FUNDING JUSTICE

LEGAL AID AND PUBLIC PROSECUTIONS IN QUEENSLAND

AUGUST 2001

QUEENSLAND
CRIMINAL
JUSTICE
COMMISSION

This report updates the CJC's 1995 report on the funding of legal aid and public prosecutions in Queensland. It focuses on the current financial situation and workload of Legal Aid Queensland (formerly the Legal Aid Commission) and the Office of the Director of Public Prosecutions. It also draws conclusions about aspects of the wider criminal justice system that have an impact on the efficient and effective operation of these two agencies. The report concentrates on LAQ's and the ODPP's respective roles in criminal law matters. It does not consider the other substantial responsibilities of LAQ in, for example, family law and civil law matters.

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CJC Mission:
To promote integrity in the Queensland Public Sector and an effective, fair and accessible criminal justice system.

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CRIMINAL JUSTICE COMMISSION

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Dear Sirs

In accordance with section 26 of the *Criminal Justice Act 1989*, the Commission hereby furnishes to each of you the report *Funding Justice: Legal Aid and Public Prosecutions in Queensland*. The Commission has adopted the report.

Yours faithfully

BRENDAN BUTLER SC
Chairperson

Foreword

This report presents an update of the CJC's 1995 *Report on the Sufficiency of Funding of the Legal Aid Commission of Queensland and the Office of the Director of Public Prosecutions, Queensland*. It has been prepared in compliance with a statutory requirement to monitor and report on such matters.

In addition to presenting data on the funding of these agencies, the report identifies issues not directly related to the funding of those agencies but which have an impact on the public perception of the funding situation, and on the ability of those agencies to make the most efficient use of the limited funds available for the provision of their services. Several of those issues were also canvassed in the 1995 report.

The report delivers conclusions, but makes no specific recommendations for change or reform. The CJC is of the view that the best contribution it can make to any reform process in the area of legal aid and public prosecutions funding is to present the facts upon which others can enter into informed debate and make informed decisions. It is not for the CJC to determine what level of funding will or should be provided to the respective agencies — that must be a decision of government in light of competing priorities.

From the consultations undertaken by the CJC for this report, it is apparent that there is a broad consensus of opinion across most key stakeholders as to what can be done in the immediate future to ensure a more efficient criminal justice system and a more efficient use of public monies in the areas of legal aid and public prosecutions. There is, for instance, a widely shared view that the time is right for a realignment of the jurisdiction of the various courts in Queensland and for the active encouragement of, and financial commitment to, the early disposition of criminal matters.

A further indication that the time is right for change is the marked degree of activity within criminal justice agencies and across government and private sector agencies relating to the consideration of reform options. The effective ongoing coordination of those activities will enhance the prospects for lasting reform.

Brendan Butler SC
Chairperson
Criminal Justice Commission

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Acknowledgments

The CJC acknowledges the considerable assistance provided by officers of Legal Aid Queensland and the Office of the Director of Public Prosecutions in preparing this report and the significant contribution of other key stakeholders during consultations and in response to early drafts of the report.

Wayne Briscoe and Laurie Cullinan of the CJC's Research and Prevention Division had principal responsibility for the preparation of this report. They were assisted by David Goody, Karel Weimar and Kate Godfrey from the CJC's Forensic Accountants Group, and Kelly Maddren from the Research and Prevention Division. The project was managed by Wayne Briscoe.

Abbreviations

CJC	Criminal Justice Commission
CJIIS	Criminal Justice Information Integration Strategy
CLC	Community legal centre
CSU	Crime Statistics Unit
DPP	Director of Public Prosecutions
LAC	Legal Aid Commission (Qld)
LAQ	Legal Aid Queensland
LPM	Legal Practice Manager in the ODPP
ODPP	Office of the Director of Public Prosecutions
OESR	Office of Economic and Statistical Research
QACJRC	Queensland Administration of Criminal Justice Review Committee
QHVSG	Queensland Homicide Victims' Support Group
QLS	Queensland Law Society
QPS	Queensland Police Service
SCAG	Standing Committee of Attorneys-General

EXECUTIVE SUMMARY

What this report does and does not do

This report updates the CJC's 1995 report on the funding of legal aid and public prosecutions in Queensland.[1]

It focuses on the current financial situation and workload of Legal Aid Queensland (formerly the Legal Aid Commission) and the Office of the Director of Public Prosecutions. It also draws conclusions about aspects of the wider criminal justice system that have an impact on the efficient and effective operation of these two agencies.

The report concentrates on LAQ's and the ODPP's respective roles in criminal law matters. It does not consider the other substantial responsibilities of LAQ in, for example, family law and civil law matters.

Main findings

Legal Aid Queensland

Since 1995, when our first report was released, legal aid funding in Queensland has improved. Despite this, it is still clear that some community needs for legal assistance are not being met. These needs fall mainly within the area of non-prescribed crime (i.e. crime that, broadly speaking, is handled in the lower courts) and provision of legal assistance prior to the first court appearance — say at the police station (before and during interviews) or at the watchhouse.

Apart from two recent increases (totalling 10 per cent) there have been no significant rises in fees paid to private practitioners for legal aid work since 1995. We were told by private practitioners that low fees had contributed to an over-reliance on junior and inexperienced but 'cheaper' practitioners to perform complex tasks, and the sparing use of expert evidence in certain cases. This, in turn, they said, had lessened the quality of representation provided to legally aided accused. Assessing such claims is difficult because of the absence of objective data on the quality of legal representation being provided by, or on behalf of, LAQ. However, our review did identify some areas of concern, including the tendering system for LAQ's duty lawyer scheme and LAQ's preferred supplier scheme.

Office of the Director of Public Prosecutions

Funding of the ODPP has increased substantially since the CJC's 1995 report, but so too has the ODPP's workload. The quality of representation is as much an issue for the ODPP as for LAQ, although in the case of the ODPP the concerns relate mainly to the use of inexperienced junior staff rather than to the practices of private practitioners, because the bulk of the Office's legal work is done in-house.

The criminal justice system

As in our 1995 study, this review has found that some features of the criminal justice system are hindering the more efficient use of available funding by LAQ, the ODPP and other criminal justice agencies. The issues discussed in this report are:

- **coordination of agencies**

  Although there is broad agreement that there should be a more coordinated approach to monitoring and managing Queensland's criminal justice system, there

1 The CJC is under a statutory responsibility to monitor and report on the sufficiency of funding for 'law enforcement and criminal justice agencies, including the Office of the Director of Public Prosecutions and the Legal Aid Commission [now Legal Aid Queensland]' (section 23(c) of the *Criminal Justice Act 1989*). In 1995, we published *Report on the Sufficiency of Funding of the Legal Aid Commission of Queensland and the Office of the Director of Public Prosecutions, Queensland.*

are still no effective ongoing coordinating mechanisms. Poor coordination has made management of the system and individual agencies more difficult and contributed to the inefficient use of resources.

- **jurisdiction of the courts**

  A strong case can be made for reviewing the limited jurisdiction of the lower, less costly Magistrates and District Courts to enable them to deal with more serious matters. Many stakeholders, including members of the Queensland judiciary (at all levels) and the private legal profession, told us that they favoured such an adjustment.

- **committals**

  It is open to question whether the Committals Project has resulted in a marked improvement in the rate or manner of disposition of criminal matters. There would be benefit in reviewing the operation of the current project and in considering whether legislative change in this area is required.

- **court listing practices**

  District Court listing practices are a major concern for some members of the legal profession and are believed to result in the disruption of the preparation and finalisation of some matters.

- **circuit courts**

  Circuit courts are an expensive but necessary part of delivering justice, and being seen to deliver justice, in Queensland. Nevertheless, there may be other ways of conducting circuits and, in particular, circuit court listing practices associated with circuits, which will reduce the cost of the LAQ and the ODPP participating in circuit work.

- **ex officio indictments**

  The ex officio process is potentially a more efficient and cost-effective mechanism for having indictable matters brought before the higher courts than by way of committal proceedings. However, the process is currently regarded by the legal profession and the QPS as much less efficient than a standard committal.

- **early pleas**

  Without real incentives for early pleas of guilty in circumstances in which the accused would not thereby be at a disadvantage, matters will continue to proceed to the more costly higher courts.

- **disclosure**

  Without a legislative requirement for parties to disclose all relevant information prior to committal proceedings, it is likely that the resolution of some criminal matters will be unnecessarily delayed, with flow-on cost implications throughout the criminal justice system.

Future funding directions

The practice of injecting funds to speed up the resolution of criminal matters by providing appropriate services at the earliest possible opportunity is known as 'front-ending the system'. The savings resulting from 'front-ending' may not be apparent in the short term, and they may not even be direct savings to the agency providing the funds.

There is no indication at this stage that substantial resources will be redirected to the 'front end' of the system. On the contrary, it appears that fewer matters are resolved in the lower courts than could be the case, that funding for representation before the lower courts is more difficult to obtain than it has been in the past, and that funding for representation before a defendant's first court appearance is non-existent.

LIST OF KEY POINTS

Listed below are the key points made about the specific topics covered by this report.

Chapter 2: Legal Aid Queensland and the Office of the Director of Public Prosecutions

Since the 1995 report, some important changes have occurred.

LAQ:

- In 1997, as a result of the decision of the Commonwealth to cease funding for State criminal matters, the structure of LAQ was altered significantly, although its functions remain generally the same as the functions of the LAC.
- To facilitate the provision of legal services by private legal practitioners LAQ has established the duty lawyer scheme and the preferred supplier scheme.
- Apart from two recent fee increases totalling 10 per cent, LAQ fees to private legal practitioners remained unchanged during the review period.

ODPP:

- The role of the DPP changed in 2000 to no longer cover staffing or financial matters. Those matters now lie with the Executive Director of the ODPP, who reports to the Director-General, Department of Justice and Attorney-General.
- During the review period, the ODPP has undergone a number of organisation reviews which have focused on increasing efficiencies and addressing issues identified in the CJC's 1995 report.
- The ODPP's fees paid to external counsel are currently 10 per cent behind fees paid by LAQ.
- The perceived success of the Committals Project has resulted in an annual recurrent allocation of funds from Treasury.

Chapter 3: Legal Aid Queensland: Funding and workload

Revenue trends and sources:

- Between 1994–95 and 1999–2000 legal aid actual revenue increased by 27 per cent.
- Most of the increased revenue came from the Queensland Government, which now provides 35 per cent of total funding; Commonwealth funding remained fairly static over the period under review.
- Unlike the pre-1995 period, which was marked by considerable volatility, revenue has increased steadily from year to year.

Real revenue:

- Legal aid real revenue increased by 16 per cent from 1994–95 to 1999–2000.

Real revenue per capita:

- Legal aid real per capita revenue has shown a slight upward trend since 1994–95, rising by 6.2 per cent.

Interstate comparisons:

- Total revenue per capita increased across all States except Victoria in the period under review.
- The marked differences between jurisdictions in per capita funding identified in the 1995 report had disappeared by 1999–2000. State Government funding of legal aid in Queensland is now comparable with that in other States.

LAQ expenditure:

- Expenditure exceeded revenue from 1995–96 to 1998–99, but declined to below total revenue in 1999–2000.
- LAQ's State revenue has tended to increase at a greater rate than its criminal workload.
- Approximately 70 to 80 per cent of LAQ's criminal expenditure relates to prescribed criminal matters.

Funding reserves:

- Since 1994, LAC/LAQ has maintained a reserve level of around $10–12 million, except for 1999–2000, when the amount rose sharply to about $20 million.

- LAQ is committed to depleting its reserves over a three-year budget cycle to a level of $7 million. LAQ's strategy may include fee increases for criminal law grants of aid, which may result in greater funding of lower court matters.

Chapter 4: ODPP: Funding and workload

Actual revenue, real revenue and expenditure:

- Real funding to the ODPP increased steadily from 1994–95 to 1997–98. Funding in the following three years was fairly stable.
- The rate of expenditure has broadly kept in line with the changes in revenue for the ODPP.
- Base expenditure has more than doubled in the last six years, in part as the result of previous special allocations being incorporated into core funding.

Workload:

- The number of criminal matters handled by the ODPP increased by 53 per cent between 1994–95 and 1999–2000. Most of the increased workload resulted from large increases in the number of sentences and, to a lesser extent, the number of ex officio matters dealt with by the office. There has also been an increase in the number of trials finalised by the ODPP in the last two years.
- Some of the extra funds provided to the ODPP have been spent on additional functions such as victim support.
- ODPP real revenue per matter has declined in recent years.

Interstate comparisons:

- It is difficult to make any meaningful comparisons between State prosecuting authorities because of differences in their structure and functions.
- Per capita funding has increased by the largest amount, in percentage terms, in Queensland. This may, in part, reflect the increase in higher court work being undertaken by the ODPP relative to the work of similar agencies in other States.

Chapter 5: Funding issues

Use of private practitioners, preferred supplier scheme:

- The legal profession (including CLCs) has raised a number of concerns about the preferred supplier scheme.
- A comprehensive independent evaluation of the scheme may be needed to ensure that the preferred supplier scheme is a cost-effective and efficient method of providing legal-aid-funded services, in a manner that is fair to the providers of the service and to their clients.
- Real expenditure on private practitioners for criminal matters remained stable between 1994–95 and 1999–2000. In 1999–2000, the amount outlayed was around $10 million.

Use of private practitioners, duty lawyer scheme:

- The duty lawyer scheme has resulted in significant cost savings for LAQ.
- There were divergent views about the impact which this scheme has had on the quality of legal services being delivered and on other parts of the criminal justice system. If LAQ undertakes a review of its use of private practitioners, it would be advantageous for such matters to be considered.

Use of private practitioners, private counsel:

- There is no clear evidence that greater use of private counsel would be a more cost-effective use of resources by LAQ or the ODPP, although there may be advantages in using private counsel to cover peaks in workload.

Criminal law fee scales

- Apart from two recent increases (totalling 10 per cent), there have been no significant changes in the scales of fees paid to private legal practitioners for legal aid work since the 1995 report.
- Fees paid to private legal practitioners by LAQ currently exceed ODPP fees by 10 per cent.
- There is widespread concern within the legal profession that the fees paid by LAQ and the ODPP are inadequate and that this has had a negative effect on the level of representation available to indigent accused.

- LAQ has recently introduced new fees that will provide some indigent accused people with legal representation before the Magistrates Courts in pleas of guilty. This may have some flow-on savings throughout the criminal justice system, particularly if the accused person opts to plead guilty in the Magistrates Court in lieu of electing to have the matter dealt with in a higher (more expensive) court.

Juniorisation:

- Juniorisation is a major factor contributing to the perception of a funding crisis within LAQ and the ODPP and raises questions about the quality of work being funded by LAQ and being undertaken by or on behalf of the ODPP.
- Juniorisation involves both in-house and private legal practitioners representing LAQ and the ODPP. For in-house lawyers, the issue relates to staffing levels and turnover rates, which are largely driven by the budgets of the ODPP and LAQ. For private lawyers, the issue relates primarily to the current criminal fee structure but also to the willingness of private legal practitioners to undertake legal aid work.

Unrepresented accused:

- It is apparent that unrepresented accused people are at a disadvantage in the criminal justice system.
- Unrepresented accused people pose problems for all courts.
- Pro bono schemes and more generous LAQ assistance in the Magistrates Courts and before the Court of Appeal may alleviate some of those problems.

Victims of crime:

- There is a concern among some stakeholders that the ODPP's services to victims are too limited.

Chapter 6: ODPP: Criminal justice system issues

Coordination of agencies:

- There have been several largely unsuccessful attempts to establish a more coordinated approach to the monitoring and management of the Queensland criminal justice system.
- The consequences of policy initiatives within LAQ and the ODPP for other agencies within the criminal justice system (and vice versa), and for the criminal justice system as a whole, cannot be predicted with any degree of certainty until there is a better understanding of how the system operates. This will not happen until the various agencies within the criminal justice system work within a common information-management environment.
- In the development of a more coordinated criminal justice system any initiative should be taken in consultation with relevant government agencies to maintain a whole-of-government approach.

Jurisdiction of the courts:

- There was widespread concern expressed during the consultation process about the limited types of matters that can currently be dealt with by magistrates.
- Similarly, concern was expressed about the limited types of serious matters that the District Court currently can deal with.
- The election process for indictable offences that can or must be dealt with summarily provides a mechanism for matters to be determined in the higher courts. It would usually be more cost-effective and time-effective for such matters to be determined in the Magistrates Courts.
- Unless legal aid is provided for matters to be determined in the Magistrates Courts, there will be little incentive to have a matter tried summarily where the accused person can elect to have the matter determined in a higher court.

Committals:

- Without adequate pre-pilot data on the Committals Project, it is difficult to determine the true impact of the project.
- The available information does not show any significant change in the outcomes of criminal matters over the life of the Committals Project.
- Committals Project matters assigned by LAQ to private legal practitioners are more likely to be committed to the higher courts, and subsequently pleaded, than those managed in-house.

- Most matters dealt with in the Committals Project are presented by way of a hand-up brief to the court.
- Continuation of the Committals Project is strongly supported by the ODPP, LAQ, the courts and the legal profession.

Court procedures:

- Since the 1995 report, the courts have explored a number of ways of making procedures more efficient and consistent.
- Court listing practices are creating problems for the legal profession where judges unexpectedly become available and little notification is given to both the prosecution and the defence to have matters ready for trial. Such practices not only disrupt the preparation of matters and reduce their readiness, but have also at times led to matters being 'nollied'.

Circuit courts:

- Circuit courts impose a significant financial and administrative burden on the ODPP and LAQ and may be more economically handled by in-house staff.
- Centralisation of at least some regional circuit courts may result in a more efficient use of resources in the criminal justice system.

Ex officio indictments:

- The QPS has established procedures to help ensure the provision of relevant information to the ODPP within two weeks of the matter being listed for an ex officio mention in the Magistrates Court.
- There is a perception within the legal profession that proceeding by way of an ex officio indictment is no longer a more efficient way of having a matter brought before the higher court than by way of committal proceedings — at least, by hand-up committals.
- The private legal profession has made the following suggestions for streamlining the ex officio indictment process:
  - — ODPP to allocate more senior staff for resolving ex officio matters
  - — LAQ to allocate more funding for the early resolution of matters
  - — magistrates to closely monitor the ex officio process
  - — explore administrative alternatives to the current system.

Early pleas

- A plea of guilty to an indictable offence in the Magistrates Court will have flow-on financial and other savings for the criminal justice system.
- LAQ funding for representation for pleas of guilty in the Magistrates Court may encourage legal practitioners to advise clients to plead early in appropriate cases.
- There is wide support for incentives to encourage early pleas of guilty, provided this is done in a way that does not disadvantage the accused.

Disclosure:

- Early and complete disclosure of evidence, by the prosecution to the accused, would encourage early pleas.
- Complete and early disclosure of relevant evidence by investigating and prosecuting authorities is central to the promotion of a fairer and more efficient justice system.
- Suggestions have been made that the obligation to disclose is so fundamental to the efficient operation of the criminal justice system that it should be reinforced by legislation and that the legislation should extend the disclosure obligation to investigative agencies responsible for investigating offences and providing evidence to prosecuting authorities.

1

INTRODUCTION

WHAT IS THIS REPORT ABOUT?

This report is an update of the Criminal Justice Commission's (CJC) 1995 *Report on the Sufficiency of Funding of the Legal Aid Commission of Queensland and the Office of the Director of Public Prosecutions, Queensland* (henceforth referred to as the 1995 report).

WHY WAS THE REPORT PREPARED?

This report has been prepared in accordance with the CJC's statutory responsibility under section 23(c) of the *Criminal Justice Act 1989*[1] to monitor and report on:

> the sufficiency of funding for law enforcement and criminal justice agencies, including the Office of the Director of Prosecutions and the Legal Aid Commission [LAC][2] (so far as its functions relate to prescribed criminal proceedings within the meaning of the *Legal Aid Act 1978*).

In *Boe v. Criminal Justice Commission*, Mr Justice de Jersey held that the nature of this obligation 'necessitates its being discharged on a more or less continual or regular or recurrent basis'.[3] His Honour stated that the CJC should:

> take steps to ascertain the amount being spent by the Government on these agencies [the ODPP and the LAC]; inquire as to the manner in which the agencies apply that money; determine whether the amounts provided are adequate to run the offices properly, to provide efficient service to the public; consider what, if any, necessary services cannot be provided, or provided properly, because of shortage of money, and so on.[4]

The 1995 report was the CJC's first report on these matters. Data on funding trends presented in the 1995 report have been updated regularly through the CJC's *Criminal Justice System Monitor* series. However, the present report is the CJC's first comprehensive update of the 1995 report. It is similar to the 1995 report in structure and approach, but deals with issues that were not apparent then and highlights those issues identified in the earlier report that continue to be of concern.

This introductory chapter outlines the approach that the CJC has taken to discharging its statutory responsibility and describes the data sources and consultative strategies used in the preparation of the report.

THE AGENCIES EXAMINED IN THIS REPORT

Section 23(c) of the Criminal Justice Act refers to 'law enforcement and criminal justice agencies' in general. This phrase encompasses not just Legal Aid Queensland (LAQ) and the Office of the Director of Public Prosecutions (ODPP) but also, for example, the Queensland Police Service (QPS), the Queensland Corrective Services Department, the CJC, the Queensland Crime Commission and the juvenile justice function within the Department of Families.

As noted in the 1995 report, it would be a massive and unmanageable task to comprehensively examine the funding of all these bodies in a single review. Therefore this report, like the 1995 report, focuses only on LAQ and the ODPP. The adequacy of resources provided to other agencies of the criminal justice system continues to be monitored by the CJC through, for example, its *Criminal Justice System Monitor* series.

This series reports regularly on trends in agency budgets, workloads and staffing levels (among other things). Under the Criminal Justice Act, the CJC is also able to conduct more-detailed inquiries into the funding of particular components of the criminal justice system when significant problems in those areas are brought to its attention — as in this case in relation to LAQ and the ODPP.

SPECIFIED CRIMINAL PROCEEDINGS

Section 23(c) of the Criminal Justice Act refers to funding for LAQ 'so far as its functions relate to prescribed criminal proceedings within the meaning of the *Legal Aid Act 1978*'. The Legal Aid Act was repealed in 1997 and replaced with the *Legal Aid Queensland Act 1997*. The reference to the repealed Act in the Criminal Justice Act should now be read as reference to the Legal Aid Queensland Act (section 101 of the 1997 Act). The phrase 'prescribed criminal proceeding' in the repealed Act and in the Criminal Justice Act becomes 'specified criminal proceeding' in the Legal Aid Queensland Act. In this report, the terms 'prescribed criminal proceeding' and 'specified criminal proceeding' are used interchangeably.

The schedule to the Legal Aid Queensland Act defines a 'specified criminal proceeding' for the purposes of that Act as:

> (a) for legal assistance under a legal assistance arrangement with the Commonwealth — a proceeding specified in the arrangement; or
>
> (b) otherwise —
>
> (i) a criminal proceeding before a court other than —
>
> (A) a Magistrates Court; or
>
> (B) the Childrens Court exercising jurisdiction other than the jurisdiction conferred by the *Juvenile Justice Act 1992* in relation to an indictable offence; or
>
> (ii) a committal proceeding for an indictable offence punishable on conviction by imprisonment of more than 14 years; or
>
> (iii) a criminal proceeding before a court mentioned in subparagraph (i) or (ii) that Legal Aid decides; or
>
> (iv) another proceeding, other than a civil proceeding, that the board decides.

Section 15 of the Legal Aid Queensland Act provides that, if an applicant to LAQ for legal assistance is an accused person charged with an indictable offence (see chapter 6 of this report), LAQ:

> must have regard to the desirability of the applicant being represented by a lawyer in a following specified criminal proceeding, whether or not the result of the proceeding is likely to favour the applicant —
>
> (i) a committal proceeding for the offence;
>
> (ii) the applicant's trial or sentencing; or
>
> (b) for an indictable offence under a Commonwealth law — must have regard to the criteria stated in the legal assistance arrangement under which the assistance is to be given.

These proceedings include criminal proceedings in the District and Supreme Courts, and committal proceedings in the Magistrates Court for offences carrying a maximum penalty of imprisonment for 14 years or more. In the 'Agreement between the State of Queensland and Legal Aid Queensland 2000/2001', LAQ agreed to expend Queensland funds in accordance with the allocations and priorities set out in the agreement. 'Specified criminal proceedings'[5] have the top priority of all types of legal assistance to be provided by LAQ (Schedule 2 of the agreement).

Section 23(c) of the Criminal Justice Act requires the CJC to consider only whether LAQ has received sufficient funds to carry out its functions with regard to specified criminal proceedings. The 1995 report noted that the LAC had maintained its resource

commitments for prescribed crime only at the cost of a marked reduction in the level of assistance provided in civil- and family-law matters and non-prescribed crime matters. It was considered important to comment on those broader issues on the basis that, if the CJC were to focus only on the prescribed crime area, 'it would not provide an accurate account of the LAC's overall funding situation …'. No examination is made of non-criminal matters in the present report, given the significant funding changes in 1997, which saw the Commonwealth cease funding of State criminal-law matters, and given that very few civil matters are funded by LAQ. However, this report does comment on funding for non-prescribed crime matters.

SUFFICIENCY OF FUNDING

Like the 1995 report, this report relies primarily on 'real-world' benchmarks to assess the adequacy of the funding of LAQ and the ODPP. These take the form of historical and inter-jurisdictional comparisons.

Historical comparisons involve comparing current levels of revenue, expenditure and service with those of preceding financial years to determine whether:

- funding for each agency has kept pace with inflation, population growth and service demands
- the level of service has deteriorated, improved or been maintained.

The historical approach indicates whether or not the agencies have been given sufficient funds to keep up with changing demand. Its main limitation is that it does not include an independent evaluation of whether the benchmark levels of funding and service provision were themselves appropriate.

Inter-jurisdictional comparisons involve comparing current levels of revenue, expenditure and service of the Queensland agencies with those of equivalent organisations in the other two major eastern States and with Western Australia.[6] Such comparisons give some indication of whether the Queensland agencies have been under-funded relative to their counterparts in other States. The major problem with this approach is that differences in agency functions and statistical reporting processes limit the scope for comparison, especially where prosecuting authorities are concerned.

By using both kinds of benchmarks, the report is able, like the 1995 report, to give a fairly comprehensive account of the funding situation of each agency, indicate whether the situation has deteriorated or improved in recent years, and make some useful comparisons. Where appropriate, the report also comments on structures and processes for setting, adjusting and monitoring funding levels and for ensuring that these funds are used cost-effectively.

However, the CJC does not see its responsibility under section 23(c) of the Criminal Justice Act as requiring it to recommend that funding for either agency be adjusted by some specific amount. The reality of the political and budgetary process is that the amount of money available for distribution among the various government programs is limited and there are many areas (for example, education, health, the environment) where there are equally strongly argued claims for increased funding. It would be presumptuous of the CJC to say that LAQ or the ODPP is more deserving of extra funds than these other areas — this is a decision that can, and should, only be taken by governments. The primary role of bodies such as the CJC should be to help ensure that the Government, LAQ and the ODPP are provided with all the information necessary to enable them to make reasonable funding assessments, and that other bodies with an influence over the funding of these agencies are properly informed.

The report focuses primarily on what the agencies concerned *are currently required to do*, rather than on what they might be doing in the future. It does not try to take account of the cost of additional activities; the focus is on past and present responsibilities and funding levels.

Inefficiencies in the operation of the criminal justice system will obviously place demands on the resources of LAQ and the ODPP and thus adversely affect the performance of

these agencies in fulfilling their statutory responsibilities. Such inefficiencies are therefore relevant to any attempt to assess the sufficiency of funding of those agencies. For that reason, this report reviews a number of issues concerning the criminal justice system in rather more detail than the 1995 report did.

During the consultation phase of this report, it became apparent that there is a widespread perception in the legal community that both LAQ funding and ODPP funding are facing a crisis. In this report we examine various aspects of that perception in light of the financial analyses that have been conducted for both agencies.

PAYMENTS TO PRACTITIONERS

Under section 23(c) of the Criminal Justice Act, the CJC's responsibility is to investigate the sufficiency of *agency* funding — not the adequacy of payments to individual practitioners. However, it is relevant to look at such payments when determining whether the agencies concerned are able to attract suitably qualified practitioners to undertake the work required and to deliver an acceptable standard of service. While it has been asserted that a substandard service is being provided by private practitioners because the fees are too low, only anecdotal evidence to this effect has been submitted to the CJC.

Although this report does not seek to resolve the issue of whether payments to practitioners are adequate, it does:

- present historical data on trends in legal aid payments to legal practitioners, particularly in relation to specified criminal proceedings (however, because the provision of LAQ-funded legal services by private practitioners has changed so dramatically since the 1995 report, the present report does not attempt to make comparisons with the provision of services before the introduction of the preferred suppliers scheme)
- discuss the concern that practitioners have expressed about the level of payment and the processes for determining and paying fees in individual cases
- compare the fees paid to private practitioners by LAQ with those paid by the ODPP.

It is hoped that this will contribute to more informed discussion about the issue of whether existing fee structures and payment practices need to be revised — and, if so, in what ways.

MANAGEMENT ISSUES

The main purpose of this review has been to update the CJC's 1995 assessment of the sufficiency of funding, not to examine the internal management practices of LAQ or the ODPP. Management matters relating to those agencies have already been dealt with in a range of reviews undertaken by other bodies.

Nevertheless, it has not been possible to divorce the task of assessing the sufficiency of funding from consideration of the way those funds are managed and the efficiency of the processes that they support. Inevitably, in the preparation of this report a number of issues about management and policy were brought to the CJC's attention, often on the advice of the two agencies themselves. We believe that it has been appropriate to discuss some of those issues.

DATA SOURCES AND THE CONSULTATION PROCESS

The information on which this report is based comes largely from the following sources:

- published information contained in LAQ and ODPP annual reports and substantial additional unpublished material provided by these agencies
- extensive consultation with senior officers of these agencies and with representatives of other key agencies and organisations, including the Queensland Law Society, the Bar Association of Queensland, the Queensland Aboriginal and Torres Strait

Islander Legal Services Secretariat, the Queensland Ombudsman's Office, the Department of Justice and Attorney-General, community legal centres, the magistracy, judges of the District Court, the Chief Justice, judges and administrators of the Supreme Court, the Premier's Department, Treasury, private legal practitioners, the Crown Prosecutors' Association, and the Queensland Police Service

- submissions from a range of organisations and individuals, received both as a result of direct approaches made by the CJC and in response to a call for submissions published in the media on 24 February 2001 (see appendix A of this report for a list of the submissions received and consultations undertaken)
- published information obtained from legal aid offices and Directors of Public Prosecutions in other Australian jurisdictions, and from an extensive literature search.

1995 RECOMMENDATIONS AND THE FINDINGS OF THIS REPORT

Appendix B of this report sets out the recommendations made by the CJC in the 1995 report and also records how the agencies concerned responded.

The present report does not make recommendations. Rather, it makes a number of points that may help the Government and the agencies concerned to deal with the issues raised.

REPORT STRUCTURE

The remainder of this report is organised as follows:

- Chapter 2 describes the evolution, structure and functions of LAQ and the ODPP.
- Chapter 3 examines LAQ funding and workload.
- Chapter 4 examines ODPP funding and workload.
- Chapter 5 examines efficiency issues relating to the use of LAQ and ODPP funds.
- Chapter 6 describes a number of criminal justice system constraints on the effective use of LAQ and ODPP funding.
- Chapter 7 is a conclusion to the report.

Details of sources cited in this report are given in the reference list that follows the appendixes.

Endnotes: Chapter 1

1 The section gives effect to recommendation BI2(f) of the 1989 Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry).

2 The Legal Aid Commission (LAC) became Legal Aid Queensland (LAQ) in 1997, so in this report LAC and LAQ refer to the same organisation but at different dates.

3 Supreme Court of Queensland, 10 June 1993 [93.186], unreported, p. 11.

4 Ibid., p. 4.

5 Specified criminal proceedings are defined in Schedule 2 of the 'Agreement between the State of Queensland and Legal Aid Queensland 2000/2001' as including District and Supreme Court criminal proceedings, indictable offences in the Childrens Court at every stage of the proceedings, appeals to the Court of Appeal or the High Court in respect of criminal charges, references to the Mental Health Tribunal in respect of prescribed criminal proceedings, committal proceedings in the Magistrates Court in respect of charges for which the maximum penalty exceeds 14 years, breaches of probation, community service and suspended sentences in District and Supreme Courts, and bail.

6 In the 1995 report, comparisons were made with only New South Wales and Victoria.

2

LEGAL AID QUEENSLAND AND THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

This chapter gives the following overview of the structure, funding and operations of Legal Aid Queensland (LAQ) and the Office of the Director of Public Prosecutions (ODPP):

- **Legal Aid Queensland**
  - establishment
  - constitution and statutory functions
  - funding
  - structure
  - criteria for deciding who is entitled to LAQ-funded legal representation in criminal law matters
  - funding of advice and representation for criminal law matters
  - payment of fees to private practitioners
- **Office of the Director of Public Prosecutions**
  - establishment
  - statutory functions
  - funding
  - structure
  - management practices
  - payment of fees for private counsel
- **LAQ and ODPP involvement in the Committals Project courts.**

LEGAL AID QUEENSLAND

Establishment of LAQ

In response to the Commonwealth Government's decision to cease funding of legal aid services for State matters from 30 June 1997, the Queensland Government enacted the *Legal Aid Queensland Act 1997*, which established a State legal aid body (LAQ) to replace the then-existing Legal Aid Commission, Queensland (LAC). The functions of LAC and LAQ are virtually identical.[1]

Upon its establishment, LAQ entered into an agreement with the Commonwealth Government on funding for it to provide legal services for matters covered by Commonwealth law, the main area being family law. LAQ also has an agreement with the Queensland Government on funding for matters covered by State law. The Commonwealth-funded and State-funded work of LAQ are quite distinct, and in this report little mention will be made of Commonwealth funding or Commonwealth-funded matters. Commonwealth funds are no longer available for State criminal law work, which is the focus of this report.

The constitution of LAQ and its statutory functions

LAQ is a statutory body with a five-person Board that is responsible for the overall management of the organisation. Section 49 of the *Legal Aid Queensland Act 1997* stipulates the composition of the Board, and the requirement that the selected members have knowledge and experience in one or more of the following areas:

- commerce
- economics
- finance
- management or
- the provision of legal services.

The Governor-in-Council appoints all Board members. One of the members must be nominated by the Minister as a person representing the interests of legally assisted persons (s. 49(2)).

The **Board's powers** are outlined in s. 54 of the Legal Aid Queensland Act, which enables it to:

(a) exercise a power that Legal Aid may exercise; and

(b) decide Legal Aid's priorities and strategies; and

(c) issue guidelines about particular types of application that the board requires be referred to it for its decision; and

(d) issue standards about giving legal services under this Act; and

(e) deal with a matter under guidelines mentioned in paragraph (c).

The Chief Executive Officer (CEO) is appointed by the Governor-in-Council on the Board's recommendation. The Board may delegate its powers to the CEO (s. 55). In addition, the Board is responsible for the daily operations of LAQ.

The CEO must ensure that the priorities and strategies determined by the Board are carried out through the work of LAQ. The CEO is also responsible, under the Board, for providing legal services to people entitled to legal assistance under the Act, and for arranging and supervising the provision of legal services to such people by LAQ lawyers.

The **main functions** of LAQ are set out in s. 43 of the Legal Aid Queensland Act. They include:

- ensuring that legal assistance is provided in the most effective, efficient, commercial and economical manner
- managing LAQ's resources to make its services available at a reasonable cost to the community and on an equitable basis throughout the State
- controlling and administering Commonwealth and State legal aid funds
- investigating new ways to deliver legal assistance in order 'to minimise the need for individual legal services in the community'.

Additional functions (s. 44) include:

- ensuring that the provision of legal services is carried out consistently and without prejudice to the independence of the legal profession
- where appropriate, working with other legal aid entities, professional legal groups and other bodies that are associated with or have an interest in giving legal assistance
- where appropriate, liaising with legal professional groups for the provision of legal services by private legal practitioners
- maximising the use of voluntary services provided by LAQ agents
- establishing local offices and other arrangements to make legal aid services available to people who are eligible for legal assistance
- arranging for the provision of duty lawyer services at courts
- endeavouring to provide interpreters, marriage counsellors, mediators, welfare and other appropriate services to legally assisted people
- encouraging law students to provide supervised voluntary legal assistance

- subject to a legal-assistance arrangement, providing financial assistance to community legal centres or other bodies providing legal assistance.

Funding of LAQ

The funding for LAQ comes from both Commonwealth and State Governments and from other State sources. When the 1995 report was written, Commonwealth funding was able to be used for State matters, including criminal law matters. Since 1997, however, the Commonwealth's contribution to LAQ has been restricted to the funding of Commonwealth matters. Chapter 3 of this report gives a detailed analysis of LAQ's funding since 1995.

An additional $10 million has been allocated to LAQ over four years by the State Government from 1 July 2001:

> … to enhance services by LAQ and community legal centres. This additional funding will ensure that legal assistance is available to those who need it most and not just those who can afford it. The enhanced services will benefit a range of groups in the community, including Indigenous women, assault victims, the mentally ill and children of families involved in child protection proceedings.[2]

Commonwealth funding

LAQ entered a three-year agreement with the Commonwealth Government for 1997–2000 and a four-year agreement from July 2000. The three-year agreement involved a funding cut of $2 million, with funding limited to $18 million per annum. LAQ has described the significant change in Commonwealth funding since 1997 as follows:

> The significant change to Commonwealth funding was the limiting of funding to cost of grants for legal assistance for matters arising under Commonwealth law and being matters of priority. The practical effect was that no longer could Commonwealth funding be applied to Commonwealth persons charged with State criminal law matters, e.g. an unemployed person charged with an offence under the Queensland Criminal Code.[3]

The four-year agreement from July 2000 provides, in addition to the $18 million per annum, funding of $19.03 million over four years:

> It is more a purchaser/provider agreement with defined outputs at an estimated price. The Commonwealth has stipulated the Priorities and Guidelines [as has the State Government in the State Agreement and pursuant to the *Legal Aid Act 1997* in relation to State-funded matters].[4]

Commonwealth priorities include, in descending order, family law matters, Commonwealth criminal law matters, and civil law matters arising from a Commonwealth statute.[5]

State funding

The balance of LAQ funding comes from a number of Queensland-based sources:

- the Queensland Government
- interest on solicitors' trust accounts[6]
- income from professional costs recovered in matters that were successfully settled or resolved in favour of the person granted legal aid[7]
- client contributions,[8] and
- interest on investments.[9]

The State funds cover:

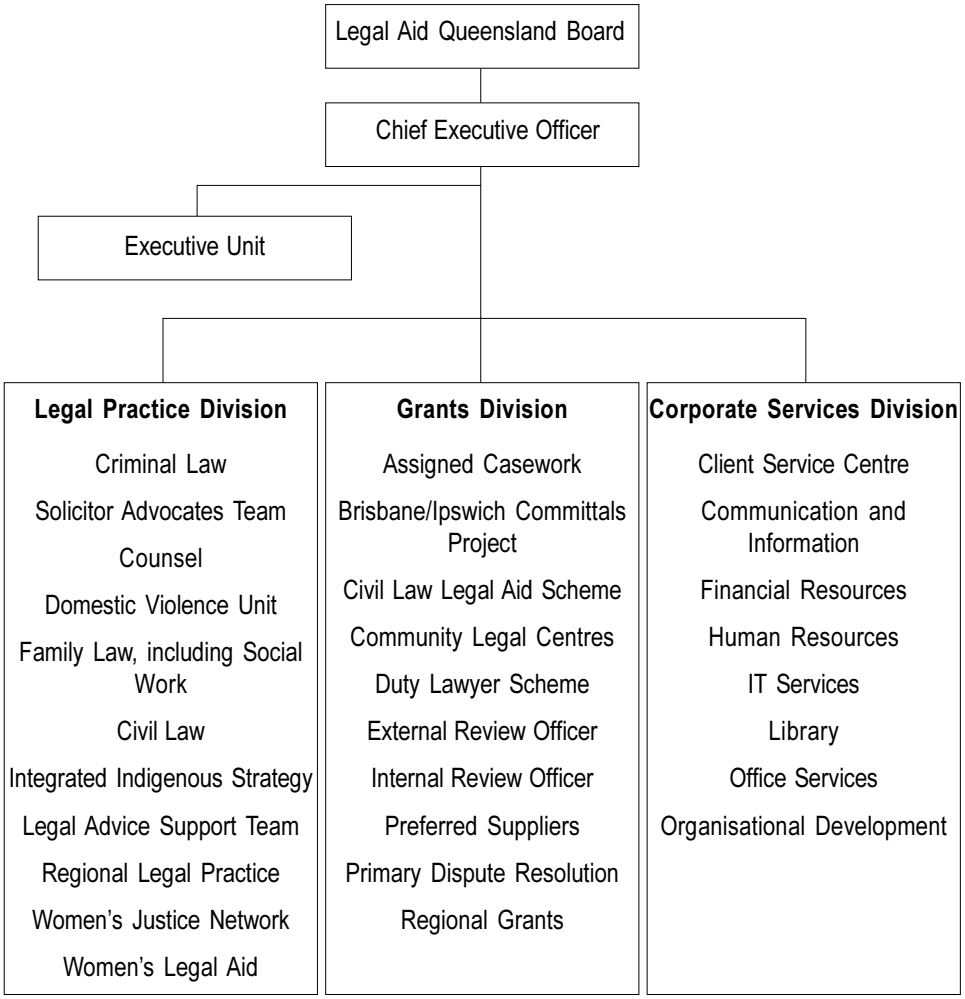
- grants of aid in State law matters (mostly criminal)
- community legal centres
- in-house salaries, overhead and disbursement costs.[10]

Structure of LAQ

LAQ has a head office in Brisbane and 13 regional offices. Almost 400 private law firms throughout the State provide legal services on behalf of LAQ (these are 'preferred suppliers', as discussed in chapter 5 of this report).

Figure 2.1 outlines the current structure of LAQ.

Figure 2.1 — Organisational structure of Legal Aid Queensland



Source: Legal Aid Queensland, *Annual Report 1999/2000*, p. 8.

The **Legal Practice Division** conducts in-house case work in criminal law in all jurisdictions, as well as family law and civil law case work. The division is responsible for the legal practice activities of LAQ's regional offices.

Regional offices undertake the full range of legal aid services, including, for example, managing cases in which legal assistance has been approved and assigned to preferred suppliers, conducting in-house case work and providing duty lawyer services.

Counsel in the Legal Practice Division represent legally aided clients in criminal matters on appeals, trials, sentences and bail applications in the superior courts, and at committal hearings, summary trials and sentences in the Magistrates and Childrens Courts. The head Counsel is the Public Defender.

The Solicitor Advocates Team within the Legal Practice Division is a specialist unit made up of solicitors who prepare and appear in a wide range of District and Magistrates Court matters and appear for clients in both Commonwealth and State matters on trials and sentences in the Magistrates Court, on sentences in the District Court and as duty lawyers in the specialist Magistrates Courts. The team is responsible for representing clients in the

Supreme Court in bail applications, and for conducting appeals from the Magistrates Court to the District Court.

During 1999–2000, the Legal Practice Division undertook a significant percentage of the crime work funded by LAQ. Counsel did a record number of circuits during the year — a total of 85 weeks throughout the State.

The **Grants Division** is responsible for purchasing legal services throughout the State 'in line with Commonwealth and State government funding priorities in order to maximise the availability of legal assistance to economically and socially disadvantaged Queenslanders'.[11] More specifically, in relation to criminal law matters, the Grants Division:

- processes legal aid applications[12]
- processes preferred supplier accounts
- manages the relationship between LAQ, private practitioners, in-house practitioners, community legal centres and clients
- manages the community legal centre funding program[13]
- administers and coordinates the duty lawyer scheme[14]
- oversees LAQ-funded casework undertaken by private legal practitioners, and
- administers the Committals Project.

Entitlement to LAQ-funded legal representation for criminal law matters

Apart from services provided by the duty lawyer scheme, grants of assistance for legal representation may be subject to a means test and/or a merit test, and to LAQ guidelines.

Means test

The means test is based on gross household income and assets and is regularly reviewed to keep it in line with cost-of-living increases. Applicants for legal assistance who receive a Department of Social Security benefit are automatically deemed to be eligible for legal aid provided they are within the assets test guidelines. People under 18 years of age are not subject to the means test. In some cases an initial contribution may need to be made by the client towards the cost of the grant.

Merit test

The merit test applies to all applications for legal assistance *other than for* 'specified criminal proceedings'. Section 15 of the Legal Aid Queensland Act provides that, in relation to State criminal matters, LAQ:

> must have regard to the desirability of the applicant being represented by a lawyer in a following specified criminal proceeding, whether or not the result of the proceeding is likely to favour the applicant —
>
> (i) a committal proceeding for the offence;
>
> (ii) the applicant's trial or sentencing.

For all other matters, the merit test applies. The merit test is necessary because there are limited public funds available for legal aid. According to the 'Agreement between the State of Queensland and Legal Aid Queensland 2000/2001', the test has three facets:

- legal and factual merits — the 'reasonable prospects of success' test
- the 'ordinarily prudent self-funding litigant test', and
- the 'appropriateness of spending limited public legal aid funds' test.[15]

The 'reasonable prospects of success' test is described thus:

> Where it appears on the information, evidence and material provided to LAQ that the proposed actions, applications or defences for which legal aid funding is sought have no reasonable prospects of success, then legal aid is refused.

The agreement gives this background to the 'ordinarily prudent self-funding litigant' test:

> Legal aid is a benefit funded by the public through Government. Many members of the public who are above the means test threshold for the granting of legal assistance have their own access to justice constrained in whole or in part because of limited financial resources. To reduce the inequity between those who have access to assistance and those who are marginally excluded, strategies are to be adopted which will provide solutions to assisted clients' problems at minimum cost. The approach to litigation of an 'ordinarily prudent self-funding litigant', one without 'deep pockets', would be to seek to resolve the matter within a specified, limited dollar application.

The test is defined in this way:

> Where it is considered that the 'ordinarily prudent self-funding litigant' would not risk his or her funds in proceedings, then neither will limited legal aid funds be risked in proceedings.

Guidelines

LAQ issued policy guidelines on 1 July 1998 for the provision of legal assistance for criminal matters in the following order of priority:

Specified criminal proceedings:

- District and Supreme Court criminal proceedings
- Indictable offences in the Childrens Court at every stage of the proceedings
- Appeals to the Court of Appeal or the High Court with respect to criminal charges
- References to the Mental Health Tribunal in respect of prescribed criminal proceedings
- Committal proceedings in the Magistrates Court in respect of charges for which the maximum penalty exceeds fourteen (14) years
- Breaches of probation, community service and suspended sentences in District and Supreme Courts
- Bail

Committal proceedings:

- Committal proceedings in prescribed criminal proceedings in the Brisbane and Ipswich Magistrates Courts during the pilot project [see the discussion of the Committals Project later in this chapter]

Summary criminal prosecutions:

- Summary trials not involving traffic prosecutions where there is a real prospect that the accused, if convicted:
  - — would be imprisoned
  - — would lose the capacity to continue in his or her usual occupation.

Pleas of guilty in the Magistrates Court:

> Pleas of guilty in the Magistrates Court where it is likely the applicant will be imprisoned or the applicant has a limited ability to give instructions because of physical, mental, intellectual or language disability.[16]

LAQ-funded advice and representation for criminal law matters

Legal advice and information

This service provides one-off legal advice for up to 20 minutes. The client is given an understanding of the legal issues involved in the matter and the steps required to resolve it. In some cases, minor assistance such as writing a letter or making a telephone call might also be rendered. The service may include helping a person to complete an application for legal assistance for an ongoing legal matter, and the client is advised at the interview whether he or she is eligible for further LAQ assistance.

Until 20 July 1992, this service was provided by private legal practitioners (who were reimbursed by the LAC) as well as by LAC staff. Since 1 July 2000, legal advice has been

provided by LAQ free of charge, with no means test applied. The means test was considered an administrative burden with limited financial benefit: 'The amount collected by way of legal advice hardly matched the administrative costs incurred in collecting.'[17]

Currently LAQ provides legal advice for the following matters:

- family law
- criminal law
- common civil law matters such as personal injury, consumer credit, discrimination and motor vehicle accidents.

In 1997 LAQ established a Call Centre that provides legal advice, information and referrals to all Queenslanders for the cost of a local call. The Call Centre replaced the Legal Aid 'Telephone Information Service', giving a more efficient and consistent information service:

> [After training,] Call Centre operators emerge highly trained in communication techniques, computer skills and a sound knowledge of legal processes. Each Call Centre operator is supported by a comprehensive database developed by Legal Aid solicitors to answer legal queries with greater efficiency and consistency. The database consists of 120 legal information screens, a glossary of 1,200 legal terms and a referral list for 1,500 community agencies.[18]

In 1999–2000 the Call Centre answered 223,878 queries, of which 56 per cent were calls for legal information. Of those, 16 per cent related to criminal law.[19]

The work of the Call Centre is supplemented by the community education and information activities performed by LAQ. In September 2000, LAQ launched a self-help kit for people appearing before the Magistrates Court on criminal charges, to help them understand the court process and what to do when entering a plea of guilty or not guilty. Such activities aim to inform people of LAQ services and increase community awareness of legal rights and responsibilities.

As part of LAQ's commitment to providing cost-effective and efficient legal services, it administers funding for 27 community legal centres throughout the State on behalf of the Commonwealth Government, the State Government and the Grants Committee of the Queensland Law Society. Community legal centres are community-based organisations that provide free legal advice and assistance to members of the community in a range of general and specialist legal areas. In 1999–2000, the funding provided to Queensland community legal centres through LAQ was $4,585,040.[20] The majority of services provided by community legal centres have not involved representing clients in prescribed criminal proceedings.[21]

Preferred suppliers

In the period under review in the 1995 report, the LAC had the practice of 'assigning', or referring, grants of legal aid to members of the private legal profession to perform services on its behalf. There was no restriction on which private legal practitioners could apply to the LAC on behalf of their clients for funding. If the client qualified under the LAC's means and merit tests and guidelines, funds would be paid to the private legal practitioner according to the LAC's scale of fees and payment practices. This scheme has now been replaced by LAQ's preferred supplier scheme.

The current preferred supplier scheme[22] arose out of a pilot project designed to provide a quality service to clients at a reduced cost to the LAC.[23]

The pilot project, approved in March 1995, involved seeking tenders for 50 per cent of assigned prescribed criminal cases in the Brisbane, Southport and Cairns District Courts.[24] Legal practitioners were asked to tender for blocks of 25, 50 or 100 matters. From the tenders received, 12 law firms were chosen. An evaluation of the pilot project was conducted by Griffith University, which recommended that the LAC adopt the preferred supplier model. The evaluation found that the quality and efficiency of those criminal cases that were managed by private tenderers were not compromised by the new model (although the interviews conducted as part of the evaluation suggested otherwise). Private law firms reported that tendering work provided certainty of income.[25]

In February 1997, after the pilot project, LAQ launched the preferred supplier scheme as a major initiative. The aim of the scheme was 'to create a more effective and efficient system of delivering legal services through private practitioners, which will benefit private practitioners, clients and Legal Aid Queensland'.

Legal Aid Queensland describes its strategy in developing the preferred supplier scheme as:

> … to implement a preferred supplier scheme which assured quality legal aid services and provided improved service to the firms involved through electronic lodgement of applications, notification of decisions and payment of fees.
>
> Studies showed that while more than 1,000 firms were previously listed as providing legal aid services … about half of the firms only submitted one or two in that time. This was confirmed by the applicants for preferred supplier status who were the firms doing the most legal aid work.[26]

Preferred supplier firms, located throughout the State, deal with one or more of the following legal areas: family law, civil law and criminal law. For criminal law matters, LAQ maintains three lists of preferred suppliers:

1. **Criminal Law — General**
   - All Magistrates Court matters except those that will be committed to the Supreme Court and those that carry a maximum penalty of life imprisonment
   - All District Court matters except those that carry a maximum penalty of life imprisonment, including 'section 222 appeals'[27]
2. **Criminal Law — Juvenile**
   - All matters before all criminal jurisdictions where the applicant is a child
3. **Criminal Law — Life**
   - Committals to the Supreme Court
   - All Supreme Court and District Court matters carrying life imprisonment
   - Appeals to the Court of Appeal and High Court
   - Mental Health Tribunal matters

As at September 2000, there were a total of 300 firms on the Criminal Law — General preferred supplier list, 178 on the Criminal Law — Juvenile list and 172 on the Criminal Law — Life list.[28]

From August 1999, preferred suppliers were required to enter into service agreements with LAQ if they wished to continue to undertake legal aid work. The main objective of the service agreement is to ensure that a quality service is provided to clients. 'In other words, we expect our preferred suppliers to meet our quality service standards.'[29] The agreement includes undertakings by the preferred supplier to:

- accept referrals at legal aid fees;
- not claim or seek to claim any payment from any client or former client in a legal aid matter, unless prior approval is obtained, save where a contribution has been imposed;
- comply with Legal Aid Queensland's Practice and Case Management Standards;
- agree to file audit process; and
- electronically lodge applications and accounts.[30]

LAQ observed that, in relation to the use of the preferred supplier lists in 1999–2000:

> 19,384 criminal law applications for legal aid were processed. The number of criminal law approved grants of legal aid was 16,916. This represents an approval rate of 87.27%.[31] Preferred suppliers handled 10,998 cases, representing 65% of the total approvals with the balance being handled by the in-house legal practice.[32]

The majority of those approvals (10,518 of the total criminal law applications) were for more serious criminal law cases, principally in the District and Supreme Courts.

Duty lawyer services

LAQ coordinates a rostered duty lawyer service in more than 100 Magistrates and Childrens Courts throughout Queensland. The service aims to ensure that people appearing in court on the first occasion after being charged with an offence have access to brief, independent legal advice and representation in court on an adjournment or a plea of guilty.

The duty lawyer service does not provide representation in summary trials or committal proceedings,[33] nor does it provide representation for people facing their first or second drink-driving charge unless a conviction might result in a sentence of imprisonment. Duty lawyer services are provided by LAQ legal staff and preferred suppliers (discussed above).

In the period under review in the 1995 report, the duty lawyer scheme was provided primarily by LAC staff and private legal practitioners paid according to the LAC's scale of fees and payment practices. During the same period, the tendering of duty lawyer services had commenced on a pilot basis in an effort to reduce costs and to ensure a smoother operation of the scheme.

The pilot commenced in 1992–93 with duty lawyer services at Holland Park Magistrates Courts being tendered to a private legal consortium. An expansion of the pilot program in 1993–94 at selected Magistrates Courts and an increase in the proportion of sessions conducted by LAC staff resulted in a saving of $132,900 in the LAC's budget for duty lawyer services provided by private practitioners.[34]

By 1994–95, the tendering of duty lawyer services had expanded to 14 Magistrates Courts and the Lotus Glen Correctional Centre. This resulted in a saving of $143,514 (combined budget allocation and actual expenditure savings). The LAC *Annual Report 1994/1995* observed (p. 16):

> [the savings] were achieved without reducing the quality of service to clients. A recent client survey conducted at major Magistrates Courts where tender arrangements are in operation indicated a high level of satisfaction with duty lawyer services. Magistrates also noted improvements in service in some courts. Quality measures are an inbuilt part of the tender arrangements.

In 1995–96 LAC observed:

> Tendering of duty lawyer services continued to deliver substantial savings without affecting the quality of service to clients, despite over-expenditure in the overall duty lawyer budget … Magistrates at major courts where tendering takes place continued to indicate a high level of satisfaction with services.[35]

In 1997–98 the tendering process was still referred to as continuing to 'deliver substantial savings without affecting the quality of service to clients'.[36]

In 1998–99 it was reported that:

> … we continued with tendered contractual arrangements for the provision of duty lawyer services to achieve best value for money in legal service delivery. Tendering of duty lawyer services has continued to deliver substantial savings without any diminution in the quality of the service delivered. The partnering relationship with our contractors is based on all parties sharing a common interest in the reliable, cost effective delivery of legal services to the community. In 1999–2000 a review of courts will be conducted where rostered duty lawyer arrangements are still in place with a view to examining their suitability for tendering.[37]

LAQ gave a similar report on the operation of the tendered contractual arrangements for the provision of legal aid services in its *Annual Report 1999/2000* (p. 44). In that year a new duty lawyer service was put to tender for the Childrens Court and the Petrie Magistrates Court.

Table 2.1 shows the breakdown of duty lawyer sessions between LAC and LAQ staff solicitors and private legal practitioners from 1994–95 to 1999–2000. Table 2.2 shows the payments made to private legal practitioners for duty lawyer work from 1994–95 to 1999–2000.

Table 2.1 — LAQ duty lawyer scheme

	1994–95	1995–96	1996–97	1997–98	1998–99	1999–2000
No. of sessions						
– Staff solicitor	2,451	2,205	2,459	2,382	2,816	2,940
– Private solicitor	4,815	5,012	4,798	4,878	5,029	5,004
No. of defendants						
– Staff solicitor	15,498	12,919	14,903	15,901	18,479	19,456
– Private solicitor	31,081	33,728	30,801	32,665	36,428	37,326

Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000.

Table 2.2 — Payments made to private legal practitioners for duty lawyer work

Year	$
1994–95	793,614
1995–96	835,153
1996–97	812,128
1997–98	853,210
1998–99	846,629
1999–2000	804,943

Source: LAQ, *Annual Report 1999/2000*, p. 75.

Fees paid to private practitioners by LAQ

Until recently there had been no substantial changes in the LAQ scale of fees since the 1995 report. A 5 per cent across-the-board increase in fees was introduced in September 2000 and a further 5 per cent increase was introduced on 30 April 2001.

LAQ has given the CJC these details of the most recent fee increases:

- the standard Supreme Court preparation fee was lifted to the previous extraordinary preparation fee;
- anomalies in counsel's fees on appeals were addressed;
- fee for hand-up committals in Brisbane and Ipswich Committals Project set at $500;
- non-merit test summary plea fee for section 552A and B matters introduced at $350; and
- fees increased overall by 5%.[38]

In September 2000, LAQ released *Revision of Criminal Law Fees: A Consultation Paper*. The consultation paper was developed in response to concern about the level of fees paid to legal practitioners and also in response to a number of process issues relating to the payment of fees.

The consultation paper set out four options for reform of the fee structure:

1. Retain the present fee structure and processing systems but increase the amounts in the scale by a further percentage figure.
2. Replace the present event scale[39] with a series of lump-sum grants that relate to the level of representation provided — for example, summary plea, District Court trial, Magistrates Court committal, Supreme Court sentence, appeal to Court of Appeal.
3. Replace the present event scale with a series of lump-sum grants based on the way the cases in each category of offences were dealt with.
4. Replace the current event scale for counsel appearing in matters on circuit and adopt a daily fee for counsel undertaking criminal circuit work. The consultation paper suggested that this option could stand alone or be adopted in conjunction with the options detailed above.

The consultation paper was circulated within the legal profession and was discussed at a joint Queensland Law Society–Bar Association of Queensland forum in December 2000.

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Establishment of the ODPP

The ODPP was established in 1984 by the *Director of Public Prosecutions Act 1984*. Before then the Attorney-General and the Solicitor-General, as Crown Law officers for the purposes of the *Criminal Code* (Qld), were the heads of the criminal prosecution system.

The Director of Public Prosecutions (DPP) is the person responsible for the prosecution of anyone charged with an indictable offence under Queensland law. The DPP conducts all proceedings before any criminal court, including the Court of Appeal and the High Court of Australia. The DPP is appointed by the Governor-in-Council (s. 5(1) of the Director of Public Prosecutions Act) and discharges his or her statutory responsibilities through the ODPP (s. 4A(2)). The DPP must be a lawyer who has been admitted to practice for not less than 10 years (s. 5(1A)).

Although s. 10(2) of the Act requires the DPP to be accountable to the Minister, this accountability must not impede the DPP's authority and independence in any way.

Statutory functions of the ODPP

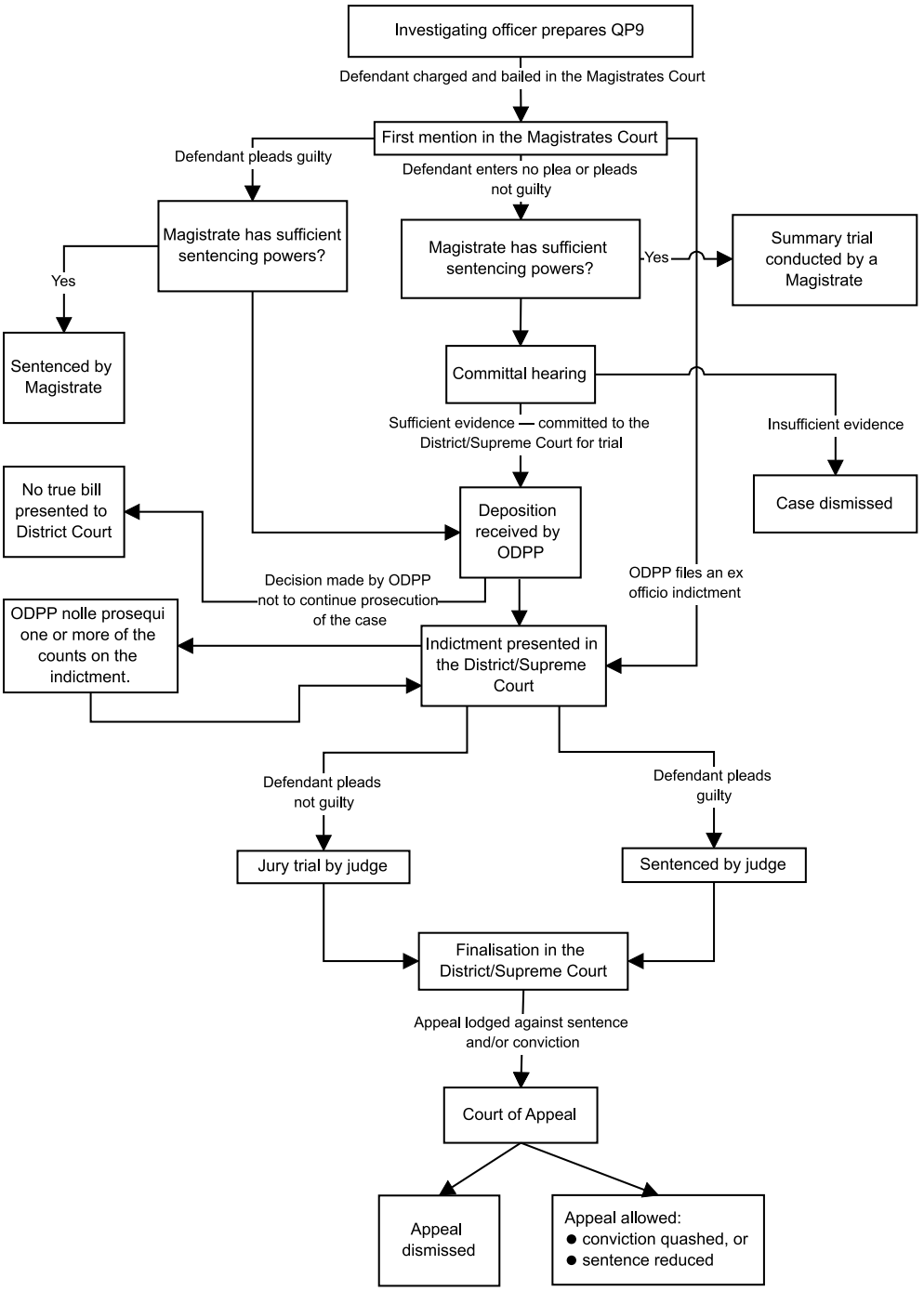
The functions of the ODPP are prescribed in s. 10(1) of the Director of Public Prosecutions Act. The primary function of the DPP is to prepare, institute and conduct all criminal proceedings in the District and Supreme Courts throughout Queensland on behalf of the Crown. Details of the amount and type of work done by the ODPP can be found in the DPP's *Annual Report 1 July 1999–30 June 2000*.

The work of the ODPP falls into three categories:

- **Case preparation**. In-house lawyers and staff of the ODPP are assigned cases and are responsible for the preparation of those cases for court. Case preparation involves identifying witnesses, gathering evidence and having all relevant material in support of the case ready for presentation at the trial.
- **Court attendance**. Court attendance involves presenting cases before the court at bail applications, mentions, committal hearings, trials, sentences or appeals. In-house lawyers generally appear at bail applications and mentions. Barristers employed by the ODPP and barristers briefed from the private bar perform the role of crown prosecutor at committals,[40] trials, sentences and appeals.
- **Victim support**. Information and support are provided to victims and their families before and during the trial. Where specialised assistance is considered necessary, the victim is referred to an appropriate professional person or organisation.

The role of the ODPP can be seen in the flow chart below, which tracks the process of a typical criminal prosecution of an indictable offence where the matter proceeds to trial.

Figure 2.2 — Flow chart of the criminal prosecution process



Source: Adapted from, *Evaluation of Brisbane Central Committals Project Magistrates Court*, commissioned by the Department of Justice and prepared by Coopers & Lybrand Consultants, p. 19.

Notes:

1. In the case of those matters that do not proceed all the way to trial:
   - the defendant may be discharged in the Magistrates Court
   - the defendant may, depending on the seriousness of the charge/s, be dealt with summarily in the Magistrates Court
   - the defendant may plead guilty in the Magistrates Court to the indictable charge/s and, again depending on their seriousness, be sentenced or committed for sentence to the District or Supreme Court
   - after committal for trial the accused may enter a plea of guilty (at the presentation of the indictment or at any time up to and including the trial)
   - the DPP can, at any stage, discontinue proceedings, e.g. for want of sufficient evidence.
2. Before the trial the ODPP may be involved in other pre-trial procedures such as applications for orders for body samples and responding to defence applications for bail.

Funding of the ODPP

Under s. 32 of the Director of Public Prosecutions Act, the Director-General of the Department of Justice and Attorney-General has administrative and financial control of the ODPP. Consequently, decisions on the allocation to the ODPP of funds received in the budget are made by the Director-General of the Department in the context of departmental priorities.

The funding of the ODPP is adjusted on an ad hoc basis and when additional judges are appointed. The 'judges formula', as it is commonly known, provides that the ODPP be funded for one additional prosecutor and clerk every time an additional judge is appointed. The formula recognises that the appointment of an additional judge will generate more work for the ODPP because of the increased number of cases that can be handled by the court system at any one time.

The ODPP receives Government funding ($19,692,500 in 1999–2000) and 'administered revenue' ($982,866 in 1999–2000). The source of administered revenue is the confiscation of profits of crime, which are returned directly to consolidated revenue.

In the 1995 report, the CJC expressed concern that the funding increases over the period then under review had not taken sufficient account of overall workload increases in the ODPP. It recommended that, as a matter of priority, the ODPP should develop workload-measuring systems capable of giving reasonably accurate information about the number of person-hours/days associated with its various activities. The CJC considered that, without such measures of workload, the ODPP would have difficulty in pressing its claims for additional resources. It is understood that the ODPP has attempted to introduce workload-measuring systems, such as time-costing, but without success.

A detailed analysis of ODPP funding is given in chapter 4 of this report.

Structure of the ODPP

The ODPP is part of the Criminal Justice Program of the Department of Justice and Attorney-General. The head office is in Brisbane, with regional offices in Ipswich, Beenleigh, Southport, Maroochydore, Toowoomba, Rockhampton, Townsville and Cairns.

The DPP is responsible for all legal issues and the Executive Director of the ODPP is responsible for all human-resource and financial issues within the ODPP. The Executive Director reports to the Director-General, Department of Justice and Attorney-General.

A Legal Practice Manager (LPM) is in charge of each regional office of the ODPP. LPMs report to the Executive Director of the ODPP on human-resource and financial issues and to the DPP on legal issues.

Whereas the DPP, assisted by the Deputy Director, is responsible for the overall functioning of the ODPP, the work of the organisation is divided into three regions — Brisbane, North and South. The Executive Director manages the Brisbane head office, and an Operations Director (North) and an Operations Director (South) have the responsibility for managing the regional offices within their respective districts.

In the year 2000, all delegations of authority relating to financial and human-resource responsibilities within the ODPP were removed from the position of DPP. Those delegations now lie with the Executive Director.

The Deputy Director of Public Prosecutions is responsible for managing the Appeals and Specialist Services Division, which handles appeals to the District Court (section 222 appeals), to the Court of Appeal and to the High Court, and matters before the Mental Health Tribunal.

Each district office employs a team of lawyers, paralegals and administrative staff, whose daily operations are managed by a Senior Crown Prosecutor/Legal Practice Manager. The Brisbane Office is divided into two Legal Practice Groups, each managed by a Legal Practice Manager. Group 1 handles the prosecution of cases before the District and Supreme Courts, Brisbane, and matters relating to confiscation of the proceeds of crime.

Group 2 manages the Brisbane Committals Project, which is outlined later in this chapter.

Prosecutions are conducted by barristers employed on a permanent basis within the ODPP[41] or by members of the private bar who are briefed by the ODPP to appear in individual cases.

ODPP management practices

Issues relating to the management of the ODPP were comprehensively explored in the 1993 report of the Queensland Administration of Criminal Justice Review Committee (QACJRC),[42] including, for example, concern that the system did not allow enough early intervention by decision-makers and that there was inadequate pre-trial preparation and a lack of obvious bases for the exercise of prosecutorial discretions. The QACJRC recommended a number of steps to rectify such problems, for example that:

- the ODPP should be reorganised into prosecution teams, which would have responsibility for the conduct of cases from receipt of depositions to conclusion of the matter
- depositions should be assessed by a senior qualified legal officer (solicitor) within each team as they are received from the Registry and, at an early stage, be sorted into major and minor cases
- there should be early examination of cases by professional staff able to take any action or decision required in relation to these matters
- where the Crown decides that it may accept a plea to a lesser charge or to only some charges, the responsible officer in the prosecution team should be authorised to contact the defence and indicate this
- members of each prosecution team should be located together
- prosecutorial discretion should be more widely devolved and most decisions be subject to an exercise of prosecutorial discretion made by a proposed Consulting Prosecuting Solicitor or by a Consultant or Senior Crown Prosecutor
- a statement of prosecution policy and guidelines should be published as a matter of priority.[43]

The CJC's 1995 report (p. 99) recommended that:

> the State Government, in consultation with the DPP, should review, cost out and, where appropriate, implement the recommendations of the Queensland Administration of Criminal Justice Review Committee (1993) relating to the restructuring and reorganisation of the DPP.

In response to the recommendations of the QACJRC and those of the CJC in the 1995 report, the ODPP has made changes to improve the agency's structure, management and productivity.[44] Some of them are briefly described below. These are in addition to the ODPP's commitment to the continuation and expansion of the Committals Project.

Legal Practice Groups

Following the recommendations of the QACJRC (1993) and of the CJC in its 1995 report, the ODPP has reorganised itself into Legal Practice Groups under designated Legal Practice Managers (LPMs). The LPM provides a quality-assurance process by checking and signing indictments and reviewing cases before matters go to trial.

Case management system

The ODPP has introduced a new case management system using a text-retrieval software program, ISYS. The ODPP advised the CJC of the operation of the system as follows:

> Managers can access standardised forms (observation forms) prepared by case officers. The case management system provides a quality assurance program that allows Legal Practice Managers to draw deficiencies in file preparation to the relevant lawyers' attention.

> At the conclusion of trials and sentences both the Crown Prosecutors and the brief-out-Counsel are required to sign off on the files, certifying to the reasons for an action, the consultation undertaken with the arresting officer and the complaint and the appropriateness of the sentence imposed. They are also required to consider whether an appeal should be considered, note favourable or unfavourable remarks made by the Judge or an interested person and comment on the state of preparation by the Legal Officer. Appellate lawyers are in an ideal position to make comment on the conduct of trials and sentence. They often take this opportunity to put forward their views.[45]

Review of briefing-out practices

The CJC recommended in its 1995 report that the ODPP investigate whether there would be any benefit in making greater use of private counsel. In August 2000 the Management Planning and Review Branch of the Department of Justice and Attorney-General, with the assistance of the ODPP, developed the *Options Paper: Briefing Practices in the Office of the Director of Public Prosecutions (Queensland)*. The ODPP examined the options paper and decided to retain its current briefing-out practice of engaging private counsel when additional crown prosecutors are required to attend to peaks in workload. (For further detail, see the discussion of briefing-out practices in chapter 5.)

Implementation of the Weighted Workload Formula

In 1996–97 the ODPP developed a formula to assess the value of case files managed in the office. Case files are examined for the severity of charge(s) and level of complexity, and are given a score that is calculated from an agreed rating scale. As well, staff workload standards were developed, which, together with file ratings, formed the basis of a funding model to guide the allocation of resources. In 1997, Coopers & Lybrand Consultants conducted an evaluation of the ODPP and recommended the continued development and finalisation of the Weighted Workload Formula 'to allow for improved and equitable work allocation'.[46]

Private counsel fees paid by the ODPP

Historically, the ODPP has briefed the majority of its prosecution work internally. External counsel are only used when there is a shortfall of prosecutors or if matters require a degree of expertise that the ODPP does not have at the time. Briefing to external counsel represents a relatively small proportion of the ODPP's total budget. The Department of Justice and Attorney-General's *Options Paper* (2000) noted that in 1998–99 the proportion of brief-out costs in the total budget of the ODPP was 3.46 per cent. From December 1997 until September 2000, ODPP fees were equivalent to fees paid by LAQ. However, the ODPP has not kept pace with the recent increases in fees paid by LAQ; ODPP fees are now 10 per cent behind the LAQ fees scale.[47]

LAQ AND ODPP INVOLVEMENT IN THE COMMITTALS PROJECT

Committals

A committal proceeding generally takes the form of a mini-trial (commonly referred to as a 'full committal'). Committals are held for indictable offences only. (See page 89 for a definition of an indictable offence.) The procedure involves the calling of witnesses and cross-examination, by both the prosecution and the defendant. A committal allows the defendant, upon hearing the evidence presented to the court, to decide whether to plead guilty or proceed to trial.

A committal can also take the form of a brief of evidence to the court. This type of committal is commonly known as a 'hand-up committal'. The brief is prepared by the prosecution and contains details of the offence, witness statements and any other document that provides evidence of the offence. A hand-up brief is prepared by the prosecution and handed up to the magistrate only with the consent of the defendant. The parties may also agree to a hand-up committal subject to the cross-examination of a witness or witnesses.

Committals Project

Between October 1994 and June 1995 a pilot project, based upon protocols between the Queensland Police Service (QPS), the ODPP and LAC, was undertaken at the Ipswich Magistrates Court. The aim of the project was to investigate whether matters would be resolved earlier, and whether those that came before the court would be better prepared, if crown prosecutors were involved in the committals process at an earlier stage,[48] and defendants were legally represented. It was expected that early resolution would help reduce court backlogs and therefore contribute to a more efficient and effective criminal justice system.

The pilot was expanded to the Brisbane Magistrates Court in July 1995. All participating agencies, and reviews by the CJC and by an independent consultancy firm, expressed satisfaction with the pilot, though to varying degrees. As a result, Treasury has adopted the project as an ongoing part of the operations of the ODPP and LAQ and is committed to recurrent funding of the project.

KEY POINTS: OVERVIEW OF LAQ AND THE ODPP

Since the 1995 report, some important changes have occurred.

LAQ:

- **In 1997, as a result of the decision of the Commonwealth to cease funding for State criminal matters, the structure of LAQ was altered significantly, although its functions remain generally the same as the functions of the LAC.**
- **To facilitate the provision of legal services by private legal practitioners LAQ has established the duty lawyer scheme and the preferred supplier scheme.**
- **Apart from two recent fee increases totalling 10 per cent, LAQ fees to private legal practitioners remained unchanged during the review period.**

ODPP:

- **The role of the DPP changed in 2000 to no longer cover staffing or financial matters. Those matters now lie with the Executive Director of the ODPP, who reports to the Director-General, Department of Justice and Attorney-General.**
- **During the review period, the ODPP has undergone a number of organisation reviews which have focused on increasing efficiencies and addressing issues identified in the CJC's 1995 report.**
- **The ODPP's fees paid to external counsel are currently 10 per cent behind fees paid by LAQ.**
- **The perceived success of the Committals Project has resulted in an annual recurrent allocation of funds from Treasury.**

Endnotes: Chapter 2

1 Section 102 of the *Legal Aid Queensland Act 1997* enables reference to the Legal Aid Commission to be taken as reference to Legal Aid Queensland, if the context permits.

2 Letter to CJC from LAQ, 4 July 2001.

3 Letter to CJC from LAQ, 22 January 2001.

4 Ibid.

5 See the Legal Aid Queensland Policy Manual, July 2000.

6 For more information, see the 1995 report, p. 14.

7 Sections 30 and 33 of the Legal Aid Queensland Act provide for LAQ to recover costs and outlays from the unsuccessful party where a costs order has been made in favour of the legally assisted person.

8 Section 18 of the Legal Aid Queensland Act allows LAQ to seek a specified monetary contribution from the assisted person to help cover the expenses incurred in providing legal assistance.

9 LAQ has the power under s. 45(5) of the Legal Aid Queensland Act to invest any money it holds on trust in accordance with the investment powers provided under Part 6 of the *Statutory Bodies Financial Arrangements Act 1982*.

10 Funding detail as it appears on the LAQ website at www.legalaid.qld.gov.au/about_us/funding.htm, p. 1. See also Schedule 1 to the 'Agreement between the State of Queensland and Legal Aid Queensland 2000/2001'.

11 LAQ, *Annual Report 1999/2000*, p. 14.

12 In 1999–2000, the division received 34,933 legal aid applications. Approvals increased to 79% in 1999–2000 from 76% approval in 1998–99 and 72% in 1997–98. Approvals in criminal matters increased from 85% in 1998–99 to 87% in 1999–2000 (LAQ, *Annual Report 1999/2000*, p. 16).

13 In 1999–2000, approximately $4.5 million in funding was provided through LAQ to 27 community legal centres (LAQ, *Annual Report 1999/2000*, p. 15).

14 Duty lawyer services are provided in over 100 Magistrates and Childrens Courts in Queensland (LAQ, *Annual Report 1999/2000*, p. 14).

15 'Agreement between the State of Queensland and Legal Aid Queensland 2000/2001', Schedule 2, Legal Aid Queensland — Service Priorities, p. 10.

16 'Agreement between the State of Queensland and Legal Aid Queensland 2000/2001', Schedule 2, Legal Aid Queensland — Service Priorities, p. 9.

17 Letter to CJC from LAQ, 4 July 2001.

18 LAQ, *Annual Report 1997/1998*, p. 7.

19 LAQ, *Annual Report 1999/2000*, p. 1.

20 Ibid., p. 76.

21 Some community legal centres do represent people on criminal charges and provide duty lawyer services.

22 LAQ also employs private firms to supply legal aid services in remote areas of the State. Legal Aid Queensland's *Annual Report 1999/2000* (p. 42) described these legal service suppliers as 'firms who practise in remote areas of Queensland who have agreed to perform services on behalf of legally assisted persons without necessarily having to enter into a formal agreement with us. There are five remote suppliers currently undertaking legal aid work in Queensland, all but one of whom have entered into a service agreement with us.'

23 This followed the recommendations of a Public Sector Management Commission report in 1992, and the CJC's 1995 report recommendation that the LAC put in place procedures that would enable it to accurately compare the cost-effectiveness of, and the quality of service provided by, private practitioners and in-house staff, and that decisions about the appropriate method of delivering legal aid services be based primarily on the information collected through this process (1995 report, recommendation 8).

24 LAC, *Annual Report 1994/1995*, pp. 20, 23.

25 Queensland Law Society, 'Griffith University team evaluates tender of prescribed crime', *Headnote*, December 1996, p. 37.

26 LAQ, *Annual Report 1997/1998*, p. 8.

27 Section 222 of the *Justices Act 1886* relating to an appeal from a Magistrates Court to a single judge of the District Court.

28 LAQ, *Revision of Criminal Law Fees: A Consultation Paper*, September 2000, p. 11.

29 LAQ, *Annual Report 1998/1999*, p. 30.

30 LAQ, *Revision of Criminal Law Fees: A Consultation Paper*, p. 11. During 1998–99, forums were held with preferred suppliers throughout Queensland to explain the impetus for service agreements and the benefits for clients. Feedback from the forums was taken into account when finalising the terms of the service agreement. See LAQ, *Annual Report 1998/1999*, p. 30.

31 The reasons for refusal were noted as: Guidelines 44%; Means 12%; Merit 26%; Merit and Guidelines 13%; Other 5%.

32 LAQ, *Revision of Criminal Law Fees: A Consultation Paper*, p. 12.

33 Except in Magistrates Court No. 5 in Brisbane, where in-house LAQ lawyers do committal proceedings, mainly by way of hand-up briefs without cross-examination.

34 LAC, *Annual Report 1992/1993*, p. 15; LAC, *Annual Report 1993/1994*, p. 29.

35 LAC, *Annual Report 1995/1996*, p. 15.

36 LAQ, *Annual Report 1997/1998*, p. 17.

37 LAQ, *Annual Report 1998/1999*, pp. 32, 33.

38 Letter to CJC from LAQ, 4 July 2001.

39 'Event scale' is described as 'where each item of work (e.g. preparation, court time, negotiations, conferences, mentions, etc.) attracts a fixed fee' (LAQ, *Revision of Criminal Law Fees: A Consultation Paper*, p. 17).

40 The Committals Project is based on the Brisbane and Ipswich Magistrates Courts. The ODPP performs the role of prosecutor and presents the case to the court. At all other Magistrates Courts, this function is performed by police.

41 As Consultant Crown Prosecutors, Senior Crown Prosecutors or Crown Prosecutors.

42 This committee was appointed by the Queensland Department of Justice and Attorney-General in 1993 to review certain parts of the Queensland criminal justice system, with particular emphasis on the existing practices within the ODPP.

43 *Report of the Queensland Administration of Criminal Justice Review Committee* (chaired by L. W. Roberts-Smith, QC), September 1993, pp. 4–9.

44 The CJC's recommendations, and the responses made to date to those recommendations, are given in appendix B of this report.

45 Letter to CJC from ODPP, 28 February 2001.

46 Coopers & Lybrand Consultants, *Office of the Director of Public Prosecutions — Final Report of the Review of Legal Practice Operation*s, October 1997, p. 54.

47 Letter to CJC from LAQ, 4 July 2001.

48 Traditionally, police prosecutors conduct committals on behalf of the State. In the Committals Project, the ODPP is responsible for the committal and a crown prosecutor appears on behalf of the State. In the courts involved in the Committals Project, the ODPP is responsible for the prosecution in the Magistrates Court and higher courts of all matters that are purely indictable offences (that is, matters that can only proceed by way of committal or by ex officio indictment). For indictable offences that can be dealt with summarily (that is, as a sentence or trial in the Magistrates Court) rather than as a committal, the QPS retains responsibility for the prosecution until it is decided that the matter will be heard in a higher court, at which time the ODPP takes over the prosecution. If the matter is to be dealt with summarily, its prosecution is retained by the QPS. For indictable offences that revert to a summary matter after the ODPP takes over, the ODPP retains the prosecution.

3

LEGAL AID QUEENSLAND: FUNDING AND WORKLOAD

In the 1995 report (p. 26), the CJC commented that:

> There can be little doubt that there is a sense of crisis in the community — particularly the legal community — about the level of funding for the LAC.

In October 2000, the president of the Queensland Law Society noted that 'The legal aid crisis is worsening.'[1]

In 1995 the CJC undertook an appraisal of such claims by presenting detailed evidence on the funding of the Legal Aid Commission (LAC) over the preceding few years. In this chapter we examine the 'crisis' in the light of the funding of LAC and Legal Aid Queensland (LAQ) since 1995 and by comparison with the state of funding documented in our 1995 report.

The chapter:

- examines trends in LAQ's State revenue[2] and its expenditure
- compares the level of State revenue for legal aid in Queensland with levels in New South Wales, Victoria and Western Australia.

STATISTICAL MEASURES USED

This and subsequent chapters make use of the following statistical measures:

Actual revenue and expenditure. These figures show the actual money value of the amount received and spent each year by the agency in question.

Real revenue and expenditure. These figures take account of the impact of inflation by stating the value of revenue and expenditure for each year in June 2000 dollars. In effect, the figures provide a measure of whether the agency's 'buying power' has improved or deteriorated over the period under review. To allow comparison of figures for the whole period, real revenue values are calculated by applying annual increases in the weighted average of the consumer price index for eight capital cities to the yearly actual revenue for each State.

Per capita measures. These measures divide total annual revenue and expenditure of the agency concerned by the population of the State in that year. Per capita measures are particularly useful for comparing the funding of agencies in different States, as they take account of differences in population size and, hence, the demand for services. Such measures can also be used as a rough check on whether changes in agency funding within a particular jurisdiction have kept up with the demand for services.

The revenue and expenditure figures quoted for the various legal aid agencies are extracted from audited accounts included in annual reports of these agencies. All agencies have used accrual accounting in the period under review.

LEGAL AID QUEENSLAND REVENUE

Revenue sources and trends

LAQ revenue comes from two different sources: Commonwealth and State.

1. Under the three-year agreement that began in 1997, the Commonwealth Government agreed to allocate $18 million per year to LAQ for the provision of

legal services that relate only to Commonwealth law. Under the agreement that began in July 2000, the Commonwealth will provide an additional $19.03 million over four years for Commonwealth matters, including family law, veterans' affairs and Commonwealth criminal cases.

2. *S*tate funding comes from several sources:
   - the Queensland Government
   - interest on solicitors' trust accounts[3]
   - income from professional costs recovered in legal matters that were successfully settled or resolved in favour of the person granted legal aid[4]
   - client contributions[5]
   - interest on investments.[6]

The Queensland Government, in fulfilling a 2001 election promise, will allocate an additional $10 million to LAQ at $2.5 million per annum for each of the next four years.

Data on total revenue (for 1994–95 to 1999–2000) and the contribution from the various sources is set out in table 3.1. The table shows that total revenue increased steadily from $42.2 million in 1994–95 to $53.7 million in 1999–2000 — a rise of 27 per cent (see also figure 3.1, on page 26).

Table 3.1 — LAC/LAQ actual revenue and percentage contribution from various sources, 1994–95 to 1999–2000

Revenue	1994–95	1995–96	1996–97	1997–98	1998–99	1999–2000
C'wlth Gov.	19,815,174 (47%)	20,182,551 (45%)	21,859,533 (48%)	20,664,444 (44%)	21,215,061 (43%)	21,328,905 (40%)
Qld Gov.	8,944,000 (21%)	10,012,500 (23%)	11,050,000 (24%)	14,423,000 (31%)	15,803,000 (32%)	18,696,084 (35%)
Trust account interest	2,073,500 (5%)	2,248,750 (5%)	1,747,500 (4%)	1,459,682 (3%)	1,495,110 (3%)	1,870,596 (3%)
General trust a/c contribution fund	5,681,178 (13%)	7,094,360 (16%)	6,949,421 (15%)	6,715,031 (14%)	7,192,883 (15%)	8,609,610 (16%)
Qld Law Society Inc.	243,629 (<1%)	296,861 (1%)	289,716 (<1%)	279,702 (1%)	299,531 (<1%)	256,121 (1%)
Costs recovery	4,103,542 (10%)	2,898,941 (6%)	2,196,986 (5%)	1,806,387 (4%)	1,875,854 (4%)	1,243,715 (2%)
Investment interest	1,080,471 (3%)	1,226,377 (3%)	1,250,06 (3%)	2819,629 (2%)	897,004 (2%)	1,435,637 (3%)
Other	287,250 (1%)	439,721 (1%)	465,606 (1%)	349,240 (1%)	260,589 (1%)	89,919 (<1%)
Total revenue	42,228,744 (100%)	44,400,061 (100%)	45,808,824 (100%)	46,517,115 (100%)	49,039,032 (100%)	53,650,587 (100%)

Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000.

The major fluctuations in the funding mix as shown by the table are:

- Commonwealth funding remains the largest single revenue source for LAQ. The amount of this revenue has been fixed by the Commonwealth–State agreement and remained relatively static for the period under review. Between 1994–95 and 1996–97, Commonwealth revenue was between 45 and 48 per cent of total LAC revenue. Over the following years this proportion declined steadily and by 1999–2000 it accounted for around 40 per cent of total LAQ revenue.
- State funding has risen dramatically during the period, with a particularly large increase between 1996–97 and 1997–98. Overall, State revenue has risen from 21 per cent of total revenue in 1994–95 to 35 per cent in 1999–2000.

- Costs recovery has shown the largest decline over the period — decreasing from 10 per cent in 1994–95 to just 2 per cent in 1999–2000. This is the result of a dramatic decrease in the number of civil law cases funded.
- Trust account interest (from the interest earned on solicitors' trust accounts) has remained at the low levels noted in the 1995 report. The slight decline in this revenue stream has been offset by a corresponding increase in revenue derived from the general trust account contribution fund.

KEY POINTS: REVENUE TRENDS AND SOURCES

- **Between 1994–95 and 1999–2000 legal aid actual revenue increased by 27 per cent.**
- **Most of the increased revenue came from the Queensland Government, which now provides 35 per cent of total funding; Commonwealth funding remained fairly static over the period under review.**
- **Unlike the pre-1995 period, which was marked by considerable volatility, revenue has increased steadily from year to year.**

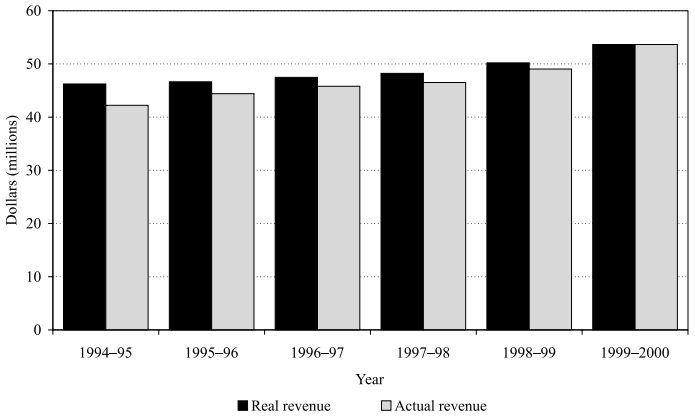
Trends in real revenue

While revenue has been increasing over the period under review, it is important for LAQ to maintain the purchasing power of that revenue as represented by real revenue. Figure 3.1 shows actual and real revenue received by the LAC and LAQ for the financial years 1994–95 to 1999–2000.

The 1995 report on LAC funding noted that real revenue had fluctuated significantly over the preceding decade, reaching a high of $48.1 million (in December 1993 dollars) in 1990–91 and from that point remaining well above the levels of the mid-1980s.[7]

Figure 3.1 shows that LAC and LAQ funding has steadily increased in real as well as actual terms over the period since June 1994. Real revenue rose a constant 1–2 per cent per annum from 1994–95 to 1997–98. In 1998–99 and 1999–2000, higher increases of 4.1 per cent and 6.9 per cent respectively were recorded.

Figure 3.1 — Legal aid actual and real revenue, 1994–95 to 1999–2000



Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000; ABS, *Yearbook Australia, 2001*.

Note: 'Real revenue' is revenue indexed for inflation, using the consumer price index. Figures are reported in June 2000 dollars.

KEY POINT: REAL REVENUE

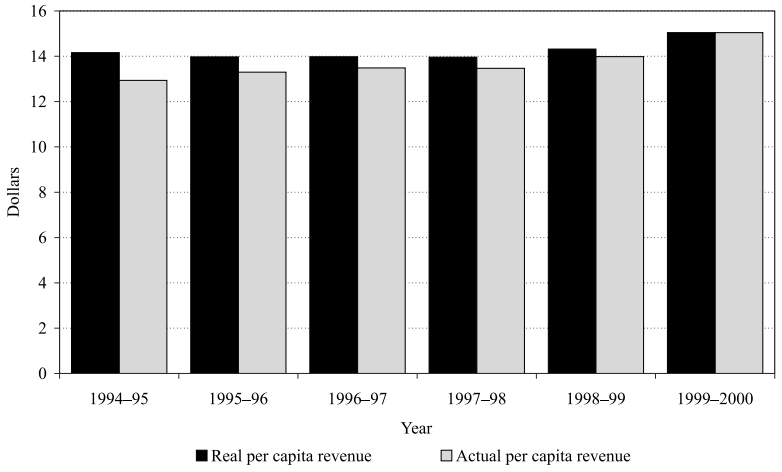
- **Legal aid real revenue increased by 16 per cent from 1994–95 to 1999–2000.**

LAQ per capita revenue

Figure 3.2 shows the trend in real per capita revenue for the LAC and LAQ since 1994–95. This measure adjusts for the population growth in Queensland since 1994–95, which has averaged 1.9 per cent per annum. On this measure, real per capita revenue was steady at around $14 until 1999–2000, when it increased to $15. This is still below the peak of $16.20 reported for 1990–91.

Commonwealth revenue per capita has been stable at approximately $6 per year. As noted in table 3.1, a drop in other revenue has been offset by a corresponding increase in Queensland government revenue.

Figure 3.2 — Legal aid actual and real per capita revenue, 1994–95 to 1999–2000



Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000; ABS, *Yearbook Australia, 2001*; ABS, *Australian Demographic Statistics*, June quarter 2000.

Note: 'Real revenue' is revenue indexed for inflation, using the consumer price index. Figures are reported in June 2000 dollars.

KEY POINT: REAL REVENUE PER CAPITA

- **Legal aid real per capita revenue has shown a slight upward trend since 1994–95, rising by 6.2 per cent.**

Comparisons with other States

Total revenue

In the 1995 report, comparisons were made with New South Wales and Victoria. In this report, comparisons with Western Australia are also included.

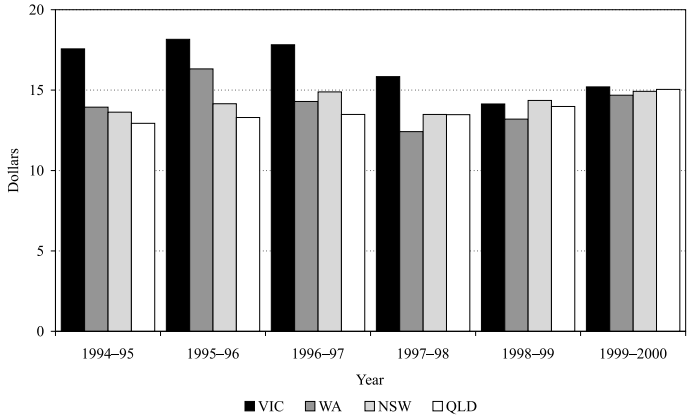
Because of the large variation in the population sizes of the four States, the amount of money allocated to legal aid is very different from State to State. Therefore interstate comparisons have been limited to per capita revenue.

Per capita revenue

The 1995 report showed that Queensland lagged behind Victoria and New South Wales in total per capita revenue for legal aid (including revenue from Commonwealth and State sources). In 1993–94, legal aid in Queensland received $0.94 less per capita than New South Wales (the next lowest) and $2.69 less per capita than Victoria (the highest).

As shown in figure 3.3, by 1999–2000 these differences had disappeared, with the legal aid bodies in Queensland, New South Wales, Victoria and Western Australia all receiving approximately $15 per capita.

Figure 3.3 — Actual legal aid revenue per capita by State, 1994–95 to 1999–2000



Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000; Legal Aid Commission of New South Wales annual reports, 1994–95 to 1999–2000; Legal Aid Commission of Victoria annual reports, 1994–95 to 1999–2000; Legal Aid Commission of Western Australia annual reports, 1994–95 to 1999–2000; ABS, *Australian Demographic Statistics*, June quarter 2000.

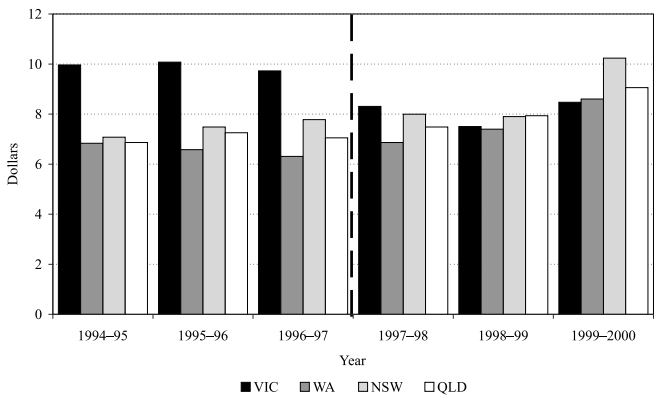
In the 1995 report it was noted that, if the LAC had been funded at the same per capita rate as its counterpart in New South Wales over the period then under review (1990–91 to 1993–94), it would have received an additional $7.6 million in funding from State and Commonwealth sources. Similarly, had the LAC been funded at the same rate as in Victoria, it would have received an additional $23.5 million over this period. If the LAC had been funded at the average of New South Wales and Victoria for the whole period under review in the 1995 report, the LAC would have received an extra $25 million for that period.

State revenue

Since 1997, a more accurate assessment of the revenue available for State criminal law matters can be made by examining only State revenue per capita — that is, when revenue from the Commonwealth is set aside. State revenue includes State Government funding, statutory interest, Law Society funding, cost recovery, investment interest and other revenues (excluding those obtained from the Commonwealth Government).

Figure 3.4 shows a substantial drop in State revenue per capita for legal aid in Victoria — particularly between 1996–97 and 1997–98 (from around $10 per capita to around $8 per capita). This corresponds with the change in Commonwealth–State funding arrangements for legal aid bodies in 1997 (indicated by the vertical dotted line in figure 3.4). In contrast, State revenue per capita in Queensland, New South Wales and Western Australia increased over the period.

Figure 3.4 — Total legal aid State revenue per capita, 1994–95 to 1999–2000



Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000; Legal Aid Commission of New South Wales annual reports, 1994–95 to 1999–2000; Legal Aid Commission of Victoria annual reports, 1994–95 to 1999–2000; Legal Aid Commission of Western Australia annual reports, 1994–95 to 1999–2000; ABS, *Australian Demographic Statistics*, June quarter 2000.

New South Wales had the largest growth, driven by an 81 per cent increase in State Government funding between 1994–95 and 1999–2000. Non-government funding in New South Wales fluctuated between 1994–95 and 1998–99 before increasing in 1999–2000. This increase may have been due to the introduction of the Public Purposes Fund in March 1999 to replace the revenue from interest earned on solicitors' trust funds and the Law Society statutory interest account.

State revenue in Queensland increased at almost the same rate as in New South Wales. However, State Government funding in Queensland remains lower than that in any other State, despite increasing at the highest rate between 1994–95 and 1999–2000 (when it almost doubled). On the other hand, non-government funding of legal aid in Queensland is relatively high compared with other States.

Western Australia has had the lowest level of State revenues for legal aid for most of the period under review — despite having the highest level of government funding in 1999–2000. Non-government funding in Western Australia has been lower than in the other States, as in Western Australia there was no Law Society funding until 1999–2000.

It is very difficult to compare crime levels and court workloads between States because of differences in definitions and counting rules. However, the limited data available indicate that Victoria has a lower rate of reported crime than Queensland[8] and the amount of crime dealt with in the Victorian higher courts is significantly less.[9] It appears that the extra per capita revenue in Victoria has until recently been used primarily to support higher outlays per grant of aid, although in the last two years Victorian expenditure per grant of aid has declined towards the Queensland level.

Queensland, New South Wales and Victoria show similar trends for most of the period because they all rely on similar types of other revenues — Law Societies, cost recovery and investment interest.

KEY POINTS: INTERSTATE COMPARISONS

- **Total revenue per capita increased across all States except Victoria in the period under review.**
- **The marked differences between jurisdictions in per capita funding identified in the 1995 report had disappeared by 1999–2000. State Government funding of legal aid in Queensland is now comparable with that in other States.**

LEGAL AID QUEENSLAND EXPENDITURE

LAQ expenditure has been governed by two main factors:

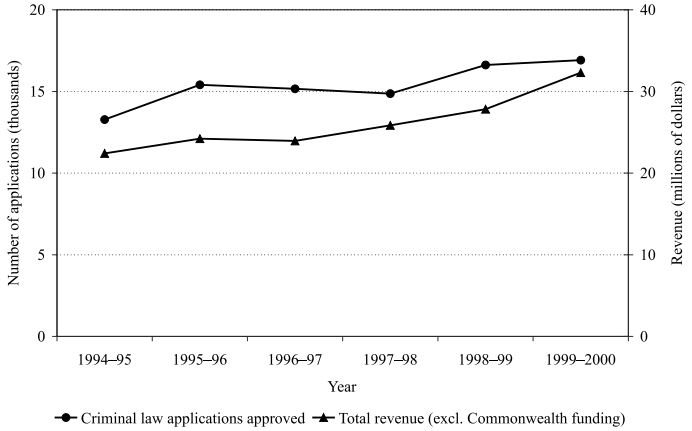
- the number of grants of aid approved
- costs per grant, which are determined by factors such as administrative overheads, the salaries and oncosts of in-house legal staff, and payments to private practitioners.

As discussed in chapter 2, LAQ is also involved in other activities, such as the duty lawyer scheme, provision of legal advice and community education. However, work associated with grants of aid accounts for the bulk of the organisation's expenditure.

In the 1995 report it was noted that during 1992–93 and 1993–94 actual total expenditure (which includes expenditure on non-criminal matters) had fallen by 26 per cent, in line with an earlier reduction in the number of grants (in relation to all areas of the law) that had been approved. There had also been reductions in salary and administration costs, and scale fees to practitioners had been restructured. The 1995 report did not give a breakdown of expenditure on criminal law matters because relevant detailed information was not available.

Figure 3.5 suggests that revenue has tended to increase at a greater rate than criminal workload. Between 1994–95 and 1999–2000 the number of applications approved for legal aid in criminal matters rose from just over 13,000 to almost 17,000 (an increase of 27 per cent). At the same time, State revenue increased from just over $22.4 million to just over $32.3 million (an increase of more than 44 per cent).

Figure 3.5 — Legal aid total State revenue and criminal law applications approved, 1994–95 to 1999–2000



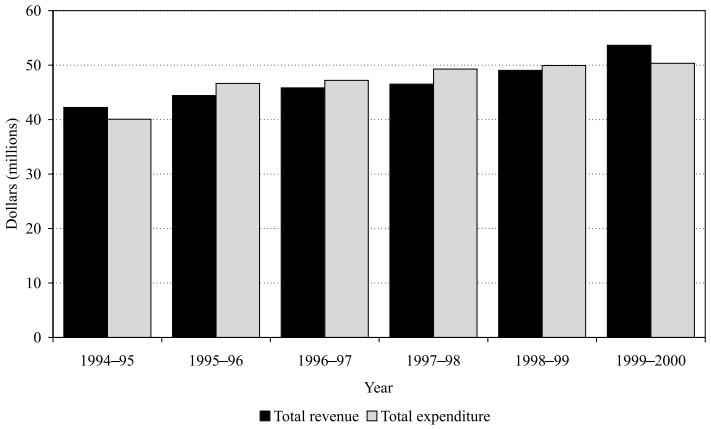
Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000.

Total expenditure

Revenue and expenditure have at times varied considerably because of factors such as fluctuating income levels, unanticipated costs and deliberate policy and management decisions. Like LAQ revenue, LAQ expenditure no longer exhibits the fluctuations noted in the 1995 report.

Figure 3.6 shows legla aid total revenue and expenditure for 1994–95 to 1999–2000. Over the period, legal aid expenditure has increased from just over $40 million to just over $50 million. For the years 1995–96 to 1998–99, total expenditure was greater than total revenue by between $0.9 million and $2.8 million per year. In 1999–2000, total expenditure was $3.3 million below total revenue.

Figure 3.6 — Legal aid actual revenue and expenditure, 1994–95 to 1999–2000



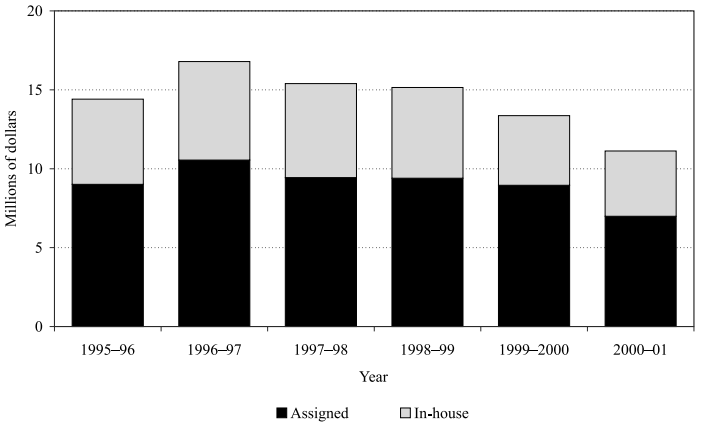
Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000.

Expenditure on criminal matters

Figure 3.7 gives a breakdown of legal aid expenditure between assigned and in-house criminal matters.

The cost of assigned criminal matters remained relatively stable at around $9 million between 1995–96 and 1999–2000, before dropping to $7 million in 2000–01 (note: figures for 2000–01 are calculated to April 2001). With only 30 per cent of criminal matters retained in-house, it is not surprising that the overall cost of in-house matters is lower than that of assigned matters. Between 1996–97 and 1998–99, in-house criminal matters cost around $6 million, but dropped to just under $5 million in the last two financial years.

Figure 3.7 — Legal aid expenditure on criminal matters, 1995–96 to 2000–01



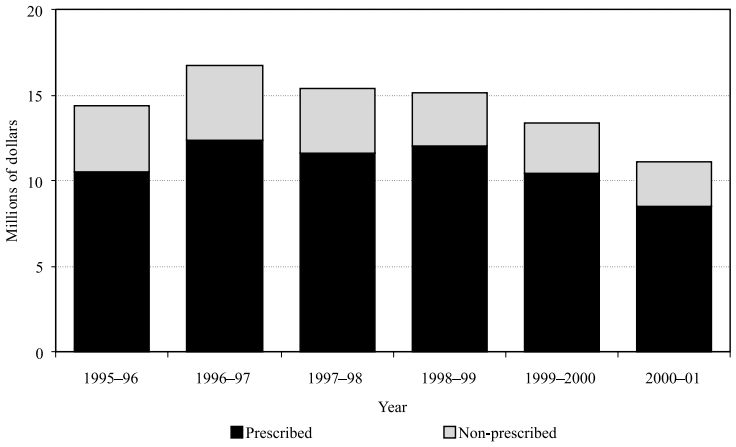
Source: LAC and LAQ unpublished data.

Notes:

1. Figures for 2000–01 are calculated to April 2001.
2. Figures include some level of double counting for matters that commenced as non-prescribed and later became a prescribed criminal matter.

Figure 3.8 shows that around 70 to 80 per cent of criminal funds are expended on prescribed criminal matters. Despite a decline in the overall costs, the proportion of expenditure associated with prescribed criminal matters continued to increase in 1999–2000.

Figure 3.8 — Legal aid expenditure on prescribed v. non-prescribed criminal matters, 1995–96 to 2000–01



Source: LAC and LAQ unpublished data.

Notes:

1. Figures for 2000–01 are calculated to April 2001.
2. Figures include some level of double counting for matters that commenced as non-prescribed and later became a prescribed criminal matter.

KEY POINTS: LAQ EXPENDITURE

- **Expenditure exceeded revenue from 1995–96 to 1998–99, but declined to below total revenue in 1999–2000.**
- **LAQ's State revenue has tended to increase at a greater rate than its criminal workload.**
- **Approximately 70 to 80 per cent of LAQ's criminal expenditure relates to prescribed criminal matters.**

LAQ RESERVES OF FUNDING

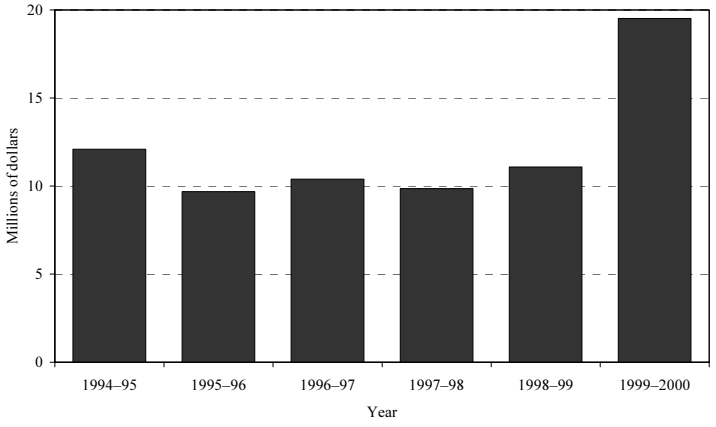
LAQ is empowered by statute to invest funds.[10] Through its investments, it has established a comfortable reserve to safeguard against any unforeseen circumstance that may put it in a position where it cannot meet committed grants of aid.

The CJC commented in its 1995 report on the substantial level of reserves maintained by the LAC over the period then under review. As a result of healthy returns on investments, reserves had reached a peak of $19 million in 1991. In response to comments by Treasury and the Public Sector Management Commission[11] that there was little justification in the LAC maintaining large reserves, the LAC managed to deplete its reserve drastically, from $19 million to approximately $5 million over two years, by substantially increasing grants of aid. Unfortunately, the reserves fell more dramatically than intended when operating deficits resulted from the increased grants, and these deficits also had to be met from the money held in reserve. Nevertheless, by 1993–94, the LAC had managed to increase its reserves to approximately $10.5 million. This was done by restricting the number of grants of aid to substantially below that given in the previous year.

Since 1993–94, the reserves have remained fairly stable — fluctuating between $10 million and $12 million per annum. Figure 3.9 sets out the LAC/LAQ reserves since 1994. Reserves remained steady at around $10–12 million until 1999–2000. In 1999–2000, they increased sharply to about $20 million.

LAQ has informed the CJC that the recent increase is a result of increased interest received from solicitors' trust accounts[12] and healthy investment returns.[13] LAQ is committed to depleting the reserves over a three-year budget cycle to a level of $7 million by operating a managed deficit budget. This may involve fee increases for criminal law grants of aid, possibly directed to the funding of lower court matters.

Figure 3.9— Legal aid reserves, 1994–95 to 1999–2000



Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000.

Note: The reserve is LAQ's total liquid assets, made up of the combined total of investments (short-term and long-term), cash at bank plus overdrafts, but not including receivables.

KEY POINTS: FUNDING RESERVES

- **Since 1994, legal aid has maintained a reserve level of around $10–12 million, except for 1999–2000, when the amount rose sharply to about $20 million.**
- **LAQ is committed to depleting its reserves over a three-year budget cycle to a level of $7 million. LAQ's strategy may include fee increases for criminal law grants of aid, which may result in greater funding of lower court matters.**

Endnotes: Chapter 3

1 R. Giudes, *Proctor*, October 2000, 'President's Page', p. 2.

2 Commonwealth funding is no longer available for State criminal law matters — see chapter 2.

3 For more information, see the 1995 report, p. 14.

4 Sections 30 and 33 of the *Legal Aid Queensland Act 1997* provide for LAQ to recover costs and outlays from the unsuccessful party where a costs order has been made in favour of the legally assisted person.

5 Section 18 of the Legal Aid Queensland Act allows LAQ to seek a specified monetary contribution from the assisted person to help cover the expenses incurred in providing legal assistance.

6 LAQ has the power under s. 45(5) of the Legal Aid Queensland Act to invest any money it holds on trust in accordance with the investment powers provided under Part 6 of the *Statutory Bodies Financial Arrangements Act 1982*.

7 Real revenue in 1987–88 (the benchmark level under the 1990 funding agreement) was just over $34.9 million.

8 ABS, *Recorded Crime Australia 1999* shows that Queensland's rate of recorded crime per 100,000 population is broadly in line with the national average. Victoria has a lower rate across almost all offence categories (exceptions: 'robbery' and 'motor vehicle theft'). See also chapter 6 for a discussion of the jurisdiction of courts.

9 Steering Committee for the Review of Commonwealth–State Service Provision, *Report on Government Services 2001*, table 9A.3 shows that, in Queensland, the higher courts dealt with around 30 per cent of all matters heard in Australian higher courts (9532 finalised matters). Only NSW recorded a higher number (11,900 matters — or 37 per cent of the national total). Victoria dealt with 4628 matters, or 15 per cent of the national total.

10 Section 45(5) of the *Legal Aid Queensland Act 1997*. Investments must be made in accordance with the *Statutory Bodies Financial Arrangements Act 1982*.

11 See the Treasury/PSMC *Review of the Legal Aid Commission (Public Defence) Funding*, 1991, p. 5.

12 Section 36E of the *Queensland Law Society Act 1952* provides for the QLS to pay to LAQ 75 per cent of the interest received from solicitors' trust accounts. The amount is paid to LAQ on a quarterly basis.

13 LAQ holds investments with Queensland Investment Corporation's cash trust and investment trust accounts, and the Queensland Treasury Corporation.

4

Office of the Director of Public Prosecutions: Funding and Workload

This chapter examines issues relating to the funding, workload and performance of the Office of the Director of Public Prosecutions (ODPP). The chapter:

- presents data on revenue, expenditure and workload of the ODPP over the last six financial years
- examines trends in the workload of the ODPP
- compares the funding of the ODPP with that of prosecuting authorities in other Australian States.

In this chapter, the revenue and expenditure figures quoted for the various prosecuting authorities have been taken from the audited accounts included in the annual reports of the ODPP and corresponding authorities in other States. The statistical measures used in the examination of LAQ funds have also been used in this chapter. (See the discussion of actual and real revenue, and per capita measures, in chapter 3.)

REVENUE, EXPENDITURE AND WORKLOAD

Revenue and expenditure

ODPP revenue is allocated on an annual basis from the State Government.

The actual revenue received and the increase (or decrease) in revenue from the previous year are set out in table 4.1. The revenue figures do not include money received by the ODPP from the confiscation of the proceeds of crime. (This is transferred to consolidated revenue and is not a funding source for the ODPP.)

Although actual revenue has generally increased over the period under review, it is important for the ODPP to maintain the purchasing power of that revenue as represented by real revenue. Table 4.1 also sets out the real revenue received, and the movement in real revenue over the previous year.

Table 4.1 and figure 4.1 show that both actual and real funding provided to the ODPP increased steadily between 1994–95 and 1997–98, before stabilising at around $20 million per year over the last three years. Expenditure has followed a similar trend.

Figure 4.2 gives a breakdown of ODPP expenditure by base funding and special allocations. The graph shows that expenditure of base funding has more than doubled in the last six years — up from slightly less than $9 million in 1994–95 to more than $19 million in 1999–2000. A particularly large increase of almost $4 million occurred in 1995–96 and in 1999–2000 there was an increase of almost $5 million.

Special allocations, on the other hand, fluctuated markedly between 1994–95 and 1998–99 — ranging from $3 million to $5 million — before dropping to a low of $11,000 in 1999–2000. The decrease in 1999–2000 was the result of special allocations in previous years being incorporated into the ODPP's base funding allocation.

Table 4.1 — ODPP actual and real revenue and percentage change per year, 1994–95 to 1999–2000

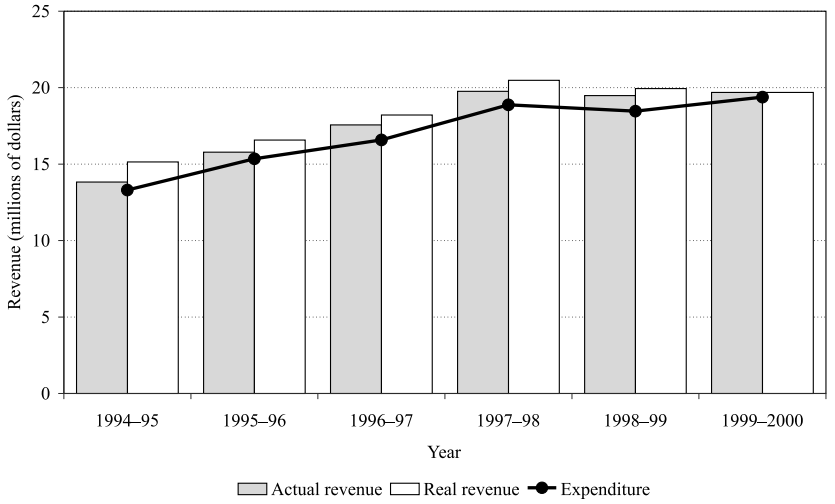
	1994–95	1995–96	1996–97	1997–98	1998–99	1999–2000
Actual revenue	13,827,111	15,779,982	17,566,650	19,757,800	19,480,600	19,692,500
% change over previous year	+ 20.5%	+ 14.1%	+ 11.3%	+ 12.5%	- 1.4%	+ 1.1%
Real revenue	$15,137,921	$16,576,871	$18,209,589	$20,480,935	$19,944,238	$19,692,500
% change over previous year	+ 16.8%	+ 9.5%	+ 9.9%	+ 12.5%	- 2.6%	- 1.3%

Sources: ODPP annual reports, 1994 and 1995–96 to 1999–2000; half-year report, Jan.–June 1995. ABS, *Yearbook Australia, 2001*.

Notes:

1. Real revenue figures take account of the impact of inflation by stating the value of revenue for each year in June 2000 dollars and have been derived from actual revenue adjusted by the weighted average consumer price index figures of the eight capital cities.
2. To allow comparisons over time, revenue figures include funding for the following:
   1993–94 to 1998–99: Property Management and Capital Works, and Victim Support Services.
   1996–97 to 1998–99: Carryover for Victim Support Services, and the Police Interview Tape Transcription function. Funding for these items is now included in the ODPP's base funding.

Figure 4.1 — ODPP actual and real revenue and actual expenditure, 1994–95 to 1999–2000



Sources: ODPP annual reports, 1994 and 1995–96 to 1999–2000; half-year report, Jan.–June 1995.

Notes:

1. Real revenue figures take account of the impact of inflation by stating the value of revenue for each year in June 2000 dollars and have been derived from actual revenue adjusted by the weighted average consumer price index figures of the eight capital cities.
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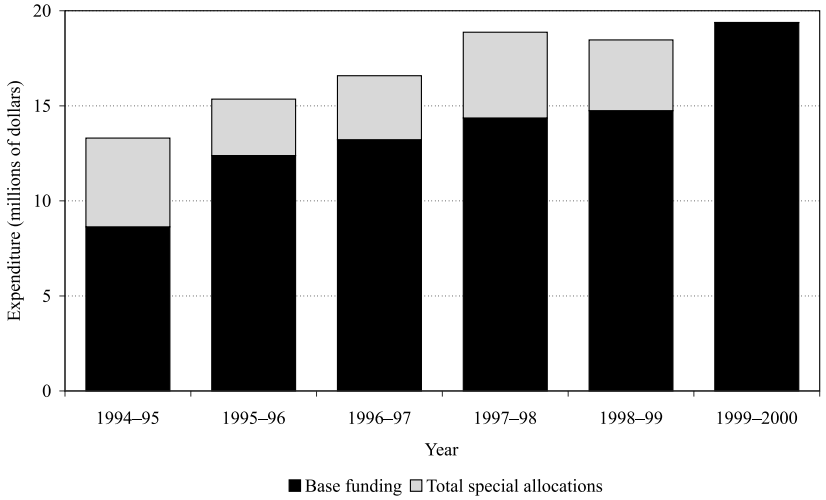
   1993–94 to 1998–99: Property Management and Capital Works, and Victim Support Services
   1996–97 to 1998–99: Carryover for Victim Support Services, and the Police Interview Tape Transcription function. Funding for these items is now included in the ODPP's base funding.

Figure 4.2 — Actual expenditure: base funding and special allocations, 1994–95 to 1999–2000



Sources: ODPP annual reports, 1993, 1994 and 1995–96 to 1999–2000; half-year report, Jan.–June 1995.

KEY POINTS: ACTUAL REVENUE, REAL REVENUE AND EXPENDITURE

- **Real funding to the ODPP increased steadily from 1994–95 to 1997–98. Funding in the following three years was fairly stable.**
- **The rate of expenditure has broadly kept in line with the changes in revenue for the ODPP.**
- **Base expenditure has more than doubled in the last six years, in part as the result of previous special allocations being incorporated into core funding.**

Workload

The 1995 report looked at how the workload of the ODPP could be used to gauge the ODPP's resource needs. However, not all the work of the ODPP is easily measurable. For example, in the 1995 report it was noted that, in addition to the ODPP's mainstream workload, such as prosecuting in trials and appearing in sentencing, the ODPP has a policy of consulting with victims of crime before important decisions are made in relation to proceedings for those crimes. The ODPP also provides advice to the QPS and the CJC, and takes action in superior courts under proceeds of crime legislation. These 'additional' tasks explain some of the extra funding received by the ODPP over the last few years.

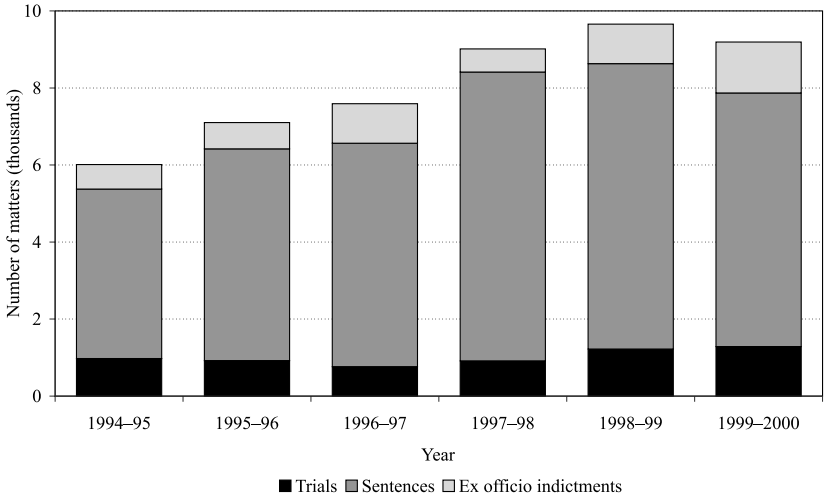
Nevertheless, a rough idea of the workload of the ODPP can be obtained by looking at the number of criminal matters it handles. A matter is categorised as a trial, a sentence or an ex officio indictment.[1] (For discussion of ex officio indictments, see chapter 6 of this report.) Table 4.2 and figure 4.3 give a summary of trends in the workload of the ODPP, according to this breakdown.

Table 4.2 — ODPP workload: trials, sentences and ex officio indictments, Queensland, 1994–95 to 1999–2000

Category	1994–95	1995–96	1996–97	1997–98	1998–99	1999–2000
Trials	977	922	766	915	1222	1288
Sentences	4398	5496	5798	7499	7410	6582
Ex officios	638	684	1026	601	1026	1321
Total	6013	7102	7590	9015	9658	9191

Sources: ODPP annual reports, 1995–2000.

Figure 4.3 — ODPP workload: trials, sentences and ex officio indictments, Queensland, 1994–95 to 1999–2000

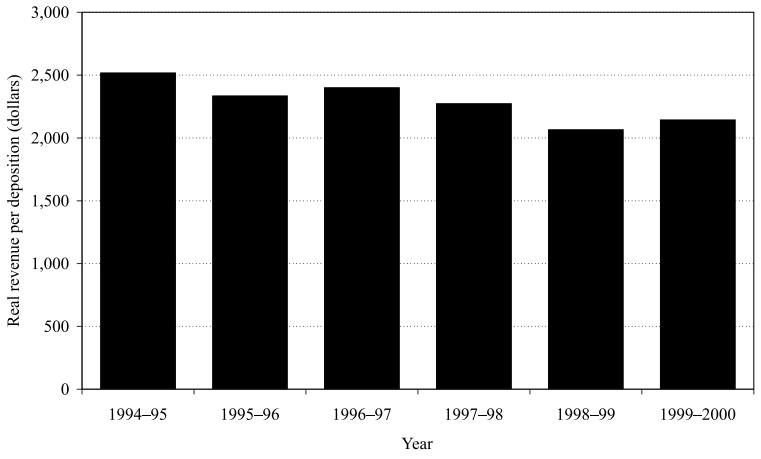


Sources: ODPP annual reports, 1993, 1994 and 1995–96 to 1999–2000; half-year report, Jan.–June 1995.

The number of sentences dealt with by the ODPP almost doubled between 1994–95 and 1997–98 — from around 4400 to more than 7400. The figure remained high in 1998–99 but dropped slightly in 1999–2000, when 6582 sentences were finalised by the ODPP. Although the number of ex officio indictments is much smaller, it has grown considerably over the period. The ODPP dealt with only 440 ex officio indictments in 1993–94 whereas by 1999–2000 this figure had increased to more than 1300. The recent increase in the number of trials dealt with by the ODPP may be due to changes to the jurisdiction of the Magistrates Court and higher courts in 1997. (See chapter 6 for discussion of the jurisdiction of Queensland courts.)

Figure 4.4 shows that real revenue per ODPP matter has declined slightly in recent years. Between 1994–95 and 1996–97, ODPP funding was around $2400 per matter, but by 1998–99 this had dropped to $2065 per matter. In 1999–2000 the figure increased slightly to $2143 — still well below the level recorded in earlier years. Real revenue per ODPP matter does not reflect the allocation of funding to tasks other than trials, sentences and ex officio indictments — for example, victim support.

Figure 4.4 — ODPP real revenue per matter, Queensland, 1994–95 to 1999–2000



Sources: ODPP annual reports, 1993, 1994 and 1995–96 to 1999–2000; half-year report, Jan.–June 1995.

Notes: Real revenue figures take account of the impact of inflation by stating the value of revenue for each year in June 2000 dollars and have been derived from actual revenue adjusted by the weighted average consumer price index figures of the eight capital cities.

KEY POINTS: WORKLOAD

- **The number of criminal matters handled by the ODPP increased by 53 per cent between 1994–95 and 1999–2000. Most of the increased workload resulted from large increases in the number of sentences and, to a lesser extent, the number of ex officio matters dealt with by the office. There has also been an increase in the number of trials finalised by the ODPP in the last two years.**
- **Some of the extra funds provided to the ODPP have been spent on additional functions such as victim support.**
- **ODPP real revenue per matter has declined in recent years.**

INTERSTATE COMPARISONS

The CJC has carried out an analysis of funding for prosecuting authorities in a number of other States, namely New South Wales, Victoria and Western Australia (table 4.3 and figure 4.5). Actual revenue received in each selected jurisdiction has been adjusted using the CPI to reflect the real value of revenue in terms of the 2000 financial year. The real revenue figures have in turn been divided by the population of each State respectively for each financial year to reflect real revenue provided to each prosecuting authority per head of population.

Table 4.3 — Director of Public Prosecutions actual revenue, real revenue and real revenue per capita, by State, 1994–95 to 1999–2000

State	1994–95 $	1995–96 $	1996–97 $	1997–98 $	1998–99 $	1999–2000 $
Actual revenue						
Qld	13,827,111	15,779,982	17,566,650	19,757,800	19,480,600	19,692,500
NSW	43,522,000	44,595,000	46,861,000	47,872,000	52,902,000	56,060,000
Vic.	18,686,000	20,319,000	18,674,000	19,498,000	21,009,000	20,979,000
WA	11,174,646	11,689,993	11,507,910	10,165,897	11,473,124	12,102,473
Real revenue						
Qld	15,137,921	16,576,871	18,209,589	20,480,935	19,944,238	19,692,500
NSW	47,647,886	46,847,048	48,576,113	49,624,115	54,161,068	56,060,000
Vic.	20,457,433	21,345,110	19,357,468	20,211,627	21,509,014	20,979,000
WA	12,234,002	12,280,338	11,929,100	10,537,969	11,746,184	12,102,473
Real revenue per capita						
Qld	4.64	4.97	5.36	5.93	5.69	5.52
NSW	7.78	7.55	7.74	7.84	8.47	8.67
Vic.	4.53	4.68	4.20	4.34	4.57	4.40
WA	7.06	6.96	6.64	5.76	6.32	6.42

Sources:

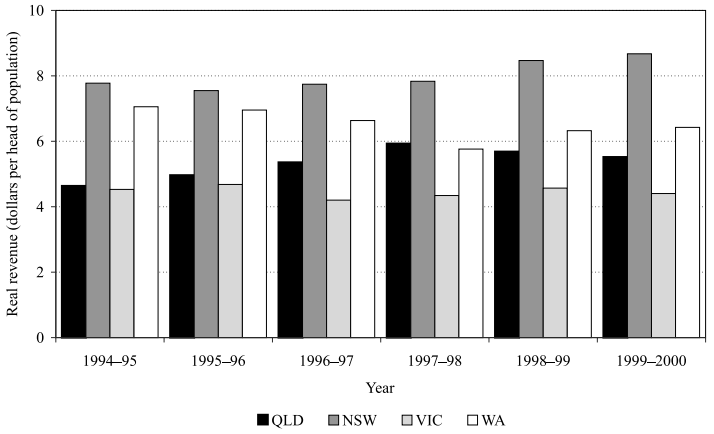
Revenue: ODPP Queensland, annual reports 1993, 1994 and 1995–96 to 1999–2000, half-year report, Jan.–June 1995; DPP NSW, annual reports 1995–2000; DPP Vic., annual reports 1995–2000; DPP WA, annual reports 1995–2000

Population: ABS, *Australian Demographic Statistics*, June quarter 2000, Estimated Resident Population, States and Territories.

Notes:

1. Real revenue figures take account of the impact of inflation by stating the value of revenue for each year in June 2000 dollars and have been derived from actual revenue adjusted by the weighted average consumer price index figures of the eight capital cities.
2. Revenue per capita is real revenue divided by the population of the relevant State in that year.

Figure 4.5 — Director of Public Prosecutions real revenue per capita, by State, 1994–95 to 1999–2000



Sources:

Revenue: ODPP Queensland, annual reports 1993, 1994 and 1995–96 to 1999–2000, half-year report, Jan.–June 1995; DPP NSW, annual reports 1995–2000; DPP Vic., annual reports 1995–2000; DPP WA, annual reports 1995–2000

Population: ABS, *Australian Demographic Statistics*, June quarter 2000, Estimated Resident Population, States and Territories.

Notes:

1. Real revenue figures take account of the impact of inflation by stating the value of revenue for each year in June 2000 dollars and have been derived from actual revenue adjusted by the weighted average consumer price index figures of the eight capital cities.
2. Revenue per capita is real revenue divided by the population of the relevant State in that year.

The graph shows the differing levels of funding across the States. As was found in the 1995 report (p. 77), it is difficult to make any meaningful comparisons between State prosecuting authorities because of differences in their structure and functions. These arise for a number of reasons, such as:

- the differing work types of each Director of Prosecutions Office; for example, within New South Wales the DPP is responsible for all of that State's committals. There is also the issue of differing jurisdictions among the State courts; for example, in New South Wales and Victoria there is a very large summary jurisdiction.
- differing use of private practitioners among States; for example, Victoria briefs out most of its work to the private profession
- the differing role of crown prosecutor among States
- differences in the average length of trial among States, which may be one indication of the complexity of a case
- different counting rules employed by each State.

Figure 4.5 shows a steady increase in funding for the Queensland ODPP up to 1998. Thereafter there is a slow decrease in funds.

KEY POINTS: INTERSTATE COMPARISONS

- **It is difficult to make any meaningful comparisons between State prosecuting authorities because of differences in their structure and functions.**
- **Per capita funding has increased by the largest amount, in percentage terms, in Queensland. This may, in part, reflect the increase in higher court work being undertaken by the ODPP relative to the work of similar agencies in other States.**

Endnote: Chapter 4

1 See ODPP annual reports, 1994–95 to 1999–2000.

5

Funding Issues

A number of stakeholders have drawn attention to issues that, although not directly related to the sufficiency of funding for LAQ or the ODPP, indicate to them that LAQ and/or the ODPP are having funding difficulties. This is despite the fact that, as shown in chapters 3 and 4, neither of those agencies is worse off financially, in real terms, than in 1995. Some of those issues involve practices that, although regarded by management as acceptable attempts to fulfil statutory obligations under a fixed budget, may need to be looked at more closely.

This chapter deals with these issues under the following headings:

- Use of private legal practitioners
- Criminal law fee scales
- The 'juniorisation' of representatives of LAQ and the ODPP
- Unrepresented accused
- Victims of crime

USE OF PRIVATE LEGAL PRACTITIONERS

In 1997, as discussed in chapter 2, LAQ introduced a preferred supplier scheme for the delivery of LAQ-funded work and a tendering system for the provision of duty lawyer services. Apart from in-house LAQ solicitors, only firms of solicitors that are preferred suppliers and contracted duty lawyers are able to undertake LAQ-funded work.[1] LAQ funds may also extend to barristers briefed by a preferred supplier, and to barristers briefed directly by LAQ.

There are some aspects of both the preferred supplier scheme and the duty lawyer scheme that have led a number of private legal practitioners to the belief that there are insufficient funds available to LAQ to provide an appropriate service to LAQ clients. Similarly, some private legal practitioners have questioned the limited use made of private barristers by the ODPP and have equated this to a funding problem in the ODPP.[2]

Preferred supplier scheme

In the 1995 report, the CJC supported initiatives that were then being developed by the LAC to introduce a more competitive regime for the provision of quality legal aid services. The result was the preferred supplier scheme, which was introduced by the LAC in February 1997.

Although the scheme has been a successful cost-saving initiative for LAQ,[3] its operation has not been independently evaluated since its inception.[4] LAQ has questioned the need for such an evaluation:

> The legal firms of Queensland were invited to become preferred suppliers. The current list of preferred suppliers (except for a small number on a waiting list) are those who applied to become preferred suppliers. Unscrambling the egg does not seem possible, as it is highly unlikely that firms not currently carrying out legal aid work would want to now take it on. Also, Legal Aid Queensland would not wish to see any weakening of the current quality controls it has. Perhaps what would be more beneficial is expenditure of funds to see what additional benefits preferred suppliers would seek, over and above straight financial reward.[5]

The private legal profession has expressed concerns about the effect of the preferred supplier scheme on the profession and on the service provided to clients.

Quality of service

One criticism of the preferred supplier scheme has been that it is not providing the same quality of service as clients would receive from privately funded legal practitioners. A solicitor in private practice informed the CJC of his reservations about the assessment by LAQ of the quality of the work of preferred suppliers. His impression was that it consists simply of an employee of LAQ reviewing a number of case files to see what has been done. More particularly, the solicitor observed:

> Quality assurance assessments of the kind universally applied to checklist management issues are never likely to reveal the actual quality of the advice given or the representation actually provided. There seems to be a lot of focus on appearances and accounting rather than substance of representation.[6]

LAQ informed the CJC that preferred suppliers are fully committed to the new scheme and that the cooperation of those law firms with LAQ audits maintains accountability and quality control. LAQ conducts a 'desktop audit' of preferred supplier firms. This involves taking completed legal aid files from the office of the preferred supplier and examining them for the following:

- claims made for payment;
- compliance with Practice and Case Management Standards;
- compliance with the terms and conditions of the Agreement;
- compliance with the criteria for inclusion on the Preferred Supplier Lists as set out in the preferred supplier application form;
- compliance with LAQ's means and merit guidelines;
- quality of legal work undertaken on behalf of Legally Assisted Persons;
- claims made for legal assistance submitted via LAQ's simplified merit checklists; and
- substantial or unresolved complaints from legally assisted persons regarding service delivery.[7]

If a preferred supplier is found to be non-compliant with any of these matters, remedial action will be specified for the supplier to comply with within a time agreed between the LAQ audit team and the supplier. Failure by the supplier to carry out the remedial action may result in a show cause notice requiring them to explain why they should not be removed or suspended from the preferred supplier list. LAQ has informed the CJC that most suppliers comply with the first notice and that no preferred suppliers have been removed from the list. In a consultation meeting LAQ did note, however, that:

> some of the small firms juggle a lot of matters and do not always get matters right — it is then a matter of getting them more organised and encourag[ing] them to attend training. This can be a problem — one LAQ training session attracted only two firms.

Inequitable distribution of work

Although a number of law firms have set up a specific legal aid work cell to deliver the required services for LAQ-funded clients, the Queensland Law Society (QLS) considers it to be inequitable for 20 per cent of preferred suppliers to handle 80 per cent of legal aid work.[8] The QLS submitted that a result of this and of insufficient fees being paid to preferred supplier firms has been 'a dramatic exiting of experienced criminal law practitioners from the field, a trend which no doubt alarms and concerns Legal Aid'.

In response to the concern expressed by the QLS, LAQ has advised the CJC as follows:

> It is not known what the Queensland Law Society Inc. … mean by inequitable distribution of work. This is particularly so in view of their adherence to the solicitor of choice principle. Most of the work handled by preferred suppliers comes about by clients directly contacting those firms. Very little criminal law work is referred out to

the preferred suppliers by Legal Aid Queensland.

> It is not a surprising figure that 20% of preferred suppliers handle 80% of legal aid work. Such figures are consistent with figures overseas, e.g. England. It is consistent with the drift to specialisation. Also, it is consistent with the quality trend of having fewer suppliers handling work, thus enabling more meaningful business relationships.
>
> Also, the notion of experienced criminal law practitioners exiting the legal aid field is challenged … If one looks back over 30 years of practice, it has always been that junior practitioners handled the criminal law work, particularly legal aid work.[9]

Community legal centres and the Magistrates Court

Community legal centres (CLCs) traditionally provide free legal services, restricted to:

- giving legal advice to the public
- conducting test cases in court
- delivering community legal education, and
- undertaking law reform projects.

As well, some CLCs have extended their work brief to include representation of clients before the Magistrates Courts — for which they receive no additional funding.[10] CLCs are of the view that this is an indirect result of limited LAQ-funded representation before the Magistrates Courts. The Senate Legal and Constitutional References Committee has noted that:

> Community legal centres, in particular, tend to be the bottom line in Australian legal aid and have been bearing the brunt of increased workloads as they try to take up the cases that cannot be met by the legal aid commissions …
>
> Given the limited funding of the centres, and their reliance on volunteer assistance, the Committee appreciates that there are real limits to their capacity to manage this increased workload.[11]

CLCs have long been assessed by both the State and the Commonwealth Governments as an efficient and cost-effective means of delivering legal assistance to the public. If that assistance is to extend to greater legal representation of people before the courts, it may be appropriate for LAQ to investigate increasing its contribution to the CLC funding pool for the purpose of enlisting the services of CLCs to provide court or other services on behalf of LAQ.[12] Of course, it is important to ensure that any additional administrative requirements resulting from such work do not become so burdensome for CLCs as to destroy their motivation to continue with such work.

Fluctuations in the use of preferred suppliers

In the 1995 report (p. 65), the CJC noted the significant reduction in work provided by the LAC to the private legal profession over the period then under review, and commented on how this contributed to a perception of a funding crisis:

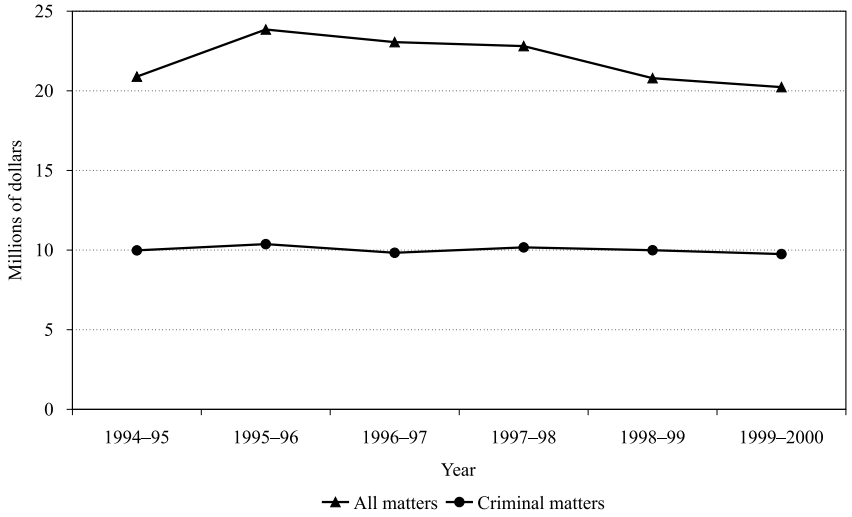
> Given the magnitude of this drop, it is not surprising that many members of the private legal profession have formed the view that the funding of legal assistance in Queensland is in crisis.

The reduction in work was thought to have resulted from an LAC management commitment to increase in-house productivity and its acknowledgment of the difficulties involved in reducing staffing levels for the purpose of cost saving. LAC believed that its best response to any revenue shortfall would be to decrease the amount of work briefed out to private practitioners.[13]

LAQ's current policy on use of private practitioners allows a 70/30 split of matters between preferred suppliers and the legal practice section of LAQ (in-house LAQ legal practitioners). Of those matters generally managed in-house, LAQ will engage private counsel when in-house counsel is unavailable.

Figure 5.1 compares the expenditure by LAQ, in real terms, on private practitioners generally and on private practitioners for criminal law matters.

Figure 5.1 — Real expenditure by LAQ on private practitioners, 1994–95 to 1999–2000



Sources: LAC and LAQ annual reports, 1994–95 to 1999–2000.

Note: Real revenue figures take account of the impact of inflation by stating the value of revenue for each year in June 2000 dollars and have been derived from actual revenue adjusted by the weighted average consumer price index figures of the eight capital cities.

In real terms:

- Between 1994–95 and 1995–96, total LAC expenditure on private practitioners increased by 14 per cent.
- After 1995–96, expenditure on private practitioners declined steadily — down 15 per cent over the period, from $23.8 million to $20.2 million in 1999–2000 (similar to spending in 1994–95).
- Expenditure on private practitioners for criminal matters remained stable over the period.

KEY POINTS: USE OF PRIVATE PRACTITIONERS, PREFERRED SUPPLIER SCHEME

- **The legal profession (including CLCs) has raised a number of concerns about the preferred supplier scheme.**
- **A comprehensive independent evaluation of the scheme may be needed to ensure that the preferred supplier scheme is a cost-effective and efficient method of providing legal-aid-funded services, in a manner that is fair to the providers of the service and to their clients.**
- **Real expenditure on private practitioners for criminal matters remained stable between 1994–95 and 1999–2000. In 1999–2000, the amount outlayed was around $10 million.**

Duty lawyer scheme

The original duty lawyer scheme began in 1994 and was managed by the QLS. Any private practitioner was able to register with the scheme and be placed on the duty lawyer register. The QLS paid practitioners $72 per hour for performing duty lawyer services.

Practitioners considered the QLS duty lawyer program to be an excellent training forum for young lawyers as well as a means of becoming known to magistrates.

In 1994, a LAC-funded duty lawyer scheme began throughout the State (following a pilot project referred to in chapter 2 of this report). The scheme allows solo practitioners

or a consortium of law firms and counsel to tender, through the auspices of a preferred supplier, for the provision of duty lawyer services before a nominated Magistrates Court.

The scheme was developed as a cost-effective means of providing 'first appearance' representation to any accused person appearing before a Magistrates Court in a criminal matter. [14]

Self-referral

Before May 1994, lawyers were prohibited from representing legally aided clients in proceedings that fell outside the role of 'duty lawyer'. The general ethical prohibition on legal practitioners was commonly referred to as 'self-referral'. This prohibition effectively meant that, once a duty lawyer had represented a client in the Magistrates Court, the lawyer would not be able to suggest him/herself as a representative for that client in further proceedings relating to the same matter.

It was a condition of the initial tendering contract for the duty lawyer scheme that practitioners abide by the rules of the QLS, which then prohibited self-referral. [15]

In May 1994, the QLS modified its policy to enable private practitioners operating as duty lawyers to self-refer in certain circumstances:

> All lawyers attending court under the guise of duty lawyer, whether as general duty lawyer or a successful tendering duty lawyer, are required to provide to a member of the public who seeks their advice a list of three names of law firms, one of which names can be their own name or the members of a successful consortium, who have expressed a willingness to deal with the area of law.
>
> Provided further that the ruling applies as follows:
>
> (a) forthwith to existing 'no tender' duty lawyer schemes;
>
> (b) at the commencement of each fresh or renewed tender contract.[16]

It was foreshadowed that legal practitioners would now be able to derive a guaranteed level of income from duty lawyer representation through access to an ongoing client base. [17] The practical effect of the new policy has been that private legal practitioners are now prepared to tender for duty lawyer work at a low price, in anticipation of receiving remuneration from LAQ for flow-on work for the same clients.

In 1998, Dewar et al. prepared a report for the QLS on the impact of changes in legal aid on criminal law. This report noted that legal firms:

> tendered at a price which meant the duty lawyer work was being done at a loss but in anticipation of the consortium firms being able to increase the amount of prescribed crime legal aid work available to them.[18]

Information provided by LAQ to the present review showed that several duty lawyer tender applications received and accepted by LAQ were for prices as low as one cent or one dollar. In one case the tender price was nil.

Savings to LAQ

The tendering scheme has resulted in cost savings for LAQ. For the four years before the scheme was introduced, payments made to private practitioners under the duty lawyer scheme were costing the then LAC on average $1,100,000 per annum. Since the introduction of the scheme in 1994, the average cost to the LAQ has been $827,500 per annum.

Table 5.1 details the annual payments since 1993–94.

Table 5.1 — Duty lawyer scheme payments to private solicitors, 1993–94 to 1999–2000

Year	$
1993–94	847,128
1994–95	793,614
1995–96	835,153
1996–97	812,128
1997–98	853,210
1998–99	846,629
1999–2000	804,943

Source: LAQ, *Annual Report 1999/2000*, table 16.

Consequences of low tenders and self-referral

Although accepting low tenders may appear to bring significant savings for LAQ, some commentators have suggested that it may result in considerable flow-on costs — not only to LAQ but also to other parts of the criminal justice system, such as the ODPP and the courts. They believe that duty lawyers will be encouraged to self-refer and settle matters before the higher courts to attract higher fees from LAQ.

Recent crime and court trends, as reported in the March 2001 issue of the CJC's *Criminal Justice System Monitor*, indicate that more matters are being handled in the higher courts, although the effect of self-referral in the context of the duty lawyer scheme cannot be held exclusively responsible for this. [19]

The QLS has expressed strong disapproval of the practice of self-referral to attract higher fees:

> It seems to the Society that if Legal Aid Queensland has evidence that any preferred supplier firms or solicitors have engaged in that conduct then Legal Aid Queensland should consider terminating the contract of the preferred supplier concerned.
>
> Further, conduct of such nature may amount to unprofessional conduct or professional misconduct and it is open to Legal Aid Queensland to make a complaint to the Society in relation to any such allegation against any particular solicitor. Any complaint made will be properly and thoroughly investigated. [20]

Quality of duty lawyers

During stakeholder consultations, the Chief Magistrate expressed the view that the quality of duty lawyers appearing before the Magistrates Court varied enormously, but that this was to be expected. The Chief Magistrate suggested that an alternative may be a duty lawyer service delivered by salaried lawyers on a rostered basis.

However, it could be argued that the duty lawyer scheme provides a specialist duty lawyer service and continuity of legal representation. The report of the Standing Committee of Attorneys-General on criminal trial reform stressed the importance of consistency of legal representation in the provision of effective management of criminal cases. [21]

Diminished pool of private practitioners for LAQ work

At the start of the duty lawyer scheme in 1994, the LAC acknowledged that there would be a number of practitioners who would be excluded from the legal aid system. The Director of LAC noted:

> We would like to keep as many practitioners in Legal Aid as possible, but with diminishing dollars this can't be done.[22]

The QLS, in its submission to the present review, noted that a result of LAQ's funding policy has been:

> [a] dramatic exiting of experienced criminal law practitioners from the field, a trend which no doubt alarms and concerns Legal Aid.

The survey of the Queensland legal profession by Dewar et al. in 1998 revealed a widespread belief that the tendering process for duty lawyers would result in a diminished pool of lawyers available for legal aid work, and referred to similar schemes in other countries, which have found that:

> in the second or third rounds [of tendering], it becomes more difficult to find qualified attorneys to bid. As a result, prices may rise.[23]

The international review further observes:

> Commentators have suggested that a major problem with contracted schemes is that, once a contract has been awarded, other lawyers in the area withdraw from that field of work. When the contract comes up for renewal, there are only a very limited number of bidders to choose from. If they demand much higher prices, there is little a contracting authority can do.[24]

Despite the predictions of the Queensland survey and the international review, LAQ has informed the CJC that:

> Winning a duty lawyer tender can mean the tender firm is likely to acquire a significant amount of clients. This in turn may decrease the number of referrals likely to be made for an unsuccessful tender firm. However, a firm's decision to withdraw from the criminal law field may be based upon a number of reasons, not simply because of reduced numbers of clients referred by LAQ.
>
> The proposition put forward by Dewar et al. (1998) has not been the experience of LAQ. LAQ accepts that the benefits of competition rely on contestable tenders which consider service and market characteristics. Recent tenders demonstrate a continued strong level of competition among prospective suppliers, with tenderers offering highly experienced duty lawyers at very competitive prices. In deciding whether or not to tender a service, LAQ recognises that, whilst continuity of supplier is important, low levels of competition can result in higher costs and poor service responsiveness. To ensure that an appropriate and effective level of competition prevails, LAQ has adopted the strategies which offer best practice in public sector tendering.[25]

In the same letter, LAQ also informed the CJC that it is currently reviewing the existing method of dual provision of duty lawyer services in Brisbane Magistrates Court No. 1, which involves both in-house practitioners and private practitioners. The review will:

> cover the tension between the commercially orientated private sector and LAQ's objective of maximising access to legal services and value for money.

KEY POINTS: USE OF PRIVATE PRACTITIONERS, DUTY LAWYER SCHEME

- **The duty lawyer scheme has resulted in significant cost savings for LAQ.**
- **There were divergent views about the impact which this scheme has had on the quality of legal services being delivered and on other parts of the criminal justice system. If LAQ undertakes a review of its use of private practitioners, it would be advantageous for such matters to be considered.**

Private counsel

LAQ

LAQ does not have formal guidelines on the briefing of counsel. LAQ has advised:

> For in-house matters, the level of counsel depends on the seriousness and complexity of the matter. LAQ uses in-house counsel where available. More serious or complex matters, such as mental health tribunal matters, murders, complicated frauds etc., are briefed to more senior counsel. If in-house counsel is not available, usually serious or complex matters are briefed to middle/senior members of the criminal bar. In the past 15 months, LAQ has briefed about 25 different barristers.
>
> For assigned matters, it is the understanding of LAQ that preferred suppliers often have a 'stable' of barristers they use and usually brief experienced criminal barristers.

> For circuit work, in-house counsel undertake much of the circuits in southeast Queensland in areas such as Maryborough, Bundaberg, Kingaroy, Warwick, Stanthorpe. In-house counsel does not undertake circuit work in Roma, Charleville or Cunnamulla. Where in-house counsel is not available, LAQ regional offices will brief a private barrister and generally try to use the local bar in the region.[26]

ODPP

The ODPP has traditionally retained the majority of its prosecution work for in-house barristers. The 1995 report noted that only a small percentage of ODPP matters were briefed out to barristers in private practice. This was based on data for 1993–94, which was the most recent year for which statistics were available. The report noted (p. 79):

> In contrast to the LAC, the great bulk of the DPP's work is handled in-house … Due to the very limited use of private counsel by the DPP, there are few, if any, practitioners for whom the DPP is a primary source of income.

In 2000, the Department of Justice and Attorney-General developed the *Options Paper: Briefing Practices in the Office of the Director of Public Prosecutions (Queensland)*. It called for changes such as:

- a tendering system as a means of attracting external counsel to undertake prosecution work on a regular basis, and
- a time-recording system to monitor the quality of both internal and external counsel's work to justify the cost effectiveness of briefing externally.[27]

The options paper reported that the ODPP continues to favour the use of in-house counsel, with external barristers being used only:

> when there is a shortfall of prosecutors or if matters require a level of legal expertise that ODPP does not have available at time of demand.[28]

The options paper noted that, although the ODPP's total staff numbers increased between 1994–95 and 1999–2000 (from 199 to an estimated 254), the number of crown prosecutors decreased over the same period (from a high of 47 in 1996–97 to 37 in 1999–2000). The options paper concluded that increases in the workload of the ODPP over the same period were compensated for by external briefing rather than by employing more staff. Briefing-out costs more than doubled between 1996–97 and 1998–99 (from $368,000 to $737,000), while internal counsel numbers dropped by 21 per cent (47 to 37).

The level of briefing-out

In-house prosecutors are used mainly for circuits, appeals and the more serious Supreme Court matters. The Director of Public Prosecutions (DPP) is, however, concerned about the level of briefing-out by the ODPP and the consequences that it has for the effective running of the office. In a consultation meeting, the DPP commented to the CJC:

> The senior level of prosecutors in this office are experts in criminal advocacy and committed to their work. But there are too few of them to prosecute all of the serious criminal trials. I do brief quality counsel, most of whom are former crown prosecutors. Nonetheless, it can be difficult to find an appropriately experienced counsel who is available to take a particular case. Of those matters which are briefed out, a significant proportion are returned shortly before the trial date. This is particularly concerning for complex trials, for homicide, serious violent and sexual offences and major fraud.

Costs of recalling briefed-out work

At a consultation meeting with the ODPP, the CJC was advised that at times the ODPP may have to recall matters that have already been briefed out, and as a result it incurs a 'fee on brief' charge from counsel. The rules of the Queensland Bar Association allow barristers to charge a fee in those circumstances, irrespective of whether they have done any work. The Bar Association argues that this is justified because in most cases, as soon as a barrister is briefed, he or she would have to familiarise himself or herself with the case in anticipation of discussions and negotiations with the defence and in order to be able to handle administrative inquiries directed to the barrister. Nevertheless, the Executive

Director of the ODPP advised the CJC that brief-outs do not have a negative impact on the ODPP budget.

Quality of preparation by private counsel

The Crown Prosecutors' Association is aware of concern that private counsel are not always as well prepared for trial as would be expected from in-house counsel. Private counsel are often briefed at the last minute to minimise the chance of unnecessary 'fee on brief' payments for matters that have not proceeded to trial. Although the Bar Association of Queensland acknowledges that many late briefs are received by private counsel, it does not believe that this has an impact on the general quality of work undertaken by barristers.

Negotiation of softer pleas

The Crown Prosecutors' Association is aware of concern that private counsel may be more inclined to negotiate a 'soft' plea because the relatively low fees they are being paid dictate their degree of commitment to the matter. The Bar Association, however, is of the view that this can be a matter of the perception and experience of individual barristers, and that the negotiation of 'softer' pleas cannot be ascribed only to low fees.

Victim support

The Crown Prosecutors' Association is aware of concern that private counsel do not provide the level of victim support that in-house prosecutors are prepared to offer. Again, the Bar Association of Queensland is of the view that this depends on the personality of individual barristers and their perception of what is required in each case

Junior private counsel

The Chief Judge of the District Court regards the practice of junior in-house lawyers in the ODPP having responsibility for a matter after the indictment has been presented as limiting the prospect of its early or timely resolution. This view is supported by the Bar Association of Queensland.

The Chief Judge has advised the CJC:

> As I understand it, in Brisbane only some indictments are briefed to a particular prosecutor on or soon after presentation of the indictment so that the prosecutor has carriage of the matter from presentation of the indictment through to trial, sentence or nolle prosequi. Consequently, in many cases the prosecutor who may ultimately prosecute at the trial is not able to confer with defence counsel before the matter is given a trial date, nor, in up to 60% of cases, more than 10 days before trial. I understand that the reason for this is that the ODPP has insufficient resources to brief prosecutors early, so that a majority of indictments are briefed to an officer in the ODPP with some legal qualification or training. Further, the Director of Public Prosecutions ensures that there is some supervision on the progress of all matters from a few very experienced prosecutors with whom defence counsel may confer. However, these experienced prosecutors are not expected to prosecute those matters at trial. [29]

Cost effectiveness of using private legal practitioners

LAQ

In the context of legal aid funding, Dewar et al. noted the difference in views on the relative merits of using salaried officers compared with using private legal practitioners:

> [This has been] the subject of animated debate in Australia since the then Commonwealth Attorney-General, Lionel Murphy, moved to establish the Australian Legal Aid Office in 1974. A series of Australian reports have described the 'salaried-v-private' debate as unproductive. [30]

The cost effectiveness of using private legal practitioners is still under question. A recent evaluation of the Committals Project conducted by LAQ showed that 63 per cent of matters handled in-house were settled in the Magistrates Court, compared with 52 per cent of matters assigned to private practitioners. [31] It also found that, of the matters that proceeded to the higher courts, those handled by LAQ in-house lawyers were more

likely to be committed for sentence and those handled by private practitioners were more than twice as likely to be committed for trial.

The LAQ evaluation found that the combination of a greater number of matters being settled in the lower courts by in-house staff, with a lower unit cost rate for in-house staff, resulted in greater savings for LAQ. Flow-on savings were also more likely to be achieved in other areas of the criminal justice system such as the ODPP and the courts.

Although these figures may indicate LAQ's commitment to the early determination of matters, no real conclusions can be made without further investigating:

- the results of those matters committed for trial to ascertain the acquittal rate
- the rate of late pleas resulting from the involvement of in-house lawyers, compared with the rate from the involvement of private legal practitioners
- a comparison with non-legally-aided matters.

The QLS was also of the view that the debate on the cost effectiveness of using private legal practitioners is unproductive:

> The figures in respect of committals, used as an example, are not helpful. It may be explained, for example, by the types of matters that the Legal Aid office briefs out. Many practitioners observe that the clients that they tend to get are the more difficult clients or the more difficult cases and that would certainly explain why there might be such a difference in matters settled in the Magistrates Court. You would need to know what the charges were and a whole range of other information before anything meaningful can be drawn from those figures. [32]

ODPP

The Department of Justice and Attorney-General's *Options Paper* on ODPP briefing practices identified four options for the ODPP, which are:

1. to retain the current briefing model
2. to adopt a total external briefing model
3. to adopt a total internal briefing model
4. to establish the ODPP as a statutory body.

The options paper acknowledged that there is no difference in the quality of work performed by either private or in-house counsel. It costed each of the above options and identified their advantages and disadvantages. The options paper found option 3 to be the most cost-effective, but the difference was only about $300,000 less than retaining the current briefing model. Option 2 was substantially more expensive, costing about $4,000,000 more than the current model. Option 4 anticipates retaining the current briefing model while establishing the ODPP as a statutory body that is responsible for its own budget management and administration.

KEY POINT: USE OF PRIVATE PRACTITIONERS, PRIVATE COUNSEL

- **There is no clear evidence that greater use of private counsel would be a more cost-effective use of resources by LAQ or the ODPP, although there may be advantages in using private counsel to cover peaks in workload.**

CRIMINAL LAW FEE SCALES

In its 1998 report, the Senate Legal and Constitutional References Committee observed:

> In regard to the payments to private lawyers, the bulk of the evidence … [presented to the Senate inquiry] suggested that the competency of representation was likely to suffer seriously unless payments were increased. Some of the evidence indicated that this was already happening. The Committee regards this situation as unacceptable.[33]

The Committee recommended that:

> The rates of payment to practitioners be set by the legal aid commissions at sufficiently high rates to ensure that competent representation continues to be provided to those receiving legal aid. [34]

Witnesses at the Senate hearings included the Executive Director of LAQ, who informed the Committee that the number of firms in Queensland who had expressed an interest in continuing with legal aid work (through the preferred supplier scheme) had fallen from nearly 1000 to about 400, and the decline was partly due to the level of fees that LAQ could afford to pay.[35] A representative of the QLS at the same inquiry observed:

> more and more I think we are going to find that matters are being handled by more junior members of the profession who do not have the experience; they might have the best of intentions, but the same level of service is not provided. [36]

In its submission to the CJC, the Bar Association of Queensland summed up its concerns in relation to the current fee scales for private practitioners performing legal aid or public prosecution work:

> Put quite simply, the stage has now been reached where the fees which are allowed for the bulk of the legally aided criminal law matters simply do not in any way reflect the commitment or work which is required from legal practitioners to complete a typical matter (let alone a more complex one). The need to increase fees is being recognised by LAQ. However, LAQ's capacity to make meaningful increases is limited by the extent of their funding …
>
> The fees allowed [to private legal practitioners undertaking prosecution work for the ODPP] are hopelessly inadequate. At the end of 1997 and after many years of being below even the available Legal Aid rates, the prosecution fees were brought into line with the Legal Aid rates. However, they have now again fallen behind those rates. This is completely unacceptable. There appears to be no valid reason why these fees should be less than or even equated to the Legal Aid rates. Unlike the doing of legally aided work (where there is arguably a component of community contribution in the nature of assisting disadvantaged persons), the work performed for the Director of Prosecutions is effectively done on behalf of government (representing the community). Any comparison with other rates paid to lawyers for government work would demonstrate a marked inadequacy in these fees.

Legal Aid Queensland

Fees for preferred suppliers and private counsel

Apart from a 5 per cent increase in fees in September 2000 and a further 5 per cent increase in April 2001, there have been no substantial changes in the LAQ scale of fees since the 1995 report. The QLS is concerned that the fees paid by LAQ to preferred suppliers are insufficient to sustain a viable legal aid practice. In its submission to the CJC, the QLS commented:

> For too long legal aid rates have fallen so far below commercially acceptable rates that legal aid has depended on the goodwill of a large number of practitioners to suffer through doing quality work for abysmally low rates of pay … Not only is the private legal profession subsidising legal aid to a massive degree in undertaking legally aided work, but solicitors are doing it in circumstances where they have to work enormous hours for very poor returns from legal aid work. [37]

In the 1980s, LAQ paid $60 per hour for Magistrates Court matters, with the hourly rate forming the basis for calculating other fee items. In the past 15 years that hourly rate has increased only $6 to $66 per hour.

The Bar Association of Queensland is also critical of the LAQ fee structure, commenting in its submission on LAQ's September 2000 consultation paper, *Revision of Criminal Law Fees*, that:

> It has been long acknowledged that the fee scale applicable to legal aid in criminal law has been inadequate and falls well below what would be reasonably regarded as proper remuneration for the work expected to deal with even the simplest of cases, let alone the more difficult ones … The difficulty with the extent to which the fee

> scale has tended to lag behind the amount of a reasonable fee is the obvious financial pressure which is placed on a practitioner (in conflict with the interests of the client and the practitioner's duty) in providing proper service to his or her client.

In its submission to the CJC, the Bar Association has referred to a number of issues in relation to the fees paid in Committals Project cases, including:

- The perception that the set fee of $500 available to solicitors to deal with a matter up to and including the first day of a committal is paid in cases of hand-up committals and 'nothing is achieved before the matter is resolved in the District Court (often by a guilty plea to charges that could have been dealt with summarily)'.
- Generally speaking, aid will not be granted for the involvement of a barrister for committal proceedings:

  > Often the client is represented by a Solicitor who is too inexperienced or busy or unwilling to undertake negotiations with the prosecution and the matter, in the interests of the client, is taken to the District Court where aid to engage a Barrister will be available. Some 'hand up' cases do go to trial, but one or two vital witnesses who should have been examined at Committal have not been examined. Such a situation is not in the best interests of the client. The view of this Association is that there is the potential for much more to be achieved in respect of the committals project, with the provision of proper funding, including sufficient funding to allow for the involvement of a Barrister in appropriate cases.

The Bar Association of Queensland has also observed that, at both the Supreme Court and the District Court levels, the fees paid to counsel by legal aid agencies in the various Australian States and Territories are lowest, and in some cases significantly so, in Queensland:

> The differences at District Court level are obviously the most striking and it may be noted that, in Queensland, it is at this level that the overwhelming majority of criminal matters are dealt with.[38]

LAQ has acknowledged that the current fees paid by LAQ to private legal practitioners for substantive work are comparatively low:

> The fees payable for the substantive legal work undertaken by the solicitor (i.e. preparation and appearance) are quite low when compared with the add-on events such as conferences, mentions, negotiations, etc.
>
> For example, the solicitor preparation fee for a murder trial is fixed at $300, while conferences and negotiations attract a fee of $99 each and mentions $104. While overall the fees are low, the conference, negotiation and mention fees are out of proportion with the preparation and appearance fees.[39]

At the Law Society's Legal Aid/Criminal Law Forum on 5 December 2000, Justice Holmes of the Queensland Supreme Court observed that:

> Legal Aid must be unique in the Western World as a form of remuneration which has not increased for almost a decade.

A further concern about LAQ fees paid to private practitioners is the difficulty in determining what the final fee will be. LAQ has observed:

> The standard grants of aid make a reasonable estimate of the steps required to bring an average matter to conclusion. The estimated fee for the case is accrued at the time the grant of aid is made. Historically, it is known that significant numbers of cases are not disposed of in the manner set out in the grant of aid. This results in some under-utilisation of the available commitment.
>
> For example, 60% of matters funded in the District Court are set down for trial and trial grants are allocated for these matters. 65% of the matters set down for trial are resolved by way of plea and only a proportion of the commitment available on the grant is payable. At the end of June 2000 this proportion was approximately 39%. The significant issue for legal practitioners is the absence of certainty of ultimate remuneration for work done.[40]

Concern has also been expressed about the processing of fee payments when extensions are sought for each stage of a matter. LAQ has noted:

> A practitioner is required to seek an extension for each stage of a matter before proceeding. If a practitioner proceeds to the next stage without approval, there is no certainty of payment as the practitioner is acting without a grant of aid. An environment has developed where a practitioner may not proceed until approval has been given. Also, for each extension, a proforma invoice is required which adds to the administrative burden for the legal practitioner as well as for Legal Aid Queensland.[41]

Fees paid by privately funded clients

A common view of practitioners expressed in the 1995 report was that the rates paid by the LAC in the criminal law area compared unfavourably with what private clients were prepared to pay: in part because with private clients it is possible to charge for more preparation time, and in part because hourly and daily rates for private work are significantly higher.

Since 1995 there have been a number of attempts to compare the costs of undertaking legal work that is funded by legal aid with the costs of undertaking similar work for privately funded clients. The results of those analyses have been varied.

From their survey of legal practitioners in Queensland, Dewar et al. concluded:

> **There is no evidence to suggest that privately paying clients are subsidising the system;**
>
> there is evidence that legal aid work alone is not profitable, making certain assumptions about drawings and return on capital, and that lawyers who do legal aid work are able to do so only because they have other profitable areas of privately paying work;
>
> if some lawyers who currently do legal aid work gave it up and replaced it with privately paying work, they would be more profitable. This suggests the existence of a subsidy in some cases, although it is premised on an assumption about the availability of privately paying work to replace legal aid work. It also overlooks the fact that there may be other rational reasons for continuing to do legal aid work even though it is presently unprofitable.[42] [*Emphasis added.*]

Primarily in the context of family law work, a recent study conducted for the Justice Research Centre in New South Wales compared services received by legally-aided clients and by self-funded clients in New South Wales, South Australia, Victoria and Queensland. The study found:

> **More than half of the legal aid cases handled by private solicitors were subsidised by the solicitor's firm**, in terms of the firm incurring costs for disbursements, agent's fees and barrister's fees that were not covered by the legal aid grant, and the solicitor spending more hours on the case than the maximum that could be claimed from Legal Aid … legal aid work tends to be undertaken by the more junior solicitor/s. Solicitors who have been in practice longer undertake a lower proportion of legal aid work … Solicitors appear to spend less time with the client and less time preparing documents in legal aid cases, but otherwise there was no difference in the quantity or quality of services provided by private solicitors to legally aided and self-funding clients. In response to legal aid funding constraints, private solicitors tend to choose either to maintain the standard of their legal aid work as a matter of policy, or to quit legal aid work altogether.[43] [*Emphasis added.*]

The QLS has commissioned a study from the Queensland University of Technology Business Faculty to compare the work performed by LAQ and three preferred supplier firms for the purpose of assessing the real cost of legal aid work. The results of the project are expected some time later in 2001.

The QLS has argued that what LAQ pays private legal practitioners is not the 'true worth' of the work undertaken:

> … there is a vast disparity between what would be paid on Legal Aid … [and] what is paid by way of private fees … even measured against scale fees, which are rarely these days applied, Legal Aid work is well and truly undervalued. The other point is that, if there was not Legal Aid, clients would be faced with a choice of paying the fees the practitioners would normally charge or representing themselves. On that test, there is no way that the rates struck with clients would be as low as Legal Aid rates. [44]

During the consultations for this report, one private legal practitioner informed the CJC that his firm could not provide the same service to legal aid clients as it could to privately funded clients without absorbing the costs within the firm. The funds provided by LAQ do not match the fees that private clients are charged for the same work. As a result, more junior staff are allocated to preparation and appearances. For example, the practitioner may charge a private client, say, $15,000 to undertake the same work that LAQ would pay less than $1000 for on behalf of a legal aid client.[45] Private clients are on retainer agreements with hourly rates, whereas the LAQ funding is for a block amount, no matter how much work is undertaken and no matter how complex the issues in the trial might be. The privately funded defendant will be guaranteed a well-researched and well-presented representation. However, there is no financial incentive to do the same level of work for a legal aid client as for a privately funded client, although some practitioners may be prepared to, in effect, subsidise the legal aid client with the higher fees charged to privately funded clients.[46] If this happens, the burden of providing representation to indigent defendants is placed in part on other clients of the legal practitioner. If it does not happen, then it could be argued that legal aid clients of private legal practitioners are being given an inferior level of representation.

In the 1995 report (pp. 62–63), in response to the belief of some practitioners that privately funded criminal law work is generally better paid than legally aided work, the CJC noted:

- In the criminal law area in particular, the LAC dominates the market for legal services. Few practitioners are in a position to do substantial amounts of privately funded criminal law work for the simple reason that there is not much of that type of work available. Hence it is erroneous to assume that the rates paid by private clients in some way provide a better indication of the 'true worth' or 'market value' of legal work than the rates paid by the LAC.

- If it was left to 'the market' to determine rates for criminal law work without the intervention of the LAC (in its capacity as the dominant purchaser of services) it is quite probable that the rates would be below what they are now. Most defendants in criminal matters have only very limited resources at their disposal and, if required to fund their own defence, would almost certainly pay less than the LAC.

- Arguably, in the final analysis, the only basis for determining whether fees are adequate is whether practitioners are willing and able to provide an acceptable level of service at the rates offered by the LAC. Clearly, there are still many practitioners willing to take on legally aided work, although many others have dropped out of the market. Whether the service being delivered is of sufficient quality is an issue which is addressed below.

It is arguable that these comments are as apt in 2001 as they were in 1995.

Fees for additional criminal costs

LAQ's Scale of Fees for Criminal Matters relates mainly to the payment of fees to legal practitioners for case preparation and court attendance. There is also provision for the payment of conferences, negotiations, viewing the crime scene and prison visits.

Although there is no express provision for the payment of any expenses incurred in the preparation for trial, it is open to practitioners to make application to LAQ for the payment of such expenses. LAQ has the discretion to fund such items as DNA tests, psychiatrists' and psychologists' reports and other expert reports. However, members of the private legal profession have informed the CJC of difficulties in accessing such funding, leading to the impression that there are insufficient LAQ funds available for what would be regarded as reasonable expenses in privately funded criminal matters.[47]

During a meeting with representatives from community legal centres (CLCs), the opinion was expressed that there are no funds available from LAQ for expert reports on, for example, mental health or domestic violence aspects of criminal matters. A representative of the Women's Legal Service explained the need for lawyers and a wide range of experts to work together in such matters to provide a just outcome for clients. There is an impression that LAQ has a stereotypical attitude to engaging certain expert witnesses. For example, it has been very difficult to obtain legal aid funds to engage a social worker or academic as an expert witness as LAQ has been reluctant to consider paying for

expert witnesses beyond the mainstream professions of psychologist, psychiatrist, medical practitioner and the like. Nevertheless, LAQ has advised the CJC that:

> Given the funding implications [of expert reports], requests are vetted so it is certainly not open slather. For example, in a recent high-profile murder trial, approval was given to engage overseas experts where necessary. DNA experts have similarly been approved. Any assertion that criminal law clients are denied the opportunity to pursue valid areas of defence is not correct. Provided sufficient justification is provided for the engagement of an expert, approval is given. [48]

Review of LAQ criminal law fee scales

As outlined in the discussion of fees in chapter 2 of this report, in September 2000, LAQ released *Revision of Criminal Law Fees: A Consultation Paper*. The consultation paper was developed in response to concern about the level of fees paid to legal practitioners and also in response to a number of process issues relating to the payment of fees, such as the difficulty of determining the final fee and lack of certainty about how much would ultimately be paid for work done.

The consultation paper set out four options for reform of the fee structure:

1. Retain the present fee structure and processing systems, but increase the amounts in the scale by a further percentage figure.
2. Replace the present event scale (as defined in chapter 2) with a series of lump-sum grants that relate to the level of representation provided — for example, summary plea, District Court trial, Magistrates Court committal, Supreme Court sentence, appeal to Court of Appeal.
3. Replace the present event scale with a series of lump-sum grants based on the way the cases in each category of offences were dealt with.
4. Replace the current event scale for counsel undertaking criminal circuit work with a daily fee. The consultation paper suggested that this option could stand alone or be adopted in conjunction with the options detailed above.

The consultation paper was circulated within the legal profession and was the subject of a joint Queensland Law Society–Bar Association of Queensland forum in December 2000.

The legal profession's response to LAQ's Consultation Paper on Revision of Criminal Law Fees

In relation to options 2 and 3 above (that is, lump-sum 'representation grants' that, generally, would provide a fixed fee as the total fee for attendances, irrespective of whether counsel are retained and irrespective of the amount of work involved or the time taken), the Bar Association of Queensland suggested that the proposal:

> provides a bias against the provision of proper legal services to the underprivileged … In essence, the proposal creates a financial incentive to practitioners to provide minimal services to a client, regardless of that client's needs. Equally, it imposes a significant burden on legal practitioners who provide more than a minimal level of service, in cases where that is called for.[49]

More specifically, the Bar Association noted:

> What must in the end be recognised is a need for the system of administration of payments to legal practitioners to recognise and easily allow for the need to properly recompense the practitioner for the work actually done, within the confines of the applicable scale. Measures which arbitrarily limit the available payments depending upon administrative steps which have been taken, and which provide as a matter of course for standard proforma claims for remuneration, have an obvious tendency to frustrate the proper remuneration of the practitioner in cases which are other than the most standard or usual.[50]

The Bar Association suggested that many of the perceived shortcomings of the Committals Project, as discussed in chapter 6 of this report, can be largely attributed to the introduction of a lump-sum fee for these kinds of matters:

> It is this Association's contention that further and more extensive forays down the path of lump sum fees are doomed to failure. [51]

Similarly, at the Law Society's Legal Aid/Criminal Law Forum, Judge Holmes of the Queensland Supreme Court voiced concern that:

> The risk is that there may be pleas of guilty in cases where issues should have been determined by a jury. There is also a real concern in relation to matters which are properly pleas of guilty. While I appreciate that some cases which do not warrant District Court resolution nonetheless end up there, there is a strong temptation to assume that, because a matter has ended as a plea of guilty in the District Court, it could equally well have been dealt with in the Magistrates Court. That overlooks, firstly, the reality that the Magistrates Court, because of its sheer volume of work, is geared to rapid disposition of numbers of matters. There is not time for reading reports, lengthy submissions, or extensive consideration. Some cases need more; in some cases the factual complexity involved will not emerge from a QP9. Secondly, committals are important to sort out the chaff from the grain in terms of appropriate charges and facts to be relied on. It is a dangerous premise to suppose that a quick resolution is necessarily a proper one. There is a risk of expedition prevailing over justice.

The Bar Association's suggestion for a revised fee structure was:

> … [to] adequately fund the solicitor to achieve full disclosure from the prosecution and take instructions from the client at a very early stage in the process. There should be funding available to then involve a sufficiently experienced Barrister in the negotiation of an early resolution of appropriate matters and/or the early identification of matters in which a substantive committal proceeding should be held. This will enable overall savings in the Legal Aid budget for the following reasons:
>
> (a) such a system would eliminate many meaningless 'hand-up' committals;
>
> (b) such a system would, in many cases, reduce the overall completion cost to substantially less than the current average cost of taking a minor matter to the District Court for sentence.
>
> Because appropriate cases are thus identified for committal and trial, and other appropriate cases are identified for early plea, the interests of the client, which are paramount, are preserved. [52]

New fees

In response to the submissions made to LAQ's *Revision of Criminal Law Fees: A Consultation Paper*, LAQ has:

- increased the fees payable by 5 per cent as from 30 April 2001, after an earlier increase of 5 per cent in September 2000
- introduced a $350 fee for pleas in the Magistrates Court in relation to offences where there is an election (that is, a choice as to which court will deal with the matter) covered by sections 552A and B of the Criminal Code. (See the section on jurisdiction of courts in chapter 6 of this report.)

The new $350 fee for pleas in the Magistrates Court covers situations where the plea cannot be entered by a duty lawyer. For example, where there are extenuating circumstances such as the need for a psychological report or an interpreter, it will not be a duty lawyer matter. The new plea fee will be an enticer for the profession. However, unlike the duty lawyer scheme, which is subject to neither the means test nor the merit test, under the new fee provision a means test (but no merit test) will apply.

The QLS submission to the CJC noted:

> A grant for a plea in the Magistrates Court is for approximately $300. However, because of the anomalous way in which these grants are structured, the practitioner is normally only permitted to claim an amount significantly less than this. This is a result of the proforma invoice, which allows an amount for preparation to be claimed, but does not permit the entire allowance for Court time to be claimed. The practitioner can usually only claim one hour. This means that for preparation and plea, even though the grant may be for $300, the amount usually payable is limited to $176 for both preparation and appearance.

Office of the Director of Public Prosecutions

In the 1995 report (pp. 79–80), the CJC noted a concern by many of the practitioners interviewed that fees paid by the ODPP to private practitioners for prosecutorial work were inadequate relative to the fees paid to private legal practitioners by the LAC. Fees paid by the LAC for preparation and appearance at trial or sentence were about one-third above the fees paid by the ODPP and for some other matters they were substantially higher. The CJC noted that practitioners interviewed for the 1995 report were adamant that these differences did not reflect variations in the work required to prosecute rather than defend. [53] The practitioners also pointed out that:

- the ODPP did not pay for a conference with witnesses unless a special application was made to the DPP for payment, whereas the LAC paid a standard amount for a conference with witnesses
- the ODPP did not pay for negotiating with the defence, whereas the LAC paid a fee for negotiating with the Crown.

The ODPP has advised the CJC that:

> As at 15 December 1997 the ODPP scale of fees … paid to private counsel matched those paid by the LAQ after the government provided additional budget supplementation. [54]

However, with recent increases in the LAQ scale of fees for criminal matters, fees paid to private legal practitioners by the ODPP have fallen behind LAQ fees by an amount equivalent to the LAQ increases.

KEY POINTS: CRIMINAL LAW FEE SCALES

- **Apart from two recent increases (totalling 10 per cent), there have been no significant changes in the scales of fees paid to private legal practitioners for legal aid work since the 1995 report.**
- **Fees paid to private legal practitioners by LAQ currently exceed ODPP fees by 10 per cent.**
- **There is widespread concern within the legal profession that the fees paid by LAQ and the ODPP are inadequate and that this has had a negative effect on the level of representation available to indigent accused.**
- **LAQ has recently introduced new fees that will provide some indigent accused people with legal representation before the Magistrates Courts in pleas of guilty. This may have some flow-on savings throughout the criminal justice system, particularly if the accused person opts to plead guilty in the Magistrates Court in lieu of electing to have the matter dealt with in a higher (more expensive) court.**

THE 'JUNIORISATION' OF REPRESENTATIVES OF LAQ AND THE ODPP

'Juniorisation' denotes the increasing use, by both LAQ and the ODPP, of junior barristers and solicitors in criminal matters. The issue has been of increasing interest to the profession, resulting in the perception that there is a funding crisis in both LAQ and the ODPP:

> … we strongly agree with the observations of the QLS, in its submission, that Legal Aid funding for criminal matters is at crisis level.[55]

Reasons for juniorisation

The increased use of junior lawyers is primarily driven by fees, the willingness of junior lawyers to undertake legal aid work, and staff numbers within LAQ and the ODPP.

In their 1998 study, Dewar et al. interviewed a cross-section of the profession, including criminal lawyers, a District Court judge, staff from LAQ and community legal centre practitioners.[56] An article based on the 1998 study reported that several private solicitors admitted to delegating legal aid work to juniors 'because low pay rates [for such work]

meant they could not generate the income expected of them as either partners or senior employees'.[57] They did, however, acknowledge that it was important to supervise junior staff to avoid difficulties with the case. The study also found a juniorisation of barristers engaging in legal aid work. It was considered that junior barristers are attracted to legal aid work, as it allows them to earn money and gain experience.

The authors of the study concluded that juniorisation is also driven by:

- the willingness of young barristers to undertake duty lawyer work for preferred suppliers, and
- referred work from senior barristers who have overloaded their diaries and cannot meet their commitments — a practice adopted by some barristers to ensure that they always are in court.[58]

During stakeholder consultations, both the QLS and the Bar Association of Queensland said they were worried by the overuse of junior counsel in legal aid matters, which they attributed to the low fees paid by LAQ:

> The overuse of junior counsel is of concern. Prosecution and defence drives this issue as senior counsel won't take on briefs as the fees are too low.

The Bar Association is of the view that the erosion of the real value of legal aid fees has led to experienced practitioners leaving criminal law to pursue more remunerative legal fields, resulting in:

> what Solicitors and Barristers call 'juniorisation' of the legal profession in this jurisdiction.

The QLS and the Bar Association of Queensland believe that staff turnover within the ODPP has contributed to the juniorisation of representation. The District Court is also mindful of the staffing problem and has commented on the frustrating process of watching new counsel gain experience, only to have them move on after three or four years. This was also identified as a problem by LAQ and the ODPP, both acknowledging that retaining staff is difficult in the current climate of the transient professional. The Executive Director of LAQ observed that young lawyers are often lured interstate or elsewhere by offers of higher remuneration after working with LAQ for only a few years. LAQ has tried to promote the option of secondments, but has found that staff allowed to transfer to another agency rarely return.

Nevertheless, LAQ has indicated that it is trying to improve the structure of its criminal law legal practice, which will involve upgrading positions and developing a definite career path for lawyers.[59]

Problems attributed to juniorisation

The Chief Judge of the District Court sees the use of junior counsel as detrimental to the early resolution of matters. She believes that the defence is unable to hold any meaningful pre-trial discussions with the junior lawyers who represent the ODPP. Her comments were echoed by a number of stakeholders, including LAQ. LAQ finds it difficult at times to negotiate with the ODPP, as the ODPP's junior in-house lawyers have no authority to negotiate matters — only senior legal personnel have that role.

Justice Holmes of the Queensland Supreme Court also expressed concern about the overuse of inexperienced counsel in the representation of people on serious charges before the Supreme Court:

> Ten years ago, it was unheard of for counsel of less than five years' experience to defend murder charges. There is, I think, a double effect. Firstly, experienced counsel can attract much better paid work. Secondly, established counsel have overheads — library, secretary, chambers rent — which mean they can barely break even on fees paid for legal aid trials. Consequently, there has been a drift to inexperienced counsel, not established in any sense. At the same time there has been an increase in the number of appeals on the ground of counsel's incompetence. Undoubtedly, there is some bandwagon effect, but I suspect that at least some of those appeals are attributable to the inexperience of counsel.[60]

Criticisms of the overuse of junior lawyers by LAQ and the ODPP have related not only to the private practitioners engaged by those agencies but also to the staff employed by them. The Crown Prosecutors' Association was critical of the allocation of very junior staff to District and Supreme Court sentences and circuit court. District Court judges voiced similar worries in a consultation meeting with the CJC, and the Bar Association of Queensland noted in its submission to the CJC:

> [ODPP] briefs [to private barristers] are, all too frequently, not properly prepared. Often what is delivered is a bundle of material, which has been collected over time as a file in respect of a particular matter and which is unorganised from the perspective of an impending trial and/or sentence.
>
> Almost invariably, clerks are sent to instruct Counsel, who are inexperienced (in many cases just newly appointed and without any significant training) and without any particular knowledge of the matter before the court. This appears to be a reflection of a completely inadequate system where there are a few clerks permanently employed in the Director's office. This system of employment of clerks on a casual basis appears to be a direct result of a lack of adequate funding of the Director's office and is obviously an inadequate and counterproductive measure. Nothing could be more calculated to undermine a proper system of training which would allow young persons to commence and work their way through various levels in that office, as their experience grows.

Benefits of early involvement of senior legal practitioners

The referral of legal aid briefs from senior to junior barristers is a practice frowned upon by one criminal lawyer commenting on the issue. Andrew Boe encourages senior barristers to return to the 'cab rank rule', where briefs are accepted in the order in which they come through the door and not on a selective basis. He states that:

> the excuse — 'I do not do criminal work any more' — rings hollow when these same counsel appear in the jurisdiction in privately funded matters.[61]

LAQ suggested that the notion that the Bar should return to the 'cab rank rule' is not a practical one:

> Senior barristers will 'flick' briefs if they get more lucrative private work. It is doubtful that any change could occur to this practice … [The notion] lacks in the sense that it is not coupled with any willingness to have flexibility in briefing rules, e.g. fee splitting between solicitor and counsel, counsel appearing uninstructed in the Magistrates Court, direct briefing of counsel in Magistrates Courts matters.[62]

Andrew Boe would also like to see solicitors ask more senior barristers to accept legal aid briefs — that is, to brief counsel commensurate with the complexity of the matter, rather than merely briefing junior counsel who might unquestioningly tolerate underprepared briefs delivered late.[63]

The Bar Association, in its response to the LAQ consultation paper on the revision of criminal law fees, suggested that the early involvement of experienced barristers would help to resolve matters earlier:

> We submit that the proper approach is to adequately fund the solicitor to achieve full disclosure from the prosecution and take instructions from the client at a very early stage in the process. There should be funding available to then involve a sufficiently experienced Barrister in the negotiation of an early resolution of appropriate matters and/or the early identification of matters in which a substantive committal proceeding should be held.[64]

The Standing Committee of Attorneys-General also looked into the use of experienced counsel and recommended that:

> Counsel with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.[65]

Similar opinions have been expressed by National Legal Aid (that is, the directors of Legal Aid Commissions in each State and Territory) and the Australian Directors of Public Prosecutions in a national forum to develop a best-practice model for the determination

of indictable charges. The Directors identified the following as best practice:

4. Counsel [but not precluding experienced solicitor advocates] with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.

5. Both Counsel should have authority to make decisions or be able to expeditiously obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion.[66]

KEY POINTS: JUNIORISATION

- **Juniorisation is a major factor contributing to the perception of a funding crisis within LAQ and the ODPP and raises questions about the quality of work being funded by LAQ and being undertaken by or on behalf of the ODPP.**
- **Juniorisation involves both in-house and private legal practitioners representing LAQ and the ODPP. For in-house lawyers, the issue relates to staffing levels and turnover rates, which are largely driven by the budgets of the ODPP and LAQ. For private lawyers, the issue relates primarily to the current criminal fee structure but also to the willingness of private legal practitioners to undertake legal aid work.**

UNREPRESENTED ACCUSED

If an accused person is not legally represented in court, this may indicate:

- a desire not to be represented, or
- an inability to afford private legal representation and failure to satisfy LAQ's means test, merit test and/or guidelines.

Without examining each case, it would be difficult to determine why particular people are self-represented in the criminal court. Nevertheless, the mere presence of unrepresented accused people in courts may lead to the perception that there is a funding problem for legal aid in those cases.

During the CJC's consultations it was suggested:

- by the Chief Magistrate, that there has been an increase in self-representation numbers in summary trials before magistrates
- by judges of the Supreme Court, that unrepresented people before the Supreme Court are likely to be unrepresented through choice and that most of those people would probably have been eligible for legal aid had they applied [67]
- by judges of the District Court, that most unrepresented people before the District Court are unrepresented through choice; however, concern was expressed at a noticeable increase in the number of unrepresented people.[68]

Dewar et al. noted that there had been an increase in self-represented litigants over the five years before their 1998 report, attributable in part to changes in legal aid means tests and guidelines.[69] They also observed that self-represented litigants are at a significant disadvantage by comparison with those who are represented.

Over all the criminal courts in Queensland, the proportion of unrepresented litigants is very low, with fewer litigants being unrepresented the higher the court in which they appear.

Before the Magistrates Court

The Chief Magistrate has estimated that about 5–10 per cent of people appearing before the Magistrates Courts are unrepresented. These people tend to have difficulties at the committal when full evidence has to be presented and argued before the court. The Chief Magistrate is of the view that represented accused are more likely to plead guilty at

an earlier stage than unrepresented accused, and that, if LAQ were to fund those matters, there might a consequential reduction in the number of committals.

Dewar et al. reported the view of practitioners interviewed during the course of their study that most unrepresented litigants were encountered in Magistrates Courts because:

> … it has become 'almost impossible' to obtain legal aid for summary trials and, unlike committal hearings, there is no incentive for practitioners to take on such cases *pro bono*.[70]

Dewar et al. observed that:

> Unlike a party to civil or family litigation, the defendant facing criminal prosecution cannot choose to withdraw from or 'abandon' their claim. The defendant cannot avoid their trial unless either the prosecution withdraws or the judge or magistrate orders a stay or strikes out the proceedings. For this reason, it could be argued that effective legal representation is of greater importance in criminal proceedings than in other types of proceedings, especially when other factors, such as the greater resources available to prosecution, the adversarial nature of the proceedings and the possible consequences of a conviction, are added in to the equation.[71]

Before the Court of Appeal

In a submission to this review, the President of the Queensland Court of Appeal has observed that funding constraints on LAQ appear to be a major contributing factor in the large number of unrepresented litigants in criminal matters appearing in the Court of Appeal:

> In 1997–1998, 74 criminal matters were heard in the Court of Appeal involving unrepresented litigants. In 1998–1999, this rose to 102 and, in 1999–2000, there were 89 unrepresented litigants in criminal matters. Interestingly, in the 1999–2000 financial year over 27% of unrepresented criminal litigants were successful. It would be interesting to know how many of those were refused legal aid on the merits test. Whilst registry staff do not have access to that statistical information, their expectation is that most of these successful litigants were refused legal aid.

The President considered that unrepresented litigants are generally disadvantaged because of:

- their lack of understanding of the appeal process
- their lack of understanding of the law
- their inability to acquire a clear sense of what the relevant points are to put before the Court of Appeal
- limited comprehension of the consequences of non-compliance with directives or orders from the Court and
- limited court experience, knowledge and reduced confidence.[72]

The President of the Court of Appeal was of the view that litigants in person place an additional burden on judges:

> A matter involving an unrepresented litigant tends to take longer to hear because often the standard of preparation is poor and the litigants are unable to clearly articulate the real point of the case. Their outlines of argument are often filed late and sometimes are not served on the respondent.

The President suggested that, if there were a more generous test for legal aid applicants in appeal matters so that more litigants were legally represented:

- the Court of Appeal would operate more efficiently and appeals would be heard and determined more speedily
- there would be fewer safety issues relating to unrepresented accused:

  > Represented litigants do not generally appear in person before the Court of Appeal. Safety issues for the judges and associates can be a concern when unrepresented litigants present their own cases and, on occasions, it has been necessary to have additional security guards in the courtroom … Unrepresented litigants are sometimes

abusive, aggressive, confused, accusatory or unstable; their presence in the registry raises safety concerns for registry staff.

- there would be less burden placed on registry staff:

> These litigants require considerable time, attention and support which is invariably supplied by the staff, despite the helpful and detailed information sheets available. Registry correspondence on the files of unrepresented litigants is approximately three times the norm. The Senior Deputy Registrar (Appeals) is often required to specifically case manage these matters … If more [litigants in appeal matters] were granted legal aid, the burden on registry staff would be reduced and their safety improved.

In response to the concern that litigants who have been refused legal aid may not receive justice, especially in serious cases, because they are disadvantaged in the presentation of their appeals, the Court of Appeal established a pro bono scheme, which was launched on 12 April 2000. The President described the scheme in this way:

> The scheme is presently only for those appellants convicted of murder or manslaughter who have been refused legal aid. It was developed because Judges of Appeal were concerned that unrepresented litigants were unable to clearly articulate the real issues in their case and grave injustice could result. There are 23 experienced criminal law barristers on the pro bono list. The first pro bono appeal, *R v Semyraha* CA No 373 of 1999, was heard in the Court of Appeal on 14 July 2000. One litigant has declined to take part in the scheme and another is currently taking advantage of the scheme. Interestingly, his listed appeal was adjourned because the counsel appointed under the pro bono scheme had insufficient time to prepare the case.

LAQ has noted that the pro bono scheme was established without reference to it. LAQ is of the view that consultation on the difficulties faced by the Court of Appeal could have resulted in a better solution than the pro bono scheme:

> Since the introduction of the scheme, only two matters have been the subject of the scheme.
>
> The standard merit test for legal aid applications in appeals to the Court of Appeal applied by all legal aid appellate practitioners is the reasonable prospects of success test. It is noted that the Court of Appeal pro bono scheme applies only to appeals in relation to murder and manslaughter convictions. Legal Aid Queensland has addressed the underlying issue by being more liberal in the application of the merit test. As a result, the public defender has initiated a merit test for such appeals whereby if it is considered that Counsel can put an argument to the Court of Appeal then legal aid will be provided. There will still be cases where, if Counsel is of the opinion that no argument can be mounted, then legal aid will not be granted.[73]

The President of the Court of Appeal has described a further step that the Court of Appeal has taken to reduce the number of unrepresented litigants appearing before that court, many of whom are in custody:

> In an effort to ensure that appellants in custody apply for legal aid at the earliest opportunity and to avoid … [delays] … registry staff with the support of the judges and LAQ have developed the following system. The registry provides a list of all unrepresented litigants in criminal matters in the Court of Appeal to LAQ. LAQ then visits those litigants in custody and takes and processes their applications for legal aid … The new system appears to be working well but it has not removed the problems of delay.

As noted above, in response to the establishment of the pro bono scheme, LAQ has brought in a more liberal merit test for legal aid applications in appeals to the Court of Appeal, on the basis that any case taken up by the Court of Appeal pro bono scheme is one case too many — because it shows that 'Legal Aid has failed'. This might also go some way towards remedying the perception of the President of the Court of Appeal that there is often a delay in assessing legal aid applications in appeals against conviction and applications for leave to appeal against sentence. The President was of the view that legal aid applications are often refused shortly before the matter is listed for hearing and the litigant may then have insufficient time to prepare his or her case:

> As a result, the hearing has to be adjourned; the time of the Court of Appeal is wasted and other litigants have lost the opportunity of an earlier determination. When legal

aid is refused there is an appeal from that refusal; the Court of Appeal matter cannot be heard until the legal aid review process is exhausted; this results in further delay and sometimes matters have been adjourned on multiple occasions.

Aboriginal Legal Services advised the CJC that they generally only fund litigants in criminal matters up to the point where the person is imprisoned. Their scheme does not fund appeals unless it is a matter of State or Commonwealth significance. That, and the restricted availability of LAQ funding for appeals, has resulted in a number of unrepresented Aboriginal people not appealing when they should have. The issue is therefore particularly important in light of the over-representation of Aboriginal people in the criminal justice system.

KEY POINTS: UNREPRESENTED ACCUSED

- **It is apparent that unrepresented accused people are at a disadvantage in the criminal justice system.**
- **Unrepresented accused people pose problems for all courts.**
- **Pro bono schemes and more generous LAQ assistance in the Magistrates Courts and before the Court of Appeal may alleviate some of those problems.**

VICTIMS OF CRIME

In 1995 the ODPP received funding for the Surviving Victims of Homicide Project. In 1996–97 the project was amalgamated with the Violence Against Women Unit to form the Victim Support Unit. The Surviving Victims of Homicide Project was aimed at 'improving the response to surviving victims of murder, manslaughter and dangerous driving causing death'[74] through contact with family members, provision of information on prosecution procedures and rendering of support throughout the prosecution process.

In a submission to the CJC, the Queensland Homicide Victims' Support Group (QHVSG) referred to the perception among its members that the ODPP is under-resourced, or that its resources are inappropriately allocated away from victim support services, to the detriment of homicide victims. This is despite the fact that QHVSG members 'report a high level of satisfaction with the quality of the services that are delivered' by the DPP and the ODPP.

The QHVSG suggests that pre-trial familiarisation with the court and its procedures (which is currently provided by officers of the ODPP to victims who are witnesses) should be extended to non-witness victims and, in the context of the QHVSG membership, 'make a significant contribution to the wellbeing of homicide victim families'.

KEY POINT: VICTIMS OF CRIME

- **There is a concern among some stakeholders that the ODPP's services to victims are too limited.**

Endnotes: Chapter 5

1 Firms making tenders for the duty lawyer scheme are limited to preferred suppliers.

2 In general in this chapter, no distinction is made between barristers and solicitors performing legal-aid-funded work: barristers and solicitors are referred to as 'private legal practitioners'. In the discussion relating to the ODPP, reference is made to barristers only, as legal work is not assigned to solicitors in private practice by the ODPP, due to the nature of the work that it performs.

3 See Legal Aid Office (Queensland), *Evaluation of Tender of Prescribed Crime Pilot Project* (prepared by T. Prenzler, A. Williams & H. Hayes, School of Justice Administration, Griffith University), 1996.

4 The precusor to the scheme, the Prescribed Crime Tendering Pilot program, was evaluated in 1996.

5 Letter to CJC from LAQ, 4 July 2001.

6 Facsimile letter to CJC from A. Boe, solicitor, 19 June 2001.

7 Details of the audit process are contained in the audit provisions of the LAQ Preferred Supplier Service Agreement.

8 Giudes, *Proctor*, p. 2.

9 Letter to CJC from LAQ, 4 July 2001.

10 Logan Youth Legal Service is the only CLC that has entered into a Duty Lawyer Service Agreement with LAQ to provide duty lawyer work in the Beenleigh Magistrates Court. Inala Community Legal Service from time to time provides representation on summary offences before the Inala Magistrates Court. The Youth Advocacy Centre provides legal representation for children in summary matters.

11 Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System* (Third Report), 1998, paras 8.80, 8.83.

12 In Victoria, CLCs have traditionally handled lower court criminal matters (information provided by Caxton Legal Centre at consultation meeting).

13 The 1995 report noted that the reduction in payments to practitioners was not matched by reductions by LAQ in other areas and was considered to be the result primarily of a marked reduction in the overall number of grants of aid in the areas of family and civil law. The trend was exacerbated by a substantial tightening of payment guidelines and a shift towards greater reliance on in-house work. For example, the percentage of grants of aid for criminal law matters, including non-prescribed criminal matters, handled in-house increased from 30 per cent in 1991–92 to just under 35 per cent in 1993–94 (disaggregated figures for prescribed and non-prescribed crime were not then available). The shift towards handling these matters in-house was explained as a function of organisational factors, as follows: 'It was difficult for an organisation with a substantial permanent staff to respond to fluctuations in income by suddenly decreasing staff according to the economic climate. Instead, it was easier for the LAC to deal with its revenue shortfall by reducing payments to practitioners. LAC management also took the view that there was excess capacity within the organisation and that existing staff could be utilised to handle a greater number of cases.' (p. 66)

14 With some exceptions, such as some traffic matters.

15 H. Fordham, 'Legal aid: Rostering to tendering', *Proctor*, March 1994, p. 6.

16 Queensland Law Society Solicitors 1999 Handbook, para. 14.02 (Council Resolution, 26 May 1994). The QLS creates policies that set standards for the conduct expected from solicitors.

17 Fordham, *Proctor*, op. cit.

18 J. Dewar et al., *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland* (research report commissioned by the Queensland Law Society and the Family Law Practitioners' Association), Faculty of Law, Griffith University, 1998, p. 77. The QLS and the Bar Association also explained to the CJC that private practitioners perform duty lawyer work for no payment in the hope that they will receive some flow-on.

19 CJC, *Criminal Justice System Monitor,* vol. 5 (March 2001), p. 7. The *Monitor* reported that recorded crime had increased over the past decade, Magistrates Court appearances had remained stable and higher court matters had significantly increased in the previous two years.

20 Submission from QLS to LAQ proposal in relation to criminal law fees for indictable matters, 10 August 2000.

Section 3B of the *Queensland Law Society Act 1952* defines 'unprofessional conduct or practice' of a solicitor as:

(a) serious neglect or undue delay; or

(b) the charging of excessive fees or costs; or

(c) failure to maintain reasonable standards of competence or diligence.

21 Standing Committee of Attorneys-General (SCAG), *Deliberative Forum on Criminal Trial Reform Report*, June 2000, recommendation 14, p. 38.

22 Fordham, *Proctor*, op. cit.

23 Dewar et al., p. 78.

24 T. Goriely, *Legal Aid Delivery Systems: Which Offer the Best Value for Money in Mass Casework? A Summary of International Experience*, Lord Chancellors Department Research Series no. 10/97, 8 (December 1997), p. 64, as quoted in Dewar et al., p. 78.

25 Letter to CJC from LAQ, 4 July 2001.

26 Letter to CJC from LAQ, 5 April 2001.

27 Department of Justice and Attorney-General, *Options Paper*, p. 5.

28 Ibid.

29 Letter to CJC from Chief Judge of District Court, 26 June 2001.

30 Dewar et al., p. 64. However, they also forecast that: 'There is likely to be pressure for the re-opening of this costs debate, especially given the calls for development of a salaried legal service within the legal aid sector in England and Wales, which has always been heavily reliant on the private profession.'

31 LAQ, *Evaluation of the Brisbane Central Courts Committals Project and the Ipswich Committals Project*, March 2001, p. 15.

32 Letter to CJC from QLS, 13 July 2001.

33 Senate Legal and Constitutional References Committee, Third Report, para. 3.103.

34 Ibid., para. 3.107, recommendation 5.

35 Ibid., para. 3.90.

36 Ibid., para. 3.91. See also the section on 'juniorisation' in this chapter.

37 See also the sections on fees in chapter 2 of this report.

38 In its submission the Bar Association was referring to a discussion paper released by the Federal Attorney-General on a proposal to fix an Australia-wide scale of fees for legally aided Commonwealth matters.

39 LAQ, *Revision of Criminal Law Fees: A Consultation Paper*, p. 16.

40 Ibid.

41 Ibid.

42 Dewar et al., pp. 112–13.

43 Justice Research Centre, NSW, *Legal Services in Family Law*, prepared by R. Hunter, 2000, pp. xvi–xvii.

44 Letter to CJC from QLS, 13 July 2001.

45 This accords with the finding in relation to legally-aided family law clients in the NSW Justice Research Centre's *Legal Services in Family Law* (p. xiv): 'The mean amount paid by legal aid to private solicitors was less than $3,500 per case, whereas the mean amount paid by self-funding clients prior to hearing was almost $5,000 in children-only cases, and $6,000 in cases involving both children and property. Legal aid clients thus have less funds available to spend on their cases than do "ordinarily prudent self-funding litigants".'

46 Andrew Boe has suggested in his paper presented to the Legal Aid/Criminal Law Forum on 5 December 2000 that, by accommodating the limited funds paid by LAQ, practitioners will 'not pursue some lines of inquiries in preparation of defences'. A similar observation was made in the NSW Justice Research Centre's *Legal Services in Family Law* (p. xviii) in relation to privately funded family law matters: 'Clients with higher incomes and/or assets are advantaged in being able to spend more money on experts, subpoenas, witnesses, discovery and barristers, and are not under such pressure to settle as those with more limited funds available.'

47 A recent example of the importance of the availability of funding for DNA testing was reported in a page 1 article in the *Australian*, 12 April 2001 ('DNA test system labelled unfair'), in which the solicitor for a man wrongfully imprisoned for rape and who was set free on the basis of the results of DNA tests, 10 months after his conviction, was reported as saying: 'DNA testing was readily available and affordable to prosecuting authorities, but was not so accessible for cash-strapped defence teams usually relying on Legal Aid funds.' The chairman of the Criminal Law Committee of the QLS was reported as saying that the conviction occurred 'purely because the defence and the prosecution were not on an equal footing' in terms of resources and access to DNA testing.

48 Letter to CJC from LAQ, 4 July 2001.

49 Bar Association of Queensland response to LAQ *Consultation Paper*, p. 5.

50 Ibid., p. 3.

51 Ibid., p. 5.

52 Ibid., p. 6.

53 In fact, many were of the view that there was more work involved in a prosecution because the brief was not as well prepared as a legal aid brief and was often received the afternoon before the trial (1995 report, p. 80).

54 Letter to CJC from ODPP, 28 February 2001.

55 Ibid., p. 7.

56 Dewar et al., op. cit.

57 J. Giddings, J. Dewar and S. Parker, 'Being expected to do more with less: Criminal law legal aid in Queensland', *Criminal Law Journal,* vol. 23, no. 2 (April 1999), p. 72.

58 Ibid.

59 Letter to CJC from LAQ, 4 July 2001.

60 Minutes of the Legal Aid/Criminal Law Forum, 5 December 2000.

61 A. Boe, 'The need for reform of criminal practice and procedure in a Legal Aid context — A practitioner's perspective', updated version of a paper delivered at the Legal Aid/Criminal Law Forum, 5 December 2000, p. 5.

62 Letter to CJC from LAQ, 4 July 2001.

63 Facsimile letter to the CJC from A. Boe, 19 June 2001.

64 Bar Association of Queensland, *Response to Legal Aid Queensland Consultation Paper Re: Revision of Criminal Law Fees*, 2000 (undated), p. 6.

65 SCAG, *Deliberative Forum on Criminal Trial Reform Report*, Recommendation 12, endorsing Recommendation 15 of the Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure Report*, September 1999 ('the Martin Report').

66 R. Coates (Chairman, National Legal Aid), 'A best practice model for the determination of indictable charges: National Legal Aid and the Conference of Australian Directors of Public Prosecutions', in Australian Institute of Judicial Administration, *Reform of Court Rules and Procedures in Criminal Cases: A Collection of Papers Presented at an AIJA Conference in Brisbane on 3–4 July 1998*, p. 40.

67 Consultation meeting with Chief Justice P. de Jersey and Senior Judge Administrator Justice M. Moynihan.

68 Consultation meeting with Chief Judge Wolfe and Judges Shanahan, Dick and O'Brien.

69 Dewar et al., p. 94.

70 Ibid., p. 97.

71 Ibid., p. 98.

72 The President of the Court of Appeal referred to Giddings, Dewar and Parker, 'Being expected to do more with less'.

73 Letter to CJC from LAQ, 4 July 2001.

74 DPP Queensland, *Half-Year Report January to June 1995*, p. 18.

6

CRIMINAL JUSTICE SYSTEM ISSUES

In its 1995 report (p. 101), the CJC noted:

> … the ability of … [the Legal Aid Commission (LAC) and the Office of the Director of Public Prosecutions (ODPP)] to utilise funds effectively is constrained by, and has implications for, what happens elsewhere in the criminal justice system. Reforms of the broader criminal justice system may well be a more realistic and effective strategy to address the resourcing problems of these agencies in the medium to longer term.

The 1995 report discussed a number of proposals that had been made to enhance the efficiency of the Queensland criminal justice system and its component agencies. These proposals covered, for example, the jurisdiction of the Magistrates Courts, the committal process, the process of listing matters for trial and many other aspects of the system.[1] Issues raised in the 1995 report have been the subject of academic, government and professional discussion since then and continue to be cause for concern in 2001.

This chapter:

- outlines some recent reviews of criminal justice issues that may have a direct or indirect influence on the effective use of legal aid or public prosecution funding
- briefly describes relevant criminal justice issues, and proposals to deal with them; the issues fall under the broad headings of:
  - coordination of agencies
  - jurisdiction of the courts
  - committals
  - court procedures
  - circuit courts
  - ex officio indictments
  - discount for early pleas
  - disclosure.

RECENT REVIEWS OF THE CRIMINAL JUSTICE SYSTEM

Recent national and Queensland reviews of the criminal justice system have focused on issues relevant to the efficient use of Legal Aid Queensland (LAQ) and ODPP funding. Some of those issues are discussed in more detail later in this chapter and elsewhere in this report. The reviews include:

Best-Practice Model for the Determination of Indictable Charges (1998)[2]
Directors of Public Prosecutions and National Legal Aid have identified a number of elements of a best-practice approach to dealing with indictable crime.

Dewar, Giddings and Parker Report (1998)[3]
This is a report from a project commissioned jointly by the Queensland Law Society (QLS) and the Family Law Practitioners' Association, originally designed to develop information for the inquiry by the Senate Legal and Constitutional References Committee into the Australian legal aid system (see below). The project covered the changes to legal aid in Queensland from the financial year 1991–92. The impact of changes to legal aid in Queensland (including changes within the legal aid system itself and 'environmental' changes) since 1992 was assessed primarily on the results of interviews with criminal law practitioners, family law practitioners, judges and

LAQ. The interviews consisted of five research questions:

- What change, if any, has there been in the availability of experienced family and criminal law practitioners to undertake legal aid work as a result of changes to legal aid in Queensland in the last five years?
- Have changes to legal aid in Queensland in the last five years:
  — disadvantaged legally-aided family and criminal law clients?
  — advantaged them?
  — made no difference?
- Have changes in legal aid increased the likelihood that litigants will undertake some or all of the matter in person, to their disadvantage?
- Is the legal aid system indirectly subsidised by (and, if so, to what extent):
  — other, full-fee-paying clients, or
  — law firms that undertake legal aid work?
- How does the rate of remuneration in legally-aided family and criminal law work compare with rates that governments pay for other kinds of legal services?

Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System (1997, 1998)

This committee, established by the Senate on 17 September 1996, produced three reports, in March 1997, June 1997 and June 1998. Chapter 3 of the third report discusses a number of issues relevant to the CJC's inquiry, including the problem of unrepresented accused, and the ability of legal aid bodies to afford competent staff to provide legal assistance and to pay appropriate rates to private legal practitioners.

The Martin Working Group (1999)[4]

The working group, under the chairmanship of the Honourable Justice Brian Martin of the Supreme Court of South Australia, was established by the Standing Committee of Attorneys-General (SCAG) to find ways in which the existing system of the administration of criminal justice can be improved. The working group, which consisted of judicial officers, representatives of legal aid organisations, prosecutors and barristers, conducted its deliberations 'in the context of the adversarial system and upon the fundamental premise that an accused is not to be compelled to answer questions or assist the prosecution in proving its case'. The working group sought to 'identify practical areas of reform which offer the greatest potential to reduce criminal trial delay while not impacting unfairly upon the right of every defendant to a fair trial'.

The working group saw the essential feature of the administration of criminal justice as the need for early and complete prosecution disclosure and accordingly recommended that there be statutory recognition of the duty of disclosure that rests upon both prosecutors and investigators: 'In our view this is the first step in changing the culture currently attaching to adversarial procedure.'

Law Reform Commission of Western Australia (1999)

In 1999 the Law Reform Commission of Western Australia published the report *Review of the Criminal and Civil Justice System* (Report Number 92). The report considered a large number of issues, some of which are relevant to the CJC's review, including the jurisdiction of courts and the categorisation of offences.

AIJA and SCAG (2000)[5]

A National Conference on Criminal Trial Reform, hosted jointly by the Australian Institute of Judicial Administration (AIJA) and SCAG in Melbourne on 24–25 March 2000, had as its starting point the Martin Report recommendations. The conference analysed existing law and practice and put forward for consideration models for reform of criminal trial procedure.

SCAG Report (2000)[6]

Nominees of the Attorneys-General of the Commonwealth, States and Territories (including representatives of the judiciary, legal aid services, policy officers, prosecutors and defence practitioners) considered the Martin Report, the AIJA conference deliberations and other relevant documents at a deliberative forum in

June 2000. The SCAG report reproduces the final recommendations and collective comments from members of that forum. Not all recommendations included in the report received unanimous support — many of the recommendations were agreed to in principle only. It was acknowledged that jurisdictional differences are likely to affect the implementation of the recommendations.

Legal Aid Criminal Law Forum (2000)[7]

In December 2000, the Queensland Law Society and the Bar Association of Queensland convened a forum to enable the judiciary, solicitors, barristers and representatives of key legal agencies to discuss issues affecting practice and procedure in the criminal justice system, in the context of a proposal by the Board of LAQ to introduce lump-sum fees in criminal law matters. Many of the issues discussed at the forum and reflected in its minutes are relevant to the efficient use of LAQ and ODPP funding.

Arising out of the Legal Aid/Criminal Law Forum, a joint Bar Association of Queensland and QLS working party was formed to continue to examine the issues raised at the forum and to attempt to involve the agencies represented there in finding solutions to problems. The QLS advises that:

> That group is currently working on a position paper which it seeks to have adopted by the significant players in the system and in respect of which it is seeking to involve the Attorney-General. The major thrust of the group's work has been to address some of the systemic problems in the Criminal Justice System with a view to restructuring that system so that there is a 'front end' approach but with that approach properly funded for all sectors, including Legal Aid.[8]

QLS and LAQ

The QLS has commissioned a study to be undertaken by the Faculty of Business at the Queensland University of Technology, comparing the work performed by LAQ and three preferred supplier firms, for the purpose of assessing the real cost of legal aid work, using an activity-based costing model. The study is expected to be completed by the end of 2001.

The Criminal Practice Workshop (2001)

The Criminal Practice Workshop was convened in February 2001 on the initiative of the Chief Justice of Queensland to enable people representing many of the most significant sectors of Queensland's criminal justice system to discuss the disposition of criminal matters through Queensland courts. A Criminal Justice Standing Committee and specific-issue working groups were established after the workshop to explore the issues raised there.

COORDINATION OF AGENCIES

The need for a more coordinated approach to the delivery of criminal justice system services has been recognised in Queensland for more than a decade. Over this period, a number of different strategies have been adopted with the aim of increasing the government's ability to monitor the operations of the wider justice system and thereby give better effect to its policies. These are some of the strategies that have been implemented:

- **The Criminal Justice Information Integration Strategy** (CJIIS) was established in 1994. The purpose of CJIIS was to facilitate the recording and exchange of information between criminal justice agencies and to publish statistical reports on the criminal justice system. The first task of CJIIS was to take the lead in developing and refining common rules for counting and classifying offences, offenders and victims across the criminal justice system agencies. The Law and Justice Policy Unit of the Office of Premier and Cabinet is currently examining the most effective means of delivering the CJIIS.
- **The Criminal Case Management Group** was also established in 1994 as an initiative of the Litigation Reform Commission. It included representatives of the Supreme and District Court judiciary, the magistracy, the ODPP, the LAC, the Queensland Public Service (QPS), the Department of Justice and Attorney-General, the private legal profession and court administration staff. The aim of the group was to develop specific strategies that could be applied on a system-wide basis to improve efficiency. The focus was mainly on reducing delays in the criminal justice system; for that to

occur, the group recommended that there be intervention at the earliest opportunity by the courts, the ODPP and the LAC.

- **The Crime Statistics Unit** (CSU) was established in 1995, within the Government Statistician's Office. The CSU essentially took over the role of recording Queensland crime and court statistics from the Australian Bureau of Statistics.
- In 1999, the Office of Economic and Statistical Research (OESR) began work on the **statistical modelling of the criminal justice system**. Within a year, the Department of Corrective Services had also begun a similar exercise, with the aim of improving the ability of the department to forecast the likely demands upon Corrective Services, subject to the adoption of different policies by government.
- In early 2001, the OESR further developed its interest in statistical models of the justice system with the commencement of a collaborative project with Griffith University and the Department of Families, aimed at modelling the juvenile criminal justice system.

Despite the good intentions behind these strategies (and as reported in volume 5 of the CJC's *Criminal Justice System Monitor*), there has been only limited progress towards a more coordinated approach to the monitoring and management of the criminal justice system. This appears to be the result of technical difficulties preventing the various agencies from linking their information systems, and the culture of the organisations involved. For example, the primary focus of the police, the courts and Corrective Services is in each case upon their particular functions within the broader criminal justice system. There is no requirement for agencies to think in terms of a *criminal justice system impact statement* when new policies are proposed or implemented.

The lack of any integrated data-management system across the key agencies has always meant that a system-wide rather than an agency-specific focus was not especially useful for individual agencies or for the government more generally. Further, agencies have been either unwilling or unable to commit themselves to the operational changes that a system-wide focus would require.

KEY POINTS: COORDINATION OF AGENCIES

- **There have been several largely unsuccessful attempts to establish a more coordinated approach to the monitoring and management of the Queensland criminal justice system.**
- **The consequences of policy initiatives within LAQ and the ODPP for other agencies within the criminal justice system (and vice versa), and for the criminal justice system as a whole, cannot be predicted with any degree of certainty until there is a better understanding of how the system operates. This will not happen until the various agencies within the criminal justice system work within a common information-management environment.**
- **In the development of a more coordinated criminal justice system any initiative should be taken in consultation with relevant government agencies to maintain a whole-of-government approach.**

JURISDICTION OF THE COURTS

In the 1995 report (p. 102), the CJC observed:

> Many matters are being dealt with in the higher courts which could adequately be handled in the Magistrates Court where the costs to the system are lower.

Magistrates exercise what is commonly referred to as 'summary jurisdiction'. This includes adjudicating and sentencing on less serious (summary) offences. Magistrates are also able to adjudicate and pass sentence on certain indictable offences that would normally be dealt with in a higher court, such as the District Court, but for which summary trial is allowed and has been 'elected' (chosen).

Generally, the higher the level of court that deals with a matter, the greater the associated costs and delays.

The Magistrates Courts are regarded as the cheapest and most speedy forum for resolving criminal matters.[9] If a matter is resolved at the Magistrates Courts level, there are likely to be relatively substantial savings flowing through the criminal justice system compared with the cost to the system of the matter being dealt with in the District or Supreme Court.

Similarly, in general terms, savings in time and costs could be achieved if a matter could be dealt with by the District Court rather than by the Supreme Court.

During the CJC's consultations, there was widespread support for a review of the jurisdiction of the Magistrates Courts, but also for a review of the types of matters that could be dealt with by the District Court but that can currently be dealt with only by the Supreme Court.

The Chief Justice of Queensland has expressed the view that a review of the jurisdiction of courts should be undertaken, although the corresponding issue relevant to the removal of matters from the jurisdiction of the District Court — that of denying people access to a jury trial — will also need to be considered.

The jurisdiction of the various courts is largely dependent on the categorisation of offences. In turn, the categorisation of offences has an impact throughout the criminal justice system. The Law Reform Commission of Western Australia has commented that:

> The different categories of offence have significant impact in terms of the ways in which offences are processed through the criminal justice system, as well as implications for the cost and delay in defending charges, and sometimes the maximum sentence which can be imposed. Yet, there is no coherent basis for the classification either with reference to the seriousness of the offending or the importance of community input through jury trial. Classification of offences as summary, indictable with the option of summary trial, or indictable with the option of trial by judge alone or by jury has evolved in a piecemeal way over many years. In our view, a restructuring of how offences are classified is long overdue.[10]

Offences dealt with by magistrates

Bishop describes the three broad categories of offences heard in Magistrates Courts as follows:

> The offences heard in magistrates' courts fall into three categories. The first category is constituted by the most serious indictable offences. These offences are not heard to finality in the Magistrates Courts. It is usual for a magistrate to conduct committal proceedings to determine whether or not the evidence against the accused is sufficient to warrant committal for trial or sentence. The second category includes the least serious offences. These offences — 'summary' or 'simple' offences — constitute the overwhelming proportion of all offences heard in magistrates' courts. The offences are determined summarily, generally by a magistrate. The remaining category is made up of offences which, in terms of gravity, fall between the two categories of offences previously described, and which, though indictable, may be prosecuted on indictment or may be heard to finality by a magistrate. The proceedings usually commence as committal proceedings and at some point are transformed into a summary hearing. The practice and procedure of a case disposed of summarily is then followed. [11]

In Queensland, indictable offences that may be determined by way of summary hearing in the Magistrates Courts are the least serious indictable offences and the procedures for dealing with them summarily vary. Other indictable matters can only be dealt with by the District Court or the Supreme Court (depending on the nature of the alleged offence):

- There are indictable offences that must be heard summarily unless the defendant elects to be tried by a jury in the higher court.[12]
- If the defendant admits guilt in relation to certain indictable offences[13] and the magistrate believes that the offence is such that the defendant can be adequately punished on summary conviction, the charge must be dealt with summarily.[14]
- There are indictable offences that may be heard summarily at the election of the prosecution.[15]

Under s. 552D of the Criminal Code, a magistrate must abstain from dealing summarily with a charge under s. 552A or 552B if satisfied that, because of the nature or seriousness

of the offence or any other relevant consideration, the defendant, if convicted, may not be adequately punished on summary conviction.

Sentences imposed by magistrates

If an indictable matter is heard summarily under s. 552A or s. 552B of the Criminal Code, the maximum penalty that a magistrate can impose is 100 penalty units or three years' imprisonment, although 'in no case may the person be punished more than if the offence had been dealt with on indictment' (s. 552H).

Magistrates have the same basic sentencing options available to them as are available to judges in the higher courts. However, a view expressed to the CJC during consultations is that magistrates are reluctant to use the full range of options. Whereas fines are clearly the preferred sentencing option used by magistrates, judges in the higher courts appear to make greater use of other options such as community service orders.[16]

Jurisdiction of Magistrates Courts in other States and Territories

In other parts of Australia such as the Australian Capital Territory, magistrates have the authority to deal with more types of indictable matters than Queensland magistrates do.[17]

Among all Australian States and Territories, Queensland has one of the lowest proportions of criminal matters dealt with in the Magistrates Courts compared with higher courts. In 1997–98, Queensland's higher courts dealt with more criminal cases than any other State or Territory (around 35 per cent of the national total). In 1999–2000, New South Wales dealt with the highest proportion — Queensland had the second-highest workload (around 30 per cent) but maintained a higher rate per 1000 population (2.3 compared with 1.7 in New South Wales).[18]

Variations among the various Australian jurisdictions as to which indictable offences can or must be dealt with summarily can be explained in part by Bishop's observations that:

> In recent times there have been two major areas of development in the summary disposition of indictable offences. The first is the extension of summary hearings at the expense of trial by jury. Confronted with large and growing case numbers, governments have passed legislation enabling accused persons to elect trial by judge alone, and have extended the gravity and number of the offences that may or must be heard summarily in the magistrates' courts … The other major development is in respect of the persons who constitute the court and of those who appear before it. Magistrates are now more qualified than formerly, legal aid is more freely available and there has been a strong movement to replace police advocates with qualified lawyers, leading to some reform.[19]

Bishop's observations are relevant to the situation in Queensland, apart from his comments on the availability of legal aid in the Magistrates Courts and on the replacement of police advocates with qualified lawyers (which in Queensland has only happened in matters before the Committals Project courts).

Elections

In the Magistrates Court, defendants charged with certain indictable offences may be able to elect to have their case heard in a higher court, where it can be decided by a jury. Defendants who do so may be influenced by a number of factors, including:

- advice from the defendant's legal representative that the defendant will get a 'better deal' from a District Court judge and jury
- the unpredictability of sentencing in the Magistrates Courts. It has been suggested that some legal practitioners advise their clients to 'plead up' to the District Court because sentencing in the Magistrates Court is unpredictable.[20] The CJC heard conflicting accounts of the consistency of magistrates' decisions. For example, QPS prosecutors were of the view that magistrates are generally consistent in their sentencing. Defence lawyers were of the view that magistrates are less consistent in their sentencing than District Court judges and that District Court judges are

more lenient in their sentencing than magistrates. This was linked to the view that what is regarded as a serious matter in the Magistrates Court, deserving of the harshest penalty available to the magistrate, is regarded as relatively minor in the District Court and deserving of a lesser penalty. The Chief Magistrate has foreshadowed discussions with her colleagues on this and other practical issues facing the Magistrates Courts.

As mentioned to the CJC during its consultations, removing the current right of election in relation to certain indictable matters and giving magistrates exclusive first-instance jurisdiction over them would entail:

- the adequate resourcing of magistrates, including out-of-court time to research and prepare
- training of magistrates
- access to comparable sentencing information from the Magistrates Courts and from higher courts. Arrangements were recently made for magistrates to have access to the comparative sentencing data kept by LAQ and the ODPP. Although an increasing number of appeals from magistrates' decisions are being heard by the District Court, the Chief Justice of Queensland has suggested that more appeals might lead to some useful guidance to magistrates.[21] The Chief Justice suggested that the establishment of a 'fund' to fund s. 222 of the *Justices Act 1886* (appeal to a single judge of the District Court) would help comparability of sentencing. LAQ does provide some funding for s. 222 appeals.
- the denial to an accused person of the 'right' to a trial by jury, and whether this is a secondary consideration to the savings made in the criminal justice system by having the matter dealt with in the Magistrates Court. Also relevant here would be the number of matters that result in a plea of guilty despite being the subject of election to the higher court.

Range of matters subject to election

Section 20 of the *Criminal Procedure Act 1986* (NSW) (referring to Table 2 to Schedule 1 of that Act) is similar to s. 552A of the *Criminal Code* (Qld) but refers to a greater number of indictable offences that must be dealt with summarily by the equivalent to Queensland's Magistrates Courts (Local Courts), unless the prosecuting authority elects to have the matter dealt with in a higher court.

The Chief Judge of the District Court of Queensland has suggested that consideration be given to expanding the types of matters covered by s. 552A of the Criminal Code in line with the New South Wales provisions.[22]

Time limit for making election

Section 23 of the *Criminal Procedure Act 1986* (NSW) provides:

> Time for making election
>
> (1) An election to have an offence dealt with on indictment must be made within the time fixed by the Local Court.
>
> (2) An election may, with the leave of the Local Court, be made after the time so fixed if the Court is satisfied that special circumstances exist.
>
> (3) However, an election may not be made after the following events:
>
> (a) in the case of a plea of not guilty — the commencement of the taking of evidence for the prosecution in the summary trial
>
> (b) in the case of a plea of guilty — the presentation of the facts relied on by the prosecution to prove the offence.

There is no such time limit in Queensland. The Chief Judge of the District Court of Queensland has suggested giving consideration to the introduction into the Queensland Criminal Code of a provision similar to s. 23 of the New South Wales legislation. A time limit would reduce the chance of an election being made, without removing the right to elect. The Chief Judge suggested that consideration could be given to different time limits depending on the sitting times of the Magistrates Courts.

The Public Defender does not, however, agree that adopting a procedure similar to that followed in New South Wales is likely to be of benefit. LAQ has informed the CJC:

> The Public Defender does not consider s. 23 of the *Criminal Procedure Act 1986* (NSW) is suitable for adoption in Queensland, where the starting point for such matters is different from that which operates in NSW. Usually, in Queensland, an offence is indictable unless it is elected that a matter be dealt with summarily.[23]

Legal aid in the Magistrates Courts

At present, there is unlikely to be any LAQ funding available for legal representation of the defendant in a summary trial before a magistrate, though there may be LAQ funding if the matter proceeds to the District Court. This is a significant disincentive for a defendant to elect to have a matter dealt with in the Magistrates Court.

Dewar et al. reported a complaint by Queensland criminal lawyers that defendants faced increasing difficulties in obtaining legal aid for criminal matters heard by magistrates. The authors believed that this was due not to any recent alteration of the legal assistance guidelines, but to the merit test being applied more stringently:

> [Legal practitioners interviewed by the authors] indicated that the lack of legal aid for summary trials was a major reason for some defendants electing to have indictable offences proceed before a District Court judge and jury. This may disadvantage some defendants as a much more substantial maximum penalty is available to a District Court judge sentencing a defendant after a trial on indictment. Section 552H(1)(a) of the *Criminal Code* provides that the maximum penalty which the Magistrates Court can impose on conviction for an indictable offence tried summarily is 3 years [imprisonment].[24]

Trials in Magistrates Courts are rarely funded by LAQ and will only be considered for funding if there is a reasonable chance of the person being acquitted, or if the person may be facing a term of imprisonment or loss of employment if found guilty. In any event, funding for Magistrates Court representation, other than the duty lawyer scheme, is low in the order of priorities for grants of legal assistance in State criminal law matters as set down in Schedule 2 of the State Government Agreement with LAQ:

(i) 'prescribed criminal proceedings' which include District and Supreme Court proceedings,

(ii) indictable offences in the Children's Court,

(iii) appeals to the Court of Appeal or the High Court with respect to criminal charges,

(iv) committal proceedings in the Magistrates Court in respect of charges for which the maximum penalty exceeds 14 years;

(v) committal proceedings;

(vi) summary criminal prosecutions;

(vii) summary trials;

(viii) pleas of guilty in the Magistrates Court.

The duty lawyer scheme, as discussed in chapters 2 and 5, only provides brief legal advice at a person's first appearance at the Magistrates Court and will, if the person requires, represent him or her on an adjournment or a plea of guilty. The scheme does not provide representation in summary trials or committal proceedings (other than in the Committals Project courts), nor does it provide representation to people facing their first or second drink-driving charge unless a conviction might result in imprisonment.

Even if the jurisdiction of Queensland courts were altered to encourage or require defendants to have their matters adjudicated and sentenced in the Magistrates Courts, a significant problem in the Queensland context would be the availability of legal aid funds to indigent defendants appearing before the Magistrates Courts.

In its consultation paper *Revision of Criminal Law Fees*, LAQ considered various options for the revision of current criminal law fees, on the assumption that legal aid should be made available as soon as possible after an accused is charged. One means of achieving this aim was seen as facilitating a shift of resources away from the District Court jurisdiction to the Magistrates Court jurisdiction.[25]

One reform option put forward by LAQ was designed to make legal aid available to the client at the earliest opportunity. 'Option 3' would replace the present event scale with a series of lump-sum grants based on the way the cases in each category of offences were dealt with. A perceived advantage of this option was that there would be increased access to grants of legal aid in the Magistrates Courts across the State.

The QLS welcomed the possibility that more Magistrates Court matters would be funded than is currently the case: 'This would be a most significant and welcome improvement to the present system.'[26] However, in the same submission, the QLS expressed concern at the prospect that any revision of LAQ funding of summary matters in the Magistrates Courts would require that 'defence lawyers should more often elect for their clients' matters to be heard summarily instead of electing for proceedings on indictment':

> Such an approach is based on the premise that a summary proceeding in the Magistrates Court is obviously beneficial to the clients in most (if not all) cases, a premise that is clearly incorrect.

The QLS noted that, just as there may be advantages in opting for a summary trial and/or sentence, so too there are advantages in electing to have matters heard in a higher court:

> … matters on indictment are heard in a higher court and are there dealt with by more experienced and learned judges and counsel. This factor alone carries with it the undeniable associated benefits of a practitioner being in a much better position to advise a client with greater accuracy as to a likely outcome. Under the proposed fee options, there will be significant pressure on solicitors to enter pleas of guilty in the Magistrates Court, even in cases where it may be in the client's best interests to proceed to the District Court for trial or sentence. It is certainly neither desirable nor beneficial to introduce a fee schedule that offers a significant financial incentive for practitioners to provide minimal services to a client. Further, it would be unfortunate to promote a system that will, perhaps frequently, present practitioners with a conflict between their own and their clients' interests and needs.

In response to a suggestion that LAQ funding for a District Court trial should be precluded if the defendant does not exercise an election for a possibly cheaper and quicker summary trial, Dewar et al. noted the following:

> The impact of such a guideline would be significant if there is only very limited legal aid availability for summary trials … there is sometimes a very good reason to have a matter proceed in the District Court. Certain magistrates, it was said, tend to impose more substantial penalties than District Court judges. Further, magistrates may tend to be less likely to make use of community-based sentencing options.[27]

The Chief Judge of the District Court has also observed, however, that two other factors need to be noted to get a more accurate picture of why so many defendants choose to be dealt with in the higher courts:

> firstly, the wish of some defendants to delay the day of reckoning and secondly, the advantage of being dealt with by higher judicial officers, being represented by more experienced counsel and the opportunity for trial by jury … [28]

In the same letter, the Chief Judge noted the importance of independent judgment and the proper exercise of the sentencing discretion in the circumstances of a particular case, and that:

> It is not possible to compare the sentencing practices of the higher courts with the Magistrates Courts without the results of a proper study comparing these practices.

Increasing the jurisdiction of the Magistrates Courts

A judge of the District Court recently commented on what he regards as a significant problem relating to the defendant's right of election on a charge of assault occasioning bodily harm:

> … prior to a 1997 amendment to the Criminal Code, most cases of assault [occasioning] bodily harm were dealt with summarily by Magistrates. There was a very good reason for that happening, namely that most of these cases are trivial assault cases that can easily be dealt with in a Magistrates Court.

> In 1997, an amendment to the Criminal Code created for the first time a right to trial by jury in these matters at the election of the accused. Immediately after this amendment it was noticed all over Queensland that a significant number of assault [occasioning] bodily harm cases were coming into the District Court that had previously been dealt with by Magistrates …
>
> The District Court Judges have endeavoured, in vain, for three years to have this problem rectified … The statistics show that since 1997 there has been an increase of 137 per cent … in the number of assault [occasioning] bodily harm cases coming before the District Court.
>
> When mention is made of the right to trial by jury, it needs to be remembered that prior to 1997 no right to trial by jury existed in these cases. The right to elect trial by jury came about only because of incompetent drafting of the 1997 amendment.
>
> The result of that 1997 amendment has been to inflict very great damage on the criminal lists of the District Court throughout Queensland. A curious result of the 1997 amendment has been to transfer to the District Court a significant part of the jurisdiction of the Magistrates Court and that was the jurisdiction to deal with minor assault cases. Many of these cases are extremely trivial and bodily harm will often consist of no more than a bruise or a scratch. It is thought that jurors are extremely angry to find that they are regularly brought to Court to deal with trivial cases of this nature.
>
> … [these cases] … often require two days to deal with and it is not uncommon for them to go on to a third day. In most of these cases no Judge would consider imposing a custodial sentence because of the trivial nature of the offence, yet a great deal of Court time has been wasted.
>
> So far as the Court is concerned, a far better solution would be to return to the situation which existed prior to the 1997 amendments where, in general terms, the ultimate discretion as to whether a charge of assault occasioning bodily harm was a fit matter for prosecution on indictment lay with the Magistrate.
>
> It is curious to note that under the Criminal Code there are other more serious assault charges that must be dealt with summarily at the election of the prosecution, subject always to the discretion of a Magistrate to commit to the District Court if the nature or seriousness of the offence is such that it may not be adequately punished on summary conviction.[29]

The judge made a similar observation in relation to the 1997 amendment that gave defendants a right to elect to have other charges, such as dangerous driving, tried in the District Court:

> In most cases of dangerous driving simpliciter there are ample powers in the Magistrates Court to deal with this type of offence.

The judge also commented on the offence of 'wilful damage'. Although that matter was not the subject of the 1997 amendments to the Criminal Code, he observed:

> Throughout the lists of the District Court throughout Queensland there are a significant number of cases of wilful damage. Many of these are of a very trivial nature. Now, under the 1995 Criminal Code Act … cases of wilful damage up to $5,000 were to be dealt with summarily by Magistrates [that Act was never proclaimed and was subsequently repealed by a new Government] … The Litigation Reform Commission reported to the Attorney-General at that time … that a significant number of very trivial cases of wilful damage had to be dealt with by trial by jury in the District Court. One of the cases that actually went to trial in the District Court was the wilful damage of a plastic cup valued at a few cents. There was another trial in the District Court of wilful damage to a flower pot valued at a few dollars.

The judge recommended that wilful damage cases up to $5000 be dealt with summarily by a magistrate, and summarised the problem in this way:

> It needs to be understood that the District Court has to deal with very serious criminal matters, such as armed robbery, rape, extortion, professional car thieves, and persons who carry on the trade or profession of housebreaking. These cases are in the list to be dealt with, and they should be dealt with as quickly as possible. There is much delay in dealing with serious criminal cases because the lists of the District Court are constantly cluttered up with trivial cases that ought to be dealt with summarily in the

> Magistrates Court. A great deal of public money is being wasted by having a jury trial of trivial cases that should be dealt with summarily in the Magistrates Court.

During the CJC's consultations, other District Court judges agreed that bodily harm matters have increased in number before the District Court and that most of these could be handled in the Magistrates Court. The District Court judges were also of the view that the monetary limit expressed in s. 552B(1)(a) and (c) of the Criminal Code (currently $5000) could be increased, provided that the prosecution was always able to elect that the matter be tried in the District Court where the circumstances might make that appropriate.

The Chief Magistrate was amenable to an increase in the jurisdiction of the Magistrates Court and also suggested that, if the jurisdiction of the District Court were to be increased to enable that court to deal with more serious drugs matters, less serious drugs matters could be handled by the magistrates.

Increasing the jurisdiction of the District Court

There are certain indictable matters, such as serious drug matters and murder, that the District Court does not have jurisdiction to deal with. These can only be dealt with by the Supreme Court.[30] However, District Court judges have observed that the District Court is quite capable of dealing with drug matters, at least.

Transfer of matters from the District Court to the Magistrates Court

Under ss. 651 and 652 of the Criminal Code, introduced in 1997, the District Court is able to hear and decide summary matters if an indictment has been presented against the person — subject to certain restrictions.[31] The District Court of Queensland *Annual Report 1999/2000* (p. 30) notes that:

> This has resulted in the creation of large numbers of extra files annually. Many of these require more work to process than indictable offences, because the provisions of section 652 have not been complied with when the court deals with the matter. The total number of applications granted by the Magistrates Court was 535, which resulted in 1388 summary offences being dealt with during the year at Brisbane by the District Court.

Reclassification of offences

The Western Australian Law Reform Commission recommended a reclassification of offences that, if adopted in Queensland, would rationalise the types of matters dealt with by the various Queensland courts and would substantially increase the number of matters heard by magistrates, as opposed to judge and jury in the higher courts:

(1) **Serious Indictable Offences**

All offences which carry a maximum penalty of a life sentence should be heard by a Supreme Court jury with the option of trial by judge alone subject to 2) below.

Intermediate Indictable Offences

All offences which carry a maximum penalty of less than a life sentence but more than 15 years imprisonment should be heard by a District Court jury with the option of a trial by judge alone subject to 2) below.

Lesser Indictable Offences

All offences which carry a maximum penalty of between five to 15 years imprisonment should be heard by a District Court jury with the option of trial by magistrate subject to 2) below. Where trial by magistrate is allowed, the summary conviction penalty available shall be no more than five years imprisonment.

Summary Offences

All offences which carry a maximum penalty of less than five years imprisonment must be heard by a magistrate.

Minor Summary Offences

Offences carrying no prison term may be heard by magistrates or justices of the peace.

(2) When Parliament is of the view that the proper adjudication of an offence requires a jury trial in order to establish contemporary community standards, the legislation should stipulate that there is a presumption that the offence should be tried by jury.

(3) Where trial by judge alone or magistrate is available it should be at the election of the defendant, unless opposed by the prosecution, in which case the issue is to be determined by the court.[32]

KEY POINTS: JURISDICTION OF THE COURTS

- **There was widespread concern expressed during the consultation process about the limited types of matters that can currently be dealt with by magistrates.**
- **Similarly, concern was expressed about the limited types of serious matters that the District Court currently can deal with.**
- **The election process for indictable offences that can or must be dealt with summarily provides a mechanism for matters to be determined in the higher courts. It would usually be more cost-effective and time-effective for such matters to be determined in the Magistrates Courts.**
- **Unless legal aid is provided for matters to be determined in the Magistrates Courts, there will be little incentive to have a matter tried summarily where the accused person can elect to have the matter determined in a higher court.**

COMMITTALS

A committal is a Magistrates Court procedure for indictable offences where a magistrate determines, on the evidence placed before him or her by the prosecution and the defence, whether a prima facie case exists against the accused for determination by a judge and jury in a higher court. It is also regarded as an important forum for testing the evidence against the accused and for facilitating the early settlement of the matter.

The CJC is aware of a number of criticisms of the committal procedure. Some stakeholders consulted by the CJC have questioned its usefulness; they have suggested that the committal process actually delays the finalisation of some matters by acting as a conduit for matters to go to the higher courts when they could have been finalised at the Magistrates Court level. Other stakeholders, such as the QLS, believe that, although the committal process is necessary, it could be made more effective by, for example, making early decisions (that is, at the 'front end') about whether a committal is necessary in a particular case.[33]

The QPS usually prosecutes matters in the Magistrates Court, including indictable offences tried summarily. The QPS also represents the Crown at most committal proceedings. In two Queensland Magistrates Courts (Committals Project courts), however, the prosecution is conducted at committal proceedings by the ODPP instead of the QPS.

As discussed in chapter 5, LAQ does not normally fund committal proceedings. However, in the Committals Project courts, LAQ funds all defendants who satisfy the means test, whether or not they satisfy the merit test.

Full and hand-up committals

There are two categories of committal proceeding, commonly referred to as:

- a full committal, and
- a hand-up committal.

A full committal is where witnesses for the prosecution are called and made available for

cross-examination. The magistrate hears the evidence and decides whether or not there is sufficient evidence to commit the accused for trial by a judge and jury in the higher courts.

A hand-up committal is a procedure in which both the prosecution and the defence agree to statements of witnesses being submitted to the magistrate. Where written statements of witnesses are tendered by the prosecution or the defence, those witnesses may not have to appear to give evidence or statements in court — s. 110A(2), *Justices Act 1886* (Qld).

There are a number of variations to the hand-up procedure. Where *all* the evidence consists of written statements and the accused consents to being committed for trial or for sentence without consideration of the written statements, the magistrate is to order the accused to be committed for trial or for sentence, without determining whether the evidence is sufficient to put the accused on trial — s. 110A(6).

A written statement can also be admitted as evidence before the magistrate, subject to agreement between the prosecution and the defence that the person making the statement will be present when the written statement is tendered, to be cross-examined by the other party. In such cases, the magistrate is to consider both the written and the oral evidence in relation to that person and determine whether it is sufficient to put the accused on trial — s. 110A(7), (8).

Hand-up committals in which no witnesses are required for cross-examination are referred to as full hand-up committals.

The CJC has been advised that in some cases a hand-up committal is the most appropriate way of proceeding a matter to the higher court, as in the case of an indictable matter that cannot be tried summarily in the Magistrates Court and where there is no need for a full committal. However, the CJC is aware of a view that some hand-up committals are used simply to gain access to LAQ funding in the higher courts. A representative of the Bar Association of Queensland has referred to such hand-up committals as 'meaningless' in that they neither seek to resolve the matter nor facilitate the trial.

Some full hand-up committals take as little as 20 minutes of court time; by comparison, full committals may take days or weeks, depending on the complexity of the matter.

Evaluation of the success of the Committals Project

The Committals Project is generally thought, by most stakeholders consulted by the CJC, to have made a worthwhile contribution to the efficiency of the criminal justice process.

There have been two independent evaluations of the Brisbane Central Committals Project — one by the CJC[34] in 1996 and the other by Coopers & Lybrand[35] in 1997. LAQ has also conducted regular evaluations of the Brisbane and Ipswich Committals Projects.[36]

In their evaluations, both the CJC and Coopers & Lybrand recommended the continuance of the Committals Project, despite the fact that the successes of the project were difficult to substantiate with only three months of pre-evaluation data from which to make comparisons and draw conclusions.

In its evaluation, the CJC identified several factors that made it difficult to accurately measure the overall cost effectiveness of the project, including:

- inaccurate time costing by the ODPP
- the fact that only a small number of matters had completed a key stage
- incomplete data on the time and costs associated with processing matters, and
- inability to quantify the time saved by the Magistrates Courts and the higher courts.

LAQ evaluations have consistently advocated the continuance of the Committals Project based upon ongoing administrative savings for the organisation — although the savings claimed to have been generated are fairly low. The LAQ evaluations have also identified a number of process difficulties that have hindered the success of the Committals Project.

Significant findings from the LAQ evaluations of the Committals Project, by year of the evaluation, include:

August 1996

- high numbers of hand-up committals without cross-examination
- little impact on the number of matters going to the District Court
- in-house LAQ legal practitioners are more 'cost-efficient' than private providers.

August 1997

- late or incomplete provision of police briefs
- understaffing and changes in staff of the ODPP
- communication problems within the ODPP and between the ODPP and the QPS
- inability of the ODPP to manage the ex officio process (see the discussion of the ex officio process, page 89)
- 'greatest drop in matters being committed for trial were those in the control of in-house legal aid staff'
- changes to rights of election, creation of new offences and increased penalties under the Criminal Code.

May 1998

- 20 per cent of cases are referred from other metropolitan courts to the Brisbane Central Committals Project Magistrates Court
- evidence of the effect of increased penalties (the maximum penalty for some common offences increased to over 14 years imprisonment)
- 92 per cent of committals handled by private practitioners were hand-ups and 8 per cent involved cross-examination; there were no full committals.

October 1999

- greater use of in-house legal practice staff, resulting in more matters finalised in the Magistrates Court
- inter-agency meetings held quarterly between the QPS, the ODPP and LAQ have resolved a number of process issues, including the need for early provision of QP9s and early contact between defence and the ODPP (QP9 is shorthand for the QPS Court Brief that details the charges laid against the accused person and the facts of the case)
- more assigned matters (that is, matters handled by private legal practitioners as opposed to in-house LAQ legal practitioners) are committed to the higher courts and subsequently pleaded than those managed in-house.

March 2001

- greater use of in-house legal staff resulted in greater savings; suggest using only LAQ staff for Brisbane duty lawyer scheme.

The success of the Committals Project has been viewed differently by the various stakeholders consulted by the CJC.

Positive comments have included:

- The Committals Project is an example of 'front-end efficiency' (that is, a commitment of resources to early stages of the disposition of matters). It allows both sides to look at the matter early.[37]
- The Committals Project has improved the quality of advocacy within the Magistrates Court.[38]
- The Committals Project has significantly reduced the backlog of matters going to the District Court and has resulted in a decrease in the 'rubbish' going up to the District Court.[39]

- The Committals Project has increased the number of early pleas of guilty, which is regarded by the ODPP as a strong indicator of the success of committal proceedings.[40]

Negative comments have included:

- LAQ fees paid to private lawyers have encouraged an increase in the number of hand-up committals and guilty pleas. Dewar et al. were of the view that the $500 flat fee paid for a Committals Project court committal encouraged the practice of hand-up briefs.[41] A solicitor has informed the CJC that:

  > The effect of this funding approach is that the Legal Aid Office has achieved what the DPP couldn't in terms of diminishing the importance of committals. Some practitioners are finding that you can make more money through bulk pleas and hand up committals rather than trials. Any funding approach that is not determined by the work actually undertaken leaves open this flaw to be exploited.[42]

  The Queensland Bar Association has expressed the opinion that the impact of the current legal aid fee structure on the committals process threatens the interests of justice. The following comments were made by the Bar Association in relation to lump-sum grants:

  > … it is a fundamentally flawed concept which may be seen as tending to place the practitioner's financial imperative at the forefront, at the potential risk of the interest of the client. As has already been observed on behalf of this Association, this type of proposal provides a bias against the provision of proper legal services to the underprivileged and it is difficult to imagine a proposal more likely to result in miscarriages of justice for legal aid clients, or, at least, result in grave criticism by legal aid clients unhappy with an outcome.
  >
  > Much of the criticism which can now be made in respect of the shortcomings of the committals project in Brisbane and Ipswich can be traced to the introduction of a lump sum fee for this type of matter. It is this Association's contention that further and more extensive forays down the path of lump sum fees are doomed to failure.[43]

  An inter-agency working party established to examine the effectiveness of the Committals Project also noted the indirect impact of LAQ fees on the performance of the Committals Project:

  > … legal aid scales fees … do not encourage the defence [counsel] to settle matters in the magistrates court … Until this issue has been satisfactorily resolved, the full benefits of the committals project will not be realised.[44]

- The diminished role of the committal in testing the evidence through the cross-examination of witnesses has also troubled the legal profession.[45] According to the 1998 research report commissioned by the QLS:

  > Concern was expressed that the funding structure encouraged practitioners to do as many committals as possible without cross-examination of any witnesses. One LAQ staff member indicated that straight hand-ups without cross-examination of any witnesses now account for 90% of Brisbane & Ipswich committals. The tendency not to cross-examine may be viewed as resulting in a disadvantage to assisted persons.[46]

  Figures 6.1 and 6.2 chart the outcome of matters dealt with in the Committals Project courts, from three months before the commencement of the pilot until 1999–2000. No significant changes in outcome are apparent over that period.

Figure 6.1 — Outcomes of matters dealt with through the Brisbane Committals Project (pre-pilot to 1999–2000)

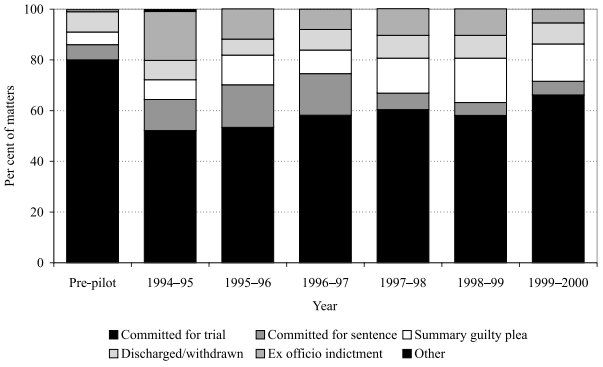
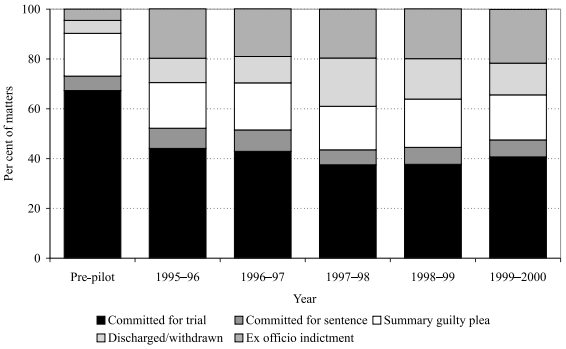


Figure 6.2 — Outcomes of matters dealt with through the Ipswich Committals Project (pre-pilot to 1999–2000)



Sources: LAC and LAQ annual reports, 1995–96 to 1999–2000.

The favouring of hand-ups

Anecdotal evidence provided to the CJC suggests that there has been a recent trend in the Committals Project towards the use of hand-up committals. At a consultation meeting with representatives of the Queensland Bar Association and the QLS, the view was expressed that 95 per cent of committals are by way of hand-ups.

A number of reasons for the increased favouring of hand-ups became evident during the stakeholder consultations, for example:

- **There is no significant fee differential for hand-ups and full committals** in the Committals Project. In response to a suggestion in the Coopers & Lybrand evaluation of the Committals Project that LAQ funding was inhibiting the early resolution of matters in the Committals Project (on the basis that the fee structure encouraged early guilty pleas at the District Court rather than at the Magistrates Court), LAQ implemented a lump-sum grant of $500 for professional fees plus $50 outlays for either a full or a hand-up committal. The same amount is paid when the matter is resolved in the Magistrates Court by way of summary plea or trial. The object of the lump-sum plea was to encourage practitioners to negotiate with the ODPP at an early stage. However, LAQ noted in its submission to the CJC:

  > Some difficulties were encountered as the full fee was initially paid regardless of outcome or the amount of time and effort put into the matter. The fee was restructured to overcome some situations, i.e. where a matter proceeds by way of ex officio indictment or the client fails to appear. In addition there were also issues regarding co-accused and multiple charges. Practices relating to the submission of accounts were clarified and the average payment for claims [for full or hand-up committals] in 1998/99 was $440.00.

- **Hand-up committals are generally regarded as a 'fast-track' method of progressing matters** to the higher courts. They are also regarded as a more efficient means of doing this than by way of ex officio indictment (see page 89). At a consultation meeting with representatives of the Bar Association of Queensland and the QLS, it was observed that hand-up committals are generally a quicker way of getting matters before the District Court than ex officio indictments and that is why they are preferred.

  Stakeholder consultations have suggested a number of reasons for the eagerness of legal practitioners to have an indictment presented to the higher courts, for example:

  — There is a perception among the legal profession that the higher courts deliver a better outcome for election offences, for both the Crown and the accused.[47] This is believed to be due to the fact that if a matter is heard before the higher courts it will be treated as being at the lower end of the scale of seriousness, whereas if it is heard before the Magistrates Court it will be considered to be at the top end of the scale. LAQ disagrees with this proposition and believes the Magistrates Court to be far more consistent in sentencing than the higher courts.

— As discussed in chapter 5, LAQ provides a more acceptable fee structure for matters dealt with in the higher courts. Both the range and the level of fees offered by LAQ for matters before the District and Supreme Courts are substantially higher than those offered for Magistrate Court matters. This has led to the belief that some private legal practitioners 'forum shop' to have matters dealt with in the jurisdiction where the higher fees are payable. The 1997 Coopers & Lybrand evaluation of the Brisbane Committals Project found that:

> there is little financial incentive for cases to be dealt with summarily at the Magistrates Court … It is evident that, if indictable cases proceed to the District Court, private practitioners are rewarded. However, if matters are dealt with summarily at the Magistrates Court, little if any financial reward is available. It is possible that some matters dealt with at the District Court could have been dealt with on first appearance.[48]

The LAQ evaluation of the Committals Project observed:

> recent anecdotal evidence from one consortium member suggests that it is common practice for private practitioners to take a matter to the higher court in order to obtain a higher fee from LAQ for a matter.[49]

In a consultation meeting, the QLS and the Bar Association of Queensland expressed the view that, if greater fees were available for private legal practitioners in the Magistrates Court, there would be fewer committals.

- **Hand-up committals are one way of getting the attention of the ODPP**. Defence lawyers have expressed the view that to be able to negotiate the matter effectively it is essential for the ODPP to be involved. When a matter is committed to a higher court it is then referred by police prosecutions to the ODPP for continued legal representation and management of the prosecution's case.[50] At a stakeholder consultation meeting with representatives of community legal centres, the view was expressed that they would tend to:

> Go for a hand-up committal just to get it to the DPP — that way you can talk with a lawyer and not the police about the elements of the defence.

KEY POINTS: COMMITTALS

- **Without adequate pre-pilot data on the Committals Project, it is difficult to determine the true impact of the project.**
- **The available information does not show any significant change in the outcomes of criminal matters over the life of the Committals Project.**
- **Committals Project matters assigned by LAQ to private legal practitioners are more likely to be committed to the higher courts, and subsequently pleaded, than those managed in-house.**
- **Most matters dealt with in the Committals Project are presented by way of a hand-up brief to the court.**
- **Continuation of the Committals Project is strongly supported by the ODPP, LAQ, the courts and the legal profession.**

COURT PROCEDURES

In the 1995 report (p. 102) the CJC observed that:

> Court listing practices need to be improved to ensure greater predictability and certainty as to when a trial is going to commence.

The courts, as a central component of the criminal justice system, have a key role in maintaining an efficient criminal justice system.

Delayed court proceedings, and court proceedings that are unexpectedly brought forward, can cause considerable hardship to the agencies and the individuals concerned. The Queensland Homicide Victims' Support Group's (QHVSG) submission to the CJC referred

to a number of instances where families of homicide victims were inconvenienced as a result of changes in hearing times. For example:

> QHVSG is aware of at least four murder trials since January 2001 involving families from interstate or from regional and remote areas that have been set down for hearing and then delayed at the last moment, causing considerable expense and emotional distress to the families concerned.

Listing of cases and case management

Court listing procedures within Queensland courts affect the preparation and readiness of matters and have direct cost implications throughout the criminal justice system, but more particularly in LAQ and the ODPP. In a consultation meeting with the CJC, the ODPP described a number of situations where District Court listing practices have disrupted the work of the agency. For instance:

- The District Court's practice of changing lists at the last minute by, for example, bringing in civil judges from the Planning and Environment Court is very disruptive to the functioning of the ODPP. The ODPP has received notice from the court that two or three judges have become available and that matters should be brought on early before them. The ODPP is then left with the task of arranging witnesses and engaging counsel in a short period of time. In most cases, this has resulted in late briefs to private counsel, which at times has meant that only junior counsel are available.
- The consequence of short notice of a judge's availability can be quite devastating for the outcome of a prosecution. The ODPP informed the CJC of a matter that had been allocated a trial date organised around the availability of a police officer as a witness. The police officer was interstate and was only available to return to Brisbane for two specific days. On a Friday afternoon the ODPP received a phone call from the District Court Listings Clerk advising that a judge had become available and requesting that the matter be brought forward to start on the following Monday. The Monday was not a day on which the police officer was available. The ODPP was unable to have the police officer before the court and asked the judge for an adjournment. The judge refused the adjournment and the case was required to proceed. As the police officer was an essential witness, the matter was 'nollied'. ('Nolle prosequi' refers to an unwillingness to prosecute. At any time before a verdict, a nolle prosequi can be entered by a Crown Law officer or the prosecution. This does not establish the innocence of the accused and another indictment can be presented against him or her in the future.)

In its submission to the CJC, the Bar Association of Queensland has also noted:

> There are many difficulties with a running list system. For example, it is difficult to expect any counsel to effectively keep a week free in order to commit to a No. 4 or No. 5 listing which may or may not proceed in a particular week. This inevitably leads to late changes of both Prosecutor and Defence Counsel, as lists and Trial Judges are changed. Whilst it is appreciated that there can never be any certainty about when matters will proceed in a running list, the degree of uncertainty attaching to particular matters is increased when matters are swapped from one list to another. The difficulty which this creates for the involvement of legal practitioners is that it necessitates late changes in counsel. Acute difficulties can be occasioned for the Director of Public Prosecutions, who usually tends to brief a prosecutor for a particular list, although it may be noted that that usually only means delivering briefs in the numbers 1 and 2 and possibly No. 3 matter in the list.

LAQ has informed the CJC that LAQ is mindful of the District Court's aim to not have idle court time and in response has employed a full-time coordinator to make sure that witnesses and legal representatives are organised and ready for trial.

District Court

The Chief Judge of the District Court has rejected the claim that the court has a practice of changing court lists at the last minute. The court's calendar is gazetted for the calendar year in the second half of the previous year and is available on the court's website. Changes to the judges' calendars are advised by letter to the ODPP and to other relevant

parties and are posted on the court's website.[51] Nevertheless, in Brisbane, Southport and some other centres, the court conducts a 'running list', which is regarded as the only way the court can deal appropriately and expeditiously with its criminal workload, having regard to the effect on the list of late pleas and nolle prosequis.

Up to five trials are listed in the District Court in Brisbane to commence before each judge who will be presiding over criminal trials in a particular week. There may be between seven and ten judges sitting in crime in Brisbane. Judges are also shown in the calendar as being on 'standby' from time to time. Judges use standby time for judgment-writing and research, but they are also on standby for criminal or civil trials when an extra judge is urgently required, or to hear urgent applications when none of the listed judges is available for that trial or application.

In 1999 the Chief Judge of the District Court established the Criminal Listing Taskforce. This is made up of the Chief Judge and four other District Court judges who manage the Brisbane Criminal Court listings and case management. The effectiveness of the taskforce has been described in this way:

> Through the hard work of the Taskforce a creditable rate of disposition has been maintained, despite there being less judge time available in Brisbane for the determination of criminal matters in the later part of the year under report.[52]

Commenting on the effect of the court's listing and case management practices, the Chief Judge of the District Court has noted:

> I have no doubt that there would be a huge backlog in the criminal lists in Brisbane if the District Court judges, especially the Criminal Listing Taskforce, did not continually monitor the lists and case-management problems in lengthy or complex cases. Indeed, one reason why a Taskforce judge or another judge conducts the daily reviews and mentions is to enable any party experiencing some problem in having a case ready for trial or sentence [to] mention their difficulty before the judge. Accordingly, where possible and appropriate the list might be rearranged to suit the convenience of a party. Convenience of the ODPP is not the only nor the first concern in determining the administration of the running list. One of the primary objects of efficient listing is to ensure, in the best interests of the community, that trials are conducted as soon as is reasonably possible. The rights of an accused person facing serious charges, especially the right to stand trial as soon as is reasonably possible, must also be respected. Accordingly, some judges make themselves available to help with the criminal list whenever they can.
>
> After an indictment is presented a judge allocates a date for the trial of the matter. Regard is had to the number of judges available to preside over criminal trials from time to time, counsels' and witnesses' availability and the type of matter involved. When the trial date is given, the parties are also advised of the trial review date. The trial review date occurs about 10 days before the start of the week in which the trial is listed to start. The court is then advised of the name of the prosecutor and the defence is expected to advise that defence counsel has conferred with the accused. Both parties are then to advise a judge that the trial is ready to proceed in all respects. If there is a problem the matter will be reviewed continuously to the morning of the trial unless it is appropriate that the trial dates are vacated.
>
> Many of the cases are reviewed or managed by the judges before the review date, to ensure that the DPP has provided the defence with all witnesses' statements and particulars and that the defence has considered whether a s. 592A hearing is required. Before the trial review date the parties in all cases are expected to raise any foreseeable problems as they arise.[53]

The Chief Judge has also noted that, because of the nature of the offences frequently dealt with in the District Court, certain cases have to be given priority — for example, cases involving child witnesses where, observes the Chief Judge:

> It cannot be stated too often that young children's evidence may be easily corrupted by the passage of time.

The Chief Judge believes that the District Court's management of criminal matters can benefit from the greater use of a proceeding established by s. 592A of the Criminal Code. Section 592A allows for either party to bring an application before the court for a direction or ruling on any of the following:

(a) the quashing or staying of the indictment; or

(b) the joinder of accused or joinder of charges; or

(c) the provision of a statement, report, proof of evidence or other information; or

(d) noting of admissions and issues the parties agree are relevant to the trial or sentence; or

(e) deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted; or

(f) ascertaining whether a defence of insanity or diminished responsibility or any other question of a psychiatric nature is to be raised; or

(g) the psychiatric or other medical examination of the accused; or

(h) the exchange of medical, psychiatric and other expert reports; or

(i) the reference of the accused to the Mental Health Tribunal; or

(j) the date of trial and directing that a date for trial is not to be fixed until it is known whether the accused proposes to rely on a defence of insanity or diminished responsibility or any other question of a psychiatric nature; or

(k) the return of subpoenas and notices to Crown witnesses; or

(l) the *Evidence Act 1977*, part 2, division 6; or

(m) encouraging the parties to narrow the issues and any other administrative arrangement to assist the speedy disposition of the trial.

Section 592A hearings are held weekly and are intended to prevent problems arising during the trial that result in a voir dire (when the jury is asked to leave the courtroom for the purpose of allowing the legal representatives of the Crown and the defence to discuss the admissibility of certain evidence into the trial). The Crown Prosecutors' Association is of the view that s. 592A applications are not routinely initiated, primarily because of the change of counsel throughout the case. The difficulty arising from such matters is that it would provide justification for delays in the proceedings.

Supreme Court

Cases in the criminal jurisdiction of the Supreme Court are managed by the judge in charge of the criminal list. Practice Directions 12 of 1999, 2 of 2000 and 1 of 2001 and s. 529A of the Criminal Code assist in the management of criminal cases in the Supreme Court. During consultation with the CJC, the Senior Judge Administrator and the Chief Justice of Queensland noted an increase in the use of s. 592A Criminal Code proceedings. They are of the view that there is little point in the court requiring legal representatives of parties to attend court simply in order to collect information from them:

> It is better to collect information before they attend so that appearances have positive outcomes in advancing cases. [54]

Magistrates Court

A number of legal practitioners consulted by the CJC were of the opinion that magistrates are inconsistent in their sentencing and do not give enough consideration to criminal matters because of time constraints — and that this results in poor judgments. The Chief Magistrate has suggested to the CJC that such criticisms may have been valid several years ago, but are no longer. The Chief Magistrate has taken a number of initiatives designed to streamline court processes and encourage more consistent sentencing by magistrates: [55]

Use of sentencing guidelines

The Chief Magistrate encourages magistrates to use documented sentencing guidelines as a quick reference to the sentencing range for specific offences. The guidelines are not intended to stifle judicial discretion but to provide a ready reference point if a magistrate is seeking guidance on sentencing ranges.

Identification of lengthy pleas

All lengthy pleas are identified, separated from the general list and set down for a time

later that day or transferred to another available magistrate. This alleviates the pressure magistrates may feel when presented with a burdensome callover list. It also allows magistrates to give the necessary consideration to lengthy matters without being concerned with progressing the general callover list. The Chief Magistrate informed the CJC that the procedure is currently operating only in the Brisbane Magistrates Court but is encouraged throughout the State.

Stakeholder meetings

The Chief Magistrate meets regularly with LAQ, the ODPP and private criminal lawyers to discuss any problems with court processes and develop new procedures where necessary. The meetings provide a forum for the continuous flow of information to the magistracy from key stakeholders.

KEY POINTS: COURT PROCEDURES

- **Since the 1995 report, the courts have explored a number of ways of making procedures more efficient and consistent.**
- **Court listing practices are creating problems for the legal profession where judges unexpectedly become available and little notification is given to both the prosecution and the defence to have matters ready for trial. Such practices not only disrupt the preparation of matters and reduce their readiness, but have also at times led to matters being 'nollied'.**

CIRCUIT COURTS

Because of Queensland's size and its decentralised population it is necessary for the District Court and the Supreme Court to provide circuit courts throughout the State. Although a number of population centres have either a Supreme Court judge or a District Court judge or both, [56] judges from Brisbane and other parts of the State are still required to travel to the regional areas on regular circuits to hear cases.

There are established circuit court centres throughout the State, but from time to time additional centres are used on an ad hoc basis. [57] Extra circuits may be scheduled, depending on factors such as:

- availability of a judge
- availability of a courtroom
- local holidays
- availability of court support staff (prosecutors, bailiffs and court reporters).

A circuit court, which will usually hear a number of matters, normally sits for a period of two weeks. The circuit calendars are set annually by the Chief Justice of Queensland and by the Chief Judge of the District Court.

Having courts visit locations that are not serviced by permanent courts ensures that justice is seen to be done in the local community and, in most cases, would avoid the inconvenience and cost of parties having to travel to another location to have their legal matter resolved. In addition to the judge, however, the judge's associate, transcribers, court staff, prosecutors, prosecutors' assistants, defence solicitors, defence counsel, expert witnesses and other personnel often have to travel great distances and be away from their home base for days, if not weeks, to attend the court.

Although both LAQ and the ODPP acknowledge the importance of circuit courts, it must be questioned whether the current operation of circuit courts is an efficient use of criminal justice system funds and, in particular, ODPP and LAQ funds.[58]

LAQ briefing-out for circuit work

LAQ's practice is to brief one counsel to appear on all legally-aided matters (in-house and assigned) for a particular circuit sitting. In recent years, LAQ has increasingly sent in-

house counsel on circuit (after considering the nature of the matter listed and the experience of available in-house counsel). In-house counsel undertake much of the circuit work in south-east Queensland in areas such as Maryborough, Bundaberg, Kingaroy, Warwick and Stanthorpe. In-house counsel do not undertake circuit work in Roma, Charleville or Cunnamulla. Where in-house counsel is not available, LAQ regional offices will brief a private barrister and generally try to use the local bar in the region.

In a consultation meeting, LAQ informed the CJC that circuits are more cost-effective if handled by in-house lawyers. However, staff constraints make it impossible for LAQ to undertake all circuits throughout Queensland. LAQ therefore believes that to meet its obligation to provide legal aid services to Queensland it is necessary to work with private practitioners.

Fees currently payable to private counsel for circuit work include separate preparation and appearance fees for each matter, regardless of the number of matters that may be heard on a particular day. [59]

ODPP briefing-out for circuit work

The practice adopted by ODPP is:

> Private counsel are engaged to assist the ODPP when more courts are listed than there are Crown Prosecutors available. Counsel are briefed with the same range of offences as in-house counsel. [60]

Cost implications of circuits for LAQ and the ODPP

The manner of listing matters for circuit courts and the fact that many higher court matters listed for trial result in a plea of guilty before the trial commences, often on the 'steps of the court', impose significant financial and human resource burdens on the ODPP and LAQ.

LAQ has pointed out a particular problem with the way circuits are organised:

> [It] generally means that a conference between solicitor, client and counsel cannot normally be held until the day of trial or the Sunday prior to the commencement of the sittings. The result of this procedural practice is that counsel, on arrival at the sittings, has no way of knowing the manner in which the listed matters will proceed.[61]

The LAQ consultation paper observed that, from a costs perspective, this means that:

> Counsel's preparation fees are nearly always paid at the trial rate regardless of whether the matter subsequently proceeds as a plea. Given that the trial preparation fee is twice the preparation fee for a plea, and that a number of pleas can be dealt with on the one day, the cost to Legal Aid Queensland for circuit payments to [private] counsel is significant.

Whenever possible, the ODPP avoids briefing private counsel for lengthy, more expensive matters:

> As at 15 December 1997 the ODPP scale of fees … paid to private counsel matched those paid by the LAQ after the government provided additional budget supplementation … Where possible, lengthy matters are not briefed to private counsel because of the high cost associated with this practice.[62]

Other inefficiencies of circuits

The CJC has been informed that circuits can become quite burdensome for senior crown prosecutors. For example, Brisbane-based prosecutors must, in addition to progressing matters in Brisbane, prepare for two weeks of circuit court:

> In Brisbane you have 1 week to prepare and 3 weeks in court — that's what is allowed. However, in reality the first week is lost as matters fall through and end up as pleas/sentences and you will be called to court. Preparation time often falls to the weekend before. On circuit it is 1 week preparation and 2 weeks court. Preparation is constrained in that prosecutors cannot fly into the circuit region until 1 day before the court sitting.[63]

This accords with an observation made by the Chief Judge of the District Court that judges in her court are reporting:

> increasing difficulties in maintaining an efficient list on circuit as in some cases the prosecutor does not arrive at the circuit until the first day of the circuit. Consequently the prosecution does not begin to interview witnesses or confer with defence counsel until the first day of the circuit.[64]

Many judges conduct callovers of the circuit lists before going on circuit from Brisbane or their respective home centres. Sometimes the callovers are conducted by telephone and in some cases the judge's associate will consult with the relevant prosecutor and with the registrar of the circuit centre. The Chief Judge of the District Court has noted that the efficacy of this system also depends largely upon the registry support available in the particular circuit centre. The Chief Judge is of the view that:

> These practices resolve many matters and ensure that the trial list proceeds as efficiently as the court might arrange.

Centralisation of circuits

The Director of Public Prosecutions (DPP) has expressed the view to the CJC that there are too many circuits in Queensland. Circuits are administratively and financially burdensome to all parties other than the parties located in the place where the court is to be held. The more circuit courts there are, the greater the inconvenience to the majority of parties.

The DPP suggested that the centralisation of at least some circuit courts to regional centres may result in a more efficient use of resources in the criminal justice system. Although it is important for justice to be seen to be done in local communities, the DPP was of the view that this could be achieved in other ways — for example, by holding sentencing days (as opposed to trials) in the smaller circuit towns.

However, the Chief Judge of the District Court has advised the CJC that:

> The judges of the District Court must administer justice according to the law in *all* districts *throughout* Queensland. Accused persons are committed for trial or sentence to the district within which the offence was allegedly committed. Citizens in Queensland have the right and obligation to act as jurors and the relevant communities have a right to have the trials of offences alleged to have been committed there conducted in that community in the manner in which the law provides. [65]

The Chief Judge does not agree with the suggestion that the more circuits there are the greater the inconvenience to the majority of parties:

> It is the experience of the judges that, in most cases emanating from rural, regional and outback Queensland, accused persons, the witnesses including complainants and the jurors (of course) reside in the community comprised in the local district.

Furthermore, in the same letter the Chief Judge noted:

> The District Court would be loath to reduce the numbers of places to which the judges travel on circuit, albeit that the majority of judges are away on circuit for between 10 and 12 weeks each year and accordingly may suffer some personal inconvenience as a result. The judges do not consider their personal convenience as a factor to be taken into account in determining whether the District Court should continue to provide justice to all Queenslanders.

KEY POINTS: CIRCUIT COURTS

- **Circuit courts impose a significant financial and administrative burden on the ODPP and LAQ and may be more economically handled by in-house staff.**
- **Centralisation of at least some regional circuit courts may result in a more efficient use of resources in the criminal justice system.**

EX OFFICIO INDICTMENTS

Indictable offences and the indictment

Serious criminal offences are often referred to as 'indictable offences'. Anyone charged with an indictable offence will usually appear in person in a Magistrates Court on the same day or the next day for the charge to be read out.

The matter will usually be set down for a committal hearing to determine if there is a sufficiently strong case against the defendant to justify a trial before a judge and jury in the District Court or the Supreme Court (which court will depend on the categorisation/ seriousness of the offence). A number of less serious indictable offences are able to be dealt with summarily in the Magistrates Courts. (See the sections on jurisdiction of courts and on committals earlier in this chapter.)

Unless the indictable offence is one that can be dealt with summarily (in which case the defendant can elect to have the matter dealt with by a magistrate or in the appropriate higher court before a judge and jury), a magistrate will not be able to accept a plea of guilty before the committal has taken place. Once the plea has been entered, the District or Supreme Court will sentence the accused person.

At the conclusion of a person's first appearance in the Magistrates Court on charges relating to an indictable offence, the magistrate will normally bail the accused person until the committal. A committal mention date will be set, but will be subject to earlier advice from the accused person that he or she wishes to proceed by way of ex officio indictment. A condition of the bail will normally be that the person appears from time to time prior to the committal proceedings, to 'enlarge the bail'.

The indictment is the document containing the charges relating to an indictable offence to be presented in the District or Supreme Court against the accused person. [66]

Ex officio presentation of the indictment

An indictment is not normally presented to the District or Supreme Court until after the accused person has been committed to either of those courts by a magistrate. However, an accused person can forgo his or her right to a committal hearing before a magistrate and ask the Director of Public Prosecutions to file an ex officio indictment in the District or Supreme Court.[67] Until recently, it was generally considered convenient to proceed to a plea of guilty in the District or Supreme Court by way of ex officio indictment (thus avoiding the committal process), provided the defence accepts that there is evidence to support the counts, and the Crown and the defence agree upon the factual basis of the plea.

For an ex officio indictment to be prepared, a statement needs to be taken from the defendant, the police record of interview needs to be transcribed, and negotiations need to be conducted with the ODPP regarding the form of the indictment. By Supreme Court Practice Direction 2 of 2000, the Chief Justice of Queensland has decreed, in part:

> To avoid waste of court resources through the adjournment of matters where … [defence has not accepted that there is evidence to support the grounds and/or the Crown and defence have yet to agree upon the factual basis of the plea] no matter will hereafter be listed for sentence upon ex officio indictment unless these documents have first been delivered to the criminal list clerk:
>
> (a) a draft of the intended indictment, and
>
> (b) a certificate signed on behalf of the Director of Public Prosecutions, and by the legal representatives of the accused, confirming that the factual basis for an intended plea of guilty has been agreed upon.

To satisfy these requirements, the ODPP will generally require:

- advice in writing from the accused person's legal representative that the accused person requests the matter to proceed by way of ex officio indictment; the ODPP will then notify the investigating police and the responsible police prosecutor of the ex officio indictment

- an ex officio brief from the QPS that will, depending on the nature of each investigation, consist of either a QP9 (see page 79) or a court brief with statements and other attachments.

The QPS has established procedures to help ensure the provision of relevant and timely information to the ODPP. The QPS Operational Procedures Manual provides that the 'ex officio brief' is to be forwarded to the ODPP within two weeks of the matter being listed to an ex officio mention date in the Magistrates Court. The 'statements and other attachments' to be appended to the court brief include, where relevant:

- the up-to-date criminal/traffic history of the defendant
- copies of notices to appear, summonses and/or bench charge sheets, in chronological order
- all taped material, including records of interview
- victim impact statements and any other witness statements that have been obtained
- any photographs, scale plans, etc. relevant to the charge(s)
- if there are multiple or complicated charges, a schedule of restitution or compensation that is being requested, where appropriate. [68]

Until sentencing in the higher court, the matter remains within the jurisdiction of the Magistrates Court. However, once parties indicate to the magistrate that an ex officio indictment is being considered or prepared, the matter will be relegated to a separate ex officio list in the Magistrates Court.

Until such time as the ex officio indictment has been settled and it goes up to the District or Supreme Court, every two to three months the matter will be called on for 'mention', so that a magistrate can monitor its progress. At each mention, the accused person will normally have to appear in court, even though the mention may take only a few minutes. Such appearances by the accused person will normally also be a condition of the person's bail. On occasion, the magistrate will allow the accused person's legal representative to appear without the accused person being present.

Until an ex officio indictment has been settled, an indigent accused person's legal representative (if any) will not be eligible for LAQ funding for attending mentions in the Magistrates Courts relating to the ex officio indictment. LAQ has informed the CJC that, although it has an ex officio mention fee, these fees are rarely paid. However, provided the accused person qualifies under LAQ's merit test, means test and guidelines, LAQ will fund a plea by way of ex officio in the higher courts. [69]

Making ex officio indictments more efficient

There is now a perception within the legal profession that proceeding by way of an ex officio indictment is no longer a quicker or more efficient way of taking a matter to the District or Supreme Court than by way of committal proceedings — at least, by hand-up committals (see discussion on 'hand-up committals', page 81).

Although there are ex officio callovers in the Magistrates Courts, there is a suggestion that ex officios are not adequately monitored by Magistrates Courts. As a consequence, there is a belief that ex officios are sitting on Magistrates Court lists for weeks 'not going anywhere'. There is also a perception that, if the QPS is aware that a matter is the subject of an ex officio indictment, it considers that to be the end of the matter.

A number of stakeholders believe that the delays are due to the ODPP being slow at processing the paperwork and negotiating the ex officio indictment. In a consultation meeting, representatives of community legal centres were of the view that:

> there doesn't seem to be anyone in ODPP to draft an indictment.

Suggestions have been made to the CJC for resolving some of the expediency issues relating to the ex officio indictment process, for example:

- The ODPP should allocate more senior staff to resolve ex officio matters.

- There should be LAQ funding for early resolution of matters.
- Magistrates should monitor ex officios more closely and 'move them along'.
- An alternative procedure for sending matters to the higher courts could be considered instead of hand-up committals and ex officio indictments — such as a certification process in which all parties certify that the matter is appropriate to go to the higher court.

The DPP has advised the CJC that delays in the ex officio process can be attributed to three factors:

1. There are delays in the delivery of material from the QPS.
2. The procedure whereby all matters on the same indictment are dealt with together by the higher courts results in queue-jumping of the sentence/ex officio list by those matters where there are several offences and the defendant pleads guilty to some. The remaining matters that are subject to an ex officio indictment are moved up the list to be determined at the same time as the pleas.
3. There is complex and lengthy negotiation between the parties of applications that involve contentious issues.

The DPP further advised that, as part of the Criminal Justice Standing Committee's review of court procedures, a new protocol is currently being developed between the courts, LAQ, the QPS and the ODPP, which should be operating later in 2001. The key feature of the protocol is a six-week turnaround from the defendant's application for an ex officio indictment to either publication of the indictment or a full hand-up committal. It is likely that the implementation of the new protocol will have significant time and cost benefits not only for the ODPP and LAQ but for the criminal justice system in general.

The Criminal Justice Standing Committee's Implementation Working Group has suggested that a practice direction be created that regulates the ex officio process.

The negative effect of ex officio indictments

If ex officio indictments were an efficient method of progressing matters to the higher courts, in some situations the process may be regarded as yet another example of encouraging matters to go to the higher courts that could have been resolved in the Magistrates Court. Just as with hand-up committals, there is a financial incentive to legal practitioners to advise their indigent clients to proceed by way of ex officio indictment to the higher courts. LAQ funds are more likely to be available for proceedings in the higher courts than in the Magistrates Court.

KEY POINTS: EX OFFICIO INDICTMENTS

- **The QPS has established procedures to help ensure the provision of relevant information to the ODPP within two weeks of the matter being listed for an ex officio mention in the Magistrates Court.**
- **There is a perception within the legal profession that proceeding by way of an ex officio indictment is no longer a more efficient way of having a matter brought before the higher court than by way of committal proceedings — at least, by hand-up committals.**
- **The private legal profession has made the following suggestions for streamlining the ex officio indictment process:**
  - **— ODPP to allocate more senior staff for resolving ex officio matters**
  - **— LAQ to allocate more funding for the early resolution of matters**
  - **— magistrates to closely monitor the ex officio process**
  - **— explore administrative alternatives to the current system.**

DISCOUNT FOR EARLY PLEAS

In 1994, the Criminal Case Management Group established, as a guiding principle for reducing backlogs in the courts and to reduce the time taken to dispose of matters, that it was necessary to encourage earlier indication of guilty pleas. The group made clear that it did not seek to increase the number of guilty pleas, but rather to bring forward the time when such pleas are indicated. [70]

The Martin Working Group (1999) considered it to be of critical importance that:

> … any proposal for reform [of the criminal justice system] address the issue of delays that currently occur in identifying pleas of guilty and in disposal of contested charges.[71]

The Martin Working Group was confident that much could be done by means of procedural and cultural changes to improve the rate of disposal of cases. For example, it was of the view that the burden on higher courts could be eased if there was an increase in the early identification of guilty pleas.

Most defendants appearing before a Magistrates Court either plead guilty or are found guilty at trial. For example, in Brisbane, a significant 16 per cent of matters listed for trial in the higher courts in 1999–2000 turned into a plea of guilty at 'the door of the court'.[72]

A plea of guilty to an indictable offence in the Magistrates Court will have flow-on financial and other savings for the criminal justice system. If the matter had proceeded to the higher court, there would be significant costs involved in the ODPP, the QPS and possibly LAQ preparing the matter for trial. A judge would need to be allocated, a jury convened and witnesses prepared. If the matter had to be dealt with by a circuit court, other costs would be involved (see page 86).

If the defendant pleaded guilty at the last moment before the trial was to have commenced in the District Court or the Supreme Court, a significant amount of that expense would be wasted — possibly with roll-on inconvenience and costs for other matters. For example, a judge who has been allocated to a trial that, at the last minute, fails to go ahead because the defendant pleads guilty may not be able to be allocated to another matter at such short notice.

The *Penalties and Sentences Act 1992* (Qld) attempts to encourage early pleas of guilty by directing the court to take into account a plea of guilty and the time it was entered when sentencing the defendant. Section 13 provides:

> (1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court —
>
> (a) must take the guilty plea into account; and
>
> (b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.
>
> (2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender —
>
> (a) pleaded guilty; or
>
> (b) informed the relevant law enforcement agency of his or her intention to plead guilty.
>
> (3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.
>
> (4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court —
>
> (a) that fact; and
>
> (b) its reasons for not reducing the sentence.
>
> (5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

Legal advice to enter a plea

Section 13 of the Penalties and Sentences Act provides little real incentive for legal practitioners to advise their clients to plead guilty at the earliest opportunity.

The defendant might be advised to delay pleading guilty on the basis that there is a chance that the sentence imposed by the District Court will be less severe than the sentence that would have been imposed by the Magistrates Court.

Once the matter has been committed to the higher court, it is apparent that many defendants enter a plea of guilty before the trial commences, often 'at the door of the court'. District Court judges informed the CJC that in their view a significant proportion of trials 'fall over' on the day of the trial, despite the court's rigorous case management and trial reviews.

The District Court judges informed the CJC that pleas of guilty will be treated as 'early pleas' whether entered at committal in the Magistrates Court or on presentation of the indictment. That is, the discount for an 'early plea' pursuant to s. 13 of the Penalties and Sentences Act will apply even though the matter could have been pleaded earlier, in the Magistrates Court. There is no incentive to the defendant to plead guilty in the Magistrates Court if the decision can be delayed through the committals process and through to the presentation of the indictment in the District Court. The only effective incentive to plead guilty for some people may be the prospect of being found guilty at trial, and that may only become apparent to a defendant when he or she is at the 'door' of the District Court. This is possibly more likely to be the case if the accused person has access to legal advice.

In consultation meetings with the QLS and the Bar Association of Queensland, it was suggested that the Committals Project allows both sides to look at the matter early and has resulted in increased pleas and a decrease in the 'rubbish' going up to the District Court. The Chief Magistrate has informed the CJC that at times defendants will enter a plea halfway through the committal, which lends credence to the suggested benefits of the committals process. The Chief Magistrate also observed that the ODPP is generally more inclined to bargain than police prosecutors are. However, as shown in figures 6.1 and 6.2 (on page 81), there has only been a minimal increase in pleas in the Ipswich Committals Project court and no real increase in pleas in the Brisbane Committals Project court.

The QLS has suggested that the encouragement of early pleas is reliant on the adequacy of LAQ funding:

> Until Legal Aid is properly funded and Private Practitioners are properly funded to examine the matter, negotiate and then prepare for a plea, there is little incentive to support such a system. It simply won't work if people are not legally represented and if those legal representatives are not properly funded. [73]

Incentives for an early plea

The defendant's right to proceed to trial has to be respected. However, if in fact the defendant believes that he or she is guilty of what he or she has been accused of, there may need to be a real incentive:

- for the defendant to enter an early plea of guilty, such as a stated discount on the sentence to be imposed by a magistrate, as opposed to a sentence to be imposed by a higher court in relation to the same conduct, and
- for the defendant's legal representative to encourage an early guilty plea in appropriate cases by the provision of legal aid funding for pleas of guilty in the Magistrates Court.

The Chief Justice of Queensland has suggested that judges be encouraged to state how they would have sentenced the defendant but for the discount given for the defendant's 'early' plea of guilty. In the Supreme Court it is the practice for judges to specify the sentencing discount they are giving because of a plea and what they would have given without the discount. The Chief Justice suggested that this practice could be entrenched by a legislative provision, but was not in favour of a rote discount for all early pleas.

The suggestion was made that judges would find it easier to discount sentences for early pleas if they were made aware of the cost savings that would result from the early plea. The Chief Justice considered that, although the community is generally critical of reductions in sentences, if potential system-wide cost savings of such pleas could be demonstrated, reductions in appropriate circumstances might be viewed more favourably.

The Chief Justice also considered that prosecutors should get into the habit of telling the court when the defendant is willing to plead guilty.

The Criminal Justice Standing Committee's Implementation Working Group identified the need for the courts to give an incentive for guilty pleas and suggested a sentencing scale that recognises the timing of the plea. The Implementation Working Group believes that adopting such procedures would also assist in promoting the use of the ex officio process.

The Martin Working Group (1999) was of the view that early and complete prosecution disclosure of evidence to the accused would also encourage early pleas. However, unless relevant legal assistance is provided at an early stage, it is unlikely that such incentives and prosecution disclosure will be very effective because they may not be readily understood by the accused person.

KEY POINTS: EARLY PLEAS

- **A plea of guilty to an indictable offence in the Magistrates Court will have flow-on financial and other savings for the criminal justice system.**
- **LAQ funding for representation for pleas of guilty in the Magistrates Court may encourage legal practitioners to advise clients to plead early in appropriate cases.**
- **There is wide support for incentives to encourage early pleas of guilty, provided this is done in a way that does not disadvantage the accused.**

DISCLOSURE

A number of recent reviews of criminal justice systems in Australia have determined that the complete and early disclosure of relevant evidence by investigating and prosecuting authorities is 'central to the promotion of a fairer and more efficient justice system'. The Martin Working Group said:

> … the most effective way of encouraging early pleas is to provide incentives and to ensure early and complete prosecution disclosure. [74]

However, the Working Group also recognised that, in this context, it is essential that an accused be represented by counsel at the earliest opportunity.

A number of guidelines issued by the Queensland DPP support the conclusion that there is a need for early disclosure by the ODPP. For example:

> Copies of written statements to be given to the defence, including copies to be used for the purposes of an application under section 110A of the *Justices Act 1886*, are to be given so as to provide the defence with a reasonable opportunity to consider and to respond to the matters contained in them; whenever possible, they should be given at least 7 days before the commencement of the committal proceedings. [Director's Guideline 2.1] …
>
> Full and early disclosure of the prosecution's case to the defence is of paramount importance if we are to have a more efficient, and less costly, system of administering criminal justice. The provision of statements taken from prosecution witnesses to be called at a committal hearing goes some way towards satisfying this objective. [Director's Guideline 2.3] …
>
> In order to provide a defendant the opportunity to make full answer and defence to a charge of a criminal or quasi-criminal nature brought against him or her, I have considered it necessary to issue the following guideline:
>
> Where a defendant charged with a criminal or quasi-criminal offence, or his or her solicitor, makes a request that witness statements taken from witnesses who are to be called by the prosecution on a summary hearing before a magistrate be provided to the defence, before the hearing date, that request should be complied with without delay. [Director's Guideline 7.7] [75]

Also, in Queensland:

> Where the Crown Prosecutor is aware that a Crown witness has a prior conviction, the defence is to be provided with details of it so that the witness might be cross-examined as to his or her credit should the defence choose to so do. [Director's Guideline 7.4] [76]

Despite the apparent breadth of current ODPP disclosure policies, the report of the Martin Working Group (p. 23) noted that the legal profession was sceptical about police practice in this regard.

Enforcement of the obligation to disclose

The Martin Working Group was of the view that the fundamental obligations to disclose should be reinforced by legislation and that the legislation should extend the disclosure obligation to investigative agencies responsible for investigating offences and providing evidence to prosecuting authorities. Disciplinary sanctions for non-compliance would also, suggested the Working Group:

> … improve the understanding of investigators as to their responsibilities and assist in overcoming a culture of resistance to disclosure that exists in some investigators. [77]

The SCAG Report of June 2000 did not favour legislative enforcement of early disclosure, and was of the view that guidelines and rules would suffice. However, the report did note general support for a procedure requiring the investigator to provide a certificate of disclosure to the prosecutor, and internal disciplinary sanctions if investigators failed to comply with their disclosure obligations. [78] It was considered that this obligation should extend to any police officer who has knowledge of a matter relevant to the guilt or innocence of an accused person — and should not be restricted simply to the individual investigator in charge of a case. [79]

Disclosure before committal

The 1999 report of the Law Reform Commission of Western Australia, the 1999 Martin Report and the 2000 SCAG Report recommended that prosecution disclosure should be required (be it by way of legislation or by way of policy reinforcement) before committal proceedings unless the requirement for disclosure is waived at the first or subsequent mention of the matter. [80] The Martin Working Group observed:

> We recognise that investigations often continue after arrest and that disclosure in many cases will be an ongoing process. In our opinion, however, the commencement of disclosure at the earliest possible opportunity has the potential to encourage early pleas of guilty and to assist, at an early stage, in identifying issues in dispute. The well-informed defendant and adviser are well placed to make decisions on these issues, but will often hesitate to do so if left to await disclosure at some time following conclusion of the committal proceedings. [81]

In a similar vein, the 2000 SCAG Report recommended that, before a committal hearing, the prosecution should supply to the court and to the defence a 'case statement outlining the acts, facts, matters and circumstances being relied upon by the prosecution' and that, where appropriate, 'the case statement should also outline the manner in which the prosecution will present its case against the defendant'. [82]

The SCAG Report agreed with recommendation 5 of the Martin Working Group that recognition be given to the ongoing nature of the disclosure obligation.

One danger to avoid when defining the disclosure obligation may be the imposition of complex and unrealistic reporting requirements in preparing for committal proceedings. Justice Mark Weinberg noted, in the Victorian context:

> The process for preparing for a committal proceeding, which was once reasonably straightforward, has now been converted into a complex exercise requiring the preparation of a significant number of important documents, all of which must be completed within strict time limits. Some practitioners complain that the new procedures require frequent and unnecessary court appearances. These appearances are often lengthy, and add delay and cost. [83]

KEY POINTS: DISCLOSURE

- **Early and complete disclosure of evidence, by the prosecution to the accused, would encourage early pleas.**
- **Complete and early disclosure of relevant evidence by investigating and prosecuting authorities is central to the promotion of a fairer and more efficient justice system.**
- **Suggestions have been made that the obligation to disclose is so fundamental to the efficient operation of the criminal justice system that it should be reinforced by legislation and that the legislation should extend the disclosure obligation to investigative agencies responsible for investigating offences and providing evidence to prosecuting authorities.**

Endnotes: Chapter 6

1 The reviews referred to in the 1995 report included those undertaken by the Criminal Code Review Committee (1992), the Queensland Administration of Criminal Justice Review Committee (1993), the Committals Committee (1993) and the Criminal Case Management Group (1994).

2 Coates, op. cit.

3 Dewar et al., op. cit.

4 SCAG, *Working Group on Criminal Trial Procedure Report*, op. cit.

5 Australian Institute of Judicial Administration, Conference Papers: Criminal Trial Reform Conference, Melbourne, 24–25 March 2000 [online] <www.aija.org.au/ctrpapers.htm>.

6 SCAG, *Deliberative Forum on Criminal Trial Reform Report*, op. cit.

7 Queensland Law Society Inc., minutes of meeting: Legal Aid/Criminal Law Forum, Brisbane, 5 December 2000.

8 Letter to CJC from QLS, 13 July 2001.

9 For example, the Steering Committee for the Review of Commonwealth–State Service Provision *Report on Government Services 2001 (Volume 1: Education, Health, Justice)*, January 2001, p. 418, noted that the average court fees collected per lodgment in Queensland Magistrates Courts in 1999–2000 was $125, in Queensland District Courts $245 and in the Queensland Supreme Court $524. Of course, this is not necessarily reflective of other, more substantial costs such as the cost of representation before the courts. In relation to the time taken for the various courts to dispose of matters, the report noted, on p. 420, that in 1999–2000 the criminal jurisdiction of Queensland Magistrates Courts finalised 93 per cent of cases within six months, the District Court finalised 74 per cent of criminal cases within six months and the Supreme Court finalised 66 per cent of criminal cases within six months.

10 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, pp. 223–24.

11 J. B. Bishop, *Criminal Procedure*, 2nd edn, Butterworths, Sydney, 1998, p. 258.

12 Section 552B(2)(5) Criminal Code referring to s. 552B(1)(a)–(m), that is, for example: stealing, fraud, receiving or other dishonesty or making anything moveable with intent to steal it and the value of the property, benefit or detriment is not more than $5000; bringing stolen goods into Queensland; damage or destruction of property to value of $5000; certain offences relating to animals; burglary-related offences where defendant is not armed and value of property is less than $1000.

13 Referred to in s. 552B(1)(a)–(e) Criminal Code.

14 Whether or not the value of any property in relation to the offence is less than the value mentioned in s. 552B(1)(a)–(e). See s. 552B(3) Criminal Code, which includes indictable offences referred to in s. 552B(1)(a)–(e). This provision and other 1997 amendments to the *Penalties and Sentences Act 1992* and the *Corrective Services Act 1988* were introduced for two reasons: to encourage defendants to have matters dealt with in the Magistrates Courts and thereby reduce the burden on the higher courts, and also to increase penalties. However, as noted in LAQ's *Evaluation of the Brisbane Central Courts Committals Project and the Ipswich Committals Project*, an increase in penalty negates the first aim of the amendments as it offers no incentive to a defendant to plead guilty.

15 Section 552A Criminal Code relating to non-sexual assaults, where the maximum penalty is not more than five years (e.g. escapes, obstructing, betting-related offences).

16 QSTATS, unpublished imprisonment data, 1994/95–1999/2000.

17 See Productivity Council, *Report on Government Services 2001*, table 9A.21. ACT magistrates are able to handle matters with a maximum penalty of up to 10 years' imprisonment and matters relating to money or other property with a maximum penalty of up to 14 years.

18 Steering Committee for the Review of Commonwealth–State Service Provision, *Report on Government Services 2001 (Volume 1: Education, Health, Justice)*, and CJC, *Criminal Justice System Monitor*, vol. 5 (March 2001), p. 7.

19 Bishop, pp. 322–23.

20 Chief Magistrate Fingleton, minutes of Legal Aid/Criminal Law Forum, Brisbane, 5.12.00, p. 9.

21 District Court of Queensland, *Annual Report 1999/2000*, p. 41, and letter to CJC from Chief Judge of District Court, 26 June 2001. Appeals from the Magistrates Court to the District Court are heard pursuant to s. 222 of the Justices Act.

22 By oral submission, 5 June 2001.

23 Letter to CJC from LAQ, 4 July 2001.

24 Dewar et al., p. 87.

25 LAQ, *Revision of Criminal Law Fees: A Consultation Paper*, p. 6.

26 QLS submission to LAQ, November 2000, p. 3.

27 Dewar et al., p. 88.

28 Letter to CJC from Chief Judge of District Court, 26 June 2001.

29 Judge M. Boyce, QC, District Court (Qld), *In the matter of the Criminal Code and the Judge's recommendations for amendment to legislation in regard to assault occasioning bodily harm*, 15 March 2001.

30 But see ss. 77, 82 and 83 of the *District Court Act 1967* (Qld) relating to the transfer of matters between the District and Supreme Courts.

31 See also ss. 78–80 of the District Court Act relating to the transfer of matters between the District and Magistrates Courts.

32 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, p. 224.

33 Letter to CJC from QLS, 13 July 2001.

34 Criminal Justice Commission, *Evaluation of Brisbane Central Committals Project*, April 1996.

35 Coopers & Lybrand Consultants, *Department of Justice — Evaluation of Brisbane Central Committals Project Magistrates Court*, October 1997.

36 LAQ evaluations of the Brisbane Central Committals Project and the Ipswich Committals Project dated August 1996, August 1997, May 1998, October 1999 and March 2001 (documents prepared for the internal purposes of LAQ).

37 Crown Prosecutors' Association, QLS, Bar Association of Queensland.

38 LAQ and the Chief Magistrate. The latter also noted that in the Committals Project courts 'You have trained lawyers as opposed to justice studies graduates. QPS prosecutions are out of their depth in indictable matters.' Similar comments were made by the Queensland Homicide Victims' Support Group in its submission to the CJC:

> Several of our members have reported that police prosecutors are sometimes used in Committal Hearings in cases involving charges of murder. On one occasion it was reported that the police prosecutor had to seek the assistance of a police barrister to argue the more complex legal aspects of the case and the hearing was adjourned until the police barrister could attend. The family involved expressed their concern that the prosecution at the committal phase appeared to be inadequate for the task compared to the two experienced barristers who appeared for the defence.

39 QLS, Bar Association of Queensland, Queensland Aboriginal and Torres Strait Islander Legal Services Secretariat.

40 ODPP, LAQ, Chief Magistrate, Queensland Bar Association, QLS.

41 Dewar et al., op. cit.

42 Written communication from solicitor Andrew Boe.

43 Bar Association of Queensland, *Response to Legal Aid Queensland Consultation Paper Re: Revision of Criminal Law Fees*, p. 5.

44 Director of Public Prosecutions, Queensland, *Annual Report 1 July 1997–30 June 1998*, p. 22.

45 See the following articles for further discussion: P. Berry, 'Impact of the new committals regime: Justices Amendment (Committals) Act 1996', *Law Society Journal*, vol. 36, no. 2 (1998), p. 70; P. Lowe, 'The new regime for committals', *Law Society Journal*, vol. 35, no. 10 (1997), p. 45; J. Willis, 'The committal: Some recent developments and findings', *Journal of Judicial Administration*, vol. 8, no. 3 (1999), p. 160.

46 Dewar et al., p. 89.

47 Election offences are those indictable offences that may be dealt with either summarily in the Magistrates Court or before a judge and jury in the higher courts.

48 Coopers & Lybrand Consultants, *Department of Justice — Evaluation of Brisbane Central Committals Project Magistrates Court*, pp. 25–26.

49 LAQ, *Evaluation of the Brisbane Central Courts Committals Project and the Ipswich Committals Project*, p. 17.

50 The ODPP also has the conduct of all indictable matters before the Brisbane and Ipswich Magistrates Courts.

51 Letter to CJC from Chief Judge of District Court, 26 June 2001.

52 District Court of Queensland, *Annual Report 1999/2000*, p. 9.

53 Letter to CJC from Chief Judge of District Court, 26 June 2001.

54 Letter to CJC from Senior Judge Administrator, Supreme Court, 22 June 2001.

55 Comments made by the Chief Magistrate at the Legal Aid/Criminal Law Forum, 5.12.00.

56 Brisbane, Southport, Ipswich, Maroochydore, Rockhampton, Townsville and Cairns have their own District and/or Supreme Courts.

57 The Gulf circuit (Mornington Island, Doomadgee and Normanton), the Cape circuit (Weipa, Aurukun and Pormpuraaw), Lockhart River, Cooktown, Thursday Island, Bamaga and Kowanyama.

58 A further issue that was raised in relation to circuits, not related to the use of LAQ or ODPP funding, concerned the need to establish jury panels in relatively small regional centres. The District Courts *First Annual Report 1996/97* (p. 34) noted the following comment by local practitioners: 'Once the panel is chosen, often the same people comprise the jury for each trial at the sittings. The selection of jury panels can have the effect of leaving the local workforce temporarily depleted. This is particularly so when the panel needs to be increased in size because of the number of co-accused, or the possibility of a new trial commencing while a jury is deliberating in a completed trial.' The DPP also expressed a similar concern about the empanelment of small-town juries.

59 The Queensland Bar Association has indicated that the issue of circuit fees for private counsel is a significant matter that is in need of further discussion. See the section on fee scales in chapter 5. See also LAQ, *Revision of Criminal Law Fees: A Consultation Paper*.

60 Letter to CJC from ODPP, 28 February 2001.

61 LAQ, *Revision of Criminal Law Fees: A Consultation Paper*, p. 23.

62 Letter to CJC from ODPP, 28 February 2001.

63 Consultation meeting with Crown Prosecutors' Association.

64 Letter to CJC from Chief Judge of District Court, 26 June 2001.

65 Letter to CJC from Chief Judge of District Court, 26 June 2001. The Chief Judge referred to s. 60 of the *District Court Act 1967*, which reads: 'A District Court shall have jurisdiction to inquire of, hear, and determine all indictable offences, wheresoever committed, save as hereinafter excepted.'

66 Section 560 of the *Criminal Code* (Qld) provides:

> Presenting indictments
>
> (1) When a person charged with an indictable offence has been committed for trial and it is intended to put the person on trial for the offence, the charge is to be reduced to writing in a document which is called an indictment.
>
> (2) The indictment is to be signed and presented to the court by a Crown Law Officer or some other person appointed in that behalf by the Governor in Council.
>
> (3) If a person has been committed for trial for an indictable offence that may be tried in the District Court, the director of public prosecutions or a Crown prosecutor may present the indictment to either the Supreme Court or District Court.
>
> (4) In deciding the court to which the indictment is to be presented, the director of public prosecutions or Crown prosecutor must have regard to —
>
> (a) the complexity of the case; and
>
> (b) the seriousness of the alleged offence; and
>
> (c) any particular importance attaching to the case; and
>
> (d) any other relevant consideration.

67 Section 561 of the *Criminal Code* (Qld) provides:

> Ex officio informations
>
> (1) A Crown Law Officer may present an indictment in any court of criminal jurisdiction against any person for any indictable offence, whether the accused person has been committed for trial or not.
>
> (2) An officer appointed by the Governor in Council to present indictments in any court of criminal jurisdiction may present an indictment in that court against any person for any indictable offence within the jurisdiction of the court, whether the accused person has been committed for trial or not and against any person for an indictable offence who with the person's prior consent has been committed for trial or for sentence for an offence before that court.

68 QPS Operational Procedures Manual, paragraph 3.4.24.

69 LAQ fees for ex officio pleas in the higher courts are — **District Court:** Solicitor $608, Counsel $546, Outlays $25; **Supreme Court:** Solicitor $698, Counsel $691, Outlays $25.

70 1995 report, p. 103.

71 SCAG, *Working Group on Criminal Trial Procedure Report*, p. 19.

72 CJC, *Criminal Justice System Monitor*, vol. 5 (March 2001), p. 9.

73 Letter to CJC from QLS, 13 July 2001.

74 SCAG, *Working Group on Criminal Trial Procedure Report*, p. 20.

75 DPP Queensland, *Annual Report 1 July 1999–30 June 2000*, pp. 46, 49, 78.

76 Ibid., p. 75.

77 SCAG, *Working Group on Criminal Trial Procedure Report*, p. 26.

78 SCAG, *Deliberative Forum on Criminal Trial Reform Report*, recommendations 4, 5.

79 See also Law Reform Commission of WA, recommendation 252(1).

80 The waiver is to avoid a requirement for prosecution disclosure being imposed when a defendant intends to plead guilty. See the Martin Report, p. 26.

81 SCAG, *Working Group on Criminal Trial Procedure Report*, p. 26.

82 SCAG, *Deliberative Forum on Criminal Trial Reform Report*, recommendation 8, p. 30. There are similar recommendations in the report of the Law Reform Commission of WA (rec. 282) and the Martin Report (rec. 12).

83 M. Weinberg, 'The criminal trial process and the problem of delay', Conference Papers: Criminal Trial Reform Conference, Melbourne, 24–25 March 2000 [online] <www.aija.org.au/ctrpapers.htm>.

7

CONCLUSIONS

This concluding chapter summarises key findings of our review of the sufficiency of funding of LAQ and the ODPP and identifies the key issues that have emerged.

LAQ: KEY FINDINGS

Since 1995, when the CJC first reported on this issue, the overall funding position of legal aid has improved, as indicated by the following:

- Between 1994–95 and 1999–2000 actual revenue increased by 27 per cent, real revenue by 16 per cent and real revenue per capita by 6.2 per cent.
- The marked differences between Australian States in per capita legal aid funding identified in the 1995 report had largely disappeared by 1999–2000.
- There is now much less year-to-year fluctuation in legal aid revenue than before 1995.
- As a result of recent unanticipated increases in funding, significant returns on investment funds and interest from solicitors' trust accounts, LAQ is now in the position of having a fairly high level of reserves.
- Since 1994–95, State revenue (which is principally used to fund the crime area) has increased at a greater rate than LAQ's criminal workload (as measured by the number of applications approved).

Although these trends are generally positive, there continues to be a substantial amount of unmet need for legal aid and there is ongoing debate about the quality of the representation provided by LAQ.

Unmet needs

This review has focused on assessing the sufficiency of LAQ funding by reference to historical trends and interstate comparisons. However, it is evident that there are needs for legal assistance within the community that are not being met, in part because of the lack of funding.

LAQ has continued to meet its obligations to fund prescribed crime matters, but funding for non-prescribed crime has been declining in recent years, both in absolute terms and as a proportion of crime-related expenditure. In particular, the combination of the LAQ means test, guidelines and merit test has made it very difficult for accused persons to obtain legal aid for summary criminal trials in the Magistrates Court. The cost of employing a legal representative is a disincentive for accused persons to opt for a trial and could lead to persons pleading guilty in circumstances where, if the matter had gone to trial, they may have been acquitted. In addition, where a person stands trial without legal representation he or she is at an obvious disadvantage. This can have serious consequences, given that a Magistrates Court conviction can result in incarceration, loss of livelihood, damage to a person's reputation and other adverse outcomes.

In addition, there is currently no LAQ-funded assistance available to people before their first appearance in court, such as at the police station (before and during police interviews) or at the watchhouse. Given that most accused persons lack the means to pay for their

own legal representation, this has meant that the 'right' of a person to communicate with a lawyer under section 249 of the *Police Powers and Responsibilities Act 2000* has so far proved to be of little practical substance.

Arguably, the earlier that legal assistance is given to a suspect or defendant in criminal matters, the more likely it is that the person will avoid inappropriate legal proceedings and be dealt with more justly. With the assistance of a legal representative, some matters could also be resolved before the defendant's first appearance in court. For example, legal assistance in clarifying charges may lead to an early admission of guilt or reduce the risk of inappropriate charges.

Quality of representation

As was the case when we conducted our 1995 review, private legal practitioners expressed strong misgivings about the low level and limited availability of fees paid by LAQ (and the ODPP). Apart from two recent increases (totalling 10 per cent) there have been no significant changes in the scales of fees paid to private practitioners for legal aid work since 1995. We were told that the low fees have contributed to the over-reliance on junior and inexperienced but 'cheaper' practitioners to perform complex tasks, and the sparing use of expert evidence in certain cases. This, in turn, was said to have had an adverse effect on the quality of representation provided to legally aided accused.

Assessing such claims is difficult because of the absence of objective data on the quality of legal representation being provided by, or on behalf of, LAQ. However, our review did identify some areas of concern.

Firstly, the tendering system for LAQ's duty lawyer scheme has led to firms of solicitors winning tenders for as little as $1 and less. In those situations there is clearly an incentive for legal practitioners to use the duty lawyer scheme to self-refer clients, in the hope that this will result in LAQ-funded higher court work. Although there is no evidence that solicitors have advised their clients not to plead guilty in the Magistrates Court because of the possibility of obtaining LAQ funding for pleading in the higher courts, there is a perception that this happens. That is sufficient to raise doubts about the quality of representation in such cases.

Secondly, LAQ's preferred supplier scheme has not been subjected to a thorough evaluation to determine its cost effectiveness and its efficiency in delivering legal-aid-funded services in a manner that is fair to the providers of the service and to their clients. Until such an evaluation is made, concerns about the quality of services provided by the scheme will remain.

ODPP: KEY FINDINGS

Funding of the ODPP has increased substantially since the CJC's 1995 report, but in the context of a considerable growth in the workload of the Office.

Between 1994–95 and 1997–98 actual total revenue of the ODPP increased by 43 per cent, with real revenue rising by 35 per cent. Funding levels thereafter remained fairly stable up to and including 1999–2000. While direct interstate comparisons are not possible, the available evidence indicates that, in terms of per capita funding, the ODPP has improved its position relative to equivalent agencies in other jurisdictions.

Although total funding has risen, so too has the workload of the ODPP. Between 1994–95 and 1999–2000, the number of criminal matters funded by the Office increased by 53 per cent, primarily because of large increases in sentences and ex officio indictments. This equates to a 14 per cent drop in real funding per matter.

Quality of representation

Quality of representation is equally an issue for the ODPP as for LAQ. In the case of the ODPP the concerns relate primarily to the use of inexperienced junior staff rather than to the practices of private practitioners, because the bulk of the Office's legal work is done

in-house. Both the ODPP and LAQ have experienced difficulties in attracting and retaining suitably qualified and experienced legal professionals, which raises questions about the adequacy of the salary and career structures in both offices.

ENHANCING THE OPERATION OF THE CRIMINAL JUSTICE SYSTEM

Similarly to our 1995 study, this review has identified a number of features of the criminal justice system that have hindered the more efficient use of available funding by LAQ, the ODPP and other criminal justice agencies. These are as follows:

- **coordination of agencies**

Although there is broad agreement that there should be a more coordinated approach to monitoring and managing Queensland's criminal justice system, there are still no effective ongoing coordinating mechanisms. The lack of coordination has made management of the system and individual agencies more difficult and contributed to the inefficient use of resources.

- **jurisdiction of the courts**

A strong case can be made that the limited jurisdiction of the Magistrates Courts and District Court in Queensland should be reviewed. Many stakeholders consulted, including the Queensland judiciary (at all levels) and the private legal profession, supported an adjustment in the jurisdiction of both courts to enable more serious matters to be dealt with by the lower, less costly courts.

- **committals**

It is open to question whether the Committals Project has resulted in a marked improvement in the rate or manner of disposition of criminal matters. In particular, there is a concern that some LAQ-funded legal practitioners may advise their clients not to plead guilty in the Magistrates Court, and to proceed by way of hand-up committals as a well-paid fast-track method of having matters brought before the higher courts. If clients then plead guilty in the higher courts the legal practitioner may be entitled to claim additional LAQ funding.

There would be benefit in reviewing the operation of the current Committals Project and in considering whether legislative change in this area is required.

- **court listing practices**

District Court listing practices are a major concern for some members of the legal profession and are believed to result in the disruption of the preparation and finalisation of some matters.

- **circuit courts**

Circuit courts are an expensive but necessary part of delivering justice, and being seen to deliver justice, in Queensland. Nevertheless, there may be alternative ways of conducting circuits and, in particular, circuit court listing practices associated with circuits, which would reduce the wasted time and expense that LAQ and the ODPP experience in participating in circuit work.

- **ex officio indictments**

The ex officio process is potentially a more efficient and cost-effective mechanism for having indictable matters brought before the higher courts than by way of committal proceedings. However, the process is currently regarded by the legal profession and the QPS as much less efficient than a standard committal.

- **early pleas**

Without real incentives for early pleas of guilty in circumstances in which the accused would not thereby be at a disadvantage, matters will continue to proceed to the more costly higher courts.

- **disclosure**

Without a legislative requirement for parties to disclose all relevant information prior to committal proceedings, it is likely that the resolution of some criminal matters will be

unnecessarily delayed, with flow-on cost implications throughout the criminal justice system.

FUTURE FUNDING DIRECTIONS

The provision or reallocation of funds to facilitate the early resolution of criminal matters is commonly characterised as 'front-ending the system'. This involves a funding commitment to resolve criminal matters at the earliest possible opportunity through the provision of appropriate legal services. A number of recent Australian reviews of legal aid and criminal justice systems have supported the concept of front-ending as a way of maximising the effectiveness and efficiency of the criminal justice system and ensuring the most effective use of limited public funds.

The savings resulting from 'front-ending' may not be apparent in the short term, and they may not even be direct savings to the agency providing the funds. It is therefore essential that efforts to improve the efficiency and effectiveness of LAQ, the ODPP and other agencies within Queensland's criminal justice system be approached from a whole-of-government perspective. To that end, Treasury may wish to consider the possible long-term savings to the Queensland community of attempts to resolve criminal law matters in the most appropriate way at the earliest possible time.

LAQ has already taken some steps to inject greater resources into the front end of the system by, for example, funding pleas in the Magistrates Courts and by increasing the fees paid to legal practitioners undertaking legal aid work. Further, the tendered duty lawyer scheme has allowed LAQ to offer duty lawyer representation to a large proportion of people on their first appearance before the Magistrates Court.

However, there is no other indication at this stage that substantial resources will be redirected to the 'front end' of the system. On the contrary, it appears that fewer matters are resolved in the lower courts than could be the case, that funding for representation before the lower courts is more difficult to obtain than it has been in the past, and that funding for representation before a defendant's first court appearances is non-existent.

FUTURE MONITORING

The CJC is required to monitor and report on the sufficiency of funding for LAQ and the ODPP on a regular basis. We will continue to present data on funding trends for LAQ and the ODPP in our *Criminal Justice System Monitor* series and will report on other developments as appropriate.

Appendix A: Submissions and Consultations

SUBMISSIONS RECEIVED

Bar Association of Queensland
Mr A. Boe, Solicitor
Legal Aid Queensland
The Honourable M. McMurdo, President, Court of Appeal
Queensland Homicide Victims' Support Group
Queensland Law Society Inc.
The Self Litigants Association
Mrs Jean Young-Smith

CONSULTATIONS

Bar Association of Queensland	5 March 2001
Andrew Boe	9 March 2001
Chief Justice of Queensland and Senior Judge Administrator, Supreme Court of Queensland	26 March 2001
Crown Prosecutors' Association	7 March 2001
Department of Justice and Attorney-General	8 March 2001
Department of the Premier and Cabinet	9 March 2001
Director of Public Prosecutions	14 March 2001
Director-General, Department of Justice and Attorney-General	26 March 2001
District Court of Queensland	1 March 2001
Legal Aid Queensland	13 March 2001
Office of the Director of Public Prosecutions	21 February 2001
Queensland Aboriginal and Torres Strait Islander Legal Services Secretariat	1 March 2001
Queensland Advocacy Incorporated	16 March 2001
Queensland Association of Independent Legal Services	6 March 2001
Queensland Law Society Inc.	5 March 2001
Queensland Magistrates	6 March 2001
Queensland Ombudsman	12 March 2001
Queensland Police Service	23 March 2001
Queensland Treasury	29 March 2001

Appendix B: Responses to recommendations of the CJC's 1995 report

Set out below are agency responses to the recommendations that the CJC made in its *Report on the Sufficiency of Funding of the Legal Aid Commission of Queensland and the Office of the Director of Public Prosecutions, Queensland* (April 1995). The responses do not necessarily reflect the implementation of the CJC's recommendations. Many of the issues that led to the CJC's recommendations, and the relevant agencies' and the Government's responses, are discussed in more detail in relevant chapters of the present report.

Legal Aid Commission funding arrangements

RECOMMENDATION 1

The 1990 Commonwealth–State Funding Agreement should be revised, as it has not provided an adequate process for maintaining the original LAC [Legal Aid Commission] service profile established by the Agreement.

A key objective of any review should be to determine an appropriate service delivery profile for the LAC. This will require consideration of such questions as the appropriate balance of criminal, family and civil law matters; the types of matters within these categories which should be given funding priority, taking into account such things as gender bias considerations; the funding relationship between the LAC and Aboriginal and Torres Strait Islander Legal Services; and an assessment of whether existing merit and means tests need revising. Once issues about the service profile have been resolved, the focus should be on determining what funding arrangements are required to enable the LAC to provide a stable level of service in terms of this profile.

Response

LAQ has advised:

> In June 1996, the Commonwealth Government gave notice of termination of the Commonwealth–State Legal Aid Agreement. The Agreement ceased on 30 June 1997. The cessation of the agreement resulted in the new Legal Aid Queensland Act 1997. Under this Act, Legal Aid Queensland is enabled to enter into legal assistance arrangements with the Commonwealth and State Governments. Legal Aid Queensland entered into a three (3) year agreement with the Commonwealth Government for 1997–2000 and a four (4) year agreement from July 2000. The three (3) year agreement involved a funding cut of $2m with funding limited to $18m per annum.
>
> The significant change to Commonwealth funding was the limiting of funding to cost of grants for legal assistance for matters arising under Commonwealth law and being matters of priority. The practical effect was that no longer could Commonwealth funding be applied to Commonwealth persons charged with State criminal law matters e.g. an unemployed person charged with an offence under the Queensland Criminal Code.
>
> The four (4) year agreement provides additional funding of $19.03m over four (4) years. It is more a purchaser/provider agreement with defined outputs at an estimated price. The Commonwealth has stipulated the Priorities and Guidelines.
>
> The State Government has entered into annual funding agreements coupled with increased funding. Statutory interest revenue remains an uncertainty, with it trending towards the high side at present.
>
> The consequence of the funding changes is that the Board, in its budget process, is forced to deal in essence with two (2) separate funds — Commonwealth and State. Organisationally, the Board has adopted a prudent reserve level of $7m to cater for any exigencies that may arise. Also, budget forecasts are made with a three (3) year time horizon.[1]

RECOMMENDATION 2

Whatever funding arrangement is adopted, provision should be made for the LAC's revenue to be reviewed periodically to take account of: changes in the level of service demand as measured by such factors as population growth and higher and lower court criminal prosecutions; unavoidable cost increases; and external legal and/or administrative changes which affect the LAC's workload.

Response

LAQ has advised the CJC:

> LAQ funding comes from the Commonwealth Government and from state sources. Commonwealth funding is for Commonwealth law matters only and is governed by an agreement between the Commonwealth Government and LAQ. State Government funding is by way of an annual funding agreement.[2]

RECOMMENDATION 3

The State Government, in conjunction with the LAC, should develop appropriate indicators, acceptable to the Commonwealth, for measuring changes in LAC costs and workload, and changes in the level of demand for legal services.

Response

The Department of Justice and Attorney-General has advised the CJC:

> The Commonwealth conducted a Legal Needs Survey and is providing additional funding over a period of four (4) years. The Agreement with the Commonwealth, effective from 1 July 2000, sets out detailed performance information and the provision of data.[3]

Legal Aid Commission payments to practitioners

RECOMMENDATION 4

The CJC supports initiatives being developed by the LAC to introduce more competitive discipline in the determination of what the organisation pays for legal services, on the condition that there is proper monitoring of the quality of services being provided under different arrangements, and of the impact of these arrangements on private legal practitioners.

Response

LAQ has advised the CJC:

> In 1996 the evaluation of a pilot project on tendering prescribed criminal law grants of aid was completed. The pilot was conducted in three (3) high-volume areas of Brisbane, Southport and Cairns. Six hundred and fifty-seven (657) cases were assigned to those firms in blocks of between twenty-five (25) and one hundred (100) matters. The evaluation found that:
>
> - Small savings per case were made under tendering, in comparison with conventional case assignments. Potential savings are reduced by increased administrative costs associated with auditing and new processes, and the disproportionate costs in one (1) region where a truly competitive environment did not exist, and in a second region where one (1) firm withdrew. The third region achieved significant cost savings.
> - No significant differences in case outcomes and client satisfaction between tendered and non-tendered matters assigned during the pilot.
> - A 'preferred supplier' model would provide the balance between meeting cost efficiency demands and providing quality services.
>
> A preferred supplier model was introduced in February 1998. The panel of legal firms contracted from more than one thousand (1000) firms to three hundred and ninety-seven (397) preferred suppliers. Preferred supplier panels cover family law, civil law, criminal law (general), criminal law (juvenile) or criminal law (life).
>
> Quality control is addressed by having case management standards in place, with auditing of preferred suppliers.[4]

RECOMMENDATION 5

Decisions on matters relating to payments to practitioners should be seen as a management responsibility, with representatives of the legal profession having input in an advisory capacity only.

Response

LAQ has advised the CJC:

> With the advent of the 1997 Act, the Fees Committee ceased. The Board sets private practitioner fees after consultation with members of the profession.
>
> Recently, a Consultation Paper [was] issued on criminal law fees. The paper contains background and options for consideration. Widespread consultation has occurred on the fee options.[5]

RECOMMENDATION 6

If scale fees are to continue to be used to any extent, serious consideration should be given to establishing a clear benchmark relationship between these scales and the cost of providing similar services in-house.

Response

LAQ scale fees have been the subject of recent consultation with the legal profession by LAQ — see Legal Aid Queensland, *Revision of Criminal Law Fees: A Consultation Paper*, September 2000.

RECOMMENDATION 7

The LAC should develop mechanisms for systematically monitoring the quality of service provided across the whole spectrum of legal aid service delivery, both internally and in relation to all assigned, tendered and franchised legal aid work.

Response

LAQ has developed the following mechanisms:

- Case Management Standards: criminal law
- Practice Management Standards
- Service Agreements for duty lawyer and preferred suppliers (private legal practitioners)

Use of private practitioners and in-house staff by the Legal Aid Commission

RECOMMENDATION 8

The LAC should put in place procedures which will enable it to accurately compare the cost effectiveness of, and quality of service provided by private practitioners and in-house staff. Decisions about the appropriate method of delivering legal aid services should be based primarily on the information collected through this process.

Response

LAQ has advised the CJC that:

> Legal Aid Queensland, through use of activity based costing and time recording, monitors the cost effectiveness of its in-house legal practice. The policy that presently operates is a 70/30 split of matters between preferred suppliers and the legal practice.[6]

Structure of the Legal Aid Commission

RECOMMENDATION 9

Experience shows that decision making by a body which is deliberately made up of representatives for a number of sectional interest groups can be slow, ineffectual and, on occasions, unduly influenced by sectional considerations. Given the critical importance of the issues the LAC will continue to address into the future, serious consideration should be given to reducing the size of, and restructuring, the current LAC. The current structure of the LAC should be reviewed, taking into account the following 'minimal' requirements:

- It is quite appropriate that the LAC should include, on its governing board, legal professionals with expertise in the operation of the legal system and the delivery of legal services. However, in order to avoid any possibility of conflict of interest, the professional associations should not have direct representation on the LAC.
- As at present, the LAC should include at least one member with specific responsibility for representing the interests of legally assisted persons.
- The LAC should include at least one person from outside the LAC with proven managerial expertise.
- It is important that an appropriate gender balance on the LAC be maintained, especially given that gender equity is a very significant issue in relation to the allocation of funds for legal assistance.

Response

The *Legal Aid Act 1997* replaced the Legal Aid Commission with a five-person Board. Section 49 of the Legal Aid Act provides:

(1) The board consists of 5 persons appointed by the Governor in Council.

(2) One of the persons must be appointed, on nomination by the Minister, as an appropriate person to represent the interests of legally assisted persons.

(3) A person, other than the person appointed under subsection (2), is not eligible to be appointed by the Governor in Council unless the person has knowledge or experience in commerce, economics, finance, management or providing legal services.

(4) The Governor in Council is to appoint 1 board member as the board chairperson.

(5) A member is to be employed under this Act and not under the Public Service Act 1996.

LAQ has advised the CJC that the Board currently comprises:

- Two (2) legal professionals — one (1) from a firm of solicitors and the other is a barrister in private practice;
- A social worker member of the Board represents the interests of legally assisted persons;
- One (1) member has substantial public sector management experience, being a former Director-General of a major Government Department;
- One (1) member is an experienced accountant in private practice and Chair of a large statutory authority; and
- Three (3) out of five (5) members are female.[7]

The Legal Aid Commission's prescribed crime workload

RECOMMENDATION 10

The CJC supports initiatives aimed at reducing the prescribed crime workload of the LAC provided that there is no detriment to accused persons and there is compliance with the principles articulated by the High Court in *Dietrich's Case*.[8]

Response

The Department of Justice and Attorney-General has advised the CJC:

> The Legal Aid Board has introduced a plea fee for matters within Sections 552A and B of the Criminal Code. It is anticipated that more matters will be pleaded in the lower court as a result of this fee innovation. The right of an accused to a fair trial, including a jury trial, is a fundamental principle in a fair justice system.
>
> The State Legal Aid Agreement sets out targets for performance based on historical data. For criminal law matters in the higher courts, legal aid is demand driven as there is a means test, but no merit test. For the Magistrates Court, merit and guidelines tests apply due to the volume of matters.[9]

Office of the Director of Public Prosecutions funding arrangements

RECOMMENDATION 11

The DPP, as a matter of priority, should develop workload measures capable of providing reasonably accurate information about the number of person hours/days associated with various activities undertaken by the Office. This will enable the DPP with Treasury to develop a funding formula which reflects changes in its workloads.

Response

The ODPP has advised the CJC:

> For a period of twelve months during 1998–99 the Office of the Director of Public Prosecutions (ODPP) conducted an extensive workload measure project. The project measured the work value of each prosecution file using measures including the number of deposition pages, number of accused, nature of evidence, and type of offence. At the conclusion of the project, the ODPP believed that the project reinforced the view that no two prosecution files are the same and that no useful workload measure can be obtained from prosecution files for similar types of offence. The ODPP formed the view that the project findings were of limited utility as a management tool for measuring workloads. Consequently, it is not proposed to undertake a similar project.[10]

Office of the Director of Public Prosecutions management issues

RECOMMENDATION 12

The Government, in consultation with the DPP, should review, cost out and, where appropriate, implement the 1995 Recommendations of the Queensland Administration of Criminal Justice Review Committee relating to the restructuring and reorganisation of the DPP. (This committee was appointed by the Queensland Department of Justice and Attorney-General in 1993 to review certain parts of the Queensland criminal justice system, with particular emphasis on the existing processes within the DPP.)

Response

The Department of Justice and Attorney-General has advised the CJC:

> The recommendations of the 1995 Queensland Administration of Justice Review Committee were superseded by the recommendations made in the 1997 Coopers and Lybrand review. As stated in Recommendation 13 (see response from the Office of the Director of Public Prosecutions), following the Coopers and Lybrand Report the Office of the Director of Public Prosecutions was restructured. It is not proposed to change the current structure to reflect the recommendations of the 1995 Review.[11]

The ODPP has advised the CJC:

> The ODPP was reviewed in 1997 by management consultants Coopers and Lybrand. The management consultants made a report recommending extensive restructuring of the ODPP. All the recommendations of the report were implemented in 1997/98. In the circumstances, it is not proposed to undertake a further review of the ODPP.[12]

Office of the Director of Public Prosecutions quality control procedures

RECOMMENDATION 13

The DPP should develop processes for routinely and systematically monitoring the quality of work performed by in-house staff and private counsel who do work on behalf of the DPP.

Response

The ODPP has advised the CJC:

> In 1997 the management consultants Coopers and Lybrand conducted a review of the ODPP and made recommendations for change …
>
> Following that report, the office was divided into Legal Practice groups. Legal Practice Managers (LPM) were put in place to manage each practice group. The LPM provides a quality assurance process when matters come in to the office by signing the indictments, and reviewing the files prior to trial.
>
> In addition, the ODPP has introduced a new case management system using a text retrieval software program (ISYS). Managers can access standardised forms (observation forms) prepared by case officers. The case management system provides a quality assurance program that allows Legal Practice Managers to draw deficiencies, in file preparation, to the relevant lawyers' attention.
>
> At the conclusion of trials and sentences both the Crown Prosecutors and the brief-out-Counsel are required to sign off on the files, certifying to the reasons for an action, the consultation undertaken with the arresting officer and the complaint and the appropriateness of the sentence imposed. They are also required to consider whether an appeal should be considered, note favourable or unfavourable remarks made by the Judge or an interested person and comment on the state of preparation by the Legal Officer. Appellate lawyers are in an ideal position to make comment on the conduct of trials and sentence. They often take this opportunity to put forward their views.[13]

Use of private practitioners by the Office of the Director of Public Prosecutions

RECOMMENDATION 14

Although the bulk of prosecution work will continue to be handled in-house by the DPP for the foreseeable future, there is scope for the DPP to make greater use of private counsel.

To determine whether greater use of briefing out is desirable, the DPP should establish a system of time recording for in-house prosecutors and processes for monitoring the quality of the work performed by both in-house and private counsel. The DPP should also endeavour to ensure that, for the purposes of this evaluation, the matters which are briefed out to private counsel are roughly comparable to those dealt with by in-house prosecutors.

Response

The ODPP has advised the CJC:

> Unlike the LAO [Legal Aid Office], the ODPP chooses not to brief circuits to private counsel. This is because matters have to be briefed as trials and they invariably become pleas of guilty. Adopting the LAO briefing practice would be an unnecessary drain on any brief-out budget. Private counsel is engaged to assist the ODPP when more courts are listed than there are Crown Prosecutors available. Counsel is briefed with the same range of offences as in-house counsel. As at 15 December 1997 the ODPP scale of fees paid to private counsel matched those paid by the LAO after the government provided additional budget supplementation. Where possible, lengthy matters are not briefed to private counsel because of the high cost associated with this practice.
>
> Last year the ODPP commissioned a review of its briefing processes. A survey was undertaken of both Crown Prosecutors and brief-out counsel. The review was conducted by the Management Planning and Review Branch, Department of Justice and Attorney General and provided a report with options. Part of this review looked into the practices of the interstate ODPPs in briefing out. It should be said, however, that this is not necessarily comparing like with like. Each jurisdiction has its own unique characteristics and practices.
>
> After examining the review report, it has been concluded that the brief-out practices of the ODPP are an efficient and effective use of resources that meet the needs of the office. An examination of the budget for brief-out fees over the past five years reveals that the ODPP is not over-reliant on private counsel to deliver core services. In addition, it should be noted that the increase in the budget in the 1998/99 period is mainly due to the increase in the brief-out fees as set out …[14]

RECOMMENDATION 15

In order to facilitate earlier decision-making in the criminal justice system, some transitional funding should be made available to enable agencies such as the DPP and LAC to change their processes and focus more resources at the 'front end' of the system.

Response

The ODPP has advised the CJC:

> The ODPP has found through the Committal Project that its early intervention does produce savings that go system wide. While the savings are difficult to quantify with any high degree of accuracy, a cost-benefit analysis conducted by the consultancy group Coopers and Lybrand identified $0.826m costs avoided over a period of two years.
>
> Independent of the consultancy report, the Brisbane Office has recorded statistics on the success or otherwise of the Committals Program conducted at the Central Courts Complex, Brisbane. Over a 2 year 10 month period these statistics show that there were 468 sentences either committed to the District Court or advised to the ODPP prior to call-over as opposed to 290 for the non-committal workgroup for the same period. This represents a saving to the ODPP in time misdirected in preparing a matter for trial when it is a plea and a saving to the Queensland Police Service as their officers are not being directed to obtain witness availability or obtain additional evidence unnecessarily.
>
> In the same period the ODPP has returned 364 matters to be dealt with in the Magistrates. These matters would, in the ordinary course of events, have been committed to the higher courts. This has provided savings to the Superior Courts.[15]

Improving the criminal justice system generally

RECOMMENDATION 16

A permanent group, similar to the Criminal Case Management Group, should be established to develop, implement and monitor across-agency strategies to improve the criminal justice system. The Criminal Case Management Group was formed in 1994 as an initiative of the Litigation Reform Commission, with the aim of developing some specific strategies that could be implemented on a system-wide basis to improve efficiency in the criminal justice system.

Response

The ODPP has advised the CJC:

> In August 1999 there was a meeting with the Chief Judge of the District Court and the DPP and other senior staff of the ODPP, the Public Defender and the Legal Aid Office (Qld). At that meeting there was a commitment to meet regularly. There has never been another such meeting with the Chief Judge since that commitment.
>
> On February 26, 2001 there was a Criminal Procedures Workshop held in the Banco Court, which … [the CJC] also attended … this workshop has come about at the instigation of the Senior Judge Administrator, Moynihan SCJ. At this workshop there were a number of procedural issues discussed and workshopped. The ODPP supports the Workshop's decision

to establish a Criminal Law Standing Committee to meet regularly to address matters referred to it by the Court of Appeal and other judicial officers and practitioners.[16]

RECOMMENDATION 17

Priority should be given to proposed legislative changes designed to improve the efficiency of the system, particularly in relation to committal proceedings.

Response

The Department of Justice and Attorney-General has advised the CJC that:

> The Committals Committee in 1993 recommended that priority should be given to implementing legislative changes designed to enhance the efficiency of the committals process. This was taken to the stage of consultation on drafting instructions for a Bill, but was superseded by administrative changes in the committals arena. The ODPP assumed responsibility for committal proceedings in Brisbane and Ipswich. The ODPP 'Committals Project' imposed time lines, mention dates and other innovations by practice agreements rather than legislation. Further, the Director of Public Prosecutions in 1995 issued a Director's Guideline that required the police to give the defence a copy of the police brief at committal proceedings.
>
> The issue of committal proceedings and expediting the process will be further examined in 2001 by:
>
> - Consideration of the recommendation of the Queensland Law Reform Commission Report relating to the evidence of young people; and
> - A proposal to give magistrates a pre-trial and committals direction power similar to Supreme and District Court judges. This will enable magistrates to require adherence to timetables and disclosure.[17]

RECOMMENDATION 18

All criminal justice agencies should give the maximum possible support to initiatives designed to improve the quality, quantity and timeliness of information relating to the operation of the criminal justice system.

Response

The ODPP has advised the CJC:

> The ODPP supports initiatives that improve the quality, quantity and timeliness of activities relating to the operation of the criminal justice system.
>
> When opportunities arise, the ODPP utilises the e-mail facility between itself, Courts and defence. Currently, the ODPP is examining the feasibility of e-mailing indictments, letters and documents to the defence. Such a practice would reduce delays in notifications and the sharing of information.[18]

Endnotes: Appendix B

1 Letter to CJC from LAQ, 22 January 2001.

2 Ibid. (paraphrased)

3 Letter to CJC from Department of Justice and Attorney-General, 12 July 2001.

4 Letter to CJC from LAQ, 22 January 2001.

5 Ibid.

6 Ibid.

7 Ibid.

8 *Dietrich v. R* (1992) 177 CLR 292.

9 Letter to CJC from Department of Justice and Attorney-General, 12 July 2001.

10 Letter to CJC from ODPP, 14 June 2001.

11 Letter to CJC from Department of Justice and Attorney-General, 12 July 2001.

12 Letter to CJC from ODPP, 14 June 2001.

13 Letter to CJC from ODPP, 28 February 2001.

14 Ibid.

15 Ibid.

16 Ibid.

17 Letter to CJC from Department of Justice and Attorney-General, 12 July 2001

18 Letter to CJC from ODPP, 28 February 2001.

References

Agreement Between the State of Queensland and Legal Aid Queensland 2000/2001.

Australian Bureau of Statistics 1999, *Recorded Crime Australia 1999.*

—— 2000, *Australian Demographic Statistics*, June quarter 2000, 3101.0.

—— 2001, *Yearbook Australia, 2001*.

Australian Institute of Judicial Administration 2000, Conference Papers: Criminal Trial Reform Conference, Melbourne, 24–25 March 2000 [online] <www.aija.org.au/ctrpapers.htm>.

Bar Association of Queensland 2000, *Response to Legal Aid Queensland Consultation Paper Re: Revision of Criminal Law Fees* (undated).

Berry, P. 1998, 'Impact of the new committals regime: Justices Amendment (Committals) Act 1996', *Law Society Journal*, vol. 36, no. 2.

Bishop, J. B. 1998, *Criminal Procedure*, 2nd edn, Butterworths, Sydney.

Boe, A. 2000, 'The need for reform of criminal practice and procedure in a Legal Aid context — A practitioner's perspective', updated version of a paper delivered at the Legal Aid/Criminal Law Forum, Brisbane, 5 December.

Coates, R. (Chairman, National Legal Aid) 1998, 'A best practice model for the determination of indictable charges: National Legal Aid and the Conference of Australian Directors of Public Prosecutions', in Australian Institute of Judicial Administration, *Reform of Court Rules and Procedures in Criminal Cases: A Collection of Papers Presented at an AIJA Conference in Brisbane on 3–4 July 1998*, pp. 39–53.

Coopers & Lybrand Consultants 1997a, *Department of Justice — Evaluation of Brisbane Central Committals Project Magistrates Court*, October.

—— 1997b, *Office of the Director of Public Prosecutions — Final Report of the Review of Legal Practice Operations*, October.

Criminal Justice Commission 1994, *Report on a Review of Police Powers in Queensland*, vol. 4, *Suspects' Rights, Police Questioning and Pre-Charge Detention*, May.

—— 1995, *Report on the Sufficiency of Funding of the Legal Aid Commission of Queensland and the Office of the Director of Public Prosecutions, Queensland*, April.

—— 1996, *Evaluation of Brisbane Central Committals Project*, April.

—— 2001, *Criminal Justice System Monitor*, vol. 5 (March).

Department of Justice and Attorney-General 2000, *Options Paper: Briefing Practices in the Office of the Director of Public Prosecutions (Queensland)*, 8 August.

Dewar, J., Giddings, J., Parker, S., with Cooper, D. & Michael, C. 1998, *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland* (research report commissioned by the Queensland Law Society and the Family Law Practitioners' Association), Faculty of Law, Griffith University, Brisbane, 1998.

Director of Public Prosecutions, Queensland 1995, *Half-Year Report January to June 1995*.

—— 1996, *Annual Report 1 July 1995–30 June 1996.*

—— 1997, *Annual Report 1 July 1996–30 June 1997.*

—— 1998, *Annual Report 1 July 1997–30 June 1998.*

—— 1999, *Annual Report 1 July 1998–30 June 1999.*

—— 2000, *Annual Report 1 July 1999–30 June 2000.*

District Courts of Queensland 1997, *First Annual Report 1996/97.*

—— 2000, *Annual Report 1999/2000.*

Fordham, H. 1994, 'Legal aid: Rostering to tendering', *Proctor*, March.

Giddings, J., Dewar, J. & Parker, S. 1999, 'Being expected to do more with less: Criminal law legal aid in Queensland', *Criminal Law Journal*, vol. 23, no. 2 (April).

Giudes, R. 2000, 'President's page — Legal aid: A national disgrace', *Proctor*, October.

Goriely, T. 1997, *Legal Aid Delivery Systems: Which Offer the Best Value for Money in Mass Casework? A Summary of International Experience*, Lord Chancellors Department Research Series no. 10/97, 8 (December 1997).

Justice Research Centre, NSW 2000, *Legal Services in Family Law*, prepared by R. Hunter.

Law Reform Commission of Western Australia 1999, *Review of the Criminal and Civil Justice System* (Report No. 92).

Legal Aid Commission of New South Wales, annual reports 1994–95 to 1999–2000.

Legal Aid Commission of Victoria, annual reports 1994–95 to 1999–2000.

Legal Aid Commission of Western Australia, annual reports 1994–95 to 1999–2000.

Legal Aid Commission of Queensland 1993, *Annual Report 1992/1993*.

—— 1994, *Annual Report 1993/1994.*

—— 1995, *Annual Report 1994/1995.*

—— 1996, *Annual Report 1995/1996.*

—— 1997, *Annual Report 1996/1997.*

Legal Aid Office (Queensland) 1996, *Evaluation of Tender of Prescribed Crime Pilot Project* (prepared by T. Prenzler, A. Williams & H. Hayes, School of Justice Administration, Griffith University, Brisbane).

Legal Aid Queensland 1998, *Annual Report 1997/1998.*

—— 1999, *Annual Report 1998/1999.*

—— 2000a, *Annual Report 1999/2000.*

—— 2000b, *Revision of Criminal Law Fees: A Consultation Paper*, September 2000.

—— 2001, *Evaluation of the Brisbane Central Courts Committals Project and the Ipswich Committals Project*, March 2001.

Lowe, P. 1997, 'The new regime for committals', *Law Society Journal*, vol. 35, no. 10.

Queensland Law Society 1996, 'Griffith University team evaluates tender of prescribed crime', *Headnote*, December.

—— 2000, minutes of meeting: Legal Aid/Criminal Law Forum, Brisbane, 5 December.

Queensland Treasury/Public Sector Management Commission 1991, *Review of the Legal Aid Commission (Public Defence) Funding.*

Report of the Queensland Administration of Criminal Justice Review Committee, chaired by L. W. Roberts-Smith, QC, September 1993.

Senate Legal and Constitutional References Committee 1998, *Inquiry into the Australian Legal Aid System* (Third Report).

Standing Committee of Attorneys-General (SCAG) 1999, *Working Group on Criminal Trial Procedure Report* ('the Martin Report'), September.

—— 2000, *Deliberative Forum on Criminal Trial Reform Report*, June.

Steering Committee for the Review of Commonwealth–State Service Provision 2001, *Report on Government Services 2001*, vol. 1, *Education, Health, Justice*, January.

Weinberg, Justice M. (Federal Court of Australia) 2000, 'The criminal trial process and the problem of delay', in Australian Institute of Judicial Administration, *Conference Papers: Criminal Trial Reform Conference*, Melbourne, 24–25 March.

Willis, J. 1999, 'The committal: Some recent developments and findings', *Journal of Judicial Administration*, vol. 8, no. 3.

Legislation referred to in this report

Corrective Services Act 1988 (Qld)

Criminal Code (Qld)

Criminal Justice Act 1989 (Qld)

Criminal Procedure Act 1986 (NSW)

Director of Public Prosecutions Act 1984 (Qld)

District Court Act 1967 (Qld)

Justices Act 1886 (Qld)

Legal Aid Act 1978 (Qld)

Legal Aid Queensland Act 1997 (Qld)

Penalties and Sentences Act 1992 (Qld)

Queensland Law Society Act 1952 (Qld)

Statutory Bodies Financial Arrangements Act 1982 (Qld)

Cases referred to in this report

Boe v. Criminal Justice Commission (de Jersey J, Supreme Court of Queensland, 10 June 1993 [93.186], unreported).

Dietrich v. R (1992) 177 CLR 292.

In the matter of the Criminal Code and the Judge's recommendations for amendment to legislation in regard to assault occasioning bodily harm, Judge M. Boyce, QC, 15 March 2001, unreported.