, the figures above suggest that this may not be happening satisfactorily and/or may not be monitored appropriately.

### **Prerequisites of courses**

Prerequisite requirements for acceptance into specialised sexual offending training courses were noted as possible barriers to further learning for officers. According to the QPUE submission (p. 4), the Sexual Offences Investigation Course, for example, cannot be completed by officers ‘who have not at least completed the first phase of detective training’. The submission goes on to note:

... a significant number of plain clothes constables and senior constables make up the SCIU and the JABs and most have not completed the Detective Training Course. This means that such officers cannot access the Sexual Offences Investigation Course and subsequently lack training in this area.

### **Ongoing or refresher training**

Concerns were also expressed about the lack of further training above and beyond the introductory courses currently available for police in Queensland. The QPUE submission noted that (p. 4):

there is no system in place for experienced police officers to receive formalised updated training as legal requirements change. There are no formal refresher courses or advanced courses for officers who have completed their training some years earlier, to ensure that those officers maintain current and relevant skills.

Ongoing training is necessary in the sexual offences area because case law, legislation and best practice policies change over time. The research evidence documented in Chapter 2 of this report and a recent review of the ICARE training program by the Department of Families and the QPS (2001) also highlight the need for ongoing training and supervision in this area. Additional training as a way to achieve best practice, for example, has been acknowledged in New Zealand, where it is police policy to ensure that officers working in the area of adult sexual assault undergo specialised ongoing training and those working in the area of child sexual abuse attend advanced training courses (New Zealand Police 1998).

### **Overview of specialist training for sexual offence investigations**

It is clear that all police officers who work in the specialist sexual offence squads require specialist training and the Commission makes specific recommendations in this regard (see below). Such training, however, will require incremental implementation. It may need to be phased in over several years to accommodate all current and future officers in these squads. To ensure that phasing in occurs appropriately, the QPS will need to record and monitor course participation carefully so that implementation is assured.

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#### **RECOMMENDATION 1 —**

That specialist sexual offence training be required for all officers working for Taskforce Argos, the SCAN (Suspected Child Abuse and Neglect) teams, the Child and Sexual Assault Investigation Unit, the Criminal Investigation Branch and the Juvenile Aid Bureau in Brisbane and in the regions, and for police prosecutors working with sexual offences.

#### **RECOMMENDATION 2 —**

That ICARE (Interviewing Children and Recording Evidence) training be required for all officers working in the specialist child sexual offence squads.

### **Issue 8: Content of training courses**

The Inquiry was advised that the QPS Sexual Offences Investigation Course includes the following learning outcomes:

- a thorough knowledge of legislation, policies and procedures as they affect the field of sexual offending
- the ability to identify all evidence required to substantiate and corroborate a complaint of a sexual nature
- the application of the provisions of associated acts and case law to sexually related investigations
- recognition of the physiological and psychological stress suffered by the victim of an assault of a sexual nature
- information about intellectual and physical disabilities.

Further, the QPS suggests that the JAB and ICARE courses have a strong focus on legislation and the acceptance of evidence by the courts and the legal profession (more information about police training courses is documented in Chapter 4 and Appendix 5).

*... the knowledge from the course was beneficial —absolutely ... sex crimes [are] a peculiar area ... like ‘similar fact’.<sup>52</sup> As a regional detective we don’t really use much in the way of ‘similar*

*fact evidence’ — but here ... that sort of evidence can be very helpful ... in the prosecution of people. (Sergeant, QPS. Interview with CMC 10.10.02)*

However, concerns were raised about the content of QPS training courses during the Inquiry. It was said that courses seemed to provide little information to officers about rules of evidence, sexual offences legislation, victims’ needs or false allegations (DPP Queensland, p. 4; LAQ, pp. 5–6; Victims of Crime Association, pp. 1–2; QPUE, pp. 4–5; Queensland Law Society, p. 4; Esther Centre, pp. 1–2; CAFSA, p. 5).

LAQ (p. 5) also noted that ‘it is essential that investigating police understand the role of particulars in the prosecution of criminal offences’. The Queensland DPP (p. 4) stated that ‘the quality of police investigations is variable and there are a number of widespread issues, namely, a lack of understanding of relevant laws and rules of evidence’. The Victims of Crime Association (p. 2) pointed out that ‘while training is provided to the QPS on investigative procedures a more extensive training requirement for police ... in victim empathy and victim issue management would be highly recommended’. Dr Christine Eastwood (p. 1) argued that ‘effective training for police about the nature and context of sexual abuse is crucial to them being able to deal with such investigations’.

The need to provide more comprehensive police training in handling sexual offences is not unique to Queensland. This need has also been recognised in a recent New South Wales evaluation of police training needs (Stewart 1999). Further, this need has been recognised by the QPS itself in both a recent internal evaluation of the ICARE training program by the Department of Families and the QPS (2001) and in their written submission (QPS, p. 30), which advised that the Coordination and Training Unit is currently conducting research into the development of advanced specialist courses for the QPS in the following areas:

- advanced child-interviewing techniques
- advanced sexual offences (to include a focus on investigation of historical offences, drink spiking and gang rape)
- physical abuse of children (to include a focus on sudden death, shaken baby, burns, fractures, bruises, and major incident recording).

A senior investigators’ course is also planned to develop the skills of officers responsible for the supervision and management of investigators. This course may address sexual offences and multidisciplinary investigative practices.

Despite these planned initiatives, the level of concern raised at the Inquiry about the content of courses was substantial enough to mean that a review of the specialist sexual offence course content may be warranted. However, it is important to note that these concerns may also reflect (a) the performance of officers who may have been trained before the new courses became available and (b) the poor participation levels in training courses more generally, rather than the content of the courses per se. Therefore, the Commission recommends a review of course content, which must consider participation rates in the training courses generally and any recent course content changes.

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### **RECOMMENDATION 3 —**

That the Queensland Police Service convene an interagency/cross-departmental working party (including representatives from the Office of the Director of Public Prosecutions, the Department of Families and Queensland Health) to assess desirable improvements to sexual offence course content.

## EXPERTISE — MAJOR ISSUES

Many different groups expressed concern that QPS officers working in the sexual offences area lacked expertise. Expertise, however, can cover a broad range of actions, behaviours and attitudes. The major issues identified by the Inquiry in this regard were:

- communication skills, including:
  - attitudes
  - interviewing techniques
  - interview protocols for special needs and Indigenous complainants
  - the interviewing environment
- investigation techniques
  - gathering evidence
  - pretext calls
- legal matters, including:
  - the timeliness of legal advice
  - application of the prima facie test
  - police prosecution at committal
- the arrest process
- human resourcing issues such as:
  - recruitment and rotation
  - succession planning
  - career advancement
- victim support and specialist services
- regional variability.

### Issue 9: Communication skills

Communication involves a range of skills, including appropriate attitudes, skilful interviewing techniques and a supportive interviewing environment. The proposed legislative changes discussed in Chapter 3, which will require the videotaping of evidence of children, also have important implications for the communication skills of police officers, as these processes will be used in court and be subject to considerable scrutiny.

*Police are poor communicators and don't provide information — police should give feedback to the complainant if their evidence is not strong — it would be more appropriate if expectations are dealt with sooner rather than later and the process need not be so drawn out. (Consultation with Townsville Victims of Crime and Sexual Assault Service Counsellors 29.10.02)*

#### Attitudes

Submissions were made to the Inquiry that the attitudes of some police officers were inappropriate, given the current understanding of the nature and consequences of sexual offences. A victim of a recent sexual assault, for example, reported that she had concerns about the endemic attitude of police in general to victims of sexual abuse, which implied that 'she must have asked for it'. As a complainant of a sexual offence she was told that 'sexual offences are the easiest to report and the hardest to prove'. She submitted to the Inquiry that 'the hardest decision of my life was to report what happened to me' and went on to say that:

I was constantly left with a perception that in some way I had contributed to the offence being committed against me ... it was a constant struggle to convince the legal system that I was a complainant of a crime, not some psycho duck loony looking for attention ... from the moment that I made my complaint I felt as though I had committed a crime.

CMC 2002b, p. 60

On the other hand, many submissions spoke of the support and kindness shown to them by officers in the specialist sexual offences squads, in particular:

I found it really easy to talk to [the investigator], he was really good'

Complainant. Interview with CMC 7.10.02

they were just so understanding, it was non-judgmental, it was very open and relaxed ... made it so much easier to think ... I was there for probably about three and a half hours'

Complainant. Interview with CMC 3.10.02

I first reported the incident to the police who were all very professional, courteous, supportive, empathetic and patient at all times from beginning to end. My experience with the police has been on the whole an extremely positive one to date and I thank them for their hard work.

Individual submission to the Inquiry by a victim of sexual abuse

I felt really really comfortable with [the investigating officer] ... he was very nice and very sensitive ... he didn't push me if I wasn't comfortable in talking about anything.

Complainant. Interview with CMC, 7.10.02

These divergent points of view stress the need for the standardisation of appropriately recruited and trained personnel to work in this area and reinforce the recommendations made in the previous section of this report.

### **Interviewing techniques**

Questionable police interviewing practices were raised by some submissions to the Inquiry. For example, the Queensland DPP (pp. 4–6) submitted that a widespread issue with the quality of police investigations is the constant and ongoing concern about the use of leading questions when interviewing children. Similar concerns were raised by members of the judiciary who were interviewed for the Inquiry (members of the Magistrates Court [25.10.02] and the District Court, the Supreme Court and the Court of Appeal [19.12.02]). LAQ also noted that police have a tendency to use 'leading questions, suggestive questions and/or complicated questions' when interviewing child complainants (p. 6) and CAFSA suggested that 'the manner in which the police question potential complainants and witnesses deserves closer scrutiny' (pp. 8–9).

Again, concerns about interviewing techniques probably reflect the low participation rates in training courses, which has been discussed previously. A recent review of the ICARE training course (Department of Families & QPS 2001, p. 39) reinforced these concerns:

At present there are insufficient numbers of staff trained and as a result many interviews are being conducted by officers who are not accredited through the ICARE training program. This situation is problematic and has a number of serious implications including children being further traumatised by unskilled interviewers and videotaped interviews being deemed inadmissible in court proceedings.

### **Interviewing protocols for special-needs complainants**

Several submissions raised concerns about the adequacy of the response by police to complainants and accused who have special needs. Queensland Advocacy Incorporated (QAI), for example, noted a number of deficiencies in the treatment of people with disabilities by the police. These included:

- a failure to identify complainants with intellectual disability, a lack of methodology to do so, and a lack of insight as to why such identification is important

- a lack of skills (or training to develop such skills) to access support and to be able to respond appropriately once the complainant has been identified as having an intellectual disability, particularly regarding the ability to adapt questioning appropriately
- a common perpetuation of the myths about disabled people casting doubt on their credibility as a witness (such as being prone to promiscuity and more likely to fabricate/exaggerate evidence)
- a tendency to be unwilling to take a statement from disabled people, thus prejudging the prospects of prosecution
- a tendency to be overly protective of complainants ('like sending a lamb to the slaughter', 'you get a baddy when you can but if it means sacrificing people on the way you've just got to let them go') — police feel that securing protection for the victim is more important than prosecuting the suspect
- making judgments based on medical reports provided for other purposes
- the perception that evidence from people with an intellectual disability is often contaminated by the influence of family or carers — there is a lack of recognition of the difficulties of people gaining such support in the first place, and that it takes a lot of retelling and the language of the teller gets enmeshed with those who are the recipients of the information
- reluctance to take statements or properly investigate when the accused is also a person with a disability — it is often perceived that the offence is less grave or better dealt with by Disability Services.

QAI commented that these may be valid approaches, but should not be considered the standard approach because repeat offenders within the disability system can go unchecked. Further, QAI suggested that the prosecution guidelines (which state that public interest is assessed on a range of things, including 'the youth, age, maturity, intelligence, physical health, mental health or special disability of the alleged offender, a witness or a victim') fail to offer specific guidance about how to measure maturity, intelligence or special disability, thereby negating the value of the assessment guidelines. QAI also raised concerns about a lack of support for police to be able to 'respond appropriately once a complainant is identified as having an intellectual disability' and identified the need for more specialist trained police in the area (p. 2).

With regard to victims from a non-English-speaking background (NESB), consultation with the Sexual Assault Service of Family Planning Queensland, Cairns (29.10.02) indicated some concerns with the police response in at least one case that they had been involved in:

We had a case where a Filipino woman had been sexually assaulted during a period of domestic violence — she didn't speak English very well and the police interviewed her with her children present, using them as translators. The woman didn't want to tell them that she had been sexually assaulted because she didn't want to talk about it in front of the children and she felt very uncomfortable. Later down the track she told the police about the sexual assault when her children were not present and they said 'why didn't you tell us about that before?' During court the police gave the impression that the woman was a stereotypical case of a Filipino woman seeking compensation from an Aussie husband, not a victim of sexual assault (who had been inappropriately interviewed in front of her children).

Although the QPS has policies regarding Aboriginal and Torres Strait Islanders, children, persons with impaired capacity, intoxication, mental illness and intellectual disability (see OPM, s. 6.3), these comments again raise concerns about the levels of training and supervision of police, and attitudes and expertise more generally. The Commission hopes that the recommendations for specialist training for all officers in the specialist sexual offence squads made earlier in this report (Recommendations 1 and 2) will contribute to higher rates of compliance with QPS policies and the application of the principles of the COVA legislation.

## The interviewing environment

The interviewing environment was also an issue of concern for some who made submissions to the Inquiry. For example:

There is only one room that we can take a statement from somebody with a computer in it and we share that with crime, child abuse and Argos ... and you can't honestly take a statement from a person when you've got other work colleagues sitting there listening ... police are forced to take statements from complainants in general work areas ... I think it's inappropriate.

Police officer, interview with CMC 11.10.02

Question by CMC interviewer: 'was it a closed office or an open space office?'

Response by complainant: 'Oh it was huge there were heaps of desks ... [people] ... were coming in and out.'

Complainant, interview with CMC 7.10.02

On the one hand, the QPS appears to have relevant policies and guidelines for the use of appropriate interviewing environments when interviewing victims of sexual abuse. The QPS guidelines state that officers are to 'conduct the interview in a private quiet area' and that, for children, the interview should be 'conducted in a manner which reduces the amount of trauma to the child', 'has a maximum of three people (other than the child) present for the interview' and that 'the interview venue is appropriate — i.e. free from any interruption and as non-threatening as environment as possible' (see Appendix 5). On the other hand, however, adherence to the policy may be difficult for some officers when the appropriate resources are unavailable. It is important, therefore, that QPS officers make every effort to ensure that interviewing practices adhere to the requirements of existing QPS policies, and that supervisors monitor this requirement.

## Videotaping evidence

Police in Western Australia now videotape the evidence of children and there is growing international recognition that this is best practice. As discussed in Chapter 3, amendments to current legislation will also make this best practice in Queensland. The Evidence (Protection of Children) Amendment Bill 2003 creates a presumption in favour of prerecording the evidence of an affected child witness and, where prerecording of evidence has not occurred, the required use of audiovisual links, if available.

Strong support for appropriately robust recording practices, such as videotaping, was provided by some submissions to the hearings. For example, LAQ suggested that:

There might be better systems than section 93A ... there's a model operating in Western Australia ... which related to the videoing of examination and cross-examination of the child in a controlled situation ... now having another look at ... our own Evidence Act, it's possible to do that under our Act, I think. It just doesn't seem to be part of the local culture. So perhaps we need to look at alternatives like the WA model, but as Mr Bugg said this morning, nothing's more boring than somebody saying they do it better somewhere else .... Perhaps all it really needs is a refocusing of resources and attention under section 21A.

CMC 2002, pp. 45–46

The prerecording of the child's evidence has many obvious benefits for the child, which we will not discuss here. We are very concerned about the lack of opportunity for defence to cross-examine and test a complaint at a committal hearing. However, it seems to us that a modification of the Western Australia procedure (permitting cross-examination for the child at committal) would go some way to ensuring that the child's evidence that was relied on at trial was presented free from the objectionable questions and comments that are contained in section 93A interviews, and that may unfairly or improperly influence the jury. Prerecording of the child's evidence also allows the prosecution to evaluate the evidence of their essential witness well before trial, to determine whether the matter should indeed proceed.

CMC 2002, p. 7

Other comments included:

The Western Australia process, where it is all videoed is good — it becomes evidence once and for all — a great idea.

Consultation with Townsville defence lawyers, 30.10.02

That would be ideal ... if legislation would allow it ... at the moment we can only use 93, like do a taped interview, for children and people with disabilities ... the problem is that they will always want that statement.

Sergeant, QPS. Interview with CMC, 10.10.02

Some caveats were noted, however. As a member of the judiciary commented during consultation on 4.12.02, 'it would require a total change in culture if child evidence is to be videoed'. This will also be a training and supervision issue.

Support was also given for the tape recording of all evidence by police in sexual offence matters:

I'm very keen on statements being tape recorded.

Deputy-Director, ODPP. Interview with CMC 8.10.02

I think all conversations with witnesses should be tape recorded ... proofs of evidence rarely cover the whole story or the true import of what the witness is saying ... there can be no argument later about whether or not the police statement was complete ... these silly types of arguments that we have from time to time with defence lawyers [re statements] that's because police didn't write down every single thing that was said ... or they may have misinterpreted what they said or whatever ... ultimately it's more accurate ... inaccuracies tend to benefit defence counsel ... it has nothing to do with the veracity of what the complainant is saying ... a lot of defence make a good living out of nutting inconsistencies of complainants at committal

Case lawyer, ODPP. Interview with CMC 8.10.02

The Commission supports any innovation that will enhance both the quality of the information collected and confidence in the police interviewing process. It is also important to reduce the risks of repeated stress to victims, inconsistencies in victims' stories that may not be relevant to the case at hand, as well as witnesses being cross-examined at length in court about what is contained in their statements. The Commission, therefore, endorses the proposed changes to the Evidence (Protection of Children) Amendment Bill regarding the videotaping of children's evidence for court proceedings. Implementation of the new Bill if passed, however, will present training challenges for the QPS and again, the Commission reiterates its recommendation for required training for all officers working in the specialist sexual offence squads.

## Issue 10: Investigation

### Gathering evidence

Many submissions to the Inquiry raised concerns about the adequacy of police investigations, some suggesting that there may be a temptation for police to take shortcuts and that the quality of the briefs prepared by the police is unacceptable for the successful progression of cases further through the system.

A number of individual complainants and accused persons, for example, reported a failure of police to investigate the informants or evidence that they had suggested to the police. Many also reported that when sources were pursued they were not examined thoroughly enough. For example, one submission by an accused person stated that 'the investigating officer failed to take statements from relevant material witnesses who directly contradicted the evidence of the complainants'. He went on to claim that 'the police were aware of [the] details (names and so on) and [the] substance of what these people would provide, yet were unwilling to take statements'. Another submission stated that 'the practice of simply looking for evidence to support a prosecution and ignoring evidence that undermines it, leads to the prosecution of demonstrably innocent [men]'.

While a victim of childhood rape stated that ‘the investigating police officers repeatedly refused to contact potential witnesses, saying that, in their opinion, they would not be of any assistance.’<sup>53</sup>

The Inquiry also received information about a number of matters in which it was argued that charges were brought by the police before the investigation was properly completed. The submission by LAQ, for example, stated that ‘it is not uncommon for charges to be brought by police before the investigation is properly completed’ and that the application of a stricter test at the committal hearing would ‘motivate proper investigation of matters, and proper consideration of the selection of charges by police’ (LAQ, pp. 7–8). The submission by the Queensland Council for Civil Liberties (p. 6) agreed:

There is an unacceptable risk that too many police (especially those who become friendly with complainants) initiate prosecutions in circumstances where they fail to collect evidence that may cast doubt on the complainant’s credibility and fail to disclose relevant unused material, particularly to the defence.

Early initiation can cause a number of problems for the criminal justice system, including insufficient evidence being obtained to fully test the strength of a case. If the ODPP does not have sufficient time to prepare the case, weaknesses or gaps in the evidence may not be discovered until they are exposed at committal or trial. The potential outcome is wasted expense and a loss of faith in the criminal justice system by the complainants and the accused.

There was also the view, particularly advanced by the ODPP, that some police investigators fail to appreciate the degree of particularisation required for a sexual offence matter to be successfully prosecuted; this was said to lead to the discontinuance of some prosecutions because there may be no reasonable prospect of conviction (consultation with ODPP, 31.10.02).

***I said ... I can’t give you exact days and dates, and he actually advised me not to try too hard. (Complainant. Interview with CMC 7.10.02)***

Another concern expressed to the Inquiry was the failure of police to investigate both sides of the story (the complainant’s and the accused’s) before arresting a suspect. Most importantly, many said that police often forget the basic premise that one is ‘innocent until proven guilty’ and that this is relevant to both the actions and the attitudes of the police. As one wife of a man accused of multiple offences wrote to the Inquiry ‘no one can know what it does to a man, an innocent man, and his family, for this to happen. Otherwise this sort of thing would be investigated properly on both sides and people not put through trauma like this’.

### **Pretext calls**

A pretext call is where the police record a telephone call by the victim to the accused to confront them about their allegations of abuse. Often, particularly in the investigation of historic cases, pretext calls are the only tool that police can use to further their investigation (‘there’s not much else you can do in those cases’: consultation with Townsville defence lawyers 31.10.02). Many successes by way of admissions, apologies and pleas, have been reported with the use of this technique.

***Pretext telephone calls — that’s something that regional detectives know very little about. But it’s very useful ... you could use it for anything — it’s not particular to sex offence investigation. (Sergeant, QPS. Interview with CMC 10.10.02)***

However, concerns were raised during the Inquiry about how police use such techniques, especially when used for child complainants and for their longer-term value in the court process. During consultation with Inquiry staff on 30.10.02, sexual assault counsellors at FPQ Cairns, for example, suggested that the use of this technique for child complainants can be quite traumatising and, as such, this approach can be ‘very disturbing ... especially ... as young children don’t have the capacity to say no to doing it because of the power differential between the child and the police’.

Members of the Supreme Court and Court of Appeals judiciary who were consulted on 19.12.02 also revealed that if the recordings sound interrogative — which they often do — they have to be excluded from the proceedings. Thus the value of the call can be lost.

In some circumstances, evidence obtained by police through pretext calls may be excluded because of the High Court decision in *R v. Swaffield* 192 CLR 159. In that case, it was held that courts have a broad discretion to exclude admissions made in circumstances where an accused’s freedom to choose to speak to the police has been impugned. Barring legislative action to address this issue, police investigators should be made aware of *Swaffield* and trained to avoid investigative methods that may lead to the exclusion of evidence obtained through pretext calls.

One judge also commented: ‘I don’t like pretext calls — half the time the accused is trying to calm the girl’.

Such calls can also work against the complainant:

We had one case where a victim responded very badly to hearing the accused’s voice on the telephone and she got very upset and swore badly/violently — and it was recorded by the police and went badly against her in court — her behaviour was perceived to be very poor by the court and had an impact on the sentencing, even though they got an admission from the offender.

Consultation with FPQ, Cairns, 30.10.02

It is clear that pretext calls can be a valuable tool for police, but extreme caution must be taken in applying this technique and in choosing complainants and offences. Again, given the need for sensitivity to the complainant and the current legal constraints as determined by the High Court, this appears to be an issue that requires careful training and close, ongoing monitoring and oversight by supervisory police.

## Issue 11: Legal expertise

The quality of any police investigation may be improved by early expert legal advice and/or enhanced legal expertise by police themselves. As indicated in Chapter 4 of this report, police determine when to lay charges and which charges to prefer. In some cases, especially with historic offences, there may be some advantages to early legal advice, particularly when police retain responsibility for prosecution at committal. This section covers three main topics: the timeliness of legal advice to police, the application of the *prima facie* test by police, and police prosecution at committal.

### Timeliness of legal advice

While it is rarely suggested that a prosecutor should be involved in the decision to arrest (see Rozenes 1996, p. 4; QPS, p. 29 and p. 34), consultations for the Inquiry suggested that the ODPP should be involved at an earlier stage of the investigation process. Some suggested pre-arrest and others suggested as early as the interview stage for advice on the sufficiency of evidence to support the appropriate charges (consultation with Townsville QPS and Townsville ODPP 31.10.02).

The QPS (pp. 3–4) submitted that the practicality and desirability of police continuing to exercise discretion in initiating proceedings should be recognised and that the existing guidelines for the initiation of the prosecution of sexual offenders by police are adequate.<sup>54</sup> Indeed, as suggested in Chapter 4 of this report, it has been established that there are unacceptable risks when prosecutors become embroiled in investigations and that this was an underlying principle of the establishment of separate prosecutorial units — first within the police, and later through the establishment of the ODPP.

Despite the clear need for police and prosecutors to retain distinct roles, however, there may be benefits for investigators having procedures that enable early legal advice from a prosecutor (see Rozenes 1996, p. 4). The Queensland DPP suggested at the hearings, for example, that ‘there has to be a maximised focus for everybody at the beginning of the process to create the best prospects of obtaining an ultimately just result ... having the earliest involvement of the ODPP in the matter’ (CMC 2002b, p. 22). The Commonwealth DPP agreed, especially for historic cases: ‘I concur ... it would be important to have pre-charging consultation in historic matters’ (CMC 2002b, p. 32).

At the Inquiry’s hearings, the Commonwealth DPP recommended a system that would require consultation with, or the approval of, the ODPP for certain sexual offence charges. In particular, he suggested that it may be appropriate for police to seek the approval of the ODPP before laying charges in ‘historic cases’. This system currently operates in Queensland in a limited way regarding the offence of maintaining a sexual relationship with a child and could be usefully extended to other categories of sexual offences.

Problems with overcharging, or wrongly charging, accused persons in Queensland are compounded by the fact that charges are likely to remain in force until they are thoroughly assessed by the ODPP and a decision is made as to what charges, if any, should be included on the indictment. The result is that, in Queensland, there may be a lengthy period before the accused will know with any certainty what case, if any, they will be required to answer.

There are policies and procedures in other Australian jurisdictions that encourage the ODPP to assess the charges at a much earlier stage. In Tasmania, for example, a system has been implemented that requires copies of all relevant material to be provided to the ODPP within 48 hours of the charge being laid (CMC 2002b, p. 33). In several other jurisdictions (DPP SA 1999; DPP NSW 1998) the ODPP is responsible for conducting the prosecution of summary and indictable offences at committal hearing (as well as other major or complex matters in each of these categories) and procedures demand that these matters are referred to the ODPP, either prior to or just after, charging.

The Queensland DPP acknowledged that procedures existed in some other States for handing over police briefs to the ODPP at a very early stage, in some instances almost immediately after charging. However, she suggested that ‘a procedure like that at present in Queensland would be completely futile because we have such a backlog of other cases to handle ... there would be no point in producing that material early because it couldn’t be looked at (CMC 2002b, p. 24).

### **Current practices in Queensland**

The Queensland DPP (p. 8) stated that, with regard to current practice, ‘sometimes, particularly in relation to a sensitive or notorious case, police will forward the brief for an opinion as to whether to charge at all, or what to charge’. The submission by the QPS agreed that there are particular cases in which police seek advice from the ODPP prior to laying charges (see CMC 2002, p. 166).

*... we've got to prove beyond a reasonable doubt. It's not a case of just throwing it in and seeing how it goes. If there is some doubt I would put the submission to the legal analysts at State Crime Ops and ask their opinion ... there is one legal officer who does predominantly all of the sex crimes investigation unit plus a bit of drug squad ... I [also get] advice from the ODPP — I've got a good relationship. I can quite easily ring anyone at the ODPP and ask them a question because I've ... worked in Brisbane for 16 years and basically they'd give you the right pointers. (Sergeant, QPS. Interview with CMC 10.10.02)*

Section 229B of the *Criminal Code* (Qld) requires police in Queensland to obtain the consent of the DPP or the Attorney-General before laying a charge of maintaining a sexual relationship with a child. This requirement exists so that difficulties in relation to particularity and other evidentiary issues can be picked up early in the process.<sup>55</sup> However, the submission by the Queensland DPP (p. 8) states that such requests are 'rarely made by police' and that there is 'serious concern' about 'overcharging' in these types of matters. She states (p. 4):

Police commonly do not understand what is required to adequately particularise an offence in law. This results not just in over charging, but in the institution of prosecutions that are completely unsustainable. One of the most common examples concerns repetitious conduct said to occur regularly over a period of time, without any specificity between occasions. If the allegation is that the same sexual act was committed once a week for a year, some police will prefer 52 charges. In fact, the only charges that the evidence may permit in law, if any, are the nomination of the first and last acts in time.

The Queensland DPP expressed the view that in such cases a prosecution against a person has been wrongly commenced and the expectations of complainants have been falsely raised (p. 5).

*I think it would be absolutely brilliant if the ODPP had an officer working at each of the squads ... a seconded officer ... how perfect would that be and it mirrors the American system ... if you could liaise directly from the day you get a complaint to the day you prosecute obviously it's going to be a lot better ... you'd have to have a formalised process [rather than ad hoc], absolutely. (Sergeant, QPS. Interview with CMC 10.10.02)*

### **Application of the prima facie test**

Section 3.4.3 of the OPM (QPS 2002) states, under the heading 'The discretion to prosecute', that 'Police Service policy on when to institute proceedings against offenders is drawn from guidelines by the Director of Public Prosecutions regarding the discretion to prosecute offenders'. The section then outlines the ODPP policy, setting out those matters that prosecutors may not take into account when making a decision to prosecute, the sufficiency of evidence test, and the public interest test.

The OPM does not clearly distinguish between the different roles of police in the prosecution process and appears to direct that the appropriate test to be applied by police, whether prosecuting a matter summarily or a committal, is the same test as that applied by the ODPP — the reasonable prospects test.

However, the submissions by the QPS at the hearings clearly indicate that, in practice, the police apply the prima facie case test when making decisions about the prosecution of a matter at a committal hearing, not the reasonable prospects test as stated in the OPM. Similarly, the QPS stated that it was the role

of the police to establish a prima facie case at committal, after which the matter rests with the ODPP (CMC 2002b, pp. 15, 20, 165). The submissions by both the QPS and the Commonwealth DPP at the hearings were, effectively, that it would not be appropriate for police to have to apply the stricter reasonable prospects test (CMC 2002b, pp. 30 and 49).

The Commission is of the view that the prima facie test is the appropriate test for the police to use to decide whether to proceed to committal, as this is the test applied by the magistrate. However, police investigating and prosecuting these matters must be cognisant of the reasonable prospects test that will be applied by the ODPP at a later stage as such knowledge is likely to be crucial to the satisfactory preparation of the case.

Police prosecuting matters summarily, however, must apply the stricter reasonable prospects test. Although it is not spelt out in the OPM, police discretion to withdraw charges exists only for matters that can be heard summarily and for indictable offences until they are committed for trial. In relation to the prosecution of sexual offences, the OPM specifies that only a commissioned officer exercising supervision over the prosecution corps responsible for the prosecution of a particular charge has authority to approve the withdrawal or offering of no evidence in relation to that charge.

The OPM (at 3.4.4), under the heading 'Withdrawal of charges' provides:

When an officer becomes aware of a change in circumstances which may indicate that, in terms of the Service policy, whether due to the sufficiency of evidence test or the public interest test, the continuance of a prosecution may no longer be warranted, that officer is to immediately advise the officer in charge of the prosecution corps responsible ... This advice is to be by report which is to contain all relevant information and reasons why the withdrawal is required. The report is to be submitted through the arresting officer's officer in charge.

Prior to withdrawing or offering no evidence in relation to a charge, the police prosecutor responsible for the prosecution of the charge is to ensure that consultation takes place with the arresting officer where possible and, where appropriate, with the victim of the crime.

A prosecutor is required to obtain such authorisation prior to offering no evidence or withdrawing a charge and is to record the particulars of such action on the relevant court brief. Particulars are to include the:

- reasons for withdrawing or offering no evidence in relation to a charge;
- name(s) of the officer providing the authority;
- names of the person(s) with whom consultation took place concerning the proposed intention not to proceed with the charge; and
- signature, rank and registered number of the prosecutor who dealt with the matter.

The prosecutor who has withdrawn or offered no evidence in respect of a charge based on the sufficiency of evidence test is to forward a copy of the relevant court brief on which the particulars of the action taken have been recorded to the appropriate Prosecution Review Committee.

In some Australian jurisdictions the exercise of the discretionary power of police to decide whether or not to proceed with a prosecution has been formally restricted in a way that it is not in Queensland. In New South Wales, for example, not long after the ODPP was established it took over the decision-making process where applications were made to police to terminate the prosecution of indictable offences before a committal order had been obtained (Rozenes 1996). This was later followed by the New South Wales ODPP taking over the conduct of all committal proceedings.

In Queensland, the information available to the Inquiry indicated that police may apply discretion in about one-quarter of reported sexual offences (see Chapter 5), although some submissions to the Inquiry suggested that, in practice, police rarely decide to discontinue the prosecution of a sexual offence case because police tend to: avoid the difficult decision to prosecute or not;

acknowledge the complainant's desire to have their 'day in court'; or recognise the deterrent effect on the accused, even if a conviction is unlikely. The outcome is that, while police retain important decision-making powers in the prosecution of cases, they are rarely, if ever, willing to exercise them.

*We're not judge and jury — we are the gatherers of evidence ... it's sometimes easier to put it to the higher courts than to write yourself out of it ... that's what the courts are for and even a magistrate won't make a decision on a lot of matters. He sends it up to the judge and jury. We're right at the bottom of the pecking order when it comes to the justice system. (Sergeant, QPS. Interview with CMC 10.10.02)*

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#### **RECOMMENDATION 4 —**

That the Queensland Police Service's Operational Procedures Manual be rewritten to distinguish clearly between the three decision-making processes relevant to police prosecution: (i) the initial decision to lay charges, (ii) summary prosecutions and (iii) the prosecution of committal hearings for indictable matters.

#### **Police prosecution at committal**

*It made a difference when the ODPP got a specialist sex offence prosecutor ... we also need specialist police prosecutors. (Consultation with Townsville QPS 31.10.02)*

Discussions about the role of police prosecutors raised a number of salient issues regarding their training, expertise and career structures. Consultation with the QPS in Cairns (28.10.02) and Townsville (31.10.02), for example, suggested that 'as with police investigators in this area the opportunities for police prosecutor training appear to be inadequate ... there are many inexperienced police prosecutors ... turnover is high as there is not a good career structure for [them]'. These same consultations suggested that the QPS has a need for specialist sexual offence police prosecutors (consultation with the Townsville QPS 31.10.02) and that the ODPP could provide training to specialist police prosecutions units as well as being involved at an earlier stage in sexual offence cases (consultation with the ODPP Townsville 31.10.02).

The QPS submission indicated that comprehensive training is provided to police prosecutors and that many officers also independently obtain some form of tertiary qualification. The submission indicates that in late 2001, the Service suspended its Brief Managers' Course to focus on the training of a large number of police prosecutors. It goes on to state that currently the training provided to police prosecutors is being redesigned, so that there might be an accredited Police Prosecutors' Course (QPS, p. 31).

In response to further queries raised by the Inquiry about police prosecutors, the QPS reported that there are currently 170 police prosecutor positions throughout the state, 47 of those positions allocated to the Legal Services Branch in Brisbane, the others being located at Dalby, the Gold Coast, Ipswich, Kingaroy, the Sunshine Coast, Townsville and Warwick.<sup>56</sup>

The QPS reported that police prosecutors undergo an intensive 20-week training course, including training in relation to special witnesses as provided by the *Evidence Act 1977* (Qld) and sexual offences more generally, such as relevant legislation, policies, procedures and the trauma to victims of such offences. As indicated earlier in this report, however, few prosecutors undergo specialist

sexual offences training (only three have been ICARE-trained and two have attended the Sexual Offences Investigation Course).

The submission by the QPUE (p. 11) stated:

The officers involved in this area consider that there is merit in appointing specialised prosecutors to prosecute offences of a sexual nature ... whilst there are three legal officers attached to the Crime Operations Branch who are available and assist the members of the Sexual Crimes Investigation Unit as required, they are not lawyers who prosecute sexual matters and for that reason their input could never be as valuable as that of a specialist sexual offence prosecutor. In the past the SCIU in Brisbane had a dedicated police prosecutor attached to the unit, and the accessibility and expertise of this person was considered an extremely valuable resource by those officers working in this area. It is thought that the DPP should consider such a proposal.

It should be noted that possession of legal qualifications is not a formal requirement for the exercise of the prosecutorial role by police. Although many hold formal legal qualifications, many obtain the necessary skills on the job (Career Planning & Management, QPS website, accessed 12.02.03; QPS, p. 34).

The submission by the Queensland DPP (p. 9) stated that ODPP involvement in sexual offences at the committal stage is invaluable, but that the ODPP cannot extend itself further into committal work unless it is properly funded to do so. The DPP stated (pp. 9–10):

While recognising that some police prosecutors are very good at this work, in general there is a substantial difference in the quality of evidence from committal hearings conducted by police and those prosecuted by ODPP lawyers.

Prosecutors are more familiar with rules of evidence and are generally more capable of ensuring that the complainant is treated fairly. Police prosecutors are reportedly less likely to hold a conference with witnesses prior to the hearing. This can reflect the listings processes of the Magistrates Court, especially in regional centres where summary and committal hearings can be joined on the one day. Substantial unfairness to the witness can result, particularly where he or she is a child alleging multiple offences. If such a child is left for cross-examination, without any opportunity to focus or contextualise, either in conference or through giving evidence in chief, almost inevitably there is confusion and inconsistencies. While the inconsistencies may derive through misunderstanding or unfairness to the witness rather than unreliability, they can affect the credibility of the complainant.

Another benefit from early ODPP involvement is the earlier response to requisitions for further evidence and the faster resolution of matters.

Police are more likely to respond promptly to requisitions made prior to the committal hearing. After the matter is committed for trial, they are distracted by other cases.

Early consideration of the whole of the available evidence is more likely to result in an early disposition of the case. Both pleas of guilty and cases too weak to proceed are identified sooner. This is identified from statistics relating to prosecution files received for Brisbane matters between May 1998 and February 2001. The data compares outcomes between Workgroup 1 (which prepares all matters from Police Prosecutions) and the Committals Workgroup (which prepares and prosecutes its own committal hearings).

The figures to which the Queensland DPP referred indicated that the matters that were reviewed by the committal workgroup resulted in a high rate of guilty pleas (84 per cent or 468 matters) either at committal or prior to the presentation of an indictment. Fewer of the matters reviewed by the committal work group resulted in guilty pleas (33 per cent or 290 matters). Conversely, very few cases reviewed by the committal work group were discontinued (approximately 16 per cent or 90 matters) compared to those that were not reviewed by the committal work group (67 per cent or 578 matters).

The Queensland DPP said that these statistics clearly demonstrated the positive influence of the ODPP in committals. She states '... in our view, there is no doubt that if a committals program of some kind were extended statewide, there

would be an improvement in the quality of these cases and the ultimate result' (CMC 2002b, p. 24).

In contrast, the submission by the QPUE (p. 11) stated that their members had raised concerns that there was 'little or no benefit arising from the Committals Project because of an absence of continuity in prosecuting personnel between committal and trial'. Indeed, the QPS commentary about the Committals Project provided to the Inquiry in response to a follow-up request was quite critical of the process, claiming that operational police were frequently not advised of the reasons for dropping a charge and that communication regarding the current status of a matter was not forthcoming. The QPS advised that there had been no formal evaluation of the Project and that information provided was anecdotal at best. The QPS recognises the value of feedback and the need for reasons for the discontinuation of cases for training and development purposes. They claimed that 'if advice and guidance are not provided by the prosecutor, the investigator cannot learn and improve'. Further, the QPS claimed that 'police often provide information to complainants about the status of their cases and that an open line of communication between police and prosecutors will assist complainants understand why decision are made'.

The recommendations made earlier in this report for compulsory training for police and police prosecutors working in the sexual offences area will enhance the committals process and its outcomes, generally, by providing police with advanced and more relevant expertise. Police prosecutors may also benefit, however, from advanced legal training regarding sexual offences as well as ongoing consultation with prosecutors from the ODPP about sexual offence matters, particularly historic cases.

The next chapter of this report, which discusses the second term of reference (the decision-making process), recommends improved communication between the ODPP and the QPS and more formal feedback mechanisms. Again, the implementation of these recommendations will go a long way towards improving the concerns raised about police prosecution.

## Issue 12: The arrest process

Concerns about the arrest process were twofold. First, some submissions suggested that the use of Notices to Appear (NTA) may be more appropriate than an arrest, especially for historic offences. Secondly, there were concerns about the attitudes of some arresting officers. The QPS argued for the maintenance of the arrest process for the majority of sexual offences. For example:

Arrest is usual practice in Argos — what was unusual was that he got bail ... we had to fight to get him bail — they were going to keep him in over night — that is usual practice ... all sex offenders are charged because an accused person can take action against a complainant ... the PPR Act says give NTAs but they don't with sex offenders ... unless there are extenuating circumstances ... the policy is if they're breathing and they walk they go to the watch-house. [It's] not written policy ... [it's] an understanding from the nature of the work and an interpretation of the act ... if it's a physical offence against someone else they go to the watch-house and get bail restrictions that he can't have contact with that person.

Sergeant, QPS. Interview with CMC 10.10.02

Similarly:

I have never served a notice to appear in relation to sexual matters — I've always arrested and charged them and taken them through to the watch-house ... this practice is just in relation to sexual matters because of the severity of the offences ... the fact that he was arrested was not unusual practice ... and I wanted to impose bail conditions to protect the complainants, the witnesses and their families.

QPS Senior Constable. Interview with CMC 11.11.02.

This issue was also important in the Volkens case (see Appendix 1). The CMC suggested in the Volkens investigation report (CMC 2003) that the QPS should ensure that all officers were 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 2001* (Qld). The CMC has written to the QPS about this issue.

Many submissions were concerned about the attitude of the arresting officers, especially a general failure to treat accused persons as ‘innocent until proven guilty’. Several formal complaints about police handling of sexual offences were made to the CMC during the period of the Inquiry and reviewed by research staff. One in particular referred to the inappropriateness of the arrest process. That case involved an alleged rape that was ultimately discontinued by the ODPP because of strong forensic evidence in support of the accused and the significant ingestion of alcohol and drugs by the complainant at the time of her allegation. In a letter to the CMC, the father of the accused argued that:

they [the police] did not give my son the opportunity to go with them, he was just arrested ... the ideology of being innocent until proven guilty is a farce ... from ... the first encounter with the police in regards this matter [it] was very much the feeling of guilty and try and prove your innocence.

It is the view of the Commission that the recommendations for training should result in officers handling arrests in a more considered manner.

## Issue 13: Human resourcing issues

### Recruitment

*I think there should be some kind of vetting process to determine whether a person is stable enough to perform those duties, 'cause it can be very stressful ... it can be very upsetting dealing with people who haven't come forward and spoken about their experiences to anybody ... and all you are getting are the details ... how someone was sodomised ... or sexually assaulted and you know after a while it can sort of ... get you down ... I think you tend to get a bit numb. (Senior Constable, QPS. Interview with CMC 11.10.02)*

For a police officer to work in a sexual offence squad, they are required to apply to work in Brisbane's Crime Operations Branch in a general capacity. Officers do not apply to work specifically in the sexual offences area. This means that it is possible that officers may work with sexual offences without being interested in working in this area. An officer who has recently worked in one of the specialist squads recently told the CMC, for example, that he was not asked by senior management if he was interested in doing sexual offences work, rather, he said:

I was just told to turn up ... I was ... surprised that prior to going there you were never counselled ... there was never any sit down and explain to you the kind of work.

Interview with CMC. 11.10.02

A regional Department of Families, SCAN Team Leader also commented:

officers are rotated through the child abuse unit and they hate it — a lot of them are just there to do a job — and in child abuse you have to give a bit more than that.

Consultation 29.10.02

Similarly, ‘officers who are interested in working in the sexual offences area could be passed over and assigned elsewhere’ (QPUE, p. 5). The QPS refuted this

argument in follow-up information provided to the Inquiry, however, stating that 'only persons who are considered suitable are accepted to work in the SCIU'.

According to the QPUE submission (p. 5), to ensure best practice in the sexual offences area 'it may be better if a special application process is implemented by the QPS to ensure that only those officers who are properly equipped and willing to engage in this sort of work are those who ultimately get there, and those who are less inclined to perform this sort of work do not'. This principle of matching aptitude and attitude is recognised in Tasmania where it is a requirement for officers working in the sexual offences area to be 'suitable to conduct investigations into crimes of a sexual nature' (personal communication from L.R. Prins, Assistant Commissioner of Police, Tasmanian Police 25.11.02). In New Zealand, best practice in policing is strived for in the area of sex offending by ensuring that investigating officers have specific skills (Dodson 1997). As indicated earlier, sexual assault officers and child sexual abuse officers are required to understand victim needs, be culturally sensitive, possess appropriate communication and interview skills and understand relevant legislation.

### **Rotation**

Working with sexual offences can be stressful and the QPS has implemented a policy of staff rotation to minimise officer stress. As a rule, QPS plain clothes constables and plain clothes senior constables in the sexual offences squads are rotated every 12 to 18 months, while a detective's usual tenure is around three years. The Inquiry was informed, however, that the Juvenile Aid Bureau falls within regional policies and that recruitment, rotation and training policies may vary between regions (follow-up information received from the QPS on request).

According to the QPUE submission (pp. 7–8) 'while the motives for this rotation policy are commendable there is concern that the policy is impeding police best practice and resulting in significant variations in expertise within QPS units'. This view was put forward by other submissions to the Inquiry as well, particularly those by victims of abuse and police working in the specialist squads. As with the QPS recruitment/selection policies and procedures, therefore, current policies regarding rotation may need to be reconsidered to ensure that skilled officers and those who genuinely wish to work in this area are able to do so.

*[The] squad ... should be rotated on a regular basis ... [there is the] capacity to burn out ... the policy has always been ... you go when you think you have had enough ... but some really enjoy the work — they've been there for 5 years. (Sergeant, QPS. Interview with CMC 10.10.02)*

### **Rank**

It was also brought to the Inquiry's attention that many officers working with sexual offences are junior in rank and limited in policing experience ('workload and inexperience are our major issues': consultation with Townsville QPS 31.10.02). A Townsville defence lawyer, for example, commented that:

they push far too junior officers into it and they push female officers into it ... I think it is the wrong thing to do — they get jaded very quickly — it affects the investigation.

Consultation 31.10.02

Similarly, a police sergeant commented to the CMC during an interview on 10 October 2002 that:

... it's not a place for plain clothes constables ... you can have them staffed there from day one out of uniform ... without having done any detective training on how to interview people or cognitive interviewing or search warrants or anything like that ... without having done a sex offenders course or a JAB

course. I think it is an area that requires at least detective level ... and I think it's an area that requires detective sergeants, not detective senior constables. The reason I say that is because a lot of people that we deal with are people with more than my vintage ... a lot of complainants are in their 40s and 50s ... [and] the decision that you make of this nature are of such high level and can have such a great impact on the complainants, offenders ... it really deserves the attention of detective senior constable upwards ... some constables struggle to do the work.

It is clear that it is essential that only police officers who are equipped with the right skills, attitude and aptitude should work in the complex and sensitive area of sexual offences. To achieve this will require adequate recruitment, selection and rotation policies that address the needs of officers and workplace health and safety requirements, as well as the needs of complainants and accused in these matters. Alternative options may need to be considered to protect the well-being of officers (for example, periodic psychological assessment may help ensure that officers continue to be able to deal with the stresses of the work).

### **Career advancement and command structure within the specialist squads**

According to consultation with the QPS in Townsville (31.10.02) and the submission to the Inquiry by the QPUE (p. 8), 'there is no career planning for officers working in the sexual offences area to look to more senior roles in the future. There is no grooming process for specific roles so that a junior officer can aspire to a more senior role within the squad'. It is the view of the Commission that, to improve long-term expertise and officer satisfaction, serious consideration should be given to improving career opportunities in the sexual offences area.

### **Succession planning**

According to the QPUE submission (pp. 8–9) 'there is an absence of succession planning within the sexual crimes units', although this may, of course, reflect general practice in all areas of the QPS. Nevertheless, there do not appear to be procedures for providing:

- (a) adequate replacement of staff as required by the demands for service
- (b) a handover/caretaker or transition period for new and old staff, particularly at senior levels, to discuss current cases, or
- (c) adequate information retrieval systems to provide information to new staff about current matters.

It seems that one officer departs and the next officer starts afresh.

### **Overview of human resourcing issues**

The Commission was of the view that sufficient concerns were raised about human resourcing and succession planning issues within the specialist sexual offences squads to warrant a review by the QPS (see Recommendations 5 and 6). That review may need to consider such issues as:

- whether there should be specific application and retention processes for the specialist sexual offence squads, rather than general application to the Crime Operations Branch
- whether preliminary and ongoing assessments of the aptitudes, interest and skills of officers working in the units would be appropriate
- how workplace health and safety concerns, more generally, can best be addressed within the squads.

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## RECOMMENDATION 5 —

That the Queensland Police Service review the recruitment, selection and rotation policies of all specialist sexual offence squads, ensuring that adequate supervision and command structures are in place and that career opportunities are provided for officers working in these squads.

## RECOMMENDATION 6 —

That the Queensland Police Service review succession-planning processes and policies for all sexual offence squads.

## Issue 14: Victim support and specialist services

### Response to victims

During the Inquiry, there were some criticisms levelled at the QPS for alleged poor attitudes towards victims of abuse and the accused (most of these submissions referred to officers who *do not* work in the specialist units). For example, Townsville Victims of Crime and Sexual Assault Service Counsellors stated during consultation with researchers on 29 October 2002 that ‘... there are good and bad officers. They generally have a negative attitude towards complainants and don’t provide the support required. It is laughable that the QPS OPM states that their first function is to “protect and support complainants” — this just doesn’t happen’. Similarly, a complainant in a sexual assault matter told CMC officers ‘I don’t recall going to get any sort of help or anything. Not from the police anyway’ (interview 2.10.02).

On the other hand, some police were perceived to be ‘zealots’, appearing to be unable to conduct adequate investigations because of their ongoing concern for the victims (most submissions of this nature referred to officers who work in the specialist units). As noted in Appendix 1, such allegations were made about the investigating officer in the Volkens case.

There was consistency, however, in the perceived importance of the first contact with police, many submissions stressing that counsellors need to be present from that time onwards to provide the support required. Some submissions suggested that there are processes that allow this to happen:

... police can refer cases to Victims of Crime or sexual assault services, but many don’t because a lot [of police] don’t think that the process and going to court is going to be hard on the victim because they [the police] go to court everyday and are used to the environment ... it’s a blokey thing ... the police go off and talk to all their mates at the court and leave the victim on her own ... they don’t realise the benefits of having one of us there ... they could use us more ... they have the offer of two services, but most don’t take it up.

Consultation with Townsville Victims of Crime and Sexual Assault Services  
29.10.02

PACT also submitted that ‘there needs to be better engagement of support persons from across departments, involving more of both the QPS and the Department of Families’ (CMC 2002b, p. 62).

### Funding

Funding for services to victims also appears to be an important issue. PACT submitted to the public hearing that the area is under-resourced (CMC 2002b, p. 70). Similarly, consultations revealed that Queensland Health funding does not cover court support for sexual assault workers (although the Victims of Crime Association is covered for court support), but that they sometimes do it because they do not feel that they can just drop clients at the most difficult time (consultation with Townsville Victims of Crime and Sexual Assault Services 29.10.02).

## Victim advocacy and the role of police officers

Many submissions referred to the confusion that may arise for a police officer who is required to provide support, take a complaint and conduct an investigation.

... these complainants are peculiar in their nature ... it's like walking on a minefield and they do really use the police as a crutch. Once they've finally told their story after 20-30 years you are the person they ring and ring and ring ... it's almost like ... being stalked by your complainant.

Sergeant, QPS. Interview with CMC 10.10.02

In this regard, the Esther Centre (p. 2) recommended that 'victim support and advocacy best occurs outside the investigating agencies'.

*[At Argos it] compounds the stress ... because you have complainants ringing you constantly and they could be crying ... in most cases they've got marriage breakdowns, relationship problems ... you end up like a counsellor and I don't think that's our role as an investigator ... I don't think it impacts negatively on the job ... [just] on your time [and] I don't know what to say ... whereas someone who has qualifications in being able to address their problems, it's gotta be beneficial because it makes them more comfortable when their matter goes to court ... I don't know what to say to someone who is suffering internally from a sexual assault matter that occurred 10–15 years ago. (Senior Constable, QPS. Interview with CMC 11.10.02)*

## Suggestions for victim services

To address the range of concerns identified above, some submissions proposed the formation of a specialist unit within the QPS in which complainants of sexual abuse can be supported by specialist support officers, as well as being provided with best policing investigative practice. For example:

police should work as part of a team which includes a skilled support person or advocate so that the police officer can focus on his part in the process and not have to fill all the request for information and support that a person requires when filing a complaint of sexual abuse.

Esther Centre, p. 2

as the QPS procedures manual provides that a primary role of police officers is to support and protect victims it is essential that QPS funding be directed towards the provision of victim support services. Such services must include victim liaison throughout all stages of [the] investigation and prosecution (i.e. advising victim as to mention dates, bail status, plea, outcome, hearing dates and procedures, referral to compensation, counselling and other services) ... it is essential that funding be provided to independent victim support services to enable effective referral by QPS where necessary.

Youth and Family Services, p. 4

... the officers were ... proposing that something akin to the ODPP set-up be put in place and that welfare officers or victim support officers be attached to the investigative units and to have persons dedicated to assisting the welfare and managing people – managing victims through the course of the prosecution as opposed to adding those responsibilities on to the shoulders of the already burdened police officers. It was felt that the officers need to retain some level of detachment in the investigative process. And, if they were to adopt a quasi social worker or welfare role, that might interfere in that process.

QPUE in CMC 2002b, pp. 92–93

Our own social worker ... would give us the delineation between the complainant and the investigator because we are supposed to be unbiased gatherers of the facts ... sometimes the police officer's role is more than just an

investigator ... [that's] not good because you feel like you owe them more ... they hang off your every word ... you've got to keep them boosted up ... I've had the complainants ring 2–3 times a day ... [there's an] average of 4 months from the time of taking the complaint until you're ready to prosecute ... and then it's another 2 months until committal ... and then another couple of months after committal ... but the ODPP VLOs only come into vogue when it comes to trial ... it is important that there should be some form of counselling service provided to the complainants ... and have it provided by the same person throughout — we need a victim support office from the day they make their complaint ... a lot call just to have a chat ... we need to be left alone to get on with the investigation.

Sergeant, QPS. Interview with CMC 10.10.02

Some submissions and consultations for the Inquiry also expressed an interest in incorporating specialist medical services into the special sexual assault units:

We need specialist support, such as psychiatrists and specialist doctors, to provide a full and appropriate response — maybe a multidisciplinary team. Child mental health unit won't do it, GMOs will do adult females. We need a joint effort/multi-agency approach.

Townsville QPS 31.10.02

A recent review of the ICARE training course by the Department of Families and the QPS (2001, p. 38) noted that 'the lack of therapeutic follow-up and support for children who are believed to have been sexually abused remains a serious concern. Adequate training and supervision, therefore, remains an important issue'.

### **Overview of victim support and specialist services**

The recommendations for required training for all officers working in the specialist sexual offence squads that were made earlier in this report should enhance the response by officers to victims of sexual abuse. This training should also improve officers' understanding of the difficulties that victims face and the need to provide ongoing support as they progress their case through the criminal justice system. Clearly, that training also needs to emphasise the importance of support agencies such as the Victims of Crime Association of Queensland, PACT and the various community and Queensland Health-funded sexual assault agencies around the state, and encourage police to liaise with these agencies as a matter of course. Indeed, more formal arrangements between police and these agencies may need to be made. The Commission encourages further liaison between the agencies to pursue such opportunities.

It is also important to recognise the strong support that many submissions provided to the Inquiry for the creation of a specialist victim support unit at the QPS, especially by police officers themselves who acknowledged the difficulties of dealing with the conflicting demands of providing ongoing support to victims while undertaking difficult and demanding investigations.

Clearly, there is a need for many complainants in sexual abuse matters to access some kind of support and/or advice from the time that they report an incident to police and throughout the ensuing investigation (the work of the ODPP's VLOs does not commence until the matter is taken over by the ODPP). In addition to the support that may be provided by victim support agencies such as PACT, the Victims of Crime Association, Bravehearts and various sexual assault services, a cost-effective approach for the QPS, which would provide benefits for both complainants and police officers alike, may be the allocation of appropriately trained support staff within the specialist sexual offences squads. The Commission encourages the QPS to pursue this concept further.

## **Issue 15: Regional variability in service delivery**

Many submissions to the Inquiry raised concerns about inconsistencies in the response provided by different police officers, different police stations and different regional areas to reported sexual offences. Despite the existence of extensive policies and protocols, a consistent understanding and application of

these processes was perceived, by those making these submissions, to be lacking. For example, in her written submission to the Inquiry, the mother of a child who was one of three victims of sexual abuse that culminated in the imprisonment of the offender, commented on the inconsistencies of the police response to the children involved: the children who went to the specialist JAB received a positive response, while one child, who went to the local police sergeant, reported a negative and antagonistic attitude and did not want to proceed. The mother commented that ‘the determination to see the court process through [by the child] depends very much on the response at the initial complaint and the support given during legal proceedings — in our case [that was] 2½ years’ (CMC 2002b, p. 55).

On the one hand, the Inquiry received much support for the specialist services provided by the specialist units. On the other hand, there was much criticism of the current ability to handle sexual offence complaints by the regional offices. The resolution of such variability, and the achievement of a uniformly high standard of knowledge and application of policies and best practice procedures, would appear to be an urgent training matter. At the same time, this variability also emphasises the importance of specialist services and the need for their appropriate geographical distribution throughout the State to ensure ready availability and reasonable access to specialist staff for all victims of sexual offences.

Although the QPS reported that the specialist units are deployed around the State as required (CMC 2002b, pp. 7–8),<sup>57</sup> the specialist units are clearly not the first to respond to an allegation of this type in a regional station, nor are they physically able to respond to every one of the 6500 sexual assaults that are reported around the State each year.

Concerns about regional variability may also reflect what has been referred to by the Department of Families and the QPS in their recent review of the ICARE training program (2001) as a failure to coordinate training in the regions. Feedback for the review indicated that this process was generally unsuccessful and had created further problems with quality assurance and the consistent delivery of programs across the State. That report recommended reinstating central coordination and funding of the ICARE training program.

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#### **RECOMMENDATION 7 —**

That the Queensland Police Service review the statewide demands made by reported sexual offences on the Service to assess the most appropriate regional response. Given the high rates of reported sexual offences in Far Northern Region, establishment of a specialist sexual offence squad in that Region may need to be given priority.

## **SUPERVISION — MAJOR ISSUES**

Sexual offence investigation is complex and sensitive: it is therefore important that police officers receive ongoing internal and external supervision. As discussed in Chapter 4, internal monitoring of police practice in Queensland occurs ‘in accordance with general management policy and procedures’ (QPS, p. 22). In the case of child sexual abuse, external monitoring and supervision occurs through SCAN teams. Police officer behaviour is also monitored by the CMC’s complaints processes and the QPS’s Ethical Standards Command (ESC).

Material provided for the Inquiry by the QPS nominates the Deputy State Coordinator, JAB, as the Detective Inspector of the SCIU. Where issues are raised regarding noncompliance with sexual offence protocols, the Detective Inspector acts as a liaison point to resolve any noncompliance with the protocols. Compliance is also maintained through the ongoing supervision of

subordinates by supervisors. No formal system exists for compliance testing, except through the normal case management of matters being investigated. Despite these layers of supervision, concerns about the quality of supervision and monitoring of police officers were noted at the hearings, especially regarding the inadequate review of matters.

## **Issue 16: Sufficiency of the review process**

### **Brief checkers and brief managers**

The CMC investigation of the Volkars case highlighted some concerns about the quality of the brief of evidence provided to the ODPP. That matter was reviewed in some detail by the QPS State Crime Operations Command, which reported that the charge details in the brief of evidence were, indeed, not consistent with some of the charges laid and that there were no copies of the bench charge sheets for one of the complainants. According to the CMC report (2003, p. 21) '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'. (A discussion of the role of brief checkers and brief managers appears in Chapter 4.)

Similar concerns about the role of brief checkers and brief managers and the quality of briefs were raised during the Inquiry. Police suggested, for example, that brief checkers/managers were not critical evidence gatherers and that expert advice was needed at the time of the investigation, rather than at the end when it is too late to add value (consultation with QPS, Townsville 31.10.02). (This issue has already been discussed earlier in this chapter in relation to legal matters.) An ODPP legal practice manager commented to the CMC (interview 16.10.02) '... there are some amazing omissions ... you wonder what the brief checker's job is other than ticking boxes'.

The current selection criteria for brief managers are that they must:

- be a QPS officer at senior sergeant or higher rank or have completed level 2 of the Management Development Program
- have successfully completed the Field Training Program
- have personal integrity.

It might be beneficial for such officers to receive relevant training in legal and specialist sexual offences material.

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### **RECOMMENDATION 8 —**

That it be a requirement for brief checkers and brief managers of the Queensland Police Service to undergo additional relevant legal and sexual offence training, as recommended for police officers working in the specialist sexual offence units.

### **Prosecution Review Committee**

The role of the QPS Prosecution Review Committee has been described in Chapter 4. Some concerns were raised about the role and functions of that Committee during the Inquiry, especially regarding the Committee's narrow terms of reference. It was suggested that, as the Committee reviews only failed prosecutions from the Magistrates Court, police are unable to consider the full range of information that could be available to them about matters that fail later in the criminal justice process (such as cases that are discontinued by the ODPP or that fail at trial in the higher courts) that may be relevant to the quality of their briefs. This can create difficulties for the QPS as this gap is likely to exclude the possibility, almost entirely, of learning from the review of serious sexual offences dealt with on indictment.

Consultations conducted for the Inquiry confirmed that, in at least one QPS region, no-one could recall there ever having been a committee convened to review a child sexual abuse matter, probably because the 'failure' of such prosecutions is likely to occur after the committal hearing and once the matter is in the hands of the ODPP (consultation with QPS Cairns 28.10.02).

Consultations also revealed that, although the relevant police prosecutor will participate in the Committee process, the investigating officer does not. In this way the Committee process provides minimal feedback to investigators (consultation with Townsville QPS, 31.10.02) and, equally, could mean that the Committee does not get first-hand feedback from the officer about the case. It was also suggested that the role of the Committee may have a negative effect on police prosecutors — it was suggested, for example, that 'this scares people out of being long-term prosecutors' (consultation with defence counsel Townsville 30.10.02).

By the QPS's own admission, this system of review can be improved. The submissions made by the QPS at the public hearings were that:

... once it goes through the process and we've got a prima facie case established, then I suppose the philosophy that's in Service thinking has been, well, that's up to the judicial process now. So there's need for improvement there; there's no doubt about that.

CMC 2002b, p. 15

The QPS suggested that this process of feedback need not apply to 'every not guilty verdict' (CMC 2002b, p. 15) and that perhaps it could be limited to those cases in which the judge had made some adverse comment about the standard of investigation or evidence. QPS submissions also noted that the provision of written reasons for the ODPP decisions to discontinue a prosecution would assist the QPS to address individual or systemic issues that may lead to the withdrawal of a prosecution (see CMC 2002b, p. 16; QPS, p. 35). This is discussed further in the next chapter.

According to follow-up information provided by the QPS to the Inquiry, the Legal Services Branch of Operations Support Command does not maintain any statistical information to identify the number of failed prosecutions, types of offences or outcomes. However, the Operational Legal Research and Advice Section conducts an analysis of statewide Prosecution Review Committee findings to identify any common or widespread practices that contribute to the failure of prosecutions, and responds by providing assistance to operational police through the publication of suitable articles in Criminal Law Bulletins.

A recent evaluation by the ESC revealed, however, that the full potential of these committees is not being realised. As outlined in Chapter 4, the Senior Executive Conference approved a 12-month trial of a failed prosecution database in September 2002. The trial began on 1 January 2003. That database will allow for failed prosecutions to be sorted by region, district, finalised date, statute, section, short title, withdrawals, dismissals, costs and issue codes. This is a positive development by the QPS. However, there may be further room for improvement, including the reinstatement of regular meetings between the QPS and the ODPP to discuss the progression of all sexual offence matters under investigation and before the courts.

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## RECOMMENDATION 9 —

That senior managers of the Queensland Police Service and the Office of the Director of Public Prosecutions reinstate regular meetings to discuss the progression of sexual offence matters under investigation and before the courts.

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## RECOMMENDATION 10 —

That the Queensland Police Service work closely with the Office of the Director of Public Prosecutions to expand the role of the Prosecution Review Committee. The role should include a review of:

- all sexual offence matters that fail at committal (whether it be the responsibility of the police or the ODPP at that stage)
- all sexual offence matters that are discontinued by the ODPP
- all sexual offence matters that fail before the higher courts (including the Court of Appeal)
- the role of the investigating/arresting officer in the matters
- the role of the police prosecutor in the matters.

## SUMMARY

There was some criticism directed towards the police response to sexual offences during the Inquiry. Much of that criticism:

- came from either victims of abuse or those who claim to have been falsely accused of committing a sexual offence whose offences had been dealt with by the criminal justice system some time ago (between 5 and 10 years ago)
- referred to officers who did not work in the specialist sexual offence units, and more often than not referred to officers working in the regions.

This suggests, therefore, that there have been significant improvements in the response to sexual offence matters by the QPS in recent years, especially with the creation of the specialist squads. Indeed, there was considerable praise for the performance and attitude of officers who currently work in the sexual offence units in Brisbane. Concerns remain, however, about the adequacy of the response to sexual offences in the regions.

Significantly, many of the concerns that were raised came from the police themselves, in recognition of the importance of their response to sexual offences and the need to do it better. Many officers, through the Police Union (QPUE), called for structural reforms that will allow them to enhance their role significantly in this regard. Many other submissions to the Inquiry also made it clear that further structural reforms are required for police officers who work with victims of sexual abuse.

Briefly, the recommendations made in this chapter call for:

- training for all officers working in the specialist sexual offence units
- effective monitoring of course participation to ensure that training occurs
- a review of sexual offences course content
- a review of recruitment, selection and rotation policies for working in the sexual offences squads to ensure that all officers in the squads have the appropriate attitudes and aptitudes for such work and enhanced succession planning, handover/transition periods and career advancement opportunities for officers working in the specialist units
- a review by the QPS of the statewide demands of sexual offences to assess the most appropriate regional response, and
- a review of the roles of brief checkers, brief managers and the Prosecution Review Committee and enhanced liaison between the QPS and the ODPP.

The QPS works closely with the ODPP on the prosecution of sexual offences. There will clearly be a need for some overlap in the various policies, procedures and practices of both agencies in the handling of sexual offences to ensure a

more effective criminal justice response. The recommendations made in this chapter, therefore, need to be considered in the light of the recommendations that are made in the next chapter, which address the issues raised by the second term of reference: the adequacy of the existing guidelines and procedures for the initiation and discontinuance of the prosecution of sexual offenders by police and the ODPP.

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## ENDNOTES TO CHAPTER 7

- 52 Sometimes, during a trial, the prosecution will seek to lead evidence about a related event in order to help establish that the accused did, in fact, commit the offence they have been charged with (e.g. the prosecution may seek to establish that the accused has committed the same offence on a previous occasion in strikingly similar circumstances). There is a general principle that says that propensity or similar fact evidence is not admissible if it shows only that the accused has a propensity or disposition to commit a crime or that they were the sort of person likely to commit the crime charged. For propensity evidence to be admissible, 'the objective improbability of its having some innocent explanation must be such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged' (*Pfennig v. R* [1995] 182 CLR 461, pp. 480–482 per Mason CJ, Deane & Dawson JJ).
- 53 One submission by a convicted paedophile, who claims to have been falsely accused, described in detail some concerns about police:
- Deliberate attempts to intimidate persons who refused to corroborate the police case or who offered evidence that would be damaging to the police case. Police told people that they knew the accused was guilty and accused them of lying to protect him. One person was told that the police didn't believe her when she said that she had never been abused by the accused ... witnesses reported being told by the police that they intended to get the accused and would leave no stone unturned and do whatever was necessary to ensure that he would go to gaol ... these people reported being made to feel dirty and felt accused of being supportive of child molesters etc.
  - Deliberate withholding, suppressing, hiding, falsifying, evading and manipulating of evidence by police to suit their case and doing so in the full knowledge that they were perverting the course of justice. Even though these people made comments that directly conflicted with the complainants, their statements were never taken ...
  - Police avoided giving truthful statement by asserting that their notebooks had been lost — it is beyond belief that experienced police could be so sloppy and careless.
  - Unethical/corrupt practices of coaching complainants/witnesses.
- 54 If police do not respond to a complaint by laying charges in Victoria they are required, pursuant to the Operating Procedures and Code for Investigators of Sexual Assault, to tell the complainant they can ask the ODPP to review the police decision (Victorian Law Reform Commission 2001, p. 34).
- 55 The *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) (which came into operation on 1 May 2003) inserts a new version of s. 229B into the Criminal Code (Qld). The requirement to obtain the consent of the DPP or the Attorney-General has been retained but 'adequacy of particulars' may be less of an issue under the new version of s. 229B because the requirement to prove three acts of a sexual nature has been removed and the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence.
- 56 Police prosecutors also travel to the following court locations: Coolangatta, Stanthorpe, Toogoolawah, Gatton, Chinchilla, Noosa, Palm Island, Ingham, Bowen, Ayr, Charters Towers, Hughenden, Richmond, Mossman and Georgetown.
- 57 For example:
- ... the [CSAIU] may also investigate or assist in the investigation of child abuse matters in other regions upon request, and provide investigative assistance or control in the investigation of complicated child abuse complaints that require multi-regional investigation. (QPS, p. 22)
- The State Crime Operations Command responds to organised and major crime, and serial or notable crimes on a statewide basis. The Command supports the regions in providing high-quality, professional and investigative services: ... one of the units within the Branch is the SCIU ... the officer in charge of the SCIU has statewide responsibilities in relation to reviewing of policy and procedures relating to JAB and the SCAN team operations. (QPS, p. 15)
- one of the roles of Taskforce Argos is to provide specialist assistance to regional investigators, utilising intelligence support, training, investigative assistance or investigative control. (QPS, p. 16)

the Child Abuse Unit in Taskforce Argos, which makes up the SCIU, has been in place for some considerable time, quite a number of years, with roles and responsibilities right throughout the State ... (CMC 2002b, p. 7)

... may I add that the SCIU also has a state charter as does State Crime Operations Command and depending on the magnitude of the crime, we can deploy staff to any part of the state, so depending on what it is and there's jobs that we are currently undertaking that are all over Queensland at the current time. So whilst we have a specific role for the metropolitan area of Brisbane, that doesn't restrict us to statewide issues and there's a lot of history within the unit of detectives travelling all over Queensland undertaking investigation, so that's basically just a very liberal guide. (CMC 2002b, pp. 8–9).

## THE SECOND TERM OF REFERENCE

### THE ADEQUACY OF EXISTING GUIDELINES AND PROCEDURES FOR THE INITIATION AND DISCONTINUANCE OF THE PROSECUTION OF SEXUAL OFFENDERS BY POLICE AND THE ODPP

***Prior to committal, the police are responsible for most of the decisions to initiate or continue a prosecution. As has been illustrated in the previous chapter, much of the decision making by police depends on the adequacy of their training, expertise and supervision. The recommendations provided there, which aim to address some of these perceived inadequacies, will not be repeated here.***

***After committal, the prosecution of a matter continues only when a case satisfies certain evidentiary and public interest tests — and it is the DPP who makes the decision to continue. Hence, this chapter concentrates on the decision-making processes of the ODPP.***

### CHALLENGES TO PROSECUTING SEXUAL OFFENCES

***None of the discretionary decisions made by a prosecutor is more critical than the initial decision to prosecute or not. (Spohn, Beichner & Davis-Frenzel 2001, p. 206)***

***The decision-making role by prosecutors has often been referred to as the ‘gateway to justice’. (Frohmann 1991)***

There are unique challenges associated with prosecuting sexual offences. Not only does the very nature of the offence, which often occurs in secret, create problems for the criminal justice process, but delays in reporting can also make it difficult to provide sufficient detail about the circumstances of the offence to ensure either successful prosecution or defence.

Recent research in the United States indicates that case rejections are motivated primarily by prosecutors’ attempts to ‘avoid uncertainty by filing charges in cases where the odds of conviction are good and rejecting charges in cases where conviction is unlikely’ (Spohn, Beichner & Davis-Frenzel 2001, p. 229). The assessment of convictability is primarily based on the prosecutor’s ability to predict the ‘downstream’ views of judges and juries who will primarily focus on legal factors such as the seriousness of the offence and the culpability of the defendant.

Several studies have concluded that convictability, and hence charging decisions, also reflect the influence of suspect and victim characteristics, such as background behaviour and motivation, often attributing credibility to victims who mainly ‘fit society’s stereotypes’. Much research has revealed, for example, that sexual assault outcomes are affected by the victim’s age, occupation, education, risk-taking behaviour (such as drinking or using drugs) and the relationship between the victim and the accused. US research has also suggested that prosecutors use a variety of techniques to discredit a victim’s account of sexual assault and, thus, to justify case rejections. Techniques

involve inconsistencies in the victim's story or incongruities between a victim's account and the prosecutor's beliefs or 'repertoire of knowledge' about the characteristics of 'typical' sexual assaults and the behaviour of sexual assault victims, including the failure to make a prompt report or inconsistencies in how that information is imparted (Spohn, Beichner & Davis-Frenzel 2001).

The QPUE submission (p. 10) to the Inquiry identified their concerns about the decision-making process as:

insufficient or no proper liaison between prosecutors and arresting officers in relation to decisions to discontinue charges, insufficient or no liaison between prosecutors and complainants in relation to decisions to discontinue charges, insufficient preparation by the ODPP of briefs for trial, with prosecutors commonly getting trial briefs only a day or two prior to trial — this leads to a rushed preparation, with insufficient conferencing with complainants, and last minute demands made of police officers for additional evidence gathering.

Similar observations were made in other submissions received by the Inquiry.

## MAJOR ISSUES

The major issues relevant to the second term of reference are:

- the need for specialist expertise at the ODPP, including training about sexual offences for case lawyers, legal practice managers, prosecutors and VLOs
- concerns about case management at the ODPP, such as:
  - case preparation
  - continuity of case representation
  - briefing out practices
- the transparency of the decision-making process
- communication strategies, including:
  - communication between the ODPP and the QPS
  - communication between the ODPP and the complainant
  - coordination of communication between the QPS and the ODPP with complainants
- concerns about dealings with the defence, including:
  - the nature of pre-trial and trial disclosures
  - defence submissions to withdraw
  - charge bargaining
- resourcing and workload
- victims' rights, including:
  - the role of victim liaison/support officers
  - the need for a complaints process.

### Issue 17: Specialist expertise

While the ODPP asserts that it liaises with the community in two ways — 'by inviting community groups that support victims of crime to address legal staff and victim liaison officers about their work and by contributing information about the criminal justice system to the training and information sessions run by community agencies' (DPP Qld 2002, p. 24) — the views expressed by a number of submissions to the Inquiry indicated that these efforts are yet to reach their maximum potential.

For example, Hetty Johnson, Director of Bravehearts, commented that:

the ODPP don't appear to have the latest research to offset the defence lawyers ... if the ODPP had better/more current research information it would be better —

[we] need to drag them into the 21st century — they need the right information — we'd be more than happy to help.

Consultation with CMC 28.1.02

The organisation Protect All Children Today (PACT) submitted that:

prosecutors should receive better training that would assist them to understand that a complainant may make a statement and then recant and add to their statement later — a better understanding of the dynamics that work in cases of sexual abuse is often needed.

CMC 2002b, pp. 66–67

The DPP informed the Inquiry that lawyers at the ODPP have considerable access to legal research via the Internet and that relevant laws and sentences are collated for easy access (personal communication 30.5.03). However, while acknowledging the legal expertise of the ODPP, the Commission believes that the overall skills of staff at the Office may be enhanced by a greater understanding of sexual offences more generally. Hence, it recommends that legal staff and VLOs receive training in aspects relevant to sexual offending such as the nature and extent of abuse, child development, the disclosure and reporting of abuse, interviewing techniques and historic cases (see Recommendation 11). To ensure compliance with training, the ODPP will need to regularly monitor and evaluate training course participation and effectiveness.

There were many favourable references throughout the Inquiry to the 'Sturgess girls' — female prosecutors who worked solely on the prosecution of sexual offence matters for Mr Sturgess QC at the ODPP in the 1980s. On the one hand, a dedicated sexual offence unit was considered to be a good idea because of the specialist expertise and support that was provided for complainants by these officers. On the other hand, it was pointed out that specialised staff in this area suffered from high rates of burnout due to the demanding nature of the work and that this, in turn, had led to a high turnover within the unit (the unit was set up in 1986 but by 1989 only one of the four speciality staff remained). Other concerns were also raised about potential restrictions on professional development for individuals confined in their daily work in such a way.

The reinstatement of such a unit was discussed at the hearings. The Queensland DPP suggested that this option was not practical because of the current workload of the Office — currently 80 per cent of all number 1 listings at the courts are sexual offence matters of some description — and that a specialist unit would therefore be overworked.<sup>58</sup> The DPP suggested that 'education and training [would be] a better approach' (CMC 2002b, p. 28). This was supported by comments made by the Deputy DPP during an interview with the CMC (8.10.02):

A specialist sexual offences squad carries a massive pressure load, emotional pressure load, on an individual ... my belief is that to have the necessary expertise you don't have to concentrate that in a few individuals ... it's really a training program issue.

And by a case lawyer for the ODPP (8.10.02):

The office does provide training in a lot of areas ... I've never received any specific training in dealing with sex complaints or children ... I've educated myself by going and speaking to trial prosecutors and more senior case lawyers and asking about cases that I have coming up ... I'm of the view that there should be a defined sexual crimes unit so that people can get sustained experience in prosecuting certain types of offences ... but not forever because you burnout.

Reinforcing the view that a specialist approach was desirable, the Commonwealth DPP gave evidence about a specialist sexual assault unit within the Tasmanian ODPP, which appeared to be working well in collaboration with specialist police.

It is the view of the Commission that the formation of a specialist sexual offences squad at the ODPP is not necessary. The reasons for this are twofold:

- 1 As the proportion of sexual offence matters dealt with by the ODPP on a daily basis is relatively high it would seem that all ODPP staff require specialist sexual offence training, rather than a select few, and that a specialist squad would be unable to handle the sheer quantity of such cases being dealt with by the ODPP.
- 2 There are important workplace health and safety requirements for staff who deal with such difficult cases, and the ODPP, unlike the QPS,<sup>59</sup> may not be in a position to provide ongoing access to the kind of support that may be required on a daily basis.

However, it is the view of the Commission that there will be individual staff members who have a particular interest and aptitude for work in this area and that they should be encouraged to apply for greater involvement in the prosecution of sexual offence matters (and that such application should receive favourable support from senior management).

It will also be important that the ODPP recognise the potential impact on staff working with sexual offence matters and, in accordance with current workplace health and safety requirements, provide for counselling options and staff rotation policies as required.

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### **RECOMMENDATION 11 —**

That all legal staff and Victim Liaison Officers at the Office of the Director of Public Prosecutions receive training in aspects relevant to sexual offending, such as the nature and extent of abuse, child development, the disclosure and reporting of abuse, interviewing techniques and historic cases.

## **Issue 18: Case management**

The Queensland DPP expressed the view that the effective operation of the criminal justice system as a whole depends on the early involvement of the ODPP, continuity of the case lawyer and Crown prosecutor from start to finish, early involvement of VLOs and victim support personnel, and the early involvement of defence counsel (CMC 2002b, p. 22). The DPP further stressed the vital nature of proper communication between the Crown and the defence and between the police and the ODPP (CMC 2002b, p. 22).

However, the Queensland DPP suggested during the hearings that the court listing process is a problem and that ‘a more discriminating approach in relation to the listing of trials so that matters are not listed until there are firm instructions as to a definite trial’ is required (CMC 2002b, p. 22).

There is, I think, sufficient data in my written submission to show that there is a substantial impact on victims and the ultimate disposition of trials in these cases because of listing problems, matters falling over through adjournments and late pleas of guilty. All of these matters, of course, involve funding issues.

CMC 2002b, p. 23

While acknowledging the understanding and commitment indicated by the DPP by these comments, the perceptions of some who made submissions to the Inquiry were that case management within the ODPP is a problem. This section of the report discusses concerns about case preparation time, client representation and briefing out practices.

### **Case preparation**

The Queensland DPP stated that it was the goal of her office to identify and deal with problems in relation to a prosecution at the earliest possible stage (p. 21).

She pointed out that this is vital to both the accused and the complainant (CMC 2002b, p. 25). However, submissions to the Inquiry raised concerns that problems are not always identified early enough, and, indeed, some expressed significant dissatisfaction with the ODPP's handling of sexual offence prosecutions overall. The submission by LAQ, for example, states:

It seems that real consideration of a case, and real evaluation of the prospects of success on each count on the indictment is deferred until the matter comes into the hands of the person responsible for the prosecution of the matter in court *the next day*. This situation is frustrating for us: we cannot properly prepare matters or advise our clients. It is unfair to our clients: they have no certainty about what is alleged against them. It is of particular concern when the prosecution elects to ultimately proceed on matters less serious and far less in number than those upon which the accused was committed for trial when there has been publicity revealing the nature and number of the committal charges.

LAQ, p. 8 (emphasis in original)

Similar concerns were raised by a victim of sexual assault with regard to case preparation time:

[I was told] by the ODPP's VLO that a prosecutor would be allocated to the case perhaps no earlier than the day of the committal hearing ... I was totally devastated by this news, as I knew there was no possible way I could inform a prosecutor of the full story in the ½ hour allocated to meet prior to sitting in front of the judge. I discussed my grave concerns with the police ... and the police were equally horrified as they fully understood the complexity of the case and the enormity of information to be both passed on to, and understood by, the prosecutor ... on the day of the hearing I had ½ an hour prior to the hearing with the prosecutor to desperately try and explain the entirety of the case. As a consequence we discussed the case briefly for 1.5 hours and the start of the hearing was delayed ... the prosecutor was very overwhelmed by the complexity of the case which was previously totally unknown [to him] and was crucial to the case ...

Individual submission to the Inquiry by a victim of sexual abuse

Several members of the judiciary who were consulted for the Inquiry proffered similar comments:

prosecutors should have the case early ... I know a lot of cases where the complainants have never met the prosecutor until the last minute.

Consultation with District Court judiciary 4.12.02

the extent to which the prosecutor interviews the complainant and determines their ability as a witness is contentious — usually the prosecutor doesn't see them until too late ... you need several days ahead of time but this just isn't happening ... like all time limits they just do it on the last day — they don't take the time unfortunately ... in reality the prosecutor is not appointed until the trial date is set.

Consultation with Supreme Court judiciary and Court of Appeal 19.12.02

LAQ suggested at the hearings that the solution may be to have the prosecutor who is going to trial to have very early management of the case. While this process is suggested as best practice by the Standing Committee of Attorneys-General (1999), and in the Best Practice Model for the Determination of Indictable Charges (attachment B to the report by the Standing Committee of Attorneys-General 1999),<sup>60</sup> those recommendations are not binding and the process has not been implemented in Queensland (CMC 2002b, p. 50).

### **Continuity of case representation**

The Queensland DPP acknowledged during the public hearings that, once a matter is in the hands of the ODPP, continuity of the case lawyer and the Crown prosecutor on that matter is very important:

the solution would be that the prosecutor who's going to go to trial has very early management of the case. That would be consistent with the best practice guidelines established nearly five years ago now ... by the joint committee of the Directors of Prosecutions and the Legal Aid Directors ... they don't seem to have been put into practice in Queensland. Perhaps that's because there isn't enough money.

CMC 2002b, p. 50

Continuity of representation would be the most cost-effective practice — each time a new staff member is assigned to a case they lose valuable time reviewing it and learning material already understood by the previous prosecutor. Staff turnover on individual matters would seem, therefore, to be false economy. Further, several submissions by victims who claimed to have been dealt with by several case lawyers for their matters told the Inquiry that such change-over was also considerably distressing for them.

It is important to note, however, that the DPP identified the listing practices of the courts as an important source of distress for complainants. In her written submission (p. 14), she described the results of a snapshot survey of the listing histories of the Brisbane District Court from July to September 2002. The survey indicated that about one-third of cases had been listed for trial up to three times. Further, she explained that the Court's priorities in providing new trial dates rest upon the availability of defence counsel and witnesses, not the prosecutor. During the period of the survey, this resulted in at least one-quarter of the matters being briefed out to at least two prosecutors; one matter had been briefed out to four prosecutors.

### **Briefing out**

Briefing out occurs when the ODPP does not have enough prosecutors to carry all matters and is required to contract out certain matters, on a case-by-case basis, to private members of the bar. The ODPP's practice is not to brief cases until very late, and to brief only the first two matters listed for the week. This practice is intended to save costs — it is possible, for example, that the first two matters included in the running list may fill an entire week and it would therefore be a waste to have to pay counsel a fee on brief for the other matters. However, if the first matters are adjourned or resolved, then the matters that are listed later will go to trial earlier than expected and possibly without adequate preparation.

Submissions to the Inquiry suggested that the current briefing out practice of the ODPP compounds the problems associated with case preparation and case continuity.

Many other concerns were raised by submissions about the quality, timeliness and appropriateness of the current briefing out practice of the ODPP. However, the Queensland DPP (p. 13) submitted that:

while a shortage of experienced permanent prosecutors has forced us to brief out a substantial proportion of sexual offence prosecutions, it is difficult to find suitable counsel to accept briefs and retain them for trial. Our fixed scale of brief fees has not increased for five years and appears to be lower than that binding any other government agency. While some counsel of note and quality continue to accept ODPP briefs, for most, the office has become a brief of last resort.

These comments were supported and amplified by others. For example:

- the ODPP pay poorly for the work that they brief out, which can result in the matters not receiving much time or attention
- the ODPP brief difficult sexual offence matters out to counsel for poor remuneration, and this can lead to counsel being too eager to dispose of the prosecution
- the ODPP tend to brief matters out on very short notice and this affects preparation for the trial
- the ODPP have rarely briefed counsel at the time of providing an undertaking to the court at a case review 10 days prior to trial.

Consultation with District Court judges 4.12.02

Some submissions also raised concerns about the skills of private barristers who are briefed by the ODPP to deal with sexual offence cases and that there is little accountability for such counsel to the ODPP.

Members of the Supreme Court and the Court of Appeal (consultation 19.12.02) indicated that the ODPP needs more senior experienced officers and 'the

resources and the time to do the job'. For a range of reasons (including financial remuneration and management practices) senior staff at the ODPP 'get dissatisfied and leave to go to the bar' ('it's a problem', they said). This tends to become a vicious cycle, which then requires more briefing out to the private bar, fewer accountability opportunities and so on.

There is a range of actions that might alleviate some of these concerns, including an examination of the fee schedule for briefing private members of the bar, matching the skills of the private bar to the offence being prosecuted, and monitoring the performance of barristers who have been briefed to prosecute ODPP matters — as per performance management procedures such as those provided by Standards Australia (1998) or the Queensland Ombudsman (2003). On the other hand, streamlined case management practices may result in fewer cases having to be briefed out.

The CJC (2001) previously recommended that the ODPP develop processes for routinely and systematically monitoring the quality of work performed by in-house and private counsel who work on behalf of the ODPP (Recommendation 13, p. 110). The Commission endorses that recommendation as there was sufficient information provided to the Inquiry to suggest that the ODPP should make the improvement of case management practices a priority.

### **Issue 19: Transparency of the decision-making process**

Current practices in Queensland allow the public and the media to view the prosecution of most sexual offences as they occur in the Magistrates Court and higher courts. Indeed, the transparency of the court process is considered to be one of the strengths of the current criminal justice system.

However, it was the perception of many who provided submissions to the Inquiry that the activities of the ODPP post-committal (such as dealings with the defence and the decision to continue or discontinue a case), are not transparent and that the ODPP operates 'as a judge and jury — behind closed doors'. For example, during her consultation with the Inquiry in November 2002, Hetty Johnson (Director of Bravehearts) said, 'It looks like mates having a chinwag in an office somewhere', while a complainant in a sexual offence matter that was discontinued by the ODPP said: 'I remember phoning my husband straight away and just saying something is wrong here. This doesn't make sense ... it just felt odd' (Interview with CMC 3.10.02).

*... at the end of the day there has to be a degree of subjectivity — it's not just tick and flick ... you have to rely upon experience, especially when you're looking at tests like the reasonable prospects test. It gets down to the particular facts and circumstances you're dealing with in an individual case. (Queensland Deputy DPP. Interview with CMC 8.10.02)*

There were also submissions that the processes adopted by the ODPP may be inconsistent: some accused persons described their cases as being similar to that of Mr Volkens, for example, but reported that the ODPP had failed to halt them, as it had done with the Volkens matter. One submission stated, for example, that:

the proposition that others similarly accused and dealt with by police, prosecution, courts and media, who have not had their cases placed under the same scrutiny ... must be seriously considered by the Inquiry ... different treatment of one individual prompts the accusation of favouritism and discrimination.

CMC 2002b, p. 50

The ODPP and other organisations outlined in their submissions to the Inquiry and at the public hearings how the decision-making process works, according to

the guidelines of the ODPP, but it is important to note that many complainants submitted that they did not understand the process, and that the process had not been adequately explained to them. In turn, this reflects poorly on the adequacy of, and adherence to, the requirements of the COVA legislation and the quality of the communication practices currently used by staff of the ODPP.

The Volkens investigation report (CMC 2003, pp. 42–44) discusses the importance of accurately recording any decisions that are made, especially on the current ODPP document called the Charge Discontinuance form. The report states: ‘the purpose of such a form 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’ (p. 44). The report goes on to state that ‘the CMC is troubled by the inconsistencies between the reasons [for discontinuance] stated in the Charge Discontinuance form and those given by Mr Rutledge [Deputy DPP] in his conversations with Complainant 3, his letter to Complainant 2, and in his interviews with the CMC’ (p. 44).

Enhanced communication protocols, including provision of written reasons to the QPS and complainants (see Issue 20), should go a long way towards making the decision-making process more transparent for complainants and the accused. Accurate and timely completion of the Charge Discontinuance form, and ongoing supervision to assess compliance by all staff, are further safeguards that should also enhance the transparency of the decision-making process.

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### RECOMMENDATION 12 —

That the Office of the Director of Public Prosecutions implement procedures to ensure that all decision-making processes are supported by relevant documentation and completed by the responsible officer.

## Issue 20: Communication

The ODPP is required to liaise and communicate with the QPS, complainants and the defence on a daily basis to collect, collate and provide information relevant to the decision-making process for the progression or discontinuance of a matter and, ultimately, for the full prosecution of a matter.

Submissions to the Inquiry voiced concerns about the formal and informal communication processes used by the ODPP. Issues relevant to communication with the QPS and complainants are discussed in this section; issues regarding the defence are discussed in the following section.

### Communication with the QPS

*I always try to get the arresting officer to sit in with me on the protocol so they can see what we do ... and even after the complainant has not been able to separate out the incidents and I explain to them the law in relation to this and what this means in practical terms ... [the police] look at me and go but why ... police focus on taking a complaint that's coherent, I'm focusing on what we have to do to prosecute it. So there's a big difference.  
(Case lawyer, ODPP. Interview with CMC 8.10.02)*

As discussed earlier, the ODPP was established, in part, because of the importance of separating the roles of investigation and prosecution within the criminal justice system. The case for separation has been convincingly built on the basis that the investigator, by virtue of their function, cannot make a

dispassionate decision about the prosecution. In practice, however, it is not possible to achieve a total separation of roles (see the reference to the Philips Royal Commission 1981, paragraphs 6.24–6.32 in the Legal Secretariat to the Law Officers 2000, paragraph 4.5). According to the QPS submission (p. 29), for example, even when the responsibility for the prosecution case passes to the ODPP, the investigating officer continues to play a key role in briefing the Crown prosecutor, conducting additional inquiries at the request of the prosecutor, arranging witnesses and presenting evidence in court.

Clearly, the standard of the investigation will have a direct bearing on whether a prosecution will proceed or not. As the conduct and quality of police investigations have been considered in detail elsewhere in this report, these matters will not be repeated here. Under the Inquiry's second term of reference, however, the separation of the roles of investigation and prosecution places particular significance on the quality and effectiveness of communication between all parties. Difficulties can arise in this regard, especially when the roles of the different agencies are not clearly defined. For example, the Glidewell Report from the United Kingdom reviewed concerns about the organisation and efficiency of the Crown Prosecuting Service (which is similar to the ODPP). The report affirmed the importance of maintaining independent investigation and prosecution functions, but found that the separation had created a gulf between Crown Prosecution Service lawyers and the police; it recommended that closer working structures should be established between the two (Glidewell 1998).

While the relationship between the ODPP and the police in Queensland can be generally described as a strong one (QPS, p. 34), the Inquiry revealed that in relation to sexual offence matters at least two main coordination and communication issues arise between the investigation and the prosecution. These relate to the timeliness of the input of the ODPP into police investigations (as discussed in the previous chapter of this report) and the feedback provided from the ODPP to police investigators.

The QPS submission (p. 34) states:

A fundamental concern is the need for open and timely communication. It is recognised that, in many cases, shift work undertaken by the member of the Service leads to short-term communication difficulties. However, there are a number of operational imperatives that prevent the adoption of the strategies that would fully address these difficulties.

The processes and procedures of the ODPP also create a number of additional difficulties. It is not uncommon for several ODPP prosecutors to have carriage of a matter before a hearing. This means investigating officers are required to communicate the idiosyncrasies of a particular matter to a variety of prosecutors, which can be time consuming and lead to inconsistent outcomes. For example, the investigating officer may be advised that a certain course of action should take place to progress a prosecution. However, having proceeded in accordance with initial advice, the proposed course of action is altered after the matter has been allocated to a different prosecutor. This is inefficient and frustrating for the officers involved.

Accessing ODPP prosecutors in a timely manner prior to a trial or committal hearing is also critical to the success of prosecutions. In circumstances where the investigating officer is not able to communicate with the prosecutor until, or very shortly before, a matter is to proceed, there is a real risk that sufficient information will not be provided in relation to what are often complex and substantial matters.

The QPS (p. 35) and QPUE (p. 10) submissions both highlighted concerns about 'insufficient or no proper liaison' between prosecutors and arresting officers about the decisions to discontinue or alter the charges against a defendant. During consultation, some police also expressed frustration at the high number of matters that the ODPP discontinues. They felt that they often worked hard to conduct the investigation and establish a prima facie case at committal, only to have ODPP subsequently enter a nolle prosequi (consultation with QPS, Cairns 28.10.02).

In their written submission, the QPS (p. 35) also claimed that, because of communication difficulties, the investigating officer is often left in the difficult position of having to justify a decision to discontinue a matter to a victim when the decision has not been fully explained to the officer and, in some instances, officers are not afforded the opportunity to address or explain perceived deficiencies in the brief of evidence or learn from the expertise of the prosecutor.

The QPS suggested that, with appropriate communication about matters, investigating officers could have the opportunity to justify and explain the rationale for the original charges, gather additional evidence if required, learn from their mistakes and provide the Service with an opportunity to address any significant or systemic problems or procedural issues identified by the ODPP.

*... re the ODPP ... there was very little discussion with the girls and the prosecutor changed ... he hardly spoke to me ... that was like pulling teeth ... I asked him whether there were any problems with the brief and he said look there's no real problems, it's all good. He never spoke to the girls ... I think I've got a right to know what's going on and I wasn't privilege to any of the conversations ... they've never explained to me any of their decisions ... what's been told to me makes absolutely no sense. (Senior Constable, QPS. Interview with CMC 11.10.02)*

During the public hearings, the Queensland DPP explained that it was usual practice for the ODPP to explore possible avenues of further evidence with both the police and the complainant before a matter was discontinued. Further, she stated that communication problems between the ODPP and the QPS were limited to the regional areas and that procedures in Brisbane were very tight (CMC 2002b, p. 23), although she did comment in her written submission that 'because of different hours and conditions of work, and the ODPP's exclusion from e-mail access to police, it remains difficult for the ODPP to contact arresting officers for important matters like requisitions, listing and witness issues. A lot of ODPP time is spent trying to track down a particular police officer' (Queensland DPP, p. 7). Consultations with ODPP staff also revealed that communication with arresting officers was often limited and difficult. They suggested that, at times, their efforts to communicate might result in contact only when it was too late to get the required extra information (consultation with the ODPP, Townsville 31.10.02).

During consultation with Inquiry staff (28.10.02), the QPS in Cairns stated that:

there is no consultation from the ODPP to the victim or to us ... the whole process should depend on a full and fair process ... we get very little consultation with the ODPP.

The Queensland DPP informed the Inquiry, however, that a new Legal Practice Manager was only appointed to Cairns in September 2002 and that since then no prosecution had been discontinued without prior consultation, 'apart from a small number where reasonable attempts at consultation failed when either the police or the complainant were uncontactable because of long leave or an itinerant lifestyle' (personal communication 30.05.03).

A number of submissions encouraged closer liaison between investigators and prosecutors for sexual offence matters. The submission by the QPUE (p. 11), for example, suggested that the ODPP should consider proposals to provide greater assistance with investigations and noted that concern about communication between the ODPP and the QPS, as discussed in the Project Horizon Report, 'remains a live issue'.

The submission by the Queensland Law Society (p. 6) reinforced the need for better feedback between the two agencies:

Whilst acknowledging the need for separate roles between investigator and prosecutor, we would encourage closer liaison between them in offences involving sexual matters.

The QPS submitted that the solution to these coordination and communication difficulties lay in ensuring the early involvement of the ODPP with investigating officers (QPS, p. 35). They emphasised that while communication between the ODPP and the QPS was generally 'very good' (CMC 2002b, p. 15), there needs to be an 'improved system of communication' between the QPS and the ODPP so that systemic or training issues can be effectively addressed (CMC 2002, p. 6). They suggested that the QPS should always be consulted prior to any decision by the ODPP to withdraw or significantly alter a charge (QPS, p. 29) and that a more formal feedback structure be implemented.

These suggestions have been made before. A confidential report prepared by the CJC (1996b, p. 6) for Project Horizon examined a sample of ODPP files that were discontinued by the entry of a *nolle prosequi* and recommended that 'there may be value in setting up a formal mechanism between the ODPP and the QPS for regular feedback on problems that may arise in the investigation and prosecution of child sexual assault offences, such as inadequate police briefs or the inadmissibility of video statements by children under 12'. That report also referred to 'the need for ongoing liaison between the QPS and the ODPP' that had been discussed in the 1996 QPS Review (Recommendations 98 and 191), which, in turn, had recommended the adoption of measures to enable ongoing feedback from the ODPP about relevant issues such as deficiencies in police training and systems reform. That review resulted in the formation of a Prosecutions Inter-Departmental Committee between the QPS, the ODPP and the Department of Justice and Attorney-General in 1997. However, the committee no longer exists and there are currently no formal processes to facilitate such feedback (ODPP personal communication 02.2003).

### **Formalised feedback to the QPS**

*I went back and looked at my brief and as far as I could tell it looked all right ... and I didn't get any explanation about where it had gone wrong. (Senior Constable, QPS. Interview with CMC 11.10.02)*

Given the concerns raised above, the QPS written submission (p. 35) stated that it would be helpful if the ODPP gave the QPS written reasons for the decision to withdraw a matter:

The QPS also believes that when the ODPP decide to withdraw a matter, written reasons for the withdrawal should be provided to the Service. This should ensure not only an accountable process, but also provide a mechanism for the Service to address individual or systemic issues within the organisation that are leading to the withdrawal of prosecutions. This could enable a course of action similar to the Prosecution Review Committee process already implemented by the QPS for matters handled within the Magistrates Court jurisdictions.

The Queensland DPP noted at the public hearings that the current practice of the ODPP is to provide a letter to the Police Commissioner when a matter is discontinued after the committal stage. However, such letters do not reveal the reasons for the ODPP's decision to discontinue (CMC 2002b, p. 23). The DPP suggested that the provision of written reasons in every discontinuance would create a resource issue for the ODPP, which is already stretched (p. 26).

Although resourcing is clearly an issue, ODPP policy already requires a written record of the decisions made. The positive consequences of the provision of written reasons will also outweigh the concerns raised. For example, in addition

to benefits for complainants, communicating these issues to the QPS would help police identify systemic and training issues and would help make the process more transparent. Benefits for the ODPP could also be achieved, including the discipline of ensuring well-developed reasoning for the decisions made.

The DPP agreed that improvements need to be made to the formal feedback procedures, particularly regarding matters that are discontinued or that otherwise fall over after the committal stage (CMC 2002b, p. 24). She also suggested that the regular meetings that used to be conducted between the ODPP and the police in the past should be reconvened.

Therefore, there is a range of ways to improve communication between the ODPP and the QPS. Recommendations 9 and 10 regarding more formal meetings between the two organisations and enhancements to the QPS's Prosecution Review Committee, which were made in the previous chapter of this report, may overcome some of these problems. Recommendations 1–3 for the police and Recommendation 11 for the ODPP regarding training of staff will also ensure some level of continuity in the shared understanding of sexual offence matters for the full range of staff involved in the handling of sexual offences more generally.

Other specific actions that the ODPP can do to enhance communication include formal feedback mechanisms to the QPS, such as the provision of written reasons for discontinuation of a matter. The Commission notes, however, that the ODPP must be sensitive to the persons involved when drafting the reasons for discontinuation for external agencies and/or individuals. For this reason it is recommended that written reasons be prepared and monitored by senior officers of the ODPP.

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### **RECOMMENDATION 13 —**

That, in collaboration with the Queensland Police Service, the Office of the Director of Public Prosecutions develop written policies for formal communication with police investigators and their supervisors about all sexual offence matters. The policy should include the provision of a written summary of the reasons for decisions that are made about each case prepared by a senior legal officer of the ODPP.

### **Communication with the complainant**

The Inquiry received several complaints about communication difficulties with the ODPP. For example:

[The prosecutor] ... just sat back in his chair and seemed very disinterested. So I was not comfortable speaking with him at all ... if you feel like someone's not listening to you then why bother ... there were a lot of questions that I wanted to ask and didn't ... because of his attitude ... you need to feel confident that you can get up and say what you have to say ... and you need to feel confident that he's going to be there to stick up for you if needed ... I found it pretty difficult ... I believed that he was supposed to be there to help me ... I said to my sister when I left ... well that was a waste of time, she said 'I reckon'.

Complainant. Interview with CMC 7.10.02

Victims' rights have been discussed in detail in Chapter 3 of this report. However, the relevance of victims' rights to the second term of reference, and the way that the ODPP responds to victims, is important. The guidelines for the prosecution of offences in Queensland state that, in relation to victims as witnesses:

A victim of crime when called upon to testify may need to relive the violence and physical distress suffered from the offence, and a prosecutor needs to be mindful of this fact.

Victims are entitled to have their role in the prosecution process fully explained and are entitled, where possible, to be consulted as to the various decisions

made in the process which may directly affect them and to be advised of the developments in the case as it progresses through the criminal justice system.

Queensland DPP 1995, p. 24

Despite these guidelines, many consultations and submissions to the Inquiry identified problems with the response of the ODPP to victims of sexual offences. In particular, there was the perception that the legal process loses sight of the fact that these cases are based on alleged offences in which the victims have been subjected to serious, personally invasive, offences. One complainant, for example, was greatly concerned about the lack of consultation, or even the provision of information by the ODPP, to the extent that she had to seek a Freedom of Information (FOI) application to determine the basis for the discontinuance of her case. 'The ODPP did not have any contact with me as a complainant,' she wrote (CMC 2002b, p. 60).

Other complainants reported similarly disturbing stories. For example:

I didn't get a chance to stand up for myself ... I just felt like I wasn't in the loop and that I was completely excluded from it.

Complainant. Interview with CMC, 7.10.02

I'm at a loss to explain how they could possibly come up with the conclusions that they did. Even the explanation they gave ... to me ... doesn't make sense ... my gut feeling was I don't believe you collected enough information to make that informed decision ... you never even spoke to me ... the only information you had was via other people and yet you're making the decision on something that happened to me that ... has a huge impact on my life and yet you didn't even feel the need to speak to me or to say, hang on ... these are the problems we have — do you have an explanation — is there something we're not looking at here.

Complainant. Interview with CMC, 3.10.02

Other concerns were also noted:

Often the ODPP don't get time to conference with the complainant during work hours — and often don't see the complainant until the day before the trial.

Consultation with the ODPP, Townsville, 31.10.02

Most of the burden falls to the PACT worker to keep the complainant informed. Due to high workloads the police and the ODPP may have limited ongoing contact with the complainant.

Consultation with the QPS, Townsville, 31.10.02

The training regarding sexual offence matters provided to the ODPP's VLOs is inadequate.

Consultation with QPS, Cairns, 28.10.02

On the other hand, members of the ODPP proffered the following comments:

It's very difficult for the complainant to understand why the Crown is not proceeding ... I try to explain it in the context of beyond reasonable doubt ... if at the end of the day the jury thinks that he probably did it it's not enough ... at the end of the day the jury has to have no reasonable doubt ... it's a very difficult concept.

Deputy DPP. Interview with CMC 8.10.02

It's never comfortable speaking to a complainant ... they have a lot invested in it ... there's no pleasant way to tell someone you're discontinuing. The best way is to at least speak ... I think under COVA we are obliged to consult with complainants about decisions that are made ... There's two standard ways of doing that: one is by phone ... that is probably the main way in which people are advised ... it's not necessarily a bad way of doing it [because they don't always want to come back in here, it's a hassle for a lot of people to come all the way in to town to talk to us. We almost never get to their place of residence ... normally it would be done over the phone ... most case lawyers do a good job, I've listened to lots of telephone conversations like this. Your job is primarily to impart the decision and to give a brief explanation of the reasons. Usually ... you've protocolled them already and you've usually raised your doubts by then ... every complainant I speak to I say you should be aware that there is no guarantee of success and there is no guarantee the person will go to prison if

convicted and there may be many reasons why we cannot proceed with it ... they should gird themselves for that possibility.

Case lawyer, ODPP. Interview with CMC, 8.10.02

Sex offences with children are a particular breed of offence which you have to have some experience with ... taking evidence off children is hard to begin with ... no lawyers look forward to speaking to child witnesses before committal ... some of them avoid it like the plague if they can ... and sometimes there are good reasons for doing that to avoid contaminating the evidence.

Case lawyer, ODPP. Interview with CMC 8.10.02

### **Formalised feedback to the complainant**

The QPS (pp. 3–4) submitted that the complainant should *always* be informed of the proposed decision by the ODPP to withdraw or significantly alter a charge. Both the guidelines of the ODPP and the COVA legislation also provide that the *reasons* for decisions made by the prosecution should be given to victims *on request*.

Currently, reasons for discontinuation are not provided in writing and the Queensland DPP suggested at the hearing that such a practice would create a further resource issue for the ODPP (CMC 2002b, p. 26). The Commonwealth DPP (p. 3) also noted in his written submission that:

The reason why a prosecution is discontinued is not always amenable to publication. The prosecutor may, on all the evidence, have made a decision to discontinue based on lack of credibility of the alleged victim or the lack of corroboration of the allegation of the victim. In such cases it is extremely difficult to publish reasons why a prosecution is discontinued and some Directors of Public Prosecution adopt the practice of not publicising reasons and merely explaining them to the victim and the victim's family.

The Director of Public Prosecutions of NSW (2001, p. 6) noted:

While the office of the DPP is publicly accountable, there are circumstances where it is inappropriate to display publicly or to individuals the reasoning process behind certain decisions. This is not because of any desire for secrecy. It needs to be kept in mind that the prosecution process deals with people. They may have a variety of sensibilities that need to be acknowledged in what we do.

However, numerous consultations called for improved practices by the ODPP, some of which included the provision of written reasons to complainants and/or formal, written documentation of decisions by the ODPP. For example:

the provision of written reasons would be good — we have to make full file notes anyway and [it] would help explain our position [to] work through the legal issues in writing.

Consultation with ODPP, Townsville, 31.10.02

consultations regarding the decision to prosecute should occur face-to-face and then be followed up in writing.

Consultation with the Queensland Law Association and the Bar Association of Queensland, Cairns, 28.10.02

consultation [with the complainant] doesn't always occur before a decision to discontinue is communicated to the defence.

Consultation with the Far North Queensland Law Society and the Bar Association of Far North Queensland, Cairns, 28.10.02

protocols may be necessary to ensure that the junior prosecutor must consult with the senior prosecutor and fill out a consultation checklist to ensure that sound decisions are made.

Consultation with the Far North Queensland Law Society and the Bar Association of Far North Queensland, Cairns, 28.10.02

To release written reasons for discontinuance, it is clear that careful documentation of why decisions are made would be required. While there may be, at times, some difficulties in drafting written reasons, the Inquiry did not hear any submissions that convincingly argued that these difficulties were insurmountable. Indeed, the Inquiry was told by some staff of the ODPP that this

is done routinely on case files (consultation with ODPP, Townsville 31.10.02), but that this may not necessarily be so in all offices. Earlier research conducted in 1996 by the CJC (1996b) suggests that this assessment may be accurate. That study reviewed ODPP files that were discontinued by the entry of a *nolle prosequi* and concluded that 'the quality of information recorded on a file by prosecutors varied greatly'. Better record-keeping by the ODPP was recommended in that report in 1996; clearly, that issue is still relevant today.

The ODPP raised limited resourcing as a reason for not providing written reasons. However, the Commission is of the view that the positive aspects of the provision of written reasons to both police and to complainants outweigh any concerns about resourcing and/or the onerousness of the task. Reasons for discontinuance are currently recorded in the case notes and it is the view of the Commission that the extra effort involved in developing these into written reasons is warranted. Recommendations 12 and 13 of the Commission address this issue by requiring the ODPP to ensure that all decision-making processes are supported by relevant documentation and that the QPS is provided with a written summary of the reasons for decisions that are made about each case.

With regard to communication with the complainant, the Commission recognises that in many cases complainants may also prefer to receive written reasons about the discontinuance of their case, but that there will be some instances in which an oral explanation is preferable. With regard to the latter, having the reasons documented and provided to the investigating police officer and/or their supervisor, both QPS and ODPP staff will be better placed to explain the decisions that have been made to the complainant.

The Commission notes, again, that the ODPP must exercise sensitivity to the people involved when drafting the reasons for discontinuation for external agencies and/or individuals. For this reason it is recommended that written reasons be prepared and monitored by senior officers of the ODPP.

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#### **RECOMMENDATION 14 —**

That the Office of the Director of Public Prosecutions develop formal policies for communicating with complainants in sexual offence matters. As part of these formal policies, a senior legal officer of the ODPP should be required to prepare a written summary of the reasons for decisions that are made about the case.

#### **Coordination of communication with the complainant**

The QPS submission (p. 35) criticised liaison between the ODPP, the QPS and the complainant as follows:

The investigating officer provides a point of liaison with the victim of an offence and communicates relevant information concerning the prosecution process. As a consequence, the investigating officer is often left in the difficult position of justifying decisions relating to the prosecution process that the officer may have had no direct involvement in. This is particularly problematic where, following a committal hearing, the ODPP does not proceed with a matter.

The QPS submitted to the Inquiry that the principal investigators in serious criminal matters often become close to complainants over time and therefore 'they are in the best position to discuss with the complainant and explain to them that the legal system is far from perfect and, at the end of the day, that's the decision that's been made' (CMC 2002b, p.16).

The Commonwealth DPP protested that police can lack the degree of objectivity necessary to explain why the charges have been dropped: 'police may be tempted to side with the victim rather than the ODPP and this may create an inappropriate and unfair tension' (CMC 2002b, p. 33).

However, it is important that communication with the complainant be coordinated. As can be seen by the following submission, complainants may not be informed at all:

I tried desperately to talk to the ... prosecutor to find out what really happened. Once again I was told, as I have been told numerous times before, no, you can only talk to your contact VLO and if that person can't help you, sorry too bad, there is nobody else who you can discuss this case with. When I asked why, I was told it was the Crown's case and I was just the key witness and I didn't have a right to know anything more or talk to anybody else as 'that was the way things are' ... I still to date have not ever received or heard anything about the outcome of the case, nothing, no e-mail. I really expected ... to receive some sort of formal result as to what happened and as to the actual result.

Individual submission to the Inquiry by a victim of sexual abuse

Taking all matters into consideration, it is the view of the Commission that the primary decision-maker (i.e. the ODPP) should be responsible for formulating the reasons for the decisions that are made. The provision of written reasons by the ODPP to both the QPS and the complainant (when required) will ensure clarity of advice, and rectify, to a certain degree, concerns about communication. The recommendations for sexual offences training for all ODPP legal staff and VLOs and specialist sexual offence police officers should also enhance communication skills by elevating the overall understanding of the issues surrounding the disclosure of sexual abuse.

It will also be important for the QPS and the ODPP to coordinate their response to complainants to ensure that every individual is fully informed of the outcome of their matter. The QPS and ODPP are therefore advised to develop formal protocols to ensure that every complainant is contacted about the outcome of their case according to the requirements of the COVA legislation.

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#### **RECOMMENDATION 15:**

That the Queensland Police Service and the Office of the Director of Public Prosecutions develop and agree to formal protocols that identify who will contact the complainant about the decisions that are made in every sexual offence matter.

### **Issue 21: Dealings with the defence**

The Volkers investigation by the CMC found that 'the process leading to the decision not to continue with the prosecution of any of the charges against Mr Volkens was unsatisfactory' (CMC 2003, p. xv). While the CMC investigation did not disclose any evidence of official misconduct, one of the concerns raised related to an alleged undertaking between the Deputy DPP and Mr Volkens's legal representatives. The potential impact of the agreement between these parties may have been a stay in the proceedings had the prosecution continued.

A range of similar concerns were raised about the relationship between the ODPP and the defence during the Inquiry. These issues are explored below.

#### **The role of the defence**

Many submissions to the Inquiry referred to examples of complainants being intimidated by defence cross-examination during committal. As discussed in the previous chapter, some also reported perceived intimidation of police prosecutors by defence counsel. Many also reported limited access to privacy screens and video linkages during the court proceedings, despite recommendations for best practice, usually because the magistrate or the judge had been reluctant to allow the appropriate use of screens and technology.

Many accused persons also reported a complete lack of understanding of the legal jargon used by both their defence counsel and the courts, and often felt

pressured by their defence counsel to plead guilty. One accused said: 'I did not understand ... one of the main problems of law is the fact that ordinary people do not understand how it works and words spoken are not wholly understood ... lawyers work out solutions that they think will be good enough.' (CMC 2002b, pp. 56–57).

A comment attached to this submission by a friend of the accused said that 'it was a sad day for all, and heartbreaking for his family, when in his confused state [our friend] pleaded guilty ... we ordinary people simply do not understand the law' (CMC 2002b, pp. 56–57).

### **Pre-trial and trial disclosures**

***Disclosure by the defence to the prosecution should be encouraged ... if it's so overwhelming that it's going to destroy us we should know about it and stop the thing from happening ... accepting submissions is almost a daily thing for prosecutors. (Legal practice manager, ODPP Interview with CMC 8.10.02)***

The adequacy of pre-trial and trial disclosure guidelines can affect both the prosecution of a matter and the decision to prosecute or not. Prosecutors depend on police investigators properly fulfilling their pre-trial and trial obligation to disclose all relevant evidence to the prosecution so that the ODPP can, in turn, meet their disclosure obligations to the defence. The defence uses the committal process to determine not only the sufficiency of the evidence, but also full disclosure of all police investigative material.

In some jurisdictions, ODPP reforms have been made to the disclosure regime so that the officer in charge of the police investigation is required to certify the completeness of the disclosure to the prosecution: this is seen by some as a satisfactory means of achieving the disclosure process (see, for example, Bugg 1999, p. 7). In Western Australia, Appendix 2 of the *Statement of Prosecution Policy and Guidelines* (DPP WA 1999) provides guidelines for disclosure of material additional to the Crown case, by specifying the duties of the police, including the requirement to certify that disclosure is complete.

The Queensland Council for Civil Liberties submitted that there are cases in Queensland where police have failed to fully disclose investigative material to the ODPP and the defence. Its written submission (p. 4) states:

Experience shows that where there is no reliable enforcement mechanism to ensure that all unused police investigation material is disclosed at least to the DPP, individual police officers (particularly if they are friendly with the complainant) can choose to withhold material that might adversely affect the credibility of the complainant not only from the defence but from the DPP.

The Council suggested that because there is a lack of disclosure machinery in Queensland 'the system has to operate on a hit and miss basis' and that the defence may have to issue a subpoena at committal for sources of information that may show evidence of the complainant's unreliability.

Deficiencies in the disclosure regime in Queensland have recently attracted government attention and reforms are proposed in the Evidence (Protection of Children) Amendment Bill 2003. The explanatory notes to the consultation draft of the Bill (JAG 2002, p. 3) state:

While the requirements of prosecution disclosure are generally well understood, and complied with, by police, prosecution and defence, there is no easily referenced code setting out the rules of disclosure. Until now the obligations of the prosecution (including the QPS and the ODPP) to disclose their case to the defence have depended on a number of different guidelines, procedures, policies, unwritten rules and general practice.

The proposed disclosure regime will ensure a balance between the need to fully inform the defence about the Crown case and the need for the safety and security of particular individuals and the state. The new provisions also provide a timeline for disclosure.

### **Charge bargaining**

The process of charge bargaining, sometimes called plea bargaining, is the negotiation between the defence and the prosecution about the charges to be proceeded with. Providing the accused pleads guilty to some charges, charge bargaining in Queensland may result in the defendant pleading guilty to fewer than all the charges, or pleading guilty to a lesser charge or charges, with the remaining charges either not being proceeded with or being taken into account under section 189 of the *Penalties and Sentences Act 1992* (Qld).

The *Prosecution Policy of the State of Queensland* (DPP 1995) acknowledges that charge bargaining plays an important role in the Australian criminal justice system. The policy sets out the principles that must govern charge bargaining if it is to function in a respectable way and address the crucial questions of visibility and accountability.

As in all Australian jurisdictions, the policy states that charge bargaining proposals must usually be initiated by the defence and that proposals that do not adequately reflect the reality and gravity of the provable conduct of the accused must be rejected. In considering any proposal, certain matters must be taken into account by the prosecutor, including the probable consequences for witnesses who may be saved the trauma of a court appearance by the acceptance of a plea, the views of the investigating officer, and the views of the victim or other people significantly affected by the offence. In no circumstances may the prosecution entertain a charge bargaining proposal initiated by the defence if the defendant maintains their innocence.

As indicated in the previous section of this report, charge bargaining was a contentious issue for some individuals who wrote to the Inquiry. For example, one submission described the abuse of several children. It was the perception of the author that: 'although the public prosecutor was very supportive of us, it seemed that once he had one conviction he really wasn't interested in the following cases, and did deals and plea bargains, which left matters forever unresolved for a number of complainants' and that 'this was a factor in a further complainant not pursuing her case' (CMC 2002b, p. 56).

In Queensland, the section of the policy that deals with charge bargaining in serious cases (i.e. where the accused is liable on the head charge to 14 or more years' imprisonment if found guilty) provides that in such cases no offer should be accepted without the consent of the DPP or Deputy DPP. In less serious cases, the section says that any consultant Crown prosecutor or senior Crown prosecutor may accept an offer to plead to a less serious charge or to fewer charges if they are satisfied that the 'justice of the case will permit the acceptance in accordance with the requirements set forth'. Crown prosecutors may also accept offers in circumstances where they are not able to refer the matter to a consultant Crown prosecutor, senior Crown prosecutor, the DPP or the Deputy DPP — if they are satisfied that the 'justice of the case will permit the acceptance in accordance with the requirements set forth'.

In dealing with a charge bargaining offer, the policy states:

Every offer should be recorded in writing. It is preferable for the representatives of the accused to make a written submission; however, if an oral offer is made, the officer who receives the offer should make a written record of it and the argument put forward to support it. This record of the offer is to be signed by the person who received it and should be placed on the appropriate file.

When an offer is accepted or rejected by the Crown, the person who accepts or rejects the offer must record the nature of the offer, their name, what decision

was made and the reasons relevant to the decision so that there is an accurate record of the decision. This record is to be signed by the person accepting or rejecting the offer and placed in the appropriate file (DPP Queensland 1995, p. 19).

However, submissions to the Inquiry raised concerns that:

- both complainants and accused are often confused and disappointed when charge bargaining occurs as they do not understand the process, have not had it properly explained, or are not consulted and have misgivings about the result
- there is the appearance that charge bargaining may, at times, occur in an ad hoc, informal manner, and
- the charge bargaining process can be fuelled by the wishes of both prosecution and the defence to dispose of these difficult matters as swiftly as possible.

### **Submissions for discontinuance by the defence**

Numerous consultations for the Inquiry suggested that any submissions by the defence to the prosecution should be done in writing. It was also suggested that any discussions, decisions, undertakings or agreements that ensue as a result of submissions by the defence should be recorded in writing by the ODPP. This issue was particularly pertinent to the Volkens case, as discussed above, where the defence made both oral and written submissions to the ODPP to discontinue the proceedings. During the discussion of the defence's submissions in the Volkens case by the ODPP and the defence, an undertaking was made by the Deputy DPP. The precise terms of this undertaking were the subject of contention, because no-one had recorded the basis on which the statements were provided (CMC 2003, p. 25). The CMC found that (p. 29):

the issue of the terms of the undertaking [between the Deputy DPP and the defence] could have been resolved had the agreement been reduced to writing and signed by both parties ... it is desirable that, where practicable, a contemporaneous note of discussions between parties be made, to avoid any possibility of misunderstanding.

The Volkens matter also raised concerns about which factors should be considered by the ODPP when determining whether to proceed with a prosecution. The CMC found that (2003, p. xv):

the decision of Mr Rutledge [the Deputy DPP] 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.

Further, the CMC found that while there was evidence from the ODPP 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.

There are guidelines elsewhere that limit the type of material that can be relied upon by the ODPP in cases such as these. For example, the Western Australian ODPP Statement of Prosecution Policy and Guidelines identifies three factors that will generally not be considered in evaluating the prospects of conviction:

- 1 material not disclosed to the prosecution by the defence
- 2 notification of a defence that purports to rest on unsubstantiated assertions of fact
- 3 assertions or facts upon which a defence or excuse are based that are contentious, or rest on information that would not, in the opinion of the prosecutor, form the basis of credible cogent evidence.

There are no such guidelines currently available in Queensland. However, it was noted in the previous section of this report that the ODPP has a policy for charge bargaining. It is quite feasible that that policy could be adapted so that it applies to submissions for discontinuance by the defence.

## Overview of dealings with the defence

Important concerns were raised about how the ODPP deals with the defence, including pre-trial and trial disclosures, submissions by the defence and the policy of charge bargaining. This is an area where clear and formal communication is required by the ODPP. It is the view of the Commission that a range of actions can be taken by the ODPP to deal with the defence in a more transparent way, including the development of policies and protocols for communication by staff with the defence, consistent written documentation of all discussions and decisions made with the defence, and independent and regular review, monitoring and auditing of all communication with the defence by senior staff.

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### RECOMMENDATION 16 —

That the Office of the Director of Public Prosecutions develop and enhance written protocols and procedures for communicating with the defence in all sexual offence matters.

## Issue 22: Resourcing and workload

The Queensland DPP told the Inquiry that in the last financial year almost half of the total number of matters finalised in Australia's Superior Courts were from Queensland, with the Office completing twice as many prosecutions as New South Wales and more than three times the number in Victoria. And yet, the budget for the Queensland ODPP is one-third of the budget for the New South Wales ODPP, even though Queensland has to carry the financial and organisational burden of the most decentralised State of the country (personal communication 30.5.03).

The current composition of the Brisbane office of the ODPP is:

- 33 legal officers who are case lawyers conducting the day-to-day work of the office
- 3 legal practice managers who supervise the day-to-day conduct of all files
- 22 Crown prosecutors who are specialist advocates whose role it is to prosecute matters in court
- the Deputy DPP and the DPP (CMC 2002b, p. 22).

Several consultations and submissions to the Inquiry suggested that the efficiency and effectiveness of the ODPP is affected by under-resourcing and compromised by high staff turnover (QPS, Cairns and Townsville, 28.10.02 and 31.10.02; members of the District Court judiciary on 4.12.02; members of the Supreme Court and Court of Appeal on 19.11.02). Indeed, the Queensland DPP said that at the time of the Inquiry there were several thousand active files in the Brisbane office and that the key internal issues for the office are workload and the level of experience of staff (CMC 2002b, p. 21). A case lawyer for the ODPP agreed: 'it's fair to say that we're all overworked and underpaid like many people in the public service ... it's a battle ... it's crisis management in many respects' (Interview with CMC 8.10.02).

The 'juniorisation' of ODPP staff has been noted for some time (see, for example, CJC 2001), but the Queensland DPP described the office as being in a 'rebuilding phase'. She stated that the ODPP was targeting the quality of case preparation by evolving and refining systems for the review and quality control of matters and increasing the training of staff. She submitted that the ODPP has been working toward the creation of new senior positions in the Office and that extra funds had now been received for this purpose. She stated that more legal staff would improve the quality of preparation of individual cases 'and the time and ability to properly conference witnesses prior to trial would be greatly enhanced' (CMC 2002b, p. 22).

During the public hearings, LAQ agreed with the comments of the DPP and suggested that the provision of further funding to the ODPP and to LAQ would be important (CMC 2002b, p. 49). The fee structure was also identified as the cause of some concern because, due to low fees to counsel, complainants are often left unconfereed until the day of the trial (this concern has been raised earlier in this report). As noted by Callaghan at a recent address to Queensland University of Technology (2002, p. 1):

To prosecute a rape trial, with all its attendant legal difficulties and emotional distraction, the DPP pays counsel a fee on brief of \$612. This is inclusive of preparation and the first day of the trial. Subsequent days of trial receive \$402. The significance of these figures is often lost on the general public — \$402 is more than most people earn in a day. Perhaps it would help if these rates were juxtaposed with those paid by the Brisbane City Council to members of the Bar who prosecute parking offences (minimum \$880 per day).

The Queensland DPP also pointed out that the various elements of the criminal justice system are inextricably interconnected — a deficiency in one area will result in difficulties in other parts of the system: ‘the burden for the ODPP is exacerbated by insufficient training for police, insufficient funding for legal aid at an early stage in the prosecution and also by listing issues’ (CMC 2002b, p. 22).

Although these issues may be outside the control of her office, there may be other measures that the DPP can take to minimise the difficulties that occur within the system due to operational issues. For example, LAQ stated that defence lawyers sometimes find it difficult to locate a person within the ODPP who has responsibility for a particular case — it was felt that there was little point in the defence making written submissions for obtaining a conviction in a particular case ‘if the person who assesses it and gives that answer isn’t the one with the responsibility of standing up in court and prosecuting the case, it seems, as a matter of human nature, that full rigour and attention is not paid to it’ (CMC 2002b, p. 49).

These difficulties may arise in part from lack of resources and staffing issues, but they also point to other management and organisational problems within the ODPP. Despite the fact that the Queensland DPP said that her office has a goal of providing continuity of staff involved on a case, the Inquiry heard many submissions that suggested that this goal was not being achieved.

The Commission acknowledges that the ODPP considers funding to be an important issue. However, it is the view of the Commission that every effort should be made by the ODPP to implement improved management practices to optimise case management and overcome some of the communication issues raised.

### **Issue 23: Victims’ rights**

The obligations to respond appropriately to victims, outlined in Chapters 3, 6, and 7 of this report regarding police responses and attitudes, apply equally at other stages of the process and particularly in relation to the ODPP. Several individuals who made submissions to the Inquiry complained that the legal processes were obscure, not properly explained and that ODPP staff were insensitive to their needs. Some concerns were also raised about the current role of the ODPP’s Victim Liaison Officers (VLOs).

#### **The role of Victim Liaison Officers**

Concerns were raised about the current roles and responsibilities of VLOs. The police in Cairns informed the Inquiry that ‘the ODPP have victim liaison officers but they have no training in sexual offences’ (consultation 28.10.02), while the submission by the Victims of Crime Association of Queensland (p. 4) suggested that ‘the recent change of title from Victim Support Officer to Victim Liaison

Officer highlights the realisation that they could not meet the needs of victims and now act more as an information distribution network’.

Members of the ODPP described the role of VLOs:

To give [victims] an idea of what their rights are ... a point of reference within the office ... they follow defined protocols ... I’m not aware that they receive any specific training ... I don’t think any of them would have qualifications above and beyond what they’ve learned on the job.

Legal practice manager, ODPP. Interview with CMC 16.10.02

It’s more of a liaison rather than a support service — a referral process onto other services. One of their major functions is to provide a bridge between victims and support services that exist out in the community.

Deputy DPP. Interview with CMC 8.10.02

However, there were some criticisms of the current role of VLOs. Hetty Johnson (Director, Bravehearts), for example, stated: ‘we don’t have many good reports about the ODPP’s victim support officers — mostly negative stuff about the ODPP in the last five years [and] it is getting worse’ (consultation 28.11.02). Some thought that the role of VLOs should be returned to its original concept. The Esther Centre argued, for example, that (p. 4):

Consideration should be given to re-establishing the Victim Support [Service] unit whose functions ceased and were realigned with administrative officers of the ODPP. Currently the role is limited to the provision of information, and not in providing specialist support and a coordinated approach to seeking redress, which may involve other bodies outside the criminal justice system.

Recommendations made earlier in this report for training in sexual offence matters for ODPP staff, including VLOs, and improved communication techniques between agencies and with complainants should enhance the quality of the response of the ODPP to complainants, and hence provide for greater consideration of victims’ rights. However, a number of submissions raised concerns about the current role of VLOs and a more formal review of their role appears to be warranted.

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## RECOMMENDATION 17 —

That the Department of Justice and the Attorney-General formally review the role and functions of Victim Liaison Officers employed by the Office of the Director of Public Prosecutions with a view to enhancing the response of the Office to complainants in sexual offence matters.

### A complaints process

While the ODPP can reconsider decisions to continue or discontinue a matter, the opportunities to do so are limited. The Queensland Prosecution Policy (DPP 1995, p. 15), for example, provides that:

Once a determination has been made to discontinue a prosecution, the decision will not be reversed unless significant fresh evidence has been produced that was not previously available for consideration or the determination of the decision was obtained by fraud and, in all circumstances, it is in the interests of justice that the matter be reviewed.

Further, decisions made by the ODPP are not reviewable by the courts (see, for example, *M v. DPP*, 6.3.96, Dunford J, Supreme Court of NSW; *Maxwell v. R* (1996) 135 ALR1; *Barton and Another v. The Queen* (1980) 147 CLR 75).

Nevertheless, there is a need for all organisations to provide a mechanism (generally called a complaints system) where concerns about process or service can be raised. Currently, the ODPP has an informal process whereby complaints about staff or matters can be reviewed by the DPP or the Deputy DPP. (A *Courier-Mail* article released on 3.03.03 by Chris Griffith and Cath Hart, for example, noted that the DPP had apologised for overlooking key evidence in a

court matter to a victim whose husband had pleaded guilty to rape, attempted rape, deprivation of liberty and four assaulted-related matters). Nevertheless, there does not appear to be a formal process that uses policy documents or written guidelines.

According to the Queensland Ombudsman, who has recently released a series of fact sheets for effective complaints management (2003) based on previous work by Standards Australia (1995; 1998):

good complaints management is an integral part of quality customer service and also provides benefits for the agency. Effective systems enable poor decisions to be quickly and efficiently rectified and deliver information identifying areas for improvement. Additionally, effective systems reduce staff stress by providing training and support to help them deal with unhappy customers.

The Queensland Ombudsman states that the main reasons public agencies need effective complaints management systems are that:

- Citizens have a right to complain and seek a remedy for a decision that is unfair or wrong.
- They can identify areas that need improvement.
- They can promote customer satisfaction.
- They can save money by resolving problems internally, close to the source.
- They can prevent complaints from escalating and multiplying, a situation that can be resource-intensive and lead to adverse publicity.
- They are fundamental to good administrative practice.

Standards Australia (1995, p. 6) identifies the essential elements of effective complaints handling as:

- commitment to the efficient and fair resolution of complaints by people in the organisation at all levels
- recognition of the need to be fair both to the complainant and the organisation
- adequate resourcing for complaints handling, including sufficient levels of delegated authority
- visibility — the complaints process should be publicised to consumers and staff and provide information to consumers about their rights to complain
- accessibility to all and easily understood
- assistance to complainants in the formulation and lodgment of complaints
- responsiveness — complaints should be dealt with quickly and courteously
- no costs or charges to the complainant, subject to statutory requirements
- the capacity to determine and implement remedies
- an appropriate system for recording complaints and their outcomes
- classification and analysis of all complaints for the identification and rectification of systematic and recurring problems
- accountability — there should be appropriate reporting and appropriate performance standards
- reviewed regularly to ensure that it is efficiently delivering effective outcomes.

The Queensland Ombudsman (2003) also recommends that senior management should consult broadly with staff and customers to determine needs and that there may be benefits in publishing information about the system in annual reports.

The Commission recommends that the ODPP develop its own complaints process to enable people to make complaints to the organisation, in the first instance, so that constructive steps can be taken internally to address identified systemic areas of concern.

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## RECOMMENDATION 18 —

That the Office of the Director of Public Prosecutions implement a complaints-handling process. In so doing, the Office should consider established guidelines, such as those developed by the Queensland Ombudsman (2003).

## SUMMARY

Resourcing is clearly an important issue for the ODPP, especially for victim support and liaison services. However, significant criticism was levelled at the ODPP for many issues that were not necessarily resource-based. Perceptions of poor management of cases, poor communication skills and inappropriate attitudes towards complainants, poor documentation of communication with the defence, difficulties with the QPS and a lack of transparency in the decision-making process overall were clearly issues of great concern to many.

The Commission has made a range of recommendations that may go some way towards improving the functioning and the public perception of the ODPP, particularly in the eyes of victims of sexual offences. These are for staff training, and for enhanced communication and formal feedback protocols with the QPS, the complainant and the defence (including written explanations of the decisions made). New to the ODPP will be the implementation of a complaints system.

Clearly, the implementation of all of these recommendations will require close and ongoing liaison between the ODPP and the QPS. The two organisations will need to work together on these matters to achieve effective reform.

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## ENDNOTES TO CHAPTER 8

- 58 A 'number 1' listing is the first matter listed on the running list of trials before a District Court judge in a particular week. The order of matters on the list is determined by the seriousness of the offence and the estimated length of the trial. Each sitting judge has a separate running list.
- 59 As required, the QPS can provide free access to human service officers within the organisation. These officers are, mostly, qualified psychologists who can either treat or refer staff for treatment as needed.
- 60 The relevant recommendations in the Working Group on Criminal Trial Procedure Report (Standing Committee of Attorneys-General 1999) are: that in complex cases the ODPP should be involved during the investigative process (Recommendation 8); that in all matters the ODPP should be involved in reviewing charges laid by the police at the earliest opportunity (Recommendation 9); and that the ODPP should be responsible for all committals, including the responsibility for deciding what material to present at the committal (Recommendation 10). The Best Practice Model for the Determination of Indictable Charges provided in attachment B of the report includes as an element of a best practice approach that the ODPP should have responsibility for the prosecution of matters at committal (element 1).

## THE THIRD TERM OF REFERENCE

### THE APPROPRIATENESS OF, AND THE CIRCUMSTANCES IN WHICH, THE PUBLICATION OF IDENTIFYING INFORMATION ABOUT A PERSON CHARGED WITH A SEXUAL OFFENCE SHOULD BE SUPPRESSED

***This chapter explores opposing arguments in the debate about whether an accused person should be named before trial and, if so, to what extent and in what circumstances. It also raises other related issues, which do not, strictly speaking, come within the third term of reference but are important issues nonetheless. Some of these are dealt with in this chapter; others are dealt with in Appendix 7.***

### MAJOR ISSUES

The major issues arising from the third term of reference are as follows:

1. Should the identity of a person charged with a sexual offence be suppressed?
2. If it is accepted that the identify of a person charged with a sexual offence should be suppressed, is the existing prohibition on publication found in the *Criminal Law (Sexual Offences) Act 1978* (Qld) adequate?
3. The prohibition on the publication of names in the *Criminal Law (Sexual Offences) Act 1978* (Qld) applies only from the time an accused is charged: the legislation does not prohibit the publication of the name of a person who is under police investigation. Is there an argument for closing this gap in the legislation?
4. The prohibition on publication contained in the *Criminal Law (Sexual Offences) Act 1978* (Qld) applies only until an accused is committed for trial or sentence. Should the prohibition be extended to a later time, such as indictment, the start of a trial, the date of a conviction or after any appeal?

The third term of reference raises the issue of whether (and if so, to what extent) a person accused of a sexual offence, but not yet convicted, should be publicly named. The issue of whether or not information about a released sex offender should be made available to the general public clearly falls outside the scope of the third term of reference.

#### **Issue 24: Should the identity of a person charged with a sexual offence be suppressed?**

The submissions to the Inquiry brought out widely different and strongly held opinions concerning the prohibition on publishing the identity of the accused in a sexual offence complaint. These opinions draw upon a range of fundamental principles such as freedom of speech, an open system of justice, the right to privacy and the right to a fair trial.

On the one hand, it was argued that a person accused of a sexual offence should be named because:

- adults accused of sexual offences should be treated the same as adults accused of other offences (such as murder) — for reasons mentioned below, the discussion of the third term of reference concerns adult offenders only.

- publication of the name of an alleged sex offender can encourage other victims to report their experiences to the police
- the safety of the public is important and public naming may prevent the accused from committing further offences.

On the other hand, it was argued that pre-trial naming should not occur because the public regards sexual offences as the worst kind of offence (even worse than murder) and premature publication can be detrimental to the reputation of an accused who is ultimately found not guilty or where charges laid against an accused are subsequently dropped.

Essential to any democracy is a system of justice that is 'open' to the public. Put simply, the public has an interest in, and a right to be informed of, the way in which the courts and the criminal justice system operate. In today's society, the print, radio and television media have taken on the role of keeping the public informed about court proceedings.

In *R v. Davies* ((1995) 57 FCR 512, pp. 514–515), the Full Court of the Federal Court discussed the general principle of an open justice system vis-a-vis sexual offences:

There are few exceptions to this general principle. One exception concerns people claiming to be victims of crime; particularly sexual offences. Most, if not all, Australian legislatures have enacted legislation providing anonymity to some such people. They did so, presumably, because their members felt that publication of those people's complaints or evidence might seriously affect their lives, whatever the outcome of the proceedings. The legislatures apparently made the judgment that, notwithstanding the public interest in freedom to report court proceedings, this consideration justifies suppression of complainants' names in many sexual assault cases ...

However, the position is different in relation to the names of persons *charged* with criminal offences. In that area there is no general rule or practice in favour of suppression. In some jurisdictions, there is some legislation to this effect; but in most Australian jurisdictions, including the Australian Capital Territory, names may be reported. Of course, this situation comes at a price. In the case of an innocent person, that price may be great. At the same time, publicity has occasionally caused undiscovered witnesses to come forward, a matter that should not be overlooked where names are suppressed, whether of an accused or, indeed, of complainants. In a case where a jury trial follows publicity, nobody could doubt that jurors sometimes come to court with a recollection of a media report naming the accused and a preconceived idea about the case, even about the accused person's guilt or innocence. This is why judges routinely instruct jurors to put media reports out of their minds and to decide the case only on the basis of what they hear and see in court. We cannot know to what extent jurors heed this instruction; but the system assumes that they do.

It is difficult to reconcile these competing public interests where sexual offences are concerned. Different jurisdictions in Australia and around the world have resolved the debate in different ways. While Queensland is not alone in protecting the identity of persons accused of sexual offences, most States in Australia, the United Kingdom and New Zealand do not offer automatic protection to sexual offenders prior to committal.

The Queensland DPP and Barnes, Kift and Walsh of QUT Law Faculty suggested to the Inquiry that the legislature should adopt an 'all or nothing' approach to name suppression (CMC 2002b, pp. 38, 155–157). That is, there should either be a prohibition on naming all defendants accused of all offences or no prohibition on naming any defendant at any stage in the prosecution process (subject, of course, to responsible reporting techniques, contempt of court and defamation laws, and the court's inherent power to suppress information). This argument was based on the view that sexual offenders should not be treated any differently from other offenders.

The authors of these submissions did not seriously advocate legislation to be introduced that prohibits the naming of all defendants accused of all offences. Rather, they argued that the prohibition provisions on naming a defendant in the

*Criminal Law (Sexual Offences) Act 1978* (Qld) should be repealed and replaced with a more general statutory power to suppress identifying particulars about any defendant (regardless of the nature of the offence allegedly committed).

It was the personal view of the Commonwealth DPP that the fear of detection is an important deterrent and that, once a person is charged, they should be identified, unless there are special circumstances justifying a suppression order (CMC 2002b, p. 38). This attitude is consistent with the principle that court proceedings should be open to the public and reported in the media, unless there is a good reason for closing proceedings (such as the protection of child witnesses and other vulnerable witnesses, victims of sexual offences, and children against whom proceedings are brought). According to this view, while the law should protect the identity of victims and children, the identity of adults accused of any offences (including sexual offences) should not be subject to any special protection and 'the interests [of innocent accused] must be sacrificed to the greater public interest in adhering to an open system of justice' (Channel 9, p. 4).

It is important to note that the principle of open justice is not an absolute one. There have always been common law and statutory exceptions to this principle and, in this instance, it is the view of the Commission that the current exception — set out in sections 7 and 10(3)(b) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) — which prohibits the naming of a person accused of certain sexual offences (until after they have been committed for trial or sentence) should not only be retained but also expanded. There are two main reasons for this.

- 1 First, unless a person's name is suppressed until after they have been committed for trial or sentence, the person will be able to be identified as having been charged with an offence that, ultimately, they may not be committed to stand trial (or sentence) for. Although this is so for all defendants not charged with a sexual offence (including, for example, a person charged with murder), the Commission agrees with the strongly held view that a person accused of a serious sexual offence requires special protection. According to the Queensland Council for Civil Liberties, sexual offences:

... arouse such deep and basic emotions of abhorrence that they have to be treated differently by the courts in order to ensure that an accused can get a fair trial ... I've lost count of the number of times over the 30 years I've been practising where a person in a social situation might come up to me and say, 'that's an interesting fraud case you're doing', 'that's an interesting dangerous driving case you're doing'. And those same people come up in a social situation where you're defending a person charged with [a sexual offence] and say, 'what are you defending that bastard for?'

CMC 2002b, p. 87

The Bar Association of Queensland (p. 7) made a similar comment:

Whilst identification of any person charged with a criminal offence can have significant ramifications for that person, being accused of a sexual offence carries social and personal consequences far and above those that flow from being accused of other criminal offences. The stigma attaching to such allegations is such that it is difficult, if not impossible, to totally overcome the effect of publication of this information, in circumstances where the charge ultimately does not proceed, or is discontinued before trial.

- 2 The second reason for supporting the retention of the current prohibitions is that, given the number of changes that have been made in the last 14 years to improve the way the criminal justice system responds to victims of sexual offences, any degradation of the 'perceived' rights of an accused may be inappropriate. In this regard, LAQ (p. 1) was particularly concerned that:

Each modification of the system to date has taken away from the rights of an accused, and in particular their right to a fair trial. Indeed, the impetus for the modifications has been a desire to improve the chance of conviction by relieving the prosecution of the rigours of compliance with the usual rules applicable to trials of criminal offences. Those accused of sexual offences are treated differently from those accused of other offences.<sup>61</sup>

## RELEVANT LEGISLATION

To facilitate an understanding of these issues, some background material about the relevant legislation in Queensland is presented here. Similar legislation in other Australian and overseas jurisdictions (primarily the United Kingdom and New Zealand) is also presented for comparative purposes.

Appendix 6 of this report sets out the provisions of the *Criminal Law (Sexual Offences) Act 1978* (Qld) that are relevant to the third term of reference.

### Queensland legislation

A fundamental principle of the Queensland justice system is that legal proceedings be:

administered in a court open to the public where the names of the parties are openly revealed and may be the subject of fair and accurate reports without fear of prosecution for contempt or action for defamation or other civil wrong. (*John Fairfax Group Pty Ltd v. Local Court of New South Wales* (1991) 26 NSWLR 131, p. 140 (Kirby J)).

However, this principle is not an absolute one. Exceptions have been developed, both by the courts<sup>62</sup> and the legislature<sup>63</sup> to respond to various situations where an insistence on open court proceedings would infringe:

a yet more fundamental principle that the chief object of the courts of justice must be to secure that justice is done. (*Scott v. Scott* (1913) AC 417, pp. 437–438 Viscount Haldane LC.)

The Criminal Law (Sexual Offences) Act contains some important statutory exceptions to the principle of open justice. It is the only Queensland Act that contains a restriction on the publication of information that may identify an adult accused. Where an adult has been charged with a non-sexual offence, such as murder, there is no legislation that prohibits the media from publishing the name of that accused.<sup>64</sup>

Section 10 of the Criminal Law (Sexual Offences) Act prohibits a person from making or publishing a statement or representation that reveals the name, address, school or place of employment of:

- a complainant (defined as a person who is alleged to be the victim of any offence of a sexual nature) at any time
- a defendant charged with only certain sexual offences before the defendant is committed for trial or sentence.

Sections 6 and 7 of the Act also prohibit the publication of identifying information about a complainant and a defendant. However, these provisions are much narrower and apply only to a report about certain court proceedings.<sup>65</sup>

Publication of information about children under the age of 17 who are accused of having committed an offence is regulated by the *Juvenile Justice Act 1992* (Qld)<sup>66</sup> (see s. 3[b] of the Act). The prohibition on publication in that Act is much wider and more general in its application: it applies to all offences (not just certain sexual offences); it applies from the time that a child is first investigated by the police; and it continues to apply after a child is convicted and sentenced.

There is very little scope for making any recommendations for changing this provision or section 191C (which enables a court to order that identifying information about a child convicted of certain serious offences may be published). For this reason, the discussion of the third term of reference focuses on adult offenders and touches only briefly on the law concerning children.<sup>67</sup>

### Legislation in other Australian jurisdictions

The legislation in New South Wales,<sup>68</sup> Victoria,<sup>69</sup> Western Australia,<sup>70</sup> Tasmania<sup>71</sup> and the Australian Capital Territory<sup>72</sup> does not prohibit the publication of information that may identify a person accused of committing a sexual offence, except *insofar as it may lead to the identification of the complainant*. For example, the *Evidence Act 2001* (Tas.) prevents the publication of identifying particulars of a person alleged to have committed incest (see s. 194K[1A]).

### South Australia

Section 71A of South Australia's *Evidence Act 1929* prohibits the publication of the identity of an accused until after the accused has been committed for trial or sentence, or has entered a plea of guilty. The penalty for breaching the provision is \$2000. The relevant extracts of this provision are set out in Appendix 6 of this report.

The history of suppression orders in South Australia is relevant to this discussion, particularly prior to 1989 when amendments to the Evidence Act removed the right of defendants (and other parties) to apply for a suppression order on the grounds of 'hardship'. According to a recent analysis by the New South Wales Law Reform Commission (2000, pp. 328–329):

The 1989 amendments were designed to bring an end to the period in which the openness of judicial proceedings in South Australia had been greatly eroded by an uncommon concern for the interests and rights of the accused. Prior to these amendments Adelaide had been labelled the 'suppression capital of Australia' ... Criticism had also been directed at the use of suppression orders when a defendant pleaded guilty, such that restrictions to publication were being imposed on the basis of risk of prejudice to reputation not just prejudice of fair trial.

## RELEVANT LEGISLATION

In 1965, legislation was introduced into the South Australian Parliament that prohibited the publication of any material that revealed the identity of a person accused of any crime in the absence of a conviction or consent by the accused. The Bill lapsed. In 1975, the Criminal Law and Penal Methods Reform Committee proposed that the publication of the identity of persons charged with summary offences should be prohibited unless and until they were convicted, but the right to anonymity for persons charged with indictable offences should not extend beyond the committal proceedings. Apart from the insertion of section 71A into the *Evidence Act 1929* (SA) in 1976 (which applies only to a person accused of committing a sexual offence), the Committee's proposal never became law (see Leader-Elliot 1990, p. 89).

Another feature of South Australia's 'suppression legislation' is section 71B of the Evidence Act. The effect of that section is that when a report of proceedings that identifies a defendant is published before the proceedings are finalised, and the defendant is subsequently found not guilty, the publisher of the report is required to publish a fair and accurate report of the result of the proceedings with the same prominence as was given to the earlier report.

### Northern Territory

The Northern Territory has adopted a position that is almost identical to the position that currently applies in Queensland. The *Sexual Offences (Evidence and Procedure) Act 1983* (NT) prohibits:

- the publication of any report concerning an examination of witnesses that reveals any identifying particulars of a defendant (s. 7)
- the publication of a statement or representation (other than a report concerning an examination of witnesses) that reveals the name, address or place of employment of a defendant (defined as a person *charged* with a sexual offence) before the defendant is committed for trial or sentence (s. 10[3][b]).

The penalty for breaching either of the provisions is \$25 000 for a corporation, and \$5000 or six months' imprisonment for an individual. The relevant provisions are set out in Appendix 6 of this report.

## Legislation in overseas jurisdictions

### New Zealand

New Zealand legislation does not specifically prohibit the publication of the name of a person accused of a sexual offence. However, under section

140 of the Criminal Justice Act 1985 (NZ) — which applies to criminal offences generally — a court may make an order prohibiting the publication of the name of any person accused or convicted of an offence (including a sexual offence), or any other person connected with the proceedings, or any particulars likely to lead to any such person's identification. A section 140 suppression order can be made for a definite or indefinite period. Where an accused applies for a permanent suppression order, section 28 of the Victims' Rights Act 2002 (NZ) requires the prosecutor to ascertain, and inform the court about, the victim's views.

The relevant sections are set out in Appendix 6 of this report.

### United Kingdom

Anonymity for defendants in sexual offence matters was repealed in the United Kingdom in 1988 following a recommendation by the Criminal Law Revision Committee (1984). The repeal was for two reasons:

- the practical difficulties experienced by police in apprehending persons suspected of sexual offences
- the injustice of singling out alleged sexual offenders for special protection 'while other defendants, including those accused of the more heinous crime of murder, could be identified' (Home Office 2002b, p. 19).

The issue was further discussed in 1999 (during the passage of the Youth Justice and Criminal Evidence Bill), and the government noted that it:

fully appreciated the very great distress and discomfort that is often experienced by those wrongly accused or charged with a sex offence after having been publicly identified. However, the criminal justice system operates on the principle of openness, which is a vital ingredient in maintaining public confidence and in encouraging witnesses to come forward. (Home Office 2002b, p. 19)

However, the courts of the United Kingdom have the power to order that the publication of a report of proceedings, or any part of the proceedings, be postponed where it is necessary for avoiding a substantial risk of prejudice to the administration of justice (see s. 4 of the Contempt of Court Act 1981 [UK]). The courts also have general powers to withhold a name or other matter from the public and to make directions prohibiting the publication of names (see s. 11 of the Contempt of Court Act).

The name of a defendant, for example, might be withheld in circumstances where doing so would be necessary to ensure his protection or that of his family. (Home Office 2002b, p. 20)

The Commission endorses the view that if a sexual offence complainant is to be treated differently by laws such as the *Evidence Act 1977* (Qld), then it is also fair that a defendant be treated likewise. There needs to be an appropriate balance between the rights of a complainant on the one hand and the rights of a defendant to a fair trial and the presumption of innocence on the other.

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### RECOMMENDATION 19 —

That the current provisions in the *Criminal Law (Sexual Offences) Act 1978* (Qld) that restrict the publication of the identity of a person charged with a sexual offence be retained.

### Issue 25: Is the prohibition contained in the *Criminal Law (Sexual Offences) Act 1978* (Qld) adequate?

There are two major problems with the current prohibitions in Queensland's Criminal Law (Sexual Offences) Act that require review. Both of these problems stem from a disparity between the protection from publicity given to a complainant and the protection from publicity given to an accused.

- 1 The first problem concerns the narrow definition of a 'prescribed sexual offence'. Unlike the prohibition provisions that apply to complainants, the prohibition on naming a defendant applies only to a defendant who has been charged with a 'prescribed sexual offence'. Because the definition of a 'prescribed sexual offence' is so narrow, some defendants who are charged with very serious sexual offences, such as maintaining a sexual relationship with a child (s. 229B of the Criminal Code), are not covered by the Act.
- 2 The second problem (which is dealt with in issue 26) concerns the failure of the Act to prohibit the naming of a person who is under police investigation but who has not been charged.

Sections 7 and 10(3)(b) of the Act, which prohibit identifying information about an accused from being published,<sup>75</sup> apply only to an accused who has been charged with a 'prescribed sexual offence', which is defined in section 3 of the Act to mean any of the following offences:

- rape
- attempt to commit rape
- assault with intent to commit rape
- an offence defined in section 352 of the Criminal Code,<sup>74</sup> which refers to:
  - indecent assault
  - procuring another person to commit an act of gross indecency
  - procuring another person to witness an act of gross indecency.

Sections 6 and 10(3)(a) of the Act, which prohibit identifying information about a complainant from being published, are much broader. They apply to a person against whom any offence of a sexual nature (including — but not limited to — a 'prescribed sexual offence') is alleged to have been committed.

Thus, the Act treats complainants and defendants quite differently. The prohibition on naming a complainant applies regardless of the type of sexual offence alleged to have been committed, whereas the prohibition on naming a defendant applies only if the defendant is charged with one (or more) of six prescribed offences. A defendant who is charged with other serious sexual offences, such as the offence of maintaining a sexual relationship with a child (s. 229B of the Criminal Code) can be identified by name at any time (subject to other laws such as the law of contempt by publication).

Thus, a defendant who is charged with numerous different sexual offences (only some of which amount to a 'prescribed sexual offence') may still be identified as having been charged with some — but not all — of the offences for which

charges have been laid. For example, a defendant who has been charged with one count of rape and one count of incest can be identified as having been charged with incest (because incest does not come within the definition of a 'prescribed sexual offence'), but cannot be identified as having been charged with rape.

To further complicate matters, the Act also treats some defendants differently. Where publication of the identity of a defendant is 'likely to lead to the identification of a complainant' (such as when the defendant is related to the complainant), the more general prohibition on publication in section 6 will apply to the defendant, rather than the restricted category prohibition in section 7.

### **The historical development of the legislation**

In its current form, the definition of a 'prescribed sexual offence' in the Act does not include any of the child sex offences found in the Criminal Code, nor some of the other serious sexual offences including:

- unlawful sodomy (s. 208)
- attempted unlawful sodomy (s. 209)
- indecent treatment of a child under 16 (s. 210)
- carnal knowledge with a child under 16 (s. 215)
- abuse of an intellectually impaired person (s. 216)
- procuring a young person for carnal knowledge (s. 217)
- taking a child for immoral purposes (s. 219)
- incest (s. 222)
- maintaining a sexual relationship with a child (s. 229B).

Some of the reasons for the inconsistencies in the Act can be found in its history. When the Bill was first introduced into Parliament in 1977, its main purpose was to provide protection for female complainants in rape and indecent assault cases.<sup>75</sup> Two features of the Bill were that a courtroom should be closed to the public when a complainant gives evidence and that a complainant should not be cross-examined about her sexual history without the court's leave.<sup>76</sup> The Bill also sought to protect the identity of both the complainant and the accused. According to the (then) Attorney-General:

Under the Bill publication at large of the complainant's identity is prohibited. Similarly the identity of the defendant is protected from premature publication.

Queensland Parliamentary Debates 1978, p. 1190

The Act, as it was originally passed, contained only one definition of a 'sexual offence'. The original definition applied equally to complainants and defendants and was in the following terms:

sexual offence means any of the following offences:

- (a) rape;
- (b) attempt to commit rape;
- (c) indecent assault on a female; or
- (d) assault with intent to commit rape.

However, in 1989, when extensive amendments were made to the sexual offence provisions in the Queensland Criminal Code, a new definition of 'sexual offence' was inserted into the Act. This new definition applied only to complainants. The previous definition of 'sexual offence' was renamed so that it became the 'prescribed sexual offence' definition. Apart from some minor amendments to the Criminal Code (which have resulted in some corresponding minor amendments to the definition of a 'prescribed sexual offence'), the definitions of a 'sexual offence' and a 'prescribed sexual offence' have essentially remained unchanged since 1989. The explanatory memorandum and the parliamentary debates about the Criminal Code, Evidence Act and other

Acts Amendment Bill 1988 do not explain why the new definition of 'sexual offence' applied only to complainants and why the prohibition on naming defendants remained tied to the limited class of sexual offences that had appeared in the Act as originally passed.

In other words, there do not appear to be any valid reasons for the inconsistencies in the definitions of a 'prescribed sexual offence' that currently apply.

### **Comparison with other jurisdictions**

Only two other Australian jurisdictions — South Australia and the Northern Territory — have passed legislation prohibiting the naming of a person charged with a sexual offence. The relevant definition of a 'sexual offence' in both South Australia's *Evidence Act 1929* and the Northern Territory's *Sexual Offences (Evidence and Procedure) Act 1983* is much wider than the definition of a 'prescribed sexual offence' in the Queensland Act.

The South Australian Act defines a 'sexual offence' to mean:

- rape
- indecent assault
- any offence involving unlawful sexual intercourse or an act of gross indecency
- incest
- any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest
- any attempt of the foregoing offences.

The Northern Territory Act — *Sexual Offences (Evidence and Procedure) Act 1983* — appears to have been modelled on the Queensland Act. However, unlike the Queensland Act, the Northern Territory Act has only one definition of a 'sexual offence' and this definition applies to *both* complainants and defendants. The Northern Territory Act defines a 'sexual offence' to mean:

- sexual intercourse or gross indecency between males in private
- sexual intercourse or gross indecency involving females under 16 years
- sexual intercourse or gross indecency by a provider of services to a mentally ill or handicapped person
- attempts at procuration of young persons or mentally ill or handicapped persons
- unlawful sexual relationship with a child
- indecent dealing with a child under 16 years
- incest by a male
- incest by an adult female
- sexual intercourse and gross indecency without consent
- coerced sexual self-manipulation
- enticing away a child under 16 years for immoral purposes.

### **Discussion**

During the public hearings, the Queensland and Commonwealth Directors of Public Prosecutions argued that there was no need to amend the definition of a 'prescribed sexual offence' in section 3 of the Criminal Law (Sexual Offences) Act to include additional offences. On the other hand, several submissions argued that the definition should be amended to include, at the very least, all serious sexual offences committed against children, such as indecent treatment of a child under 16, carnal knowledge with a child under 16 and maintaining a sexual relationship with a child. For example, Mr O'Gorman, representing the

Queensland Council for Civil Liberties, said:

... I must say that I was surprised yesterday by Leanne Clare's [the Queensland DPP] contention, and indeed Damian Bugg's [the Commonwealth DPP] contention, that child sex offences should not be put in a different class so far as naming names from any other criminal offence. I looked at that proposition with more than mild surprise. Child sex offences, child sex prosecutions are in a category of their own. Child sex abuse so stirs the abhorrence of most people that unlike any other offence in the Criminal Code it arouses such understandable and basic emotions of revulsion and distaste that the normal presumption of innocence which might be extended by those in the community to, say, a fraud or even a date rape charge simply does not exist.

CMC 2002b, p. 87

This sentiment was also echoed by Citizens Against False Sexual Allegations Inc. (CAFSA) at the public hearings: 'there is a presumption of guilt in these cases which flies in the face of our alleged presumption of innocence ... this is probably the stickiest mud you can throw' (CMC 2002b, p. 145). A recent newspaper editorial also noted that, 'short of branding a person a murderer, there is scarcely a more damaging accusation that can be made than to label someone a paedophile' (*Courier-Mail*, 25 June 2002).

Apart from the current prohibition on naming a defendant charged with a prescribed sexual offence (until after they have been committed for trial or sentence), the law offers little protection for persons wrongly accused of a sexual offence. Where a defendant has been charged with a child sexual offence (or another offence not captured by the definition of a 'prescribed sexual offence') the fact that the defendant's identity is not protected (even for a short period) can lead to irreparable damage to the defendant's reputation if the defendant is ultimately acquitted or the charges are dropped. In addressing this issue, Mr O'Gorman (p. 9) offered the following example:

Despite the fact that Scott Volkens has obtained a new and important coaching position with Australian Swimming, he will always be remembered as a person who was accused of child sexual offences, especially in his capacity as a swimming coach.

In due course, if he were to open an ordinary suburban swimming school, one would have to be concerned that there would be many in the community who would remember the allegations against him and would decline to send their children to such a swimming school.

It is the view of the Commission that the definition of a 'prescribed sexual offence' should be amended to provide greater universality of application and to harmonise the intrinsic rights and protection offered to both the complainant and the accused. To bring about this change, the definition could be amended thus:

1. The definition could be deleted from the Act and sections 7 and 10(3)(b) could be amended so that the prohibition on naming a defendant would apply whenever a defendant is charged with a 'sexual offence'.<sup>77</sup> However, this would mean that a defendant charged with a very minor sexual offence, such as a minor indecent act (s. 227 of the Criminal Code), would not be able to be identified.
2. An additional list of serious sexual offences could be added to the definition. The only 'drawback' to this option is that the definition would need to be amended each time a serious sexual offence was added to, or renumbered in, the Criminal Code.
3. The third option — which is the preferred option — is that the current definition of a 'prescribed sexual offence' could be replaced with a new definition of a 'prescribed sexual offence' based on the definition of a 'sexual offence' that appears in section 4 of South Australia's *Evidence Act 1929*. This definition would be wide enough to include the offences currently covered by the definition of a 'prescribed sexual offence',<sup>78</sup> and other serious sexual offences found in the Queensland Criminal Code, but not listed in the current definition of a 'prescribed sexual offence'.<sup>79</sup>

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## RECOMMENDATION 20:

That the definition of a 'prescribed sexual offence' contained in section 3 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) be deleted and replaced with a new definition modelled on the definition of a 'sexual offence' that appears in section 4 of South Australia's *Evidence Act 1929*.

### **Issue 26: Should the *Criminal Law (Sexual Offences) Act 1978* (Qld) be amended so that the identity of a person being investigated for a 'prescribed sexual offence' (but not yet charged) cannot be published?**

*... he never should have been named ... I totally agree with that because of the way the media has absolutely drilled us girls because we can't get up and tell our story because ... it never went to court ... I'm fully behind that whole don't name people. (Complainant. Interview with CMC 7.10.02)*

Section 10(3)(b) of the *Criminal Law (Sexual Offences) Act* prohibits a person from making or publishing a statement or representation in a report (other than a report about the defendant's committal hearing)<sup>80</sup> that reveals the name, address, school or place of employment of a defendant charged with a 'prescribed sexual offence' before the defendant is committed for trial or sentence.

The section prohibits the naming of a defendant only from the time they are charged. The Act does not prohibit the naming of a person who is suspected of having committed a prescribed sexual offence and is being investigated by the police. This is the case even if publication of a suspect's name could lead to identification of the complainant.

In deciding whether to name such a person, the media must be careful not to breach other laws, such as the law of defamation. The law of contempt of court is not relevant at this early stage because a publication will constitute a contempt only if it relates to proceedings that are current or pending. For criminal proceedings to be 'current or pending', the person who is the subject of the proceedings must either have been arrested or charged.<sup>81</sup>

In comparison, section 10(3)(a), which prohibits the naming of a complainant, is much wider. It applies from the moment a person makes a complaint about a sexual offence to the police (see s. 10[3][a] and the definition of a 'complainant' in s. 3 of the Act).

Sections 6 and 7 of the Act, which have been referred to in earlier sections of this chapter, will not be discussed in relation to this issue because they do not apply to a person who is being investigated.

### **QPS policies**

Although the media are not subject to a legislative prohibition on naming a person who is under investigation for a 'prescribed sexual offence', there are a number of relevant provisions in the OPM and the *Police Service Administration Act 1990* (Qld) that regulate the release of information about suspects.

Paragraph 1.10.9 of the OPM states that police officers and other QPS staff may disclose information pertaining to investigations if:

- such disclosure is necessary for the effective conduct of the investigation, or
- the information is of such a nature that it would be normally released in the public interest to media organisations and the like.

Paragraph 1.10.11 of the OPM is particularly relevant. It provides that police officers and other QPS staff are not to supply information to the media that identifies a defendant *before* their appearance in open court.<sup>82</sup> This paragraph prohibits police officers and other QPS staff from providing the media with a defendant's name prior to the defendant being charged. If a police officer or other staff member acts in contravention of this paragraph of the OPM, they can be subject to disciplinary action. However, this paragraph also effectively allows police officers and other QPS staff to provide the media with a defendant's name once they have made their first appearance in an open court. Since a defendant's first court appearance will usually occur within hours of being charged,<sup>83</sup> this paragraph is inconsistent with the various prohibition provisions in the Criminal Law (Sexual Offences) Act regarding the naming of a defendant prior to the defendant being committed for trial or sentence.

The section headed 'release of information following appearance in court' (which also comes under paragraph 1.10.11 of the OPM) also provides for disclosure of a defendant's name 'following an appearance in open court'. This section of the OPM is also inconsistent with the prohibition in the provisions of the Act.

The Queensland Police Media Guidelines (QPS unpub.) state that the name of an offender or accused should be released or confirmed only after their court appearance. The guidelines are also, therefore, inconsistent with the prohibition in the provisions of the Act.

Under section 10.1 of the Police Service Administration Act, it is an offence (as opposed to a breach of discipline) for police officers and other QPS staff to disclose information (except for work purposes) that has come to their knowledge because of their employment, unless:

- the disclosure is authorised by the Police Commissioner
- the disclosure is about a drug diversion assessment and is made to the Director-General of Queensland Health
- the disclosure is made under due process of law
- the information is not of a confidential or privileged nature, or
- the information would normally be made available to any member of the public on request.

The Police Service Administration Act is, therefore, consistent with the provisions of the Criminal Law (Sexual Offences) Act.

### **Other police bodies**

The QPS policies are similar to the police policies in the United Kingdom, where the Association of Chief Police Officers (2000, p. 7) has issued guidelines that apply to all offences. The guidelines provide that anyone under investigation, but not charged, should not be named until after they have been charged.

The Northern Territory Police, Fire and Emergency Services Media Policy (1994, p. 6) also provides that the names of people charged with criminal offences should not be released before they have appeared in court.

### **Other Australian jurisdictions**

Section 71A(2) of South Australia's *Evidence Act 1929* provides that:

A person shall not, before the relevant date, publish any statement or representation:

- (a) by which the identity of a person who has been, or is about to be, charged with a sexual offence is revealed; or
- (b) from which the identity of a person who has been, or is about to be, charged with a sexual offence, might reasonably be inferred,

unless the accused person consents to the publication.

The relevant provisions in the Northern Territory's *Sexual Offences (Evidence and Procedure) Act 1983* are virtually identical to those in Queensland's *Criminal Law (Sexual Offences) Act 1978*. They do not prohibit the naming of a person who is under police investigation.

The *Juvenile Justice Act 1992* (Qld) prohibition on naming a defendant (under the age of 17) is much wider than the equivalent prohibition in the Criminal Law (Sexual Offences) Act. The prohibition applies from the time that a child is first investigated or detained by the police. However, the prohibition on naming a child who has not yet been charged is not an absolute one. The prohibition does not apply to a publication permitted by a court order or to a publication authorised by the Director-General of the Department of Families (see s. 224AT[2] and [3] of the Juvenile Justice Act). The Director-General can authorise the publication of a child's name, however, only if satisfied that the publication is necessary to ensure a person's safety.

### **The media**

The Australian Press Council (APC 2001) is the self-regulatory body of the print media. While it has issued a number of General Press Releases that guide the press about certain matters, the APC does not have the power to legally enforce its guidelines. Rather, its authority rests on the willingness of publishers and editors to respect the Council's views, to adhere voluntarily to ethical standards, and to admit mistakes publicly.

Similarly, television is regulated by the Australian Broadcasting Authority (ABA), a federal statutory authority responsible for the regulation of free-to-air radio and television, pay television, digital broadcasting and Internet content in Australia. The ABA has established codes of practice for commercial television stations (ABA 1999), as well as a complaints process. The ABA can take administrative action (such as a fine or cancellation of a licence) for any breaches of the code.

The Media Entertainment and Arts Alliance (MEAA) is a professional organisation and registered union for people working in the Australian industries of the media, communications, entertainment, arts, and sport. The MEAA also has an established Code of Ethics, but it does not prevent journalists from publishing the names of persons accused of sexual offences prior to the time of being charged.

### **Submissions**

A prohibition on naming a person who has been charged with a prescribed sexual offence is of little value when the person's name can be published prior to them being charged. Mr O'Gorman for the Council for Civil Liberties argued very strongly at the public hearings that the Act should be amended so that the media are prohibited from naming a person who is being investigated by the police but not yet charged:

[Our written submission refers to] recent media tactics of not only naming a person under investigation, particularly when they're high profile and particularly when it's child sex, but in fact running the details of the allegations prior to charge courtesy of judiciously placed leaks from the Queensland Police Service.

We now have a regular scenario especially in child sex cases but in other cases ... when a person, particularly high profile, is under investigation the allegations are leaked in detail before they're charged and then once they're charged the media then unctuously say, 'we can't tell you anymore', having in fact told everything prior to the charge being laid ...

I contend that there is a very strong case to be made out to prohibit the naming of a person under investigation ...

My view is that the defendant should be put in the same position as the complainant. Why is it so uneven? Why is the system so unbalanced that a complainant, and let me make it clear, a complainant should be given the protection of anonymity, but I say there's something fundamentally wrong with the system that gives a complainant, particularly pre-charge, anonymity even if

that complainant turns out to be a liar, and let's face it in this area there are some liars, whereas a potential accused is able to be named in a series of so-called investigative reports in a newspaper well before charge. It is a system that is fundamentally unbalanced.

CMC 2002b, pp. 87–9

The QPS suggested that the naming of a suspect prior to charging can also have a detrimental effect on the police investigation (CMC 2002b, p. 19).

In brief, the submissions to the Inquiry that addressed this particular issue agreed that the current 'gap' in the legislation that allows for the publication of a person's name prior to being charged should be removed. Nonetheless, during the public hearings, the Chairperson of the CMC queried whether complete removal of the gap would present any difficulties for the QPS in investigating matters. Acting Chief Superintendent Barron for the QPS responded with:

It's probably difficult to answer because you might want the person's identity out there for obvious reasons. But in the main probably, no.

... if there was a serial rapist or something like that and that person was well known then you might want to expose that person to the general community for a raft of reasons for ... their safety and to also locate the person.

... there are instances where probably you would want to expose the person but I'd see that ... as more the exception than the rule on very rare occasions.

CMC 2002b, p. 100

The QPS Media Guidelines presently allow 'photographs, copies of video footage, or likenesses of escapees or people sought for interview to be issued to the media only after all other avenues of inquiry have been exhausted, or to warn of danger' (QPS unpub., paragraph 10.1). Before releasing images and associated details of suspects or persons absconding from lawful custody to the media, police officers must obtain the authority of a commissioned officer (QPS OPM 2002a, paragraph 1.10.12).

## Discussion

The Commission agrees that section 10(3)(b) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) should be amended to prohibit the naming of a person who is under investigation by the police prior to being charged. This extension to the existing prohibition will ensure that the Act protects the identity of a defendant from 'premature publication'.<sup>84</sup> Section 71A(2) of South Australia's *Evidence Act 1929* could be used as a model provision. That section provides:

A person shall not, before the relevant date, publish any statement or representation:

- (a) by which the identity of a person who has been, or is about to be, charged with a sexual offence is revealed; or
- (b) from which the identity of a person who has been, or is about to be, charged with a sexual offence, might reasonably be inferred, unless the accused person consents to the publication.

The provisions in the *Juvenile Justice Act 1992* (Qld) represent an alternative model. They prohibit the publication of the name of a child who is being 'dealt with' under the Act: the words 'dealt with' are defined to include 'being investigated for an offence' and 'being detained'.

However, it is the view of the Commission that this 'gap' in the legislation should not be removed entirely. There will always be occasions, albeit fairly rare, when the QPS will need to be able to release identifying information about a suspect to ensure the general community's safety and to help locate the suspect. However, the QPS should be able to release this type of information only where all other avenues of inquiry have been exhausted. In drafting this exception to the prohibition on naming a suspect, sections 224AT(2) and (3) of the *Juvenile Justice Act* could be used as a model. This provides for the Director-General of the Department of Families to authorise the publication of a child's name where the Director-General is satisfied that the publication is necessary to ensure a person's safety.

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## RECOMMENDATION 21 —

That section 10(3)(b) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) be amended to include a prohibition on naming a person who is under investigation by the police, with the proviso that identifying information about a suspect can be released if it is necessary to ensure the safety of a person or the community and/or to help locate the suspect or the complainant or otherwise assist the investigation.

## RECOMMENDATION 22 —

That the Queensland Police Service amend the references in paragraph 1.10.11 (xix) of the Operational Procedures Manual that relate to the name of a defendant being disclosed 'following an appearance in open court', so that they are consistent with the various prohibitions on naming a defendant set out in the *Criminal Law (Sexual Offences) Act 1978* (Qld). Paragraph 1.10.11 (xix) should therefore read: 'Members are not to supply information to the media that identifies a defendant charged with a "prescribed sexual offence" prior to the defendant being committed for trial or sentence'. A similar amendment should also be made to the Queensland Police Media Guidelines.

### **Issue 27: Should the prohibition on publication of the identity of a person charged with a 'prescribed sexual offence' in the *Criminal Law (Sexual Offences) Act 1978* (Qld) be extended beyond the committal proceedings?**

The legislative prohibition on naming a defendant charged with a prescribed sexual offence does not apply once the defendant is either committed to stand trial for the offence or committed to a higher court for sentencing — see sections 7, 8(2) and 10(3)(b) of the *Criminal Law (Sexual Offences) Act 1978* (Qld). The only exception is where the defendant's identity would be likely to lead to the identification of the complainant: section 6 of the Act prohibits the defendant's name from being published in a report about the committal hearing or subsequent trial. In comparison, the identity of a complainant is specifically suppressed, indefinitely, from the time the complainant makes a complaint to the police — see sections 6 and 10(3)(a) of the Act.

#### **Submissions and discussion**

Several submissions to the Inquiry argued that the Act should be amended so that the prohibition on naming a defendant continues to apply after the committal hearing. Some argued that the prohibition should be extended to indictment of the defendant. For example, LAQ argued that 'the importance of the presentation of the indictment ... is sometimes overlooked' (p. 9). Others argued that a defendant should not be named until the commencement of a trial; still others suggested that the relevant date should be the date of conviction.

Despite these differing views, most of the submissions agreed that the prohibition on naming a defendant should not be tied to the end of the committal hearing. There were various reasons for this, including:

- the relatively easy test applied by a magistrate at a committal hearing — for example, LAQ argued that 'there ought to be something done about the test for committal ... so that when someone is committed for trial ... [it] means more than it does now' (CMC 2002b, p. 49)

- the substantial proportion of cases withdrawn by the ODPP after committal (approximately 35 per cent according to the data presented in Chapter 5 of this report)
- the potentially irreparable damage to the reputation of a defendant whose charges are subsequently dropped (or who is acquitted).

The Bar Association of Queensland (pp. 7–8), for example, argued in its written submission that:

The Association accepts that the overriding principle of our justice system (that proceedings be conducted in public) is of such fundamental importance that a total prohibition on the publication of identifying details of an accused person cannot be justified.

That said, the present law can lead to great injustices ... where an accused is identified after being committed for trial but the Director of Public Prosecutions subsequently decides not to proceed to indictment ... the stigma attaching to [sexual offence] allegations is such that it is difficult, if not impossible, to totally overcome the effect of publication of this information, in circumstances where the charge ultimately does not proceed, or is discontinued before trial.

... a proper balancing of the competing public interests would be met if the law prohibited the publication of identifying information about a person ... charged with any sexual offence unless and until that person is placed in the charge of a jury. Such a provision ... would protect ... a person charged with a sexual offence but in respect of which an indictment is not subsequently presented, from the devastating consequences of publication of this fact.

LAQ (p. 7) was concerned that:

There is often a great difference between the matters upon which an accused is committed for trial or sentence and those upon which the prosecution ultimately proceeds. The prejudice associated with this situation is obvious. The delay between committal and trial, indeed the delay between committal and presentation of an indictment, aggravates this prejudice. We endorse the views set out in the third paragraph [of page 5 of the Commission's Discussion Paper].<sup>85</sup> We add that the fact that there is a relatively high level of discontinuance of these matters strengthens the argument in favour of non-publicity prior to trial.

The Queensland Law Society went further and submitted that, because 'the bar [for committal] is so low (evidence no matter how weak or tenuous), a defendant should not be named until he or she is convicted' (p. 7; CMC 2002b, p. 111).

The submissions that argued for extending the period of prohibition on the publication of the defendant's name because of the potential impact on the defendant included CAFSA (pp. 11–12), Dr Gee (CMC 2002b, p. 145), the ODPP Townsville branch (consultation 31.10.02) and the Queensland Council for Civil Liberties. The Council (p. 111) argued that:

... the proposal of not naming names until conviction ... would rectify the current absurdity that an acquitted person's reputation is tarnished forever.

Similar comments were made by a Rockhampton solicitor (John Williams and Associates, Solicitors, Rockhampton, p. 3):

There is a greater impact in regional centres upon the accused person who is later found not guilty due to the much smaller size of the community and the stigma that attaches to sexual offences (particularly those involving children).

The majority of submissions from individuals to the Inquiry also suggested that the release of any identifying information should not occur until at least after the committal and, preferably, not until a person is convicted. Those views were presented at the public hearings:

... they still believed in a process which assumed innocence until proven guilty ... and that the public release of the name of any person accused of such crimes made a fair trial virtually impossible, and that, even if acquitted, an assumption of guilt was unlikely to ever lift from that person.

CMC 2002b, p. 58

There were some submissions that also argued for: '... no change to the existing ... law ... as the current restrictions on the identification of alleged sexual offenders strike the appropriate balance' (Channel 9, p. 9). This view was generally held by the media organisations. For example, Channel 9 (pp. 5–6) submitted that:

... the Volkers case was a one-off situation that will rarely be repeated. It would be a knee-jerk reaction to amend the law as it has existed for over 20 years merely because, in one high profile case, a person's reputation has been tarnished unfairly and in such a widespread manner. This is the price that must be paid for the open administration of justice ... once a Magistrate has considered that the evidence produced *could* support a conviction, the balance shifts. No longer is the [accused's] right to privacy paramount. The public then has a sufficient interest to be made aware of the identity of the accused and the nature of the charges.

Like Channel 9, Dr Eastwood (p. 1) also believed that the release of information after committal can encourage other complainants to come forward and make a complaint to the police:

One of the biggest hurdles which exists in relation to the prosecution of sexual abuse is the disclosure of the child and subsequent reporting ... As in the case of D'Arcy, complainants may be more likely to come forward if they know similar offences were perpetrated against victims.

A recent article in the *Sunday Mail* also noted that:

It is publicity that encourages other victims to come forward and seek justice and publicity about just two complaints led to the avalanche of child sex charges against former politician Bill D'Arcy.

Sweetman 2002, p. 71

Similarly, the QPUE (p. 12) commented that:

... it is extremely common for further complainants to come forward to police once an alleged sex offender is identified in the media. This has occurred on numerous occasions ... particularly so in high profile investigations where media coverage is significant.

... investigating police officers see a significant public benefit in the offender being named so that other potential complainants can come forward prior to an offender's trial. It is also thought that in many instances this would be in the accused's favour, so that all complaints can be considered together rather than the prosecution of an offender occurring on a piecemeal basis due to delayed publicity of an offender.

During the public hearings, the QPUE modified this view somewhat and indicated that, although its preference was for the period of prohibition on naming a defendant not to be extended, the Union did not believe that the balance between the defendant's rights and the public interest 'would be greatly affected if [naming] was done upon indictment, for example'.

On the other hand, LAQ (pp. 9–10) argued that:

... there are other investigative means by which the police might uncover other complainants. For example, it is not uncommon for the police to make inquiries of all members of a particular class at a school once one child comes forward with an allegation of sexual abuse by their teacher ... The known complainant themselves might be able to identify others. There may be records which might be checked etc. Indeed as [the Commission's Discussion Paper notes], it is often the *trial* of the offender which encourages other complainants to come forward. This opportunity to expose other offences would not be lost if publicity was suppressed prior to trial.

Further, LAQ (p. 10) responded to the argument that post-committal publicity can help protect the public from the defendant with the following comment:

...any real risk of further offending by an accused may be addressed by stringent bail conditions, if indeed such a risk can be established. We suggest that if the prosecution was in a position to prove that the accused was a real threat to members of the public prior to trial (or indeed to the complainant or another witness) then it is likely that bail would be refused in any case.

Channel 7 argued that a defendant may be prejudiced by the delays between committal and trial and that ‘the solution is ... not increased reporting restrictions, but rather consideration of how the delay can be reduced’ (pp. 2–3).

The Queensland DPP (p. 16) was of the view that:

A blanket suppression on the identification of offenders prior to conviction does have some attraction for the Crown. It could be expected to diminish defence complaints about an unfair trial, because of pre-trial publicity. It might also diminish the prospects of a mistrial through reporting, during the trial, prejudicial information about the accused.

On the other hand, there have been previous cases where the disclosure of an accused’s details, has prompted further witnesses to come forward.

Although post-committal publicity (which is permitted under the current legislation) can cause great hardship to a defendant whose charges are later dropped or who is ultimately acquitted, the Commission was not convinced that the concerns raised about post-committal publicity were sufficiently well founded to warrant a change to the legislation. Indeed, such an extension does not currently exist in any other State of Australia.

If police investigations and ODPP reviews are improved (as per the recommendations that have been made in the previous chapters), the number of discontinuances and acquittals may drop significantly, as may the number of potential innocent defendants prejudiced by media coverage. At the same time, allowing publication once a defendant has been committed for trial or sentence offers these advantages:

- it may encourage other complainants to come forward
- it ensures that subsequent proceedings are open to the public.

In the absence of sufficiently compelling reasons, there appears to be little justification for extending the current prohibition contained in the Criminal Law (Sexual Offences) Act beyond committal proceedings.

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### RECOMMENDATION 23 —

That there be no change to the current provisions within the *Criminal Law (Sexual Offences) Act 1978* (Qld) that prohibit the publication of the identity of a person charged with a ‘prescribed sexual offence’ until the person has been committed for trial or sentence.

## OTHER ISSUES

Some submissions to the Inquiry raised issues that were considered to be beyond the third term of reference, but important to document, nevertheless. These included:

- the naming of an accused who is related to a complainant
- the lack of consistency in the drafting of the Criminal Law (Sexual Offences) Act
- the penalties imposed when an accused is named in contravention of the Criminal Law (Sexual Offences) Act
- the readability of the Criminal Law (Sexual Offences) Act
- the implications of the prohibition on naming an accused for government agencies
- the power to make general suppression orders.

A brief overview of these issues is provided in Appendix 7. The Commission suggests that the Queensland Law Reform Commission, or a similar body, be given a reference to review and report on these issues.

Another issue that is indirectly relevant to the third term of reference is the issue of sex-offender notification laws (sometimes referred to as 'Megan's Laws'). There are many different varieties of these types of laws. Typically, they require released sex offenders to notify police and, in some cases, other justice agencies of their whereabouts for a particular period of time. They can also entail publicly notifying bodies with a special interest such as schools, recreational organisations and even entire communities that a released sex offender is residing in their local area (Lincoln 2003, p. 1).

Queensland has legislation that enables the QPS to track the whereabouts of a sex offender who has been released from prison. Under section 19 of the *Criminal Law Amendment Act 1945* (Qld), a trial judge or another court (hearing an application brought by the Attorney-General or the DPP) can order a person who has been convicted of a sexual offence committed against a child under 16 years of age to report (personally) to a particular police station within 48 hours of their release from custody and thereafter report (in writing) any change of name or address, again within 48 hours to a particular police station. This section and various sections in the *Corrective Services Act 2000* (Qld) have recently been amended by the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld). As a result of these amendments, courts will be able to require released sex offenders to report personally to police on an ongoing basis. Release to work, home detention and parole orders made by the Corrections Board will have to include a condition requiring prisoners to report to police.

Unlike some American jurisdictions, Queensland's legislation does not provide for information about the whereabouts of a released sex offender to be made available to the general public. Having said that, it is not uncommon for this information to somehow be ascertained and distributed to members of the public by 'vigilante groups' or media coverage (as occurred earlier in 2003 when the convicted sex offender Dennis Ferguson was released from custody in Brisbane).

Over the years, there have been a number of calls for Queensland to introduce American-style notification laws. However, recent studies suggest that there is little evidence that community notification laws reduce recidivism (Presser & Gunnison 1999).

The third term of reference only raises the issue of whether (and if so, to what extent) a person accused of a sexual offence, but not yet convicted, should be publicly named. The issue of whether or not information about a released sex offender should be made available to the general public clearly falls outside the scope of the third term of reference.

## SUMMARY

The *Criminal Law (Sexual Offences) Act 1978* (Qld) currently prohibits the media from naming a defendant charged with certain sexual offences until after the defendant has been committed for trial or sentence. The Inquiry's third term of reference raised issues about the merits and adequacy of this prohibition.

The overwhelming majority of submissions argued that the prohibition should be changed in at least two ways:

- 1 To extend the period of time that the prohibition applies to unambiguously include the period when a person is under police investigation.
- 2 To extend the prohibition so that it applies to all major sexual offences.

It is the finding of the Commission that these two changes should be made to the *Criminal Law (Sexual Offences) Act*.

Many of the submissions also argued that the existing prohibition should be extended for some time after a defendant is committed for trial or sentencing (such as the start of the defendant's trial). These comments suggested that

because many defendants have their charges dropped after committal, but prior to trial, they may suffer irreparable harm if they are named in the media at committal. It is the view of the Commission, however, that the current legislation is adequate and that no changes should be made. This extension has not been made in any other State of Australia.

It is expected that implementation of the recommendations made in this report for the first and second terms of reference should reduce the number of matters that are discontinued after committal, and hence the number of defendants who suffer harm if their cases are publicised and then discontinued.

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## ENDNOTES TO CHAPTER 9

- 61 Some modifications apply to offences other than sexual ones, but the application of the modifications is, in practice, almost wholly restricted to offences of a sexual nature.
- 62 Some examples of these exceptions are: where police informants are giving evidence; where the subject matter of a court action is a trade secret or other confidential information; and where issues of national security are involved. For further information about common law exceptions see New South Wales Law Reform Commission 2000, p. 6.
- 63 Some examples of these exceptions are:
- the coroner can close an inquest and make a non-publication order under s. 30A of the *Coroners Act 1958* (Qld)
  - CMC hearings are generally not open to the public (see s. 177 of the *Crime and Misconduct Act 2001* [Qld])
  - where an offender has cooperated with authorities in exchange for a reduced sentence, the offender's sentence hearing must be conducted in private (see s. 13A of the *Penalties and Sentences Act 1992* [Qld])
  - it is an offence under s. 121 of the *Family Law Act 1975* (Cwlth) to publish an account of Family Court proceedings that identify a party or witness.
- 64 However, the media is still subject to the law of contempt (and also defamation) and must be careful not to publish information that is likely to interfere with a fair trial. See s. 8 of the *Criminal Code* (Qld), s. 129 of the *District Court of Queensland Act 1967* (Qld), s. 50 of the *Magistrates Court Act 1921* (Qld) and s. 24 of the *Children's Court Act 1992* (Qld) for some general contempt of court provisions.
- 65 Section 6, which regulates publications that identify a complainant (and a defendant where their identity could lead to the identification of the complainant, such as when they are related), only applies to a report about a committal hearing or trial. Section 7, which regulates publications that identify a defendant, applies only to a report about a committal hearing.
- 66 Legislation in all Australian States and Territories protects the identity of a juvenile accused of a criminal offence (whether the offence is a sexual offence or not).
- 67 Sections 224AB and 224AT(1) of the *Juvenile Justice Act 1992* (Qld) (when read together) provide that a person must not publish identifying information about a child who is being, or has been, 'dealt with under the Act'. The prohibition in s. 224AT continues to apply after a child is convicted and sentenced and after a child becomes an adult. It also applies to an adult who is dealt with under the Act as if they were still a child (see s. 224AB).

The prohibition on publication of identifying information does not apply to:

- a publication permitted by a court order
- a publication authorised by the Director-General of the Department of Families (which can be given only if the Director-General is satisfied the publication is necessary to ensure a person's safety). See s. 224AT(2) and (3) of the Act.

Section 191C, which came into operation only in December 2002, allows a court to order that identifying information about a child convicted of a serious offence that is a life offence (i.e. an offence for which a person sentenced as an adult would be liable to life imprisonment) may be published. This type of publication order can be made only where:

- the court has sentenced the child to a period of 10 years' imprisonment or life imprisonment
- the offence involves the commission of violence against a person
- the court considers the offence to be a particularly heinous offence having regard to all the circumstances

- the court considers that it would be in the interests of justice to allow the publication to be made.

Publication permitted under a s. 191C order is not allowed until the end of any appeal period or, where a child does appeal, until after the appeal has been finalised.

The *Child Protection Act 1999* (Qld) also contains a prohibition on publication of information leading to the identity of a child who is the subject of an investigation or order, made under that Act (see s. 189).

- 68 See s. 578A(2) of the *Crimes Act 1900* (NSW).
- 69 See s. 4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic.), which prohibits, whether or not a proceeding is pending in a court, the publication of any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed.
- 70 See s. 36C(6) of the *Evidence Act 1929* (WA).
- 71 See s. 194K of the *Evidence Act 2001* (Tas.).
- 72 See s. 76E of the *Evidence Act 1971* (ACT).
- 73 The prohibition on publication contained in s. 6 (which generally applies only to a complainant) also applies to an accused where identification of the accused could lead to identification of a complainant; e.g., the accused and complainant are related.
- 74 Section 352 also refers to ‘aggravated versions’ of these three offences.
- 75 In 1977 rape was defined in the *Criminal Code* (Qld) as an offence that could be committed only by a male against a female.
- 76 The following quote from the *Queensland Parliamentary Debates* (1978, p. 283) identifies the motivation behind the Bill:
- The present practice of subjecting the rape victim to inhuman tactics and public disgrace should not be allowed to continue. It is surely our role this evening to make certain that the legislation brought down here protects the victim from ridicule and public embarrassment.
- 77 ‘Sexual offence’ is defined in s. 3 of the Act to mean ‘any offence of a sexual nature ...’. This definition currently only applies to a complainant.
- 78 Namely: rape; attempt to commit rape; assault with intent to commit rape; indecent assault; procuring another person to commit an act of gross indecency; and procuring another person to witness an act of gross indecency.
- 79 Including: sodomy (s. 208); attempted sodomy (s. 209); indecent treatment of a child under 16 [s. 210]; carnal knowledge with a child under 16 (s. 215); abuse of an intellectually impaired person (s. 216); procuring a young person for carnal knowledge (s. 217); taking a child for immoral purposes (s. 219); incest (s. 222); and maintaining a sexual relationship with a child (s. 229B).
- 80 The prohibition on publishing the name of a defendant in a report about the defendant’s committal hearing is set out in s. 7 of the Act.
- 81 The effect of the High Court’s decision in *James v. Robinson* (1963) 109 CLR 593 is that ‘the media are not constrained by the law of ... contempt at a time when a manhunt is in progress (unless, perhaps, a warrant has been issued for that person’s arrest) or a suspect who has not been arrested or charged is being questioned, or in a siege situation such as occurred at Port Arthur in April 1996’ (Butler & Rodrick 1999, p. 182).
- 82 See 1.10.11 cl (xix) of the OPM under the heading ‘Information not to be released — Order’.
- 83 One of the main purposes of this first court appearance is to give the defendant an opportunity to make an application for bail.
- 84 Protection of the identity of a defendant from premature publication was one of the stated aims of the legislation (*Queensland Parliamentary Debates* 1978, p. 1190).
- 85 That paragraph is as follows:
- There are opposing views about the publication of information identifying the accused. One viewpoint is that sexual offences should be treated differently to other offences. It is argued that the privacy of the defendant should be maintained, especially given the social, personal and financial consequences associated with sexual offence allegations. There may be a lengthy period of time between the committal and the trial, in which the accused’s identity might be publicised, and the presumption of innocence does little to protect an accused when the circumstances involve sexual offence allegations. A high level of media and public interest in these types of cases exists, and openness and publicity should be limited so as not to inflame pre-trial prejudice to the accused.

## OTHER WAYS OF HANDLING SEXUAL OFFENCES

***Many submissions to the Inquiry suggested that, given the current difficulties surrounding the criminal prosecution of sexual offences, alternatives to the criminal justice system ought to be considered. This chapter provides a brief overview of those submissions and some of the research currently available in the area.***

### THE ISSUES

*Survivors want to make sure it doesn't happen to someone else. For most it's not about getting punishment; it's more about acknowledgment that it happened. (Consultation with Hetty Johnson, Director, Bravehearts, 28.11.02)*

#### **The impact of the criminal justice system on complainants and accused**

One of the primary goals of Queensland's criminal justice system is to identify and punish wrongful conduct defined by Parliament as criminal. Its processes are designed to ensure a fair trial, to minimise the chances of an unjust conviction, and to impose an appropriate punishment upon individuals who have been convicted.

However, the Victims of Crime Association of Queensland submitted to the public hearings that 'the adversarial approach used in Queensland courts towards victims generates a high level of trauma' (CMC 2002, p. 73). Indeed, complainants and accused alike said in their submissions to the Inquiry that they:

- were traumatised by the criminal justice process in general, and by their dealings with police and the ODPP more particularly
- did not understand the criminal justice process, and
- felt bewildered and dissatisfied both by the decisions made regarding the investigation and prosecution of the offences, and with the outcome.

Numerous submissions argued persuasively that some of these complaints arise, at least in part, from the very nature of the criminal justice process itself.

The past 10 years have seen substantial improvements in the way that the criminal justice system responds to people who allege that a sexual offence has been committed against them (many of these changes have been discussed in Chapter 3). However, there are limits to the changes that can be made to help complainants without interfering with the rights of the accused. It has been argued that some changes already dangerously cross that line.

For example, the submission by LAQ to the public hearings of the Inquiry raised concerns about the use of statements taken under section 93A of the *Evidence*

*Act 1977 (Qld)*. It was said that these statements often prejudice the accused person because there is no control over the questioning process (CMC 2002b, p. 45). The changes to the law that mean that complainants in sexual offence cases can no longer be cross-examined at large in relation to their sexual activities with others has also been criticised from the defence perspective (see, for example, Callaghan 2002, p. 12). The argument advanced is that such a statutory presumption could have a significant impact on the ability of the accused to bring relevant evidence before the court.

Often a judgment of an accused person's guilt or innocence in relation to sexual offences is a matter of one person's word against another's. Some observations made by Jerrard JA of the Queensland Court of Appeal are pertinent. In the case of *R v. D* [2002] QCA 445, the jury had acquitted D of three counts of indecent treatment of his niece and convicted him of the fourth. D argued that there was inconsistency in the verdicts, thus rendering them unsafe and unsatisfactory. The child and her father were the only witnesses. The accused did not give or call evidence. The Court found a rational explanation for the apparent inconsistency of the verdicts and dismissed an appeal. In his judgment, Jerrard JA made the following observations (p. 44):

I think it appropriate to remark upon the sparsity of the evidence upon which the jury was asked to form views about the reliability of the complainant's evidence, and her father's, and upon the issue of the occurrence of sexual abuse beyond reasonable doubt. I make these comments because of my experience in serving as a judge in the Family Court of Australia for four years. In that court ... to satisfy the complainant child's need for protection from the risk of exploitative sexual behaviour by males in the father's household including the appellant, a judge would ordinarily have expected far more evidence to have been given.

His Honour outlined the evidence that would ordinarily be presented in the Family Court and noted that the adult witnesses would have been cross-examined, but there would have been no cross-examination of the child. His Honour continued (p. 46):

Others may share my view that it is an unacceptable oddity in this 21st century that the criminal processes in this state place the entire evidentiary burden of proof of the serious charges brought against the appellant upon the evidence of a child who was only 11 and a half years old in May 2002, whereas other courts making equally important determinations on the same topic of sexual abuse of children by family or extended family members routinely, and almost invariably, gain information from many other sources, and positively discourage the concept that truth can be ascertained by the cross-examination of a child. My opinion ... is that the practices and procedures of the latter court [the Family Court] provide a sound and satisfactory basis for judgment, and that those routinely engaged practices and procedures are far more a search for the truth than the procedures of the state criminal courts. I suggest that in cases of this nature, the focus of the enquiry ought to be upon what has happened in the child's life rather than upon proof of a criminal charge, although the enquiry into what had happened may well establish that a criminal offence has been committed; and the procedures routinely used in the criminal jurisdiction should be radically reconsidered. This would require a paradigm shift, but would assist those who are wrongly accused in having that fact identified.

## **Other criminal justice approaches**

The search for ways to improve the criminal justice system so that it can better respond to sexual offences continues across many jurisdictions. Among the jurisdictions that have progressed alternative processes are Canada, Victoria, Western Australia and New Zealand. For example, in 2000, the Law Commission of Canada published a report that reviewed the criminal justice system and alternative processes. The report noted (p. 1 report and p. 3 executive summary) that survivors of sexual abuse have a broad range of needs, including:

- an acknowledgment of the harm done and accountability for that harm
- an apology
- access to therapy and education

- financial compensation
- commitment to raising public awareness to prevent recurrence of their experiences.

The Canadian report also indicated that the prosecution of an offence can itself re-traumatise. As complainants in the criminal justice system are merely witnesses, they do not control any aspect of it and may not be kept fully informed of its progress and consequences. The criminal justice system can only meet a limited range of victims' needs since it is characterised by a formal structure and adversarial nature that does not promote acknowledgment, apology or reconciliation.

The Canadian report observed that if alternatives to the criminal justice system are to respond effectively to the needs of victims, they must first respect and engage victims to the fullest extent. Secondly, victims must be given access to information and support so that they can make informed choices about how to deal with their experiences. Thirdly, any process by which sexual offences can be dealt with should be fair, fiscally responsible and acceptable to the public. The report goes on to analyse the different legal responses to sexual offences such as inquiries by ombudsman offices, children's commissions, public inquiries, truth commissions, community initiatives and redress programs run by children's institutions.

### **Specialised courts**

Some jurisdictions have established, or are considering establishing, specialised courts to deal with sexual offences. Submissions were made to the Inquiry supporting this concept. A recent report by the NSW Standing Committee on Law and Justice (2002) evaluated options to change the process of prosecutions for child sexual assault in New South Wales and recommended that a specialist jurisdiction be established within the existing Local and District Court structure to deal with child sexual assault matters. As a result of that recommendation, a pilot project to trial a new specialist jurisdiction is currently under way in Parramatta and an evaluation of its effectiveness has been implemented (Rodger 2003). The court includes the following features:

- judicial officers and counsel are disrobed and receive specialist training in issues relevant to child development and sexual assault
- there is a presumption in favour of using pre-recorded evidence and electronic facilities such as CCTV
- a centralised videoconferencing facility where the child gives evidence is linked to the relevant court where proceedings are being held
- appropriate child-friendly facilities are available.

The Australian National Child Sexual Assault Reform Committee has also proposed in its draft report (Cossins unpub.) that a child sexual offences court be established in each Australian jurisdiction on the grounds that specialist courts have been found to reduce disposition times and stay rates, increase the numbers of cases going to trial and proceeding to sentencing, increase conviction rates and guilty plea rates and to reduce complainants' experiences of secondary trauma.

The Committee suggests that the recommended features of a specialist child sexual offences court should include:

- specialist judges and prosecutors who are trained in child development issues
- use of court-appointed and trained intermediaries to conduct cross-examination on behalf of the defence in order to eliminate contact between defence counsel and the complainant and, hence, opportunities for intimidation and harassment
- adversarial trials

- specific assignment of child sexual abuse cases to the court
- legal representation for child complainants during the trial
- abolition of committal hearings
- victimless prosecution in cases where the child is too young or otherwise incapable of giving evidence
- remote room that is located outside the court precinct and equipped with state-of-the art CCTV facilities, a waiting room and play area
- mandatory use of CCTV for complainant's evidence in chief and cross-examination in accordance with section 106N, *Evidence Act 1906* (WA) unless the complainant chooses to give evidence in court
- legislation that permits the pre-recording of a child's evidence (s. 106I, *Evidence Act 1906* [WA]) and cross-examination
- an ongoing training program for prosecutors, including support services to enable opportunities for debriefing to prevent burnout and high staff turnover
- child witness service to prepare the child and provide pre- and post-counselling to be staffed by personnel trained in child sexual abuse matters
- appropriate policy guidelines for pre-consultations with complainants, in particular the content of material that should be communicated to the child for the purposes of court preparation
- alternative models for punishment of offenders such as diversion of the offender (from the criminal justice system) into treatment versus conviction plus mandatory attendance at treatment program
- attachment of a trial mediation program to the specialist court for historical abuse cases with strict protocols for the screening of appropriate cases and an in-built evaluation program to assess its effectiveness: the program would be available in those cases where the complainant in an historical abuse case makes a voluntary choice to participate; voluntary participation by the accused would also be required and may need to be offered as an alternative to sentencing, possibly in combination with a diversionary treatment program.

In the United States, a specialised court for dealing with sexual offence cases was established in Florida 2001.

### **Separate representation for complainants**

As indicated above, there have also been moves towards providing separate representation for complainants in sexual offence matters in several jurisdictions. In Ireland, for example, recent legislation gives adult complainants in very serious sexual offence cases a right to separate legal representation in certain circumstances.<sup>86</sup>

In its *Sexual Offences: Law and Procedure Discussion Paper* (2001), the Victorian Law Reform Commission outlines current considerations regarding separate representation for complainants by lawyers. It states that separate representation may assist with the conduct of the investigation and the trial, communication with police and prosecutors, and make witnesses feel more part of the process rather than merely observers. A contrary view is that separate representation would result in higher costs, longer trials and could have the potential to undermine the prosecution case and jeopardise the accused's right to a fair trial (Victorian Law Reform Commission 1991; 2001). The recent comments by Jerrard JA of the Queensland Court of Appeal, referred to above, also emphasise the advantages of procedures in the Family Court when sexual abuse is an issue, as those procedures allow for children to be separately represented (*R v. D* 2002, QCA 445, p. 44).

### **Conferencing**

The Victorian Law Reform Commission (2001) is currently considering the merits

of legal alternatives such as conferencing and other 'restorative justice' and 'therapeutic jurisprudence' processes that may contribute to a more appropriate range of potential responses to sexual offending.

### **Community-based intervention/prevention treatment programs**

Some jurisdictions have community-based 'diversionary' schemes or other treatment programs that operate in conjunction with, or alongside, the criminal justice system to provide non-custodial treatment to certain categories of sexual offenders. This is not the case in Queensland, where most state-sponsored treatment programs for sexual offenders are provided in prisons.

The Inquiry heard that in Queensland when an offender admits their offending behaviour and says that they want help, the criminal justice system can do very little. Even where the offences committed are at the lower end of the scale of sexual offences, and the victim provides an impact statement to the court at sentencing stating they do not wish to see the offender go to prison, the imposition of a custodial sentence — during which the offender may or may not receive treatment — is likely to be the only available option.

*... with the best intentions in the world, we still have a legal system, not necessarily a justice system. (Individual submission to the Inquiry. CMC 2002b, p. 60)*

Regarding diversionary programs, LAQ noted in its written submission (pp. 1, 3):

We do not think that every sexual offence case must be processed through the criminal justice system. We suggest that there are many cases which could be resolved via some sort of pre-conviction diversion program ... We suggest that diversionary programs give more hope for reparation and rehabilitation than the criminal justice system currently does ...

In many cases, our community is dependent solely on the criminal justice system to provide relief to complainants of sexual offences. Yet apart from punishment and criminal compensation, this system does little to address the aftermath of offending for both the complainant and the accused. The various attempts at modification and the persistent pressures for modification of the system indicate that the system is inappropriate ... to deal with sexual offences in all their manifestations, and their broader consequences. Although there are other agencies which have some part to play, the focus of attention is on the court process and the punishment of the offender. When we consider the tragedy of child sexual abuse in particular, it is vital that the response to it addresses the moral, social, psychological and educational issues that give rise to that abuse, as well as its 'criminality'.

At the public hearings, PACT argued that there should be greater investment in targeted treatment programs for limited categories of offenders, such as adolescents (CMC 2002b, pp. 65–66). QAILS (para 22) also stated that:

In Queensland under the Juvenile Justice Act amendments it is possible to divert children who offend from formal involvement in the courts whenever appropriate. The Act does not cover child sexual offenders. It would, we submit, be appropriate to amend the Act to allow this to occur.

A limited treatment program has recently been made available to young offenders in Queensland, including young sexual offenders. Griffith University has established the Griffith Adolescent Forensic Assessment and Treatment Centre (GAFATC), which can provide assessment reports to the courts and individual, group and family treatments for clients (2001, p. 7). Its programs are not diversionary, but may be available to young offenders after they have gone through the court system and completed their sentence.

Other jurisdictions offer a greater range of responses to sexual offending. For example, a Pre-Trial Diversion of Offenders Program has been run by the New South Wales Department of Health since 1989. Known as Cedar Cottage, the program treats adults who have sexually assaulted their own or their partner's

children. It is intended to provide an incentive for a limited category of offenders to plead guilty and to be diverted to a community-based treatment program. Diversion of offenders for assessment occurs pre-trial. Diversion for treatment occurs after a conviction and appropriate undertakings are provided to the Court. A detailed evaluation of the program is said to be under way (NSW Standing Committee on Law and Justice 2002, pp. 224–225). Another non-custodial program operated in New South Wales by the Department of Health is the New Street Adolescent Service, which targets adolescents who have committed sexual offences. A residential service called Mirvac House has also been established recently through private sector sponsorship (p. 231).

The NSW Standing Committee on Law and Justice examined some of these options (pp. 211–234) and noted that the full range of treatment services should be made available for adults and adolescents in non-custodial settings (in addition to the already existing custodial programs).

Since 1988 the Western Australia Government has funded non-government agencies and service providers to deliver treatment services to children, individuals and families who have experienced intrafamilial child sexual abuse (in order to encourage the development of a range of treatment options). These programs in Western Australia operate on the basis of the following principles:

- Sexual offences at the lower end of the scale may not always be best dealt with by an offender being imprisoned.
- Imprisonment can sometimes be against the wishes of the complainant child and mother. The family may wish to try to survive intact.
- They are not diversion programs. Participation in such programs does not prevent the wrong being addressed through the criminal justice system. Programs outside the criminal justice system may provide an alternative process to help heal and prevent abuse, and may provide an alternative for some complainants who do not wish to proceed through the criminal justice system (see Department for Community Development [WA] 1993, p. 15).

The programs provided by SafeCare Inc. in Western Australia have gained some prominence. SafeCare is a private, not-for-profit organisation founded in Perth in March 1989 to deal with intrafamilial abuse. The SafeCare programs integrate treatment of offenders with support for victims and other family members. SafeCare's primary focus is the protection of children from child sexual abuse and their healing from its traumatic effects. SafeCare programs emphasise the offender taking responsibility to remove child guilt, involve the whole family, are based on voluntary rather than coercive participation, and aim to break the cycle of offending.

The SafeCare programs are designed for young offenders, less serious offenders, and offenders who acknowledge their offending and want treatment. The programs have attracted some concern about their ability to provide adequate protection for the children of offenders (Department for Community Development [WA] 1993, pp. 1–2), although a departmental review noted that 'one of its strengths is that it takes cognisance of the fact that many family members are severely traumatised by interventions that result in family members being separated from others' (Department for Community Development [WA] 1993, p. 20; [www.safecare.com.au](http://www.safecare.com.au)). The program is currently being evaluated by the School of Psychology at Curtin University (Department for Community Development 2002, p. 14).

In New Zealand, independent programs such as those run by Safe Network Inc. and Wellington Stop are based on similar frameworks. They provide specialist community-based treatment programs that emphasise that offenders must take responsibility for their behaviour, provide support and counselling to the offender, partner and family, and emphasise the safety of past or potential victims of sexual abuse. These programs are available in New Zealand for adult, adolescent and child offenders (<[www.safenetwork.co.nz](http://www.safenetwork.co.nz)>, <[www.wellingtonstop.co.nz](http://www.wellingtonstop.co.nz)>).

In the United States, treatment of sexual offenders can occur in various settings and at various stages in the criminal justice system. Some states have sentencing options that combine a probation sentence, which may or may not include confinement, with community-based outpatient treatment. The offender is supervised by correctional personnel during the mandated treatment and, if the offender does not make satisfactory progress, or is not adhering to the treatment plan, the case may be returned to court, reviewed by the judge and a prison sentence imposed. Treatment is offered to the offender, but if sufficient progress is not attained, incarceration remains an option ([www.atsa.com](http://www.atsa.com)).

## SUBMISSIONS AND DISCUSSION

While accepting that community opinion demands harsh penalties for people found guilty of sexual offences (especially when perpetrated against children), it is important not to overlook the need for treatment to prevent further offending. Submissions to the Inquiry advanced the view that there were other processes that could provide useful adjuncts and alternatives to the current criminal justice system. They supported the exploration of various offender programs, such as non-custodial court diversionary programs, voluntary treatment programs and other early intervention models such as adolescent offender programs.

Note was also taken of the serious consequences that flow from conviction, which, in the case of sexual offences, will almost certainly result in imprisonment. There were high levels of concern, for example, about convictions that occur on the jury's assessment of credibility of one person's version of events against another's. Many submissions suggested that where a conviction rests on the assessment of credibility alone, the results sometimes appear to 'lack rhyme or reason', be a 'lottery' or a 'gamble'.

The submission by the Queensland Law Society (p. 1) stated that often in these cases 'the reality is that a jury will ultimately base its verdict on whether they believe the accused or the complainant'. In discussing this matter, LAQ (p. 1) observed:

The nature of many sexual offences and the circumstances in which they are committed do not easily translate into a criminal offence which can be prosecuted through the criminal justice system in the usual way. We have in mind particularly uncorroborated, non-violent acts of sexual interference in a family context, where the verdict depends on the assessment by the jury of the credibility of the victim, versus the credibility of the accused ... their credibility must be assessed in an artificial setting, based on limited information. The number of successful appeals based on the ground of an 'unreasonable' or 'unsafe and unsatisfactory' verdict is, it seems to us, an acknowledgment that the system is not working well.

Other submissions to the Inquiry suggested that the adversarial process may have only a limited capacity to deal satisfactorily with sexual offences. The submission by the Queensland Law Society, for example, 'calls for a paradigm shift of the whole system' (para 9). The Society (para 15) submitted that:

...the current regime severely limits the options available to a complainant and results in an unacceptably high risk of injustice being effected towards the accused.

The submission by the Bar Association of Queensland noted 'that allegations of sexual misconduct are, by their very nature, difficult to process through the criminal justice system' (para 2.2[a]).

QAILS (para 29) agreed that the criminal justice system is inappropriate to deal with sexual offences in all their manifestations. It also cited the finding of the Aboriginal Women's Taskforce and the Aboriginal Justice Council (1995) that the criminal justice system fails to deal with any aspect of family violence in a culturally sensitive manner (2002, para 17).

The Esther Centre (pp. 3–5) also noted the importance of exploring alternative processes:

Sexual abuse of children and vulnerable adults is serious. It is always in the public interest to test the evidence and to take action which will protect others be they children or vulnerable people so that further abuse will not occur — even if the action is not through the criminal justice system. Too often nothing is done, simply because it does not fit the boundaries laid down by the criminal justice system. The criminal justice system should be part of an over all system, which protects, and provides redress for when harm occurs ... Research could be undertaken into models of alternative dispute resolution processes for dealing with historic abuse and addressing the issues, which are currently presenting due to statute of limitations ... The Irish Government has created the Redress Bill, which provides an alternative avenue for addressing historic complaints including sexual abuse.

## SUMMARY

Concerns that the criminal justice system neither adequately supports victims of sexual offences, nor offers adequate treatment or prevention programs for offenders, were raised by many who made submissions to the Inquiry. This chapter has highlighted some of those concerns and provided some information about alternative processes for handling sexual offences drawn from several programs currently available in New South Wales, Western Australia and the United States. Despite considerable support for alternative programs provided by the submissions, however, options such as these are not yet available here.

Without the results of adequate comparative evaluation data, the Commission is unable to recommend either for or against the implementation of alternative processes to the criminal justice system for the handling of sexual offences (such recommendations would also be outside the terms of reference of the Inquiry).

Other recent Queensland reviews have come to similar conclusions. The *Report by the Taskforce on Women and the Criminal Code* (Queensland Government 2000a), for example, recommended that alternative processes such as victim-offender mediation should not replace the traditional criminal justice system for adult offenders (Recommendation 35.1) and that, as a matter of principle, offences of violence should result in the prosecution of an offence where evidence supports the charge (Recommendation 35.2). More recently, the report on the implementation of the Project Axis report on child sexual abuse in Queensland (Queensland Government 2002a), stated that:

subject to the evaluation of current trials in NSW and WA, the government does not support the recommendation made by Project Axis to examine the possibility of introducing a pre-trial diversion scheme for first time intrafamilial child sex offenders in Queensland, given the vulnerabilities of victims of child sexual abuse and the consequences of failure.

Current and future evaluations of alternative or supplementary processes to the criminal justice system, however, may provide fertile ground for enhancements to the current systems for dealing with sexual offences. Processes that ultimately match the severity of the offence, the willingness of the offender to take ownership of their behaviour and seek treatment or restoration, the wishes of the complainant and the availability of a range of programs and/or punishments, may provide a more desirable range of available options.

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## ENDNOTE TO CHAPTER 10

- 86 See Criminal Law (Rape Act) 1981 (Ire), s. 4A, inserted by the Sex Offenders Act 2000 (Ire); Ireland, Department of Justice, Equality and Law Reform (1998); the Dublin Rape Crisis Centre and School of Law, Trinity College (1998), which recommended the change and which examines the use of separate legal representation for rape victims in a number of European countries (mostly these are inquisitorial systems but some, for example Denmark, are hybrids of inquisitorial and adversarial).

## THE NEXT STEP: IMPLEMENTATION OF THE RECOMMENDATIONS

This report began by stating that confidence in the criminal justice system is a linchpin of our society, and that such confidence demands a robust criminal justice process. Yet, despite many positive comments about the process, the Inquiry also highlighted a number of perceived shortcomings in how the criminal justice system in Queensland currently responds to sexual offences.

Concerns about the decision-making processes for the continuance or discontinuance of sexual offence matters were of particular concern — some estimates suggesting that even though approximately 6500 offences are reported to the QPS each year, just over one-half of those offences will be assessed by the lower courts, about one-quarter will reach the higher courts and about one-fifth (approximately 17 per cent) will result in the conviction of an offender. Linked to these concerns about the attrition of sexual offence matters from the criminal justice system were concerns about the adequacy of the investigation and prosecution processes of the QPS and the ODPP.

Despite the depth and breadth of the issues and concerns raised, however, there was surprising consistency in the suggestions for reform made by the submissions to the Inquiry and in the broader review undertaken for the Inquiry.

The Commission makes 23 recommendations throughout the body of this report. These recommendations aim to enhance the criminal justice system's response to sexual offence allegations by:

- improving the collection and dissemination of evidence, including interview material, for the prosecution of sexual offences
- reducing the stress associated with the criminal justice process for victims and the accused
- enhancing the timeliness of the decision-making process to discontinue or continue matters
- enhancing community confidence in the fairness and objectivity of the process
- enhancing court proceedings by having better prepared police briefs and earlier legal advice.

Many of these recommendations support those made by previous reviews such as the Taskforce on Women and the Criminal Code (Queensland Government 2000a), the follow-up report by the Department of Cabinet and the Premier on Project Axis (Queensland Government 2002a), Project Horizon by the QPS and the CJC (1997) and its supplementary follow-up reviews.

Implementation of the recommendations will require new policies and/or procedures for the QPS and the ODPP, enhanced training and supervision regimes for both organisations, and legislative change. The Commission strongly encourages the key players in the criminal justice system to act upon the recommendations in this report.

To assess the progress of the recommendations and their relative short- and long-term effectiveness, the Commission proposes that the CMC review the implementation of the recommendations in two years' time.

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## RECOMMENDATION 24

That the Crime and Misconduct Commission review the implementation of the Commission's recommendations arising from the Inquiry into the Handling of Sexual Offence Matters by the Criminal Justice System, and report to Parliament in two years' time.

### The major issues at a glance

The remainder of this chapter outlines the major issues raised by the Inquiry and summarises the Commission's response.

Although each issue did not necessarily result in a specific recommendation, each one contributed significantly to the decisions that were made about how and where the most effective improvements could be made to enhance the criminal justice system's response to sexual offence allegations. Even though some of the issues fell outside the Inquiry's terms of reference, each contributed to the larger picture and is presented for further consideration by government.

The first six issues listed below cross all three terms of reference. The remainder address each term of reference in turn. The full list of recommendations appears at the end of this chapter.

#### **Are the implications of disclosures of sexual abuse fully understood?**

The Commission makes a number of recommendations to enhance the understanding of sexual abuse more generally, including training for specialist police and ODPP staff, formal communication strategies by the ODPP and the QPS about sexual offence matters and a review of the role of the ODPP's Victim Liaison Officers. See Recommendations 1, 2, 3, 11, 14, 15 and 17.

#### **Should there be a statute of limitations for the prosecution of historic sexual offences?**

The Commission does not favour a statute of limitations for sexual offence matters. However, the recommendations for reform by the QPS and the ODPP should enhance the prosecution of historic cases and help expedite decisions to pursue or discontinue prosecutions.

#### **Is the committal process in need of review?**

While submissions to the Inquiry provided a great deal of support for making the committal process more effective than it currently is, there were conflicting views about:

- the nature of the test applied (prima facie test or reasonable prospects)
- the importance of costs
- the value of the Committals Project; that is, the pros and cons of police versus ODPP representation at the committal hearing
- whether the committals process should be retained at all.

It is the view of the Commission that these arguments cannot be resolved without a full evaluation of the current situation in Queensland and a broader examination of the processes currently operating in the other States of Australia and overseas. This may be a matter for government to take forward.

#### **Can sexual offence matters be expedited through the criminal justice system?**

Implementation of the recommendations arising from the Inquiry should improve the timeliness of the decision-making processes by police and the ODPP for sexual offence matters generally. The Commission also acknowledges that court processes can affect the time required for sexual offence matters to progress

through the system, but the examination of such processes was not within the terms of reference of the Inquiry. A review of the committals process may be fruitful in this regard.

### **Are there ways that the police and the ODPP can offer more support to the victims of abuse?**

The Commission's recommendations for specialist training for police and ODPP staff, for a review of the regional response by the QPS to sexual offences, for enhanced communication with complainants, for a review of the role of ODPP Victim Liaison Officers, and for implementation of a formalised complaints-handling process by the ODPP should all improve support to victims of abuse. See Recommendations 1, 2, 3, 7, 9, 11, 13, 14, 15, 17 and 18.

### **Are resources within the criminal justice system adequate to handle sexual offence allegations?**

While limited resourcing was raised as a significant impediment to the ability of each agency to handle sexual offence matters more effectively, the Commission identified a number of management issues which, if dealt with appropriately, may overcome some of the concerns raised. See Chapters 6, 7 and 8.

### **Are police adequately trained to handle sexual offence allegations?**

Specialist training for all police officers working in the specialist units is recommended. See Recommendations 1, 2 and 3.

### **Can the communication skills of police officers handling sexual offences be improved?**

The Commission notes that the QPS appears to have adequate policies for interviewing victims of sexual abuse, but adherence to these policies may be difficult when resources are unavailable and specialist training is limited. Training for all specialist sexual offence police officers should, therefore, enhance the communication process (see Recommendations 1, 2 and 3). It is also important that police officers make every effort to ensure that interviewing practices adhere to the requirements of existing QPS policies and the principles of the COVA legislation and that these requirements are carefully monitored by supervising staff.

### **Can police investigations be improved?**

Training of all specialist sexual offence officers, a review of the QPS's regional response to sexual offences, improved supervision and review practices by the QPS and more formalised involvement by the ODPP in all sexual offence matters should enhance the quality of police investigations. See Recommendations 1, 2, 3, 7, 8, 9 and 10.

### **Can legal advice to police about sexual offences be enhanced?**

Training for all specialist sexual offence officers and brief checkers/managers will enhance the understanding of relevant legal issues by police officers (see Recommendations 1, 2 and 8). A review of the QPS's OPM about police decision-making processes will also clarify some concerns about the required processes (see Recommendation 4). Formal liaison between the QPS and the ODPP about the progression of sexual offence matters will also enhance the timeliness of legal advice by the ODPP to the QPS (Recommendations 9, 10, 13, 14 and 15). The Commission is unable to make more specific recommendations about police or ODPP representation at committal until the committals process has been adequately reviewed.

### **Can the arrest process for sexual offence matters be improved?**

Two concerns regarding the arrest process were raised:

- concern about the attitudes of *some* arresting officers towards *some* accused

- concern about the potential use of a Notices to Appear for some people accused of sexual offences rather than the full arrest process.

Recommendations 1, 2 and 3 for training may allay these concerns.

**Can human resourcing issues be improved for police officers who handle sexual offence matters?**

Human resourcing issues relevant to the specialist sexual offences squads of the QPS (including recruitment, rotation, rank, career advancement and succession planning) were raised by many police as important issues that can affect their ability to work effectively within these units. Recommendations 5 and 6 call for the QPS to review these processes.

**How can the regional response to sexual offences by police be enhanced?**

The Commission recommends that the QPS assess the most appropriate regional response to allegations of sexual abuse. See Recommendation 8.

**Can the review and supervision processes for sexual offence matters by the QPS be better?**

Recommendations for additional training for sexual offence officers and brief checkers and brief managers, regular meetings between the QPS and the ODPP about sexual offence matters under investigation and before the courts, and an expansion of the role of the Prosecution Review Committee should enhance the current review and supervision of sexual offence matters by the QPS. See Recommendations 1, 2, 3, 8, 9 and 10.

**Would the ODPP benefit by broadening its training to incorporate the non-legal aspects of sexual offences?**

The Commission recommends broader sexual offence training for ODPP legal staff and Victim Liaison Officers. See Recommendation 11.

**How effective are the ODPP's case management processes?**

The Commission suggests that the ODPP make case management of sexual offence matters, including case preparation, continuity of case representation and briefing out practices, a priority.

**How can the ODPP's decision-making processes for sexual offence matters be made more transparent?**

The Commission recommends documentation of all decision-making processes for sexual offence matters. See Recommendations 12, 13, 14, 15 and 16.

**How can communication between the ODPP and the QPS and the complainant be improved?**

A range of recommendations for regular meetings between the QPS and the ODPP and formal documentation of all decision-making processes will enhance communication between the agencies and with the complainant. See Recommendations 9, 10, 11, 12, 13, 14 and 15.

**How can dealings with the defence by the ODPP be more transparent?**

The Commission recommends documentation of all decision-making processes relevant to the defence. See Recommendations 12 and 16.

**How relevant is resourcing of the ODPP to the handling of sexual offence matters?**

While acknowledging the concerns raised by the ODPP regarding funding, it is the Commission's view that every effort should be made by the ODPP to implement improved management practices in the first instance.

### **How effectively are victims' rights addressed by the ODPP?**

A combination of more broadly based sexual offence training for ODPP staff, formalised communication strategies between the ODPP and the QPS and complainants, a review of the role of Victim Liaison Officers and the implementation of a formal complaints handling process by the ODPP, will contribute to enhanced recognition of victims' rights. See Recommendations 11, 13, 14, 15, 17 and 18.

### **Should the identity of the accused in a sexual offence matter be suppressed?**

The Commission believes that the identity of an accused in a sexual offence matter should be suppressed. See Recommendation 19.

### **How adequate are the existing legal prohibitions on the publication of the identity of an accused?**

The Commission identified a number of gaps in the prohibitions of the *Criminal Law (Sexual Offences) Act 1978* (Qld) and the police OPM and Media Guidelines regarding the publication of the identity of an accused. Recommendations 20, 21 and 22 identify how these gaps can be closed.

### **Should the prohibition on publication of the identity of the accused be extended beyond the committal proceedings?**

The Commission recommends that there be no change to the current provisions of the *Criminal Law (Sexual Offences) Act 1978* (Qld) — i.e. that the prohibition on the publication of the identity of the accused is not extended beyond committal for trial or sentence. See Recommendation 23.

### **Should alternatives to the criminal justice system be considered for sexual offences?**

Many submissions to the Inquiry suggested that, given the current difficulties surrounding the criminal prosecution of sexual offences, alternatives to the criminal justice system ought to be considered. Chapter 10 of the report provides a brief overview of those submissions and some of the research literature available on the topic.

## **LIST OF RECOMMENDATIONS**

- 1** — That specialist sexual offence training be required for all officers working for Taskforce Argos, the SCAN (Suspected Child Abuse and Neglect) teams, the Child and Sexual Assault Investigation Unit, the Criminal Investigation Branch and the Juvenile Aid Bureau in Brisbane and in the regions, and for police prosecutors working with sexual offences.
- 2** — That ICARE (Interviewing Children and Recording Evidence) training be required for all officers working in the specialist child sexual offence squads.
- 3** — That the Queensland Police Service convene an interagency/cross-departmental working party (including representatives from the Office of the Director of Public Prosecutions, the Department of Families and Queensland Health) to assess desirable improvements to sexual offence course content.
- 4** — That the Queensland Police Service's Operational Procedures Manual be rewritten to distinguish clearly between the three decision-making processes relevant to police prosecution: (i) the initial decision to lay charges, (ii) summary prosecutions and (iii) the prosecution of committal hearings for indictable matters.
- 5** — That the Queensland Police Service review the recruitment, selection and rotation policies of all specialist sexual offence squads, ensuring that adequate

supervision and command structures are in place and that career opportunities are provided for officers working in these squads.

**6** — That the Queensland Police Service review succession-planning processes and policies for all sexual offence squads.

**7** — That the Queensland Police Service review the statewide demands made by reported sexual offences on the Service to assess the most appropriate regional response. Given the high rates of reported sexual offences in Far Northern Region, establishment of a specialist sexual offence squad in that Region may need to be given priority.

**8** — That it be a requirement for brief checkers and brief managers of the Queensland Police Service to undergo additional relevant legal and sexual offence training, as recommended for police officers working in the specialist sexual offence units.

**9** — That senior managers of the Queensland Police Service and the Office of the Director of Public Prosecutions reinstate regular meetings to discuss the progression of sexual offence matters under investigation and before the courts.

**10** — That the Queensland Police Service work closely with the Office of the Director of Public Prosecutions to expand the role of the Prosecution Review Committee. The role should include a review of:

- all sexual offence matters that fail at committal (whether it be the responsibility of the police or the ODPP at that stage)
- all sexual offence matters that are discontinued by the ODPP
- all sexual offence matters that fail before the higher courts (including the Court of Appeal)
- the role of the investigating/arresting officer in the matters
- the role of the police prosecutor in the matters.

**11** — That all legal staff and Victim Liaison Officers at the Office of the Director of Public Prosecutions receive training in aspects relevant to sexual offending, such as the nature and extent of abuse, child development, the disclosure and reporting of abuse, interviewing techniques and historic cases.

**12** — That the Office of the Director of Public Prosecutions implement procedures to ensure that all decision-making processes are supported by relevant documentation and completed by the responsible officer.

**13** — That, in collaboration with the Queensland Police Service, the Office of the Director of Public Prosecutions develop written policies for formal communication with police investigators and their supervisors about all sexual offence matters. The policy should include the provision of a written summary of the reasons for decisions that are made about each case prepared by a senior legal officer of the ODPP.

**14** — That the Office of the Director of Public Prosecutions develop formal policies for communicating with complainants in sexual offence matters. As part of these formal policies, a senior legal officer of the ODPP should be required to prepare a written summary of the reasons for decisions that are made about the case.

**15** — That the Queensland Police Service and the Office of the Director of Public Prosecutions develop and agree to formal protocols that identify who will contact the complainant about the decisions that are made in every sexual offence matter.

**16** — That the Office of the Director of Public Prosecutions develop and enhance written protocols and procedures for communicating with the defence in all sexual offence matters.

- 17** — That the Department of Justice and the Attorney-General formally review the role and functions of Victim Liaison Officers employed by the Office of the Director of Public Prosecutions with a view to enhancing the response of the Office to complainants in sexual offence matters.
- 18** — That the Office of the Director of Public Prosecutions implement a complaints-handling process. In so doing, consideration should be given to established guidelines such as those developed by the Queensland Ombudsman (2003).
- 19** — That the current provisions in the *Criminal Law (Sexual Offences) Act 1978* (Qld) that restrict the publication of the identity of a person charged with a sexual offence be retained.
- 20** — That the definition of a ‘prescribed sexual offence’ contained in section 3 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) be deleted and replaced with a new definition modelled on the definition of a ‘sexual offence’ that appears in section 4 of South Australia’s *Evidence Act 1929*.
- 21** — That section 10(3)(b) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) be amended to include a prohibition on naming a person who is under investigation by the police, with the proviso that identifying information about a suspect can be released if it is necessary to ensure the safety of a person or the community and/or to help locate the suspect or the complainant or otherwise assist the investigation.
- 22** — That the Queensland Police Service amend the references in paragraph 1.10.11 (xix) of the Operational Procedures Manual that relate to the name of a defendant being disclosed ‘following an appearance in open court’, so that they are consistent with the various prohibitions on naming a defendant set out in the *Criminal Law (Sexual Offences) Act 1978* (Qld). Paragraph 1.10.11 (xix) should therefore read: ‘Members are not to supply information to the media that identifies a defendant charged with a “prescribed sexual offence” prior to the defendant being committed for trial or sentence’. A similar amendment should also be made to the Queensland Police Media Guidelines.
- 23** — That there be no change to the current provisions within the *Criminal Law (Sexual Offences) Act 1978* (Qld) that prohibit the publication of the identity of a person charged with a ‘prescribed sexual offence’ until the person has been committed for trial or sentence.
- 24** — That the Crime and Misconduct Commission review the implementation of the Commission’s recommendations arising from the Inquiry into the Handling of Sexual Offence Matters by the Criminal Justice System, and report to Parliament in two years’ time.



# **APPENDIXES**



# APPENDIX 1: THE VOLKERS CASE

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Executive summary taken from *The Volkiers Case: Examining the conduct of the police and prosecution* (CMC 2003)

## BACKGROUND TO THE VOLKERS CASE

On 26 March 2002, following a police investigation that began in August 2001, internationally renowned swimming coach Scott Volkiers 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 Volkiers 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 Volkiers's legal representatives on 22 July 2002. On 25 July 2002, Mr Volkiers 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 Volkiers'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 Volkiers'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 Volkiers. 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 Volkiers 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 Volkiers seeking an ex gratia payment for the expense and hardship suffered by Mr Volkiers 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 Volkiers 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 Volkiers, 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 Volkens 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 Volk'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 Volk's (page 14)**

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

*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 Volk's, 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 Volkers. (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 Volkers could not proceed to trial.’

Mr Johnson further stated that he has been informed that the current owner of the Volkers residence told Mr Jason Davies and Detective Sergeant Marsh that Volkers 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 Volkers weeks before the DPP had made her decision.

*There is no evidence that any employee of the public relations firm acting for Mr Volkers 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 Volkers, 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 Volkers 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 Volkers's legal representatives were concerned that the media appeared to know about the decision to drop the charges against Mr Volkers 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 Volkers 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 Volkers 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 Volkens 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.*

## APPENDIX 2: INQUIRY DISCUSSION PAPER

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### BACKGROUND

The Criminal Justice Commission (CJC) and the Queensland Crime Commission (QCC) recently merged to become the Crime and Misconduct Commission (CMC). The new *Crime and Misconduct Act 2001* allows the Commission to expand its research and prevention program to address issues involving organised crime and paedophilia, including a follow up to the issues that were raised by the former QCC's Project Axis.

Recent media interest in the investigation, prosecution and discontinuance of the prosecution of Mr Scott Volkens has raised public interest in the systemic issues involved in the handling of sexual offences by the criminal justice system. On 27 September 2002 the CMC sought a reference from the Premier, The Honourable P Beattie MP, to examine the way that the criminal justice system deals with reported sexual offences, pursuant to section 52(1)(c) of the *Crime and Misconduct Act 2001*.

On 3 October 2002, the Commission resolved:

1. To hold a hearing in relation to:
  - (a) the training, expertise and supervision of police officers investigating sexual offences
  - (b) the adequacy of existing guidelines and procedures for the initiation and discontinuance of the prosecution of sexual offenders by police and the Office of the Director of Public Prosecutions, and
  - (c) the appropriateness of, and the circumstances in which, the publication of identifying information about a person charged with a sexual offence should be suppressed.
2. That closing the hearing would be contrary to the public interest.

And further, the Commission resolved to approve that the hearing be a public hearing.

The CMC now calls for written submissions from representatives of relevant government agencies, concerned interest groups and the wider community, to enable it to examine the relevant issues.

Written submissions are due to the Commission by 4 November 2002. A public hearing will also be conducted at the Crime and Misconduct Commission to examine the issues further. The dates for the hearing will be 20 and 21 of November 2002.

The Commission intends to conduct the hearing by receiving oral and written submissions. The hearing will not be an adversarial process and will not take evidence on oath. Further details concerning the hearing procedure will be posted on the CMC's website next week.

Following the hearings, the CMC will identify and document the major systemic issues noted by the Inquiry in a public report. That report will make recommendations regarding the processes for investigating and prosecuting sexual offences in Queensland and identify whether further examination of the issues is required.

### CONDITIONS OF THE INQUIRY

It is not the purpose of the hearings to receive complaints or evidence about specific cases or to investigate individuals. The Inquiry will be limited to an examination of the systemic issues involved in the handling of sexual offences by the criminal justice system. Specific allegations relating to particular cases will be assessed in the normal way by the Misconduct Complaints Services Section of the CMC to determine whether investigative or other action is required. Such allegations will not be considered to be part of the public Inquiry.

While parties involved in Mr Volkert's case are welcome to provide submissions to the Inquiry regarding the terms of reference noted above, the case will also be examined separately to determine whether there is any reasonable suspicion of official misconduct on the part of any person.

The terms of reference of the Inquiry will not include the issue of compensation to parties in respect of child sexual offence allegations and/or charges.

## CONTACT DETAILS

For further details about this Inquiry please contact:

Dr Margot Legosz  
Telephone: 3360 6031  
E-mail: [margot.legosz@cmc.qld.gov.au](mailto:margot.legosz@cmc.qld.gov.au)

Send all submissions for this Inquiry to:

The Inquiry into the Handling of Sexual Offence Matters  
Research and Prevention  
Crime and Misconduct Commission  
GPO Box 3123  
BRISBANE QLD 4001.

## TERMS OF REFERENCE

### **1. The training, expertise and supervision of police officers investigating sexual offences**

On average, approximately 6500 sexual offences are reported to the Queensland Police Service (QPS) annually. Most of these offences (about 58 per cent) are committed against children younger than 16 years of age (CJC 1999). As increased media attention, changing legal responses and shifts in societal attitudes towards sexual abuse appear to have enhanced the numbers of victims reporting to police, there is a need to consider the training programs, investigative expertise and procedural guidelines for supervising and reviewing investigations of sexual offences.

The police provide the front line response to complaints of sexual offences in Queensland, having the primary responsibility for investigating the complaint and gathering evidence for the prosecution. In the case of complaints about child sexual abuse, they also have the authority to take children into protective custody if children are perceived to be at risk (QCC and QPS 2000).

The detection of sex offenders is clearly dependent upon complaints being made to the police. While recent evidence reveals that a significant proportion of the population has experienced sexual abuse<sup>1</sup>, as few as 28 per cent of victims will report it (ABS 1996, p. 66). A key aspect, among many, in encouraging victims of sexual offences to officially report their victimisation clearly lies in their initial interaction and relationship with the police.

The adequacy of the response by police to child sexual abuse allegations has been examined previously in Queensland and, importantly, a series of significant structural changes have been undertaken to enhance service delivery and improve effectiveness. An earlier review revealed a series of shortcomings in police investigations of child sexual abuse and identified the need to improve the coordinated service delivery model, to provide additional training support and to increase the selection and retention of specialist sexual offence staff. Since that review, protocols for the investigative process

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<sup>1</sup> A recent study of sexual abuse experiences during childhood within a representative national Australian sample of 908 women and 876 men found that, prior to the age of 16 years, 33.5 per cent of females and 15.9 per cent of males had experienced an unwanted non-penetrative sexual event and 12 per cent of females and 4 per cent of males had experienced an unwanted penetrative sexual event (Dunne, Purdie, Cook, Boyle & Najman, in press).

have been developed (QPS, Operational Procedures Manual, accessed September, 2002)<sup>2</sup>, including the formation of the Sexual Offences Investigation Squad, the Child Exploitation Investigation Squad and the Child Abuse Investigation Unit within the Crime Operations Branch.

A review of the practices and procedures of police responses to sexual offences would allow for an assessment of whether current practices are appropriate, effective and operating as intended. Additionally, such an examination could uncover any existing barriers (perceived or otherwise) within the QPS for officers considering developing expertise in this area.

In summary, information directly related to the police handling of sexual offences (including child sexual offences), in particular, information related to the expertise of investigators, the level of supervision and review of investigations, and the provision of training and assistance for front line officers, is sought. This information will assist in the CMC's review to ensure both effectiveness and public confidence in the police response to sexual offending in Queensland.

## **2. The adequacy of existing guidelines and procedures for the initiation and discontinuance of the prosecution of sexual offences by the police and the Office of the Director of Public Prosecutions (ODPP)**

There is a series of unique challenges associated with prosecuting sexual offences (QCC and QPS, 2000). Delays in reporting, for example, make it difficult for investigators to gather corroborating evidence such as medical evidence and witnesses. Delayed disclosures, more frequent amongst child victims (CJC 1999), can also make it extremely difficult for victims to provide sufficient detail about the circumstances of the offence to ensure successful prosecution (QCC & QPS 2000) and, in the case of the accused, some of the usual defences, such as an alibi, are unlikely to be available.

According to the rape and sexual assault protocols for police (QPS, Operational Procedures Manual, accessed September, 2002), officers of the QPS have three main functions in rape and sexual assault cases:

- to protect and support complainants
- to investigate and establish if an offence of rape or sexual assault has been committed
- to identify, apprehend and prosecute the offender(s).

In the vast majority of cases charges are brought by the police without prior consultation with the ODPP. In these circumstances the selection of charges is for the investigating officer to determine.

In Queensland, the ODPP was established to prosecute offences independent of both the political process and the process of investigation conducted by police (see the *Director of Public Prosecutions Act 1984* [Qld]). The ODPP will usually not have any input until a committal hearing date is set and the brief of evidence is forwarded to the ODPP for its consideration. In some regions the committal hearings are conducted by the QPS and consideration by the ODPP does not occur until after the accused has been committed for trial. While the views of the investigating officer and the alleged victim are normally sought and considered, once a prosecution is in the hands of the ODPP, the decision to proceed or not with that prosecution is made by the Director independently of those responsible for the investigation. Once the ODPP assumes control of the matter it is responsible for the selection of the charges, for conducting the court proceedings and it has the authority to discontinue a case if it appears that a prosecution is not justified.

In Queensland, the ODPP has policies and guidelines that assist it to carry out its prosecutorial functions (Director of Public Prosecutions 1995). The criteria that are applied when deciding whether to prosecute a case fall into two categories: the sufficiency of the evidence and whether it is in the public interest to prosecute. In the first category the prosecutor must be satisfied that there is a reasonable prospect of securing a

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<sup>2</sup> These include: gender appropriateness, caring for the complainant, physical safety, accuracy of records, the medical examination, evidence and exhibits, legal representation, taking statements, false complaints, withdrawal of complaints, follow-up procedures, arrest, summons, charge and bail and the role of police prosecutors.

conviction. When deciding whether there is enough evidence, the prosecutor must consider a number of things, including whether the evidence is admissible and whether it is reliable. A prosecution should not proceed to consider the second category if not satisfied as to the first.

The second criterion relating to public interest identifies that the factors affecting the decision to prosecute include the seriousness of the offence, the need for deterrence and the circumstances of the alleged offender. With regards to sexual offences, the Director of Public Prosecutions Prosecution Policy of the State of Queensland specifically states that:

Sexual offences such as rape or attempted rape are a gross personal violation and are serious offences. Sexual offences committed upon children should always be regarded seriously. Where there is sufficient evidence to warrant prosecution, there will seldom be any doubt that the prosecution is in the public interest. (Director of Public Prosecutions 1995)

The prosecution will start or continue only when a case satisfies both the sufficiency and public interest criteria.

Not all cases reported to the police proceed through the criminal justice system. Between 700 and 900 persons accused of sexual offences come before the Magistrates Court annually. The majority are committed for trial or sentenced in a higher court, although about half plead guilty (CJC 1999).

Recent research reveals that between 20 and 40 per cent of sexual offence cases are discontinued after charges have been laid (CJC 1999; QCC & QPS 2000), and that there are a number of reasons why this occurs. In previous reports, the CJC (1999) and the QCC and QPS (2000) have suggested that further research appears to be warranted into why sexual offence cases are withdrawn and discontinued at a higher rate than other offence types. A 1997 report suggested that deficiencies in investigations, such as interviewing techniques and inadequate police briefs, may be associated with the high rates of withdrawal (reported by QCC & QPS 2000). Since the release of that report, the QPS has appointed Brief Managers throughout the state to monitor briefs and has formed Failed Prosecution Committees to review failed prosecutions within the Magistrates court. A review of the current level of functioning of those processes may allow an assessment of the success of those innovations.

Systematically documenting the reasons and the range of characteristics associated with why sexual offences are continued or discontinued is of central interest to this Inquiry. An additional important consideration is the provision of existing guidelines for case management and the extent to which current practices operate within such guidelines. Another issue that requires deliberation is the extent to which consultation occurs when consideration is being given to withdrawing charges. The complainant, the investigating police officer and the accused all have a different perspective and, regularly, these views do not coincide. The nature and extent of any consultation between these parties requires consideration.

In summary, the Inquiry will consider whether the applicable guidelines now in existence adequately address the concerns that are raised in submissions made by the representatives of relevant government agencies, concerned interest groups and the wider community.

### **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**

It is a fundamental principle of our judicial system that the courts are open and accessible to the public, that justice is administered in public and that court proceedings can be freely reported. Nevertheless, the law also recognises that the proper administration of justice may require modification to this general principle in circumstances where publicity could be contrary to the interests of justice. The courts have discretion to place limits on the open and public nature of proceedings. This requires a judicial balancing exercise, heavily weighted in favour of openness and publicity, but also involving considerations of fairness. Important factors to consider include the need to protect the innocent, the need to ensure that the accused will be able to have a fair trial and the need to protect the identity and privacy of parties, witnesses and victims.

There are specific statutory exceptions to the general rule of openness and publicity regarding court proceedings. In Queensland, the *Criminal Law (Sexual Offences) Act 1978* (Qld) sets out, for sexual offence cases, the exceptions to the general rule of openness and publicity. This legislation, in certain circumstances, prohibits the publication of names, addresses and other identifying details of the complainant and defendant in relation to nominated sexual offences, but not all sexual offences. It is not clear why some sexual offences are included and others are not. Consideration will be given to the nature and extent of the protection afforded by the Act.

There are opposing views about the publication of information identifying the accused. One viewpoint is that sexual offences should be treated differently to other offences. It is argued that the privacy of the defendant should be maintained, especially given the social, personal, and financial consequences associated with sexual offence allegations. There may be a lengthy period of time between the committal and the trial, in which the accused's identity might be publicised, and the presumption of innocence does little to protect an accused when the circumstances involve sexual offence allegations. A high level of media and public interest in these types of cases exists, and openness and publicity should be limited so as not to inflame pre-trial prejudice to the accused.

The alternative view holds that because of the highly personal nature of sexual abuse, victims rarely disclose their experiences and offenders often remain undetected for a long time, if not forever. Victims might be more likely to come forward to report their experiences if they become aware that the same or similar offence that was perpetrated against them might have been perpetrated by the same offender against others. There have been a number of trials in recent years that have exposed offenders who have perpetrated sexual abuse upon multiple victims many years after the abuse occurred.

Public safety and harm minimisation issues have also been raised as critical points in support of disclosing information about the accused. This argument holds that persons close to the accused, such as neighbours, children, students or work colleagues, might be better able to take appropriate steps to minimise the risks of the offence occurring again during the lengthy time that it takes for cases to go to trial, if they are aware of who has been alleged to be a sexual offender.

There are strong arguments in support of each of the opposing views. This Inquiry will consider all arguments both for and against the public disclosure of identifying information of persons charged with sexual offences.

## REFERENCES

- Australian Bureau of Statistics 1996, *Women's Safety Australia*. AGPS Canberra.
- CJC 1999, *Reported Sexual Offences in Queensland*, Criminal Justice Commission.
- Director of Public Prosecutions Queensland 1985. *Guidelines to the Crown Prosecutors, the Solicitor for Prosecutions and Legal Staff Concerned with the Prosecution of Offences (issued pursuant to s. 11(1)(a) of the Director of Public Prosecutions Act 1984)*, in Carter et al., *Carter's Criminal Law of Queensland*, Butterworths, 1988, pp. 150 117–153 061 [Service 43].
- Director of Public Prosecutions Queensland 1995. *Prosecution Policy of the State of Queensland*, in Carter et al., *Carter's Criminal Law of Queensland*, Butterworths, 1988, pp. 150 001 150 066.
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- QCC & QPS 2000, *Child sexual abuse in Queensland: Responses to the problem*. Project Axis: Volume 2, Queensland Crime Commission & Queensland Police Service.
- QPS 2002, *Operational Procedures Manual: Rape and sexual assault protocols for police*. Accessed September.

## APPENDIX 3: SUBMISSIONS TO THE INQUIRY

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Invitations to provide written or oral submissions to the Inquiry, and requests to appear at the public hearings of the Inquiry, were sent to a number of key government departments and agencies. Many chose to respond (see next page). Many also chose not to respond, due to time restrictions and workloads and, in some cases, the perception that the terms of reference for the Inquiry were not relevant to their organisation.

The table on the next page documents the organisations that either provided a written submission or agreed to be consulted or interviewed for the Inquiry. Many of these groups and individuals were also represented at the hearings (see Appendix 4 for the hearing schedule).

Overall, written submissions were received for the Inquiry from 8 government departments and agencies, 10 legal organisations, 10 community organisations, 2 media groups, 3 academic affiliations and 39 individuals. All of the transcripts of the interviews conducted by the CMC for the Volkert investigation were also reviewed for the Inquiry by the project manager and incorporated throughout this report where appropriate. In addition, the CMC conducted 20 consultations with a range of academic, legal, community and government agencies and individuals, and spoke to 75 callers who made oral submissions to the Inquiry by telephone.

For a variety of reasons, including the following, the names of individuals who made submissions to the Inquiry have not been identified in this report:

- a number of submissions were provided by victims of sexual offences, and the accused, whose cases were still before the courts
- some submissions provided the names of, and other identifying information about, individuals who had not given their independent approval for the release of those details in a public forum
- some submissions were unsuitable for public release.

Some of the written submissions and the full transcripts of the public hearing are available on the CMC's website at <[www.cmc.qld.gov.au](http://www.cmc.qld.gov.au)> for a limited period.

## List of Submissions to the Inquiry

<b>Type of agency</b>	<b>Name</b>
	<b>Written submissions</b>
<b>Government</b>	<ol style="list-style-type: none"> <li>1. Queensland Police Service (QPS)</li> <li>2. Queensland Police Union of Employees (QPUE)</li> <li>3. Queensland Health</li> <li>4. Department of Families</li> <li>5. Office for Women (Community Engagement Division) Department of Premier and Cabinet</li> <li>6. Education Queensland</li> <li>7. The CMC</li> <li>8. Commission for Children and Young People</li> </ol>
<b>Legal</b>	<ol style="list-style-type: none"> <li>1. Legal Aid Queensland</li> <li>2. Bar Association of Queensland</li> <li>3. Queensland Law Society</li> <li>4. Damian Bugg, SC, Commonwealth Director of Public Prosecutions on behalf of the Australian Directors of Public Prosecutions</li> <li>5. John Williams and Associates, Solicitors, Rockhampton</li> <li>6. Queensland Council for Civil Liberties</li> <li>7. Leanne Clare, Queensland Director of Public Prosecutions</li> <li>8. Queensland Aboriginal and Torres Strait Islander Legal Service Secretariat</li> <li>9. A Judge</li> <li>10. Chamber of the President, Court of Appeal, Brisbane</li> </ol>
<b>Community</b>	<ol style="list-style-type: none"> <li>1. Youth and Family Service Logan City</li> <li>2. Bravehearts Inc.</li> <li>3. Sexual Assault Support and Prevention Service Rockhampton</li> <li>4. Queensland Advocacy Inc. (QAI)</li> <li>5. Victims of Crime Association of Queensland</li> <li>6. Protect All Children Today (PACT)</li> <li>7. The Esther Centre</li> <li>8. Citizens Against False Sexual Allegations Inc. (CAFSA)</li> <li>9. World Support, Nambour</li> <li>10. Disability Training Program, Victims of Crime</li> </ol>
<b>Media</b>	<ol style="list-style-type: none"> <li>1. Channel 9 Queensland</li> <li>2. Freehills for Channel 7</li> </ol>
<b>Academic</b>	<ol style="list-style-type: none"> <li>1. Mr Michael Barnes, Ms Sally Kift and Ms Tamara Walsh, Faculty of Law, Queensland University of Technology</li> <li>2. Dr Christine Eastwood, Faculty of Education, Queensland University of Technology</li> <li>3. Mr Mark Kebbell, Forensic Psychology, James Cook University</li> </ol>
<b>Individual</b>	<p>Thirty-nine written submissions were received from a range of individuals such as victims and accused in sexual offences matters, the partners and parents of such individuals, legal and medical representatives of such individuals and interested members of the community. In addition, the transcripts of all of the interviews with the Volkert complainants and all of the legal representatives in that matter were also considered as submissions to the Inquiry.</p> <p><b>Consultations and interviews</b></p> <ol style="list-style-type: none"> <li>1. QPS Townsville</li> <li>2. QPS Cairns</li> <li>3. ODPP Townsville</li> <li>4. Two Magistrates</li> <li>5. Two District Court Judges</li> <li>6. Three Appeals and Supreme Court Judges</li> <li>7. Far North Queensland Law Society and Legal Aid — Townsville</li> <li>8. Far North Queensland Law Association — Cairns</li> <li>9. Cairns Women's Legal Service</li> <li>10. SQWISI (Self-Help for Queensland Workers in the Sex Industry) — Cairns</li> <li>11. Cairns Sexual Assault Service (Family Planning Queensland)</li> <li>12. Department of Families SCAN Team Leader — Cairns</li> <li>13. Victims of Crime — Townsville</li> <li>14. Townsville Sexual Assault Service</li> <li>15. Bravehearts Inc.</li> <li>16. Dr Christine Eastwood, Queensland University of Technology</li> <li>17. Aboriginal and Torres Strait Islander Legal Service Brisbane</li> <li>18 &amp; 19. Individuals who requested interviews</li> <li>20. The Assistant Commissioner for Crime and a QPS Inspector, CMC</li> </ol> <p><b>Telephone calls</b></p> <p>Approximately 75 telephone calls were counted as oral submissions to the Inquiry</p>

## APPENDIX 4: HEARING SCHEDULE

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### WEDNESDAY 20.11.2002

#### Morning session: 10:00 am – 1:00 pm

10:00	Opening address	Mr Brendan Butler SC
10:30	Queensland Police Service	Nominated representative
11:00	Break	
11:30	Queensland Director of Public Prosecutions	Ms Leanne Clare
12:00	Commonwealth Director of Public Prosecutions	Mr Damian Bugg QC

#### Afternoon session: 2:00 pm – 4:00 pm

2:00	Legal Aid Queensland — Public Defender	Mr Brian Devereaux
2:30	Crime and Misconduct Commission: summary of individual submissions	Dr Margot Legosz
3:00	Protect All Children Today	Dr Richard Roylance
3:30	Victims of Crime	Mr Chris Murphy

### THURSDAY 21.11.2002

#### Morning session: 9:00 am – 11:30 pm

9:00	Queensland Council for Civil Liberties	Mr Terry O’Gorman
9.30	Queensland Police Union of Employees	Mr Phil Hocken
10:00	Break	
10:30	Queensland Law Society Inc.	Mr Daniel Creevey
11:00	Bar Association of Queensland	Mr Ralph Devlin

#### Afternoon session: 1:00 pm – 4:00 pm

1:00	Esther Centre	Ms Karyn Walsh
1:30	Citizens Against False Allegations Inc.	Mr Michael Cox
2:00	Queensland University of Technology	Mr Michael Barnes
2:30	Reply, Office of the Director of Public Prosecutions	Nominated representative
2:45	Reply, Queensland Police Service	Nominated representative
3:00	Closing address	Mr Brendan Butler SC

#### Witness list (Wednesday):

Acting Chief Superintendent Peter Barron, State Operations Command, QPS  
Mr Colin Strofield, Legal Adviser to the QPS  
Ms Leanne Clare, Queensland Director of Public Prosecutions  
Mr Michael Nicolson, Legal Practice Manager, ODPP  
Mr Damian Bugg, Commonwealth Director of Public Prosecutions  
Mr Brian Devereaux, Legal Aid Queensland  
Dr Margot Legosz, Senior Research Officer, CMC  
Dr Richard Roylance, PACT  
Mr Chris Murphy, Victims of Crime Association of Queensland

#### Witness list (Thursday)

Mr Terry O’Gorman, Queensland Council for Civil Liberties  
Mr Phil Hocken, General Secretary, QPUE  
Mr Glen Cranny, Solicitor for the QPUE  
Mr Daniel Creevey, Queensland Law Society Inc.  
Mr Tony Glynn SC, President, Queensland Bar Association  
Mr Ralph Devlin, Queensland Bar Association  
Ms Karyn Walsh, Esther Centre  
Mr Michael Cox and Dr Travis Gee, CAFSA  
Mr Michael Barnes and Ms Sally Kift, School of Justice Studies, QUT  
Mr Paul Rutledge, Deputy Director, ODPP  
Commissioner Robert Atkinson, QPS  
Mr Colin Strofield, QPS

## APPENDIX 5: SUMMARY OF QPS POLICIES AND PROCEDURES FOR DEALING WITH SEXUAL OFFENCES

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The information contained here expands the information provided in Chapter 4 regarding the police response to sexual offences.

### QPS GUIDELINES

The QPS Operational Procedures Manual advises officers as follows:

- Treat every complaint as genuine unless otherwise established during the investigation. They are expected to acknowledge that there is no typical response to complaints of rape and/or sexual assault and that a complainant may demonstrate a range of emotions that should not detract from the genuineness of the complaint.
- Introduce themselves and supply the complainant with their name, rank, and contact number and advise the complainant of their role in the investigation.
- Be sympathetic, supportive and sensitive to the emotional and physical needs of the complainant.
- Create an environment of trust with the complainant.
- Conduct the interview in a private quiet area.
- Inform the complainant of the investigative process that will take place.
- Keep the complainant informed on what is happening throughout the investigation.
- Allow the complainant the choice of deciding whether or not to proceed with a formal complaint and provide advice on what assistance is available to the complainant, whichever decision is reached.
- Ensure a list of support agencies within their area is available to the complainant as part of a sexual offences information package.
- Organise for a change of clothing for the complainant as soon as possible, if necessary.
- Explain to the complainant that any clothing worn at the time of the offence may be required for forensic examination depending on the nature of the offence.
- Ask if the complainant would like a support person to be present during the taking of a statement, e.g. a friend, family member or a community support worker.
- Provide a copy of the statement to the complainant.
- Advise the complainant that if the matter goes to court, the legal representative for the defence will be receiving a copy of the statement.
- Advise the complainant of the format of the interview and how it will be conducted.
- Ensure, where possible, that if the complainant has a disability/impairment, a representative from the appropriate agency, a support person, or in the case of the deaf or hearing impaired, a qualified interpreter, is present during the interview.
- Ensure, where a complainant is not conversant with the English language that, where available, an appropriate qualified interpreter is present.
- Respect a complainant's decision to withdraw their complaint, inform them that no further action will be taken by the police and advise the complainant of support agencies available.
- Ask the complainant of any concerns relating to the bail process.
- Advise the complainant if the offender is apprehended.
- Advise the complainant of any charges laid.
- Inform the complainant of any bail conditions or variations.

- If there is not enough evidence to substantiate the complaint, advise the complainant as to why the complaint will not be proceeding, as well as providing the complainant with a list of referral agencies available.

More specific protocols relating to medical examinations, police interviewing, and police obligations to victims throughout the criminal justice process are also provided in the interagency guideline document (Queensland Government 2001). Although the interagency guidelines generally mirror the OPM protocols, some differences do exist. For example, under the heading medical examinations in the OPM police are told to:

- ensure that the complainant is aware of the procedures involved in the medical examination and the desirability to have such examinations;
- advise the complainant of the option of having a support worker present during the examination; and
- obtain the complainant's consent prior to taking any photographs of any injuries inflicted during the sexual assault/rape (Queensland Police Service 2002a).

These general medical examination provisions also appear in the interagency guidelines, but in addition officers are also advised that:

- Where urgent medical attention is required, arrangements should be made by the police to transport the victim to the nearest acute sexual assault service.
- Where medical attention is not required, the police must provide the victim with a space away from the general public and work activities of the police station.
- Where a recent sexual assault has occurred the police must:
  - Explain to the victim the importance and reasons for conducting a medical examination.
  - Explain the purpose in advising victims not to wash, eat or drink (where appropriate) but to also recognise that in some instances the victim may be too uncomfortable to comply, in which case officers must respect this decision.
  - Contact the medical facility with an estimated time of arrival to provide the service an opportunity to prepare for the victim's attendance (Queensland Government 2001).

Officers conducting interviews with children are further told to ensure that:

- The interview is conducted in a manner that reduces the amount of trauma to the child.
- The interview has a maximum of three people (other than the child) present for the interview so that a 'panel' situation does not develop. It is difficult for a child to disclose details of sexual abuse in front of a group of strangers. Persons recommended to be present include the investigating officer, a representative from the Department of Families, an independent person and the child.
- When the child requests that persons other than investigators be excluded from the interview, the wishes of the child be respected where possible.
- The interview venue is appropriate — i.e. free from any interruption and as non-threatening an environment as possible for the child.
- Background information in relation to the child and the child's surroundings has been gathered before the interview to facilitate rapport building with the child during the interview.
- The interview is planned — the roles of the persons present during an interview should be clearly negotiated prior to the commencement of the interview.
- All persons present at the interview are introduced to the child and the child's role is clearly explained to all people present at the interview.
- Feedback is sought from the child that they are comfortable with the people who are present.
- The child understands the reason for the interview without asking leading questions.

- Age-appropriate language is used and police jargon is avoided, that police talk at a level that is understood by the child and the child's language is used to clarify the meaning of words where necessary.
- They describe to the child the method of recording the interview, including the audio and video equipment.
- At the commencement of the interview, police establish rapport with the child before discussing the sexual abuse.
- The child particularises the circumstances of the offence in as much detail as possible.
- They consider the needs of the child and are conscious of nonverbal communication. If the child appears bored or is losing concentration it may be necessary to either temporarily change the direction of the interview or temporarily suspend the interview. The interview may be recommenced when the child is settled.
- They always show a caring and sympathetic attitude. Never prejudge or show bias during an investigation.
- They determine if a medical examination or counselling should subsequently occur.
- They avoid leading questions or suggestive statements. Officers are told to remember the child must volunteer all of the information obtained without any prompts.
- They do not make any promises to the child that they may later be unable to keep.
- They never show shock or horror at anything the child says.
- They never initiate any touching with the child.
- They avoid rewarding the child, either by verbal or nonverbal communication, if the child provides important information.
- They never terminate an interview abruptly. Allow the child to talk through the issues in a 'wind down' period.
- When terminating the interview, officers advise the child what is expected to happen in the future.
- They advise the child how additional information can be obtained.
- They provide the child with names and telephone contact numbers to enable future contact with police.
- Video and audio facilities are used to record children's statements.

The QPS also recognises that going to court can be an especially traumatic experience for child victims and, as such, officers are required to prepare the child for court. The following suggestions/options are made to investigating officers about how best to prepare a child for court:

- Introduce the child to the appropriate court support system.
- Keep the child conversant with the remand and subsequent hearing date. Ensure, where possible, that hearing dates do not clash with important events in the child's life e.g. a birthday.
- Take the child to the court room that will be used as the hearing approaches.
- Give the child the opportunity to sit in the witness box and talk to the child while the child is in the witness box.
- Provide the child with a map of the court indicating where different people will sit, their titles and the functions they perform in the court. The investigating officer should not indicate to the child where the offender will sit, as identification may become an issue during the proceeding.
- Provide the child with a glossary of terms so that the child will have a better understanding of what is happening.
- Introduce the child to the police prosecutor prior to the court hearing.

- Inform the child that: the judge or magistrate will assist the child if something is not understood; the child may ask for and take a drink of water in the witness box; the child may ask to go to the toilet; if a question is not understood, the child has a right to say that the question is not understood.

## QPSTRAINING

The most intensive and specialised training package offered by the QPS is the Sex Offences Investigation Course. The aim of this course is to 'provide police officers with specialist skills and knowledge relevant to the investigation of a sex offence'. Training in the following is included:

- police rape and sexual assault protocols
- criminal offences relating to sexual offences
- the issue of consent
- offences against the person other than sexual offences
- the identification of offenders
- fresh complaint
- *Criminal Law (Sexual Offence) Act 1978* (Qld)
- medical examinations
- role of the Government Medical Officer
- drug-assisted rape
- *Evidence Act 1977* (Qld)
- protocols for interviewing children
- covertly recorded evidence
- historical sexual offence legislation
- films, publications and computer images
- persons with intellectual and physical disabilities
- search warrants and crime scene warrants
- interviewing suspects
- role of the Office of the Director of Public Prosecutions
- *Criminal Offence Victims Act 1995* (Qld).

In the case of child sexual abuse, the JAB course introduces officers to the role of the Bureau by providing training on investigative techniques, information gathering and guidance when conducting investigations with juveniles. More specific areas covered in this training program include:

- Child Abuse Operational Procedures Manual
- SCAN — Suspected Child Abuse and Neglect
- *Evidence Act 1977* (Qld)
- computer crime
- Shaken Baby Syndrome and Sudden Infant Death Syndrome
- interviewing complainant children — ICARE interviews
- pretext telephone conversations
- Rape and Sexual Assault Protocols.

## APPENDIX 6: LEGISLATION RELEVANT TO THE THIRD TERM OF REFERENCE

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### QUEENSLAND LEGISLATION

The relevant provisions of the *Criminal Law (Sexual Offences) Act 1978* (Qld) are as follows:

#### 3 Definitions

In this Act —

**complainant** means a person in respect of whom a sexual offence is alleged to have been committed.

**defendant** means a person charged with having committed a sexual offence.

**examination of witnesses** means an examination of witnesses in relation to an indictable offence, being a sexual offence, commenced after the commencement of this Act and taken pursuant to the *Justices Act 1886*.

**prescribed sexual offence** means any of the following offences —

- (a) rape;
- (b) attempt to commit rape;
- (c) assault with intent to commit rape;
- (d) an offence defined in the Criminal Code, section 352.

**report** means an account in writing and an account broadcast or distributed in any way in or as sound or visual images.

**sexual offence** means any offence of a sexual nature, and includes a prescribed sexual offence.

#### 6 Publication at large of complainant's identity prohibited

(1) Any report made or published concerning an examination of witnesses or a trial, other than a report specified in section 8(1), shall not reveal the name, address, school or place of employment of a complainant therein or any other particular likely to lead to the identification of a complainant therein unless the court, for good and sufficient reason shown, orders to the contrary.

...

#### 7 Publication prematurely of defendant's identity prohibited

(1) Any report made or published concerning an examination of witnesses in relation to a prescribed sexual offence, other than a report specified in section 8, shall not reveal the name, address, school or place of employment of a defendant therein or any other particular likely to lead to identification of a defendant therein unless the justices taking the examination, for good and sufficient reason shown, order to the contrary.

...

#### 8 Exempted reports

(1) Sections 6 and 7 do not apply to —

- (a) a report made for the purposes of an examination of witnesses or a trial or of a proceeding on appeal arising from a trial;
- (b) a report made verbatim of a judgment or decision delivered in a trial or in a proceeding on appeal arising from a trial and contained in a recognised series of law reports;
- (c) a report made to or on behalf of the Department of Justice and Attorney-General, the Commissioner of the Police Service, the Board of Teacher Registration or the department for the time being administering the *Child Protection Act 1999* for the purposes of the department or other entity to or on behalf of which it is made.

(2) Section 7 does not apply to a report made concerning an examination of witnesses that reveals any particular referred to in that section of a defendant therein who as a result of the examination is committed for trial or sentence upon a charge of a sexual offence if the report is made after the committal order

is made and does not reveal any such particular of any other defendant therein who is not so committed.

...

#### 10 Offences and penalty

(1) A person who makes or publishes a report to which section 6 or 7 applies that contravenes the applicable section commits an offence against this Act.

...

(3) A person who, by a statement or representation made or published otherwise than in a report concerning an examination of witnesses or a trial, reveals the name, address, school or place of employment of —

(a) a complainant, at any time; or

(b) a defendant charged with a prescribed sexual offence to which the statement or representation relates, before the defendant is committed for trial or sentence upon that charge; commits an offence against this Act except where the statement or representation is made or published for an authorised purpose referred to in section 11.<sup>1</sup>

(4) A person who commits an offence against this Act is liable —

(a) in the case of a body corporate — to a penalty not exceeding \$2000; and

(b) in the case of an individual — to a penalty not exceeding \$500 or to 6 months imprisonment.

(5) The fact that a person is liable to a penalty prescribed by subsection (4) in respect of an offence defined in subsection (2) shall not prevent the person being dealt with for contempt of court evidenced by the person's offence.

## SOUTH AUSTRALIAN LEGISLATION

The relevant provisions of South Australia's *Evidence Act 1929* (s. 71A) are as follows:

### Restriction on reporting proceedings relating to sexual offences

...

(2) A person shall not, before the relevant date, publish any statement or representation —

(a) by which the identity of a person who has been, or is about to be, charged with a sexual offence is revealed; or

(b) from which the identity of a person who has been, or is about to be, charged with a sexual offence, might reasonably be inferred, unless the accused person consents to the publication. Penalty: Two thousand dollars.

...

(5) In this section relevant date means —

(a) in relation to a charge of a major indictable offence or a charge of a minor indictable offence for which the accused person has elected to be tried by a superior court — the date on which the accused person is committed for trial or sentence; or

...

(c) in any case — the date on which the charge is dismissed or the proceedings lapse by reason of the death of the accused person, for want of prosecution, or for any other reason.

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<sup>1</sup> Section 11 provides: (1) For the purposes of section 10 an authorised purpose is one authorised by or pursuant to this section. (2) The following purposes are authorised by this section —  
(a) the purpose of an investigation into the complaint made by or on behalf of a complainant  
(b) the purpose of preparing for or conducting an examination of witnesses or a trial or a proceeding on appeal arising from a trial.

## NORTHERN TERRITORY LEGISLATION

The relevant provisions of the *Sexual Offences (Evidence and Procedure) Act 1983 (NT)* are as follows:

### 3. Definitions

In this Act, unless the contrary intention appears —

**defendant** means a person charged with having committed a sexual offence;

**sexual offence** means —

(a) an offence against section 128 to 132 (inclusive), 134, 135, 192, 192B or 201 of the Criminal Code;

(b) an offence against section 127 of the Criminal Code committed in the circumstances referred to in subsection (2) of that section;

(c) an offence against section 188(1) of the Criminal Code committed in the circumstances referred to in subsection (2)(k) of that section; or

(d) an offence committed against section 60 to 69 (inclusive), 70(2), 71, 72 or 74 of the Criminal Law Consolidation Act;

...

### 7. Premature publication of defendant's identity prohibited

Subject to section 9, a report made or published concerning an examination of witnesses shall not reveal the name, address, school or place of employment of a defendant or any other particular likely to lead to identification of a defendant, unless the justice taking the examination makes an order to the contrary.

### 11. Offences

...

(2) A person who, by a statement or representation made or published otherwise than in a report concerning an examination of witnesses or a trial, reveals the name, address, school or place of employment of —

(a) a complainant, at any time; or

(b) a defendant, before the defendant is committed for trial or sentence upon a charge of having committed the sexual offence to which the statement or representation relates, is guilty of an offence, except where the statement or representation is made or published for an authorised purpose referred to in section 12.

(3) A person who is guilty of an offence against this section is liable —

(a) in the case of a body corporate — to a fine of \$25 000; and

(b) in the case of an individual — to a fine of \$5000 or imprisonment for 6 months.

## THE VICTIMS' RIGHTS ACT 2002 (NZ)

### 140. Court may prohibit publication of names —

(1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

2) Any such order may be made to have effect only for a limited period, whether fixed in the order or to terminate in accordance with the order; or if it is not so made, it shall have effect permanently.

...

person commits an offence and is liable on summary conviction to a fine not exceeding \$1000 who commits a breach of any order made under this section or evades or attempts to evade any such order.

## APPENDIX 7: ISSUES INDIRECTLY RELEVANT TO THE THIRD TERM OF REFERENCE

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### INTRODUCTION

Included in this appendix are six issues that were raised by submissions to the Inquiry regarding the third term of reference — the publication of identifying information about a person charged with a sexual offence — that were considered to fall outside the jurisdiction of the Inquiry. These issues are documented here to emphasise their importance and to encourage further review by other more appropriate bodies. The Commission suggests that the Queensland Law Reform Commission, or a similar body, be given a reference to review and report on these issues.

### THE ISSUES

The issues are:

- 1 the naming of an accused who is related to a complainant
- 2 The lack of consistency in the drafting of the *Criminal Law (Sexual Offences) Act 1978* (Qld)
- 3 The penalties for naming a complainant or an accused in contravention of the *Criminal Law (Sexual Offences) Act 1978* (Qld)
- 4 The readability of the *Criminal Law (Sexual Offences) Act 1978* (Qld)
- 5 Implications of the prohibition on the naming of an accused for government agencies
- 6 The power to make general suppression orders

#### **1. The naming of an accused who is related to a complainant**

The *Criminal Law (Sexual Offences) Act 1978* (Qld) does not specifically prohibit the publication of the name of an accused who is related to the complainant or whose identity is otherwise linked to the complainant's identity. Section 6 of the Act — which prohibits the publication of 'any other particular likely to lead to the identification of a complainant' — indirectly prohibits the naming of an accused who is related or otherwise linked to the complainant. However, that prohibition applies only to a report about a committal hearing or trial. Section 10 of the Act, which is the main or key 'prohibition provision', does not contain an equivalent of the indirect prohibition found in section 6 of the Act. Therefore, an accused who is related or otherwise linked to the complainant can currently be named in the media prior to being charged with a sexual offence and/or after being committed for trial or sentence (if the indirect prohibition in section 6 does not apply). This would seem to be inconsistent with the intention of the Act, which is to preserve a complainant's anonymity.

#### **2. The lack of consistency in the drafting of the *Criminal Law (Sexual Offences) Act 1978* (Qld)**

Sections 6 and 7 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) have been drafted with both specific and general words. These sections prohibit the publication of the name, address, school, or place of employment of a complainant [section 6] or defendant [section 7] and prohibit the publication of any other particular likely to lead to the identification of a complainant [section 6] or defendant [section 7].

The prohibition in section 10(3) of the Act contains only specific words: unlike sections 6 and 7, it does not contain the additional general words 'any other particular likely to lead to the identification of ...'. This would appear to be a drafting error.

### **3. The penalties for naming a complainant or an accused in contravention of the *Criminal Law (Sexual Offences) Act 1978 (Qld)***

The penalty for naming a complainant or defendant in contravention of sections 6, 7 or 10 of the *Criminal Law (Sexual Offences) Act 1978 (Qld)* has remained the same since the Act was first proclaimed in 1978. The penalty is \$2000 for a corporation and \$500 or six months imprisonment for an individual [see s. 10(4)]. The penalty for breaching a similar provision vis-à-vis children in Queensland is \$75 000 for a corporation and \$7500 or two years imprisonment for an individual [see s. 224AT of the *Juvenile Justice Act 1992 (Qld)*].

The penalty is manifestly smaller than penalties that have recently been imposed on publishers and broadcasters found guilty of the common law offence of contempt.<sup>1</sup> The penalty provision in the *Criminal Law (Sexual Offences) Act 1978 (Qld)*, therefore, needs to be reviewed and updated.

### **4. The readability of the *Criminal Law (Sexual Offences) Act 1978 (Qld)***

Submissions to the Inquiry showed how difficult it is to understand the *Criminal Law (Sexual Offences) Act 1978 (Qld)*. A number of written submissions either misinterpreted the prohibition provisions (sections 6–8 and 10) and/or failed to mention the key prohibition in section 10(3) (which is in the part of the Act headed ‘offences and penalty’). Some submissions also incorrectly stated that the Act prohibits a suspect’s name from being published prior to the suspect being charged with a sexual offence. Inquiry researchers also experienced some difficulty interpreting the meaning of certain provisions in the Act.

Consideration should be given to redrafting the Act in its entirety. This would provide the opportunity to consolidate the prohibition provisions — which are currently spread across four different sections.

### **5. Implications of the prohibition on the naming of an accused for government agencies**

Section 6 of the *Criminal Law (Sexual Offences) Act 1978 (Qld)* prohibits the publication of identifying information about a complainant in a report about a committal hearing or trial and section 7 prohibits the publication of identifying information about a defendant in a report about a committal hearing. It is an offence to publish a report that contravenes either of these two sections.

However, the prohibitions in sections 6 and 7 do not apply to the Board of Teacher Registration, the Department of Justice and Attorney-General, the Commissioner of Police or the Department of Families. This means, for example, that the Commissioner of Police can inform the Board of Teacher Registration that a particular teacher has been charged with a sexual offence and when his or her committal hearing will take place. The exemption set out in section 8(1)(c) does not apply to other significant agencies such as Education Queensland or the CMC.

The CJC raised this anomaly in its 2000 report on *Safeguarding students: Minimising the risk of sexual misconduct by Education Queensland staff* and recommended that the CJC, Education Queensland, the Board of Teacher Registration, the QPS, the Queensland Teachers’ Union, the QCC and Crown Law jointly consider the legal and ethical factors currently preventing the sharing of information about Education Queensland employees between relevant agencies with a view to making recommendations to the relevant Ministers (CJC 2000, pp. 51–55).

The ambit of the exemption in section 8(1)(c) of the *Criminal Law (Sexual Offences) Act 1978 (Qld)* and the sharing of information (at least between public sector agencies) about persons suspected or charged with a sexual offence are critical issues that require further attention.

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<sup>1</sup> In the case of *Attorney-General (NSW) v. Radio 2UE Sydney Pty Ltd* (unreported, New South Wales Court of Appeal, Priestly, Meagher and Powell JJ, 11 March 1998), a radio station was fined \$200 000 for contempt of court. Ten years earlier, well known radio personality Deryn Hinch was imprisoned for 12 days and charged \$15 000 after he broadcast the criminal history of a former priest facing child sex charges: *Hinch v Attorney-General (Vic)* [1987] VR 721.

## **6. The power to make general suppression orders**

The ODPP (pp. 15–16) and Barnes, Kift and Walsh of the QUT Law Faculty (p. 13) argued in their written submissions, and during the public hearings (CMC 2002b, pp. 38 & 157), that the prohibition on naming a defendant in the *Criminal Law (Sexual Offences) Act 1978* (Qld) should be repealed and replaced with a more general statutory power to suppress identifying particulars about any defendant (regardless of the nature of the offence the defendant is alleged to have committed).

Unlike many jurisdictions in Australia, Queensland does not have a general statutory power to suppress information about a trial (including particulars about a party's identity). The New South Wales Law Reform Commission (2000, p. 348) has recently proposed that a new provision be inserted into the New South Wales *Evidence Act 1995* to give courts the power to suppress the publication of reports about evidence presented during court proceedings as well as material that would lead to the identification of parties and witnesses involved in the proceedings.

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Bravehearts.  
Commonwealth Director of Public Prosecutions (Damian Bugg).  
Channel 9 Queensland.  
Citizens Against False Sexual Allegations Inc. (CAFSA).  
Faculty of Education, QUT (C. Eastwood).  
Channel 7.  
John Williams and Associates, Solicitors, Rockhampton.  
Legal Aid Queensland (LAQ).  
Protect All Children Today (PACT).  
Queensland Aboriginal and Torres Strait Islander Legal Service Secretariat.  
Queensland Advocacy Inc. (QAI).  
Queensland Council for Civil Liberties (QCCL).  
Queensland Director of Public Prosecutions (Leanne Clare).  
Queensland Law Society.  
Queensland Police Service (QPS).  
Queensland Police Union of Employees (QPUE).  
Esther Centre.  
Victims of Crime Association of Queensland.  
Youth and Family Service Logan City.

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**Personal communications**

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