



COMMUNITY DEVELOPMENT AND JUSTICE STANDING COMMITTEE

INQUIRY INTO THE PROSECUTION OF ASSAULTS AND SEXUAL OFFENCES

**Report No. 6
in the 37th Parliament**

2008

Published by the Legislative Assembly, Parliament of Western Australia, Perth, April 2008.

Printed by the Government Printer, State Law Publisher, Western Australia.



Community Development and Justice Standing Committee

Inquiry into the Prosecution of Assaults and Sexual Offences

ISBN: 978-1-921355-33-2

(Series: Western Australia. Parliament. Legislative Assembly. Committees.
Community Development and Justice Standing Committee. Report 6)

328.365

99-0

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COMMUNITY DEVELOPMENT AND JUSTICE STANDING COMMITTEE

INQUIRY INTO THE PROSECUTION OF ASSAULTS AND SEXUAL OFFENCES

Report No. 6

Presented by:

Mr A.P. O'Gorman, MLA

Laid on the Table of the Legislative Assembly
on 10 April 2008

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COMMITTEE'S FUNCTIONS AND POWERS

The functions of the Committee are to review and report to the Assembly on: -

- (a) the outcomes and administration of the departments within the Committee's portfolio responsibilities;
- (b) annual reports of government departments laid on the Table of the House;
- (c) the adequacy of legislation and regulations within its jurisdiction; and
- (d) any matters referred to it by the Assembly including a bill, motion, petition, vote or expenditure, other financial matter, report or paper.

At the commencement of each Parliament and as often thereafter as the Speaker considers necessary, the Speaker will determine and table a schedule showing the portfolio responsibilities for each committee. Annual reports of government departments and authorities tabled in the Assembly will stand referred to the relevant committee for any inquiry the committee may make.

Whenever a committee receives or determines for itself fresh or amended terms of reference, the committee will forward them to each standing and select committee of the Assembly and Joint Committee of the Assembly and Council. The Speaker will announce them to the Assembly at the next opportunity and arrange for them to be placed on the notice boards of the Assembly.

INQUIRY TERMS OF REFERENCE

That the Committee inquire into and report on -

(a) decisions made in the past 5 years by the Director of Public Prosecutions (DPP) not to proceed with prosecutions in cases which involve charges in relation to assaults or sexual offences, and in particular to –

- (i) investigate the reasons for prosecutions not proceeding;
- (ii) review the extent to which the information and evidence provided to the DPP was perceived by the DPP to be prejudicial to the prosecution or otherwise inadequate;
- (iii) review guidelines for determining which cases presented to the DPP should not go to trial;
- (iv) identify the extent to which the public interest is a factor in decisions by the DPP not to proceed with a prosecution, and how that public interest is determined;
- (v) review how the age of the alleged victim affects such decisions;
- (vi) assess the adequacy of these and other criteria for making a decision not to prosecute;
- (vii) determine how the relevant authorities have been informed of, and taken account of, feedback from the DPP about the adequacy of the information placed before him;

(b) the adequacy of victim support services for victims of sexual assaults; and

(c) any other matter pertaining to an allegation or case of sexual assault that has been before the Western Australia Police Service or the DPP, and is deemed relevant by the Committee.

(2) Neither the report from the Committee nor the evidence released by the Committee will specifically identify any individual who has not faced trial, directly as a result of the DPP's decisions not to prosecute, whether or not any such individual has been charged and is currently before the court on any criminal matter, but the Committee may detail case background and circumstances of decisions made by the DPP.

(3) The Committee will ensure that if evidence is to be taken in public, witnesses undertake not to disclose the names of those individuals referred to in the preceding paragraph and will be advised that to breach such an undertaking will be regarded as a contempt of the House and dealt with accordingly.

(4) The Committee will report to the Legislative Assembly by 29 November 2007.

(5) For the duration and purpose of this inquiry only, the following members are appointed to the Committee: the Member for Hillarys, the Member for Churchlands and the Member for Maylands.

CHAIR'S FOREWORD

I am pleased to present to the Legislative Assembly the sixth report of the Community Development and Justice Standing Committee of the Thirty-Seventh Parliament. This Report finalises the Committee's *Inquiry into the Prosecution of Assaults and Sexual Offences* commenced on 25 October 2006.

Sexual assault and violent crime are issues of concern to all Australians in all walks of life. This Inquiry was initiated in the Legislative Assembly following concerns expressed by the member for Hillarys¹ in relation to a widely publicised case involving a Mr Dante Arthurs who subsequently pleaded guilty, in 2007, to the unlawful detention and murder of 8-year-old Perth girl, Sofia Rodriguez-Urrutia-Shu.

The member was concerned that in 2003, prior to this tragic event, a police interview of Mr Dante Arthurs (on an unrelated case of aggravated indecent dealing with a child under the age of 13) was deemed inadmissible by the DPP. This precluded the use of the evidentiary material gathered in the course of the interview and contributed to the decision by the Director of Public Prosecutions not to prosecute the case.

This Inquiry was therefore instigated to review the extent to which prosecutions of sexual offences were impeded by aspects of the judicial process that were poorly executed; and the extent to which prosecutions are negatively impacted by the systems which make up the formal response to such crimes.

Victims of sexual offences are at the heart of this Inquiry. The Committee recognises that enabling victims to have confidence in the criminal justice process is critical if offenders are to be brought to justice. Therefore the courage of victims of sexual offences in coming forward and providing statements to the Committee, at the risk of reliving their personal trauma, is both acknowledged and especially appreciated. Without their stories this Inquiry would have been significantly less able to identify and respond to the issues surrounding the investigation and prosecution of sexual offences.

Extensive consultation was also undertaken with a range of state government agencies in Western Australia, in Queensland, and in New South Wales, and their contribution to the Inquiry is gratefully acknowledged.

How the criminal justice system handles sexual offences is a vast and controversial topic, as is the issue of the provision of adequate victim support. No single inquiry could do justice to all aspects of this topic. However the Report highlights many of the key concerns that exist within all sections of the community, including representatives from the legal profession, the Office of the Director of Public Prosecutions, the Western Australia Police, the general public, forensic agencies, and support services, with respect to the investigation and successful prosecution of

¹ Mr Rob Johnson, Member for Hillarys, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 September 2006, pp6795- 6806.

sexual offences. Such concerns centred on the contributory reasons for the high rate of attrition in reported cases, from the initial call to the police (if the offence is reported at all) to the final outcome in court.

Current work practices and procedures were examined by the Committee in the light of victims' experiences to establish their quality and effectiveness and to establish, to the degree possible, their impact on the high attrition rate in this area of crime.

Having reviewed the findings the Committee makes 37 recommendations for the reform of the criminal justice system and associated processes in the state of Western Australia.

I would like to thank my fellow Committee members for their individual and collective contributions over the course of the Inquiry. I also recognise the contribution of Mr Nigel Lake, former Clerk Assistant, in the early months of the Inquiry, the Committee's Principal Research Officer, Dr Brian Gordon, and Research Officer Ms Jovita Hogan, for their professional and enthusiastic support throughout this Inquiry, and for their invaluable assistance in the preparation of this report.

MR A.P. O'GORMAN, MLA
CHAIR

ABBREVIATIONS AND ACRONYMS

ABS	Australian Bureau of Statistics
ACQ	Acquitted
AIC	Australian Institute of Criminology
ASCA	Advocates for Survivors of Child Abuse
ASD	Adjourned sine die
CAC	Child Advocacy Centre
CCTV	Closed circuit television
CIU	Child Interview Unit
CMC	Crime and Misconduct Commission
CPU	Child Protection Unit
CPS	Crown Prosecution Service
CS	Convicted and sentenced
DoCS	Department of Community Services, (NSW)
DPC	Department of Child Protection
DPP	Director of Public Prosecutions
GP	General Practitioner
IT	Information Technology
JIRT	Joint Investigation and Response Team
NOL	Notice of discontinuance
NSPCC	The National Society for the Prevention of Cruelty to Children
NSW	New South Wales
NT	Northern Territory
ODPP	Office of the Director of Public Prosecutions
QLD	Queensland
PDF	Portable document format
PG	Plea of guilty
QC	Queens Counsel
SA	South Australia
SARC	Sexual Assault Resource Centre
Tas.	Tasmania
UK	United Kingdom
US	United States
Vic.	Victoria
VSS	Victim Support Services
WA	Western Australia
WAPOL	Western Australia Police
WAS	Witness Assistance Services

GLOSSARY

Attrition: The highly selective process of elimination during the progress of any reported case going through the justice system.²

Consent: Saying "yes" to engaging in a particular act. Consent does not occur when one person says no, says nothing, is coerced, is physically forced, is mentally or physically helpless, is intoxicated, is under the influence of drugs, and is unconscious. Having given consent on a previous occasion does not mean that a person has consented for any future encounter. The definition of consent for minors is even more limited.³

Corroboration: Corroboration is evidence from a source independent of the relevant witness which implicates the accused by tending to show both that the crime was committed and that the accused committed it.

People with a decision making disability: Individuals who are unable to make reasoned decisions because of dementia, intellectual disability, mental illness or acquired brain injury.

Perpetrator: Depending on the context, a perpetrator of sexual assault may be referred to as the accused, an assailant, a suspect, an alleged offender, or a defendant.

Re-victimisation: The process of "reliving" an assault or abuse in a negative way by having to retell it or answer questions about it to others.

Victim: Depending on the context, a person who has experienced sexual assault may be referred to as a victim/survivor, a survivor, a complainant, a patient or a client.

Witness: Someone who was present during the committing of a crime. In Western Australia and in the context of this report the term "witness" may be used to describe the "victim" of the assault/sexual offence. This is because the prosecutor's principal role is to assist the court to arrive at the truth of the matter and to do justice for the community. As such the prosecutor has no client.

² Soulliere, D.M., 'Pathways to attrition', *The Qualitative Report*, Vol. 10 No. 3, September 2005, p416.

³ Advocates for Youth, 'Glossary'. Available at:
<http://www.advocatesforyouth.org/youth/health/assault/glossary.htm>. Accessed on 9 October 2007.

EXECUTIVE SUMMARY

This is the first and final report of the Community Development and Justice Standing Committee on the *Inquiry into the Prosecution of Assaults and Sexual Offences*. Witnesses' testimony was taken in closed hearings. Where the Committee has chosen to maintain the confidentiality of those submissions and transcripts, the quoted sources are referenced by number only and steps have been taken to veil the author's identity in the quoted content. Additionally, the Committee has not identified any individual who has not faced trial, directly as a result of the Director of Public Prosecution's decisions not to prosecute, whether or not any such individual has been charged and is currently before the court on any criminal matter.

In recent years the 'veil of secrecy' surrounding sexual offences has significantly lifted, encouraging a steadily increased rate of reported incidents. One of the more recent causal factors for the increased rate of reporting is considered to be the domestic violence legislation enacted in 2004. The result is that sexual offence cases now form approximately 20% of the Office of the Public Prosecutor's (ODPP) workload. However less than 15% of cases reported to the Western Australia Police (WAPOL) reach the ODPP. Of these some 59% are convicted. In other words less than 9% of reported cases secure a conviction.

This Report considers the stages in the criminal justice system at which cases can be withdrawn, dismissed, or discontinued, and the contributory reasons for dismissal, withdrawal and discontinuance. Not infrequently victims themselves may choose to withdraw for a number of reasons, some of which will have to do with their experience of the judicial processes. These reasons are explored throughout the report.

The Committee has identified a number of shortcomings in the systems, procedures and practices relative to the judicial process during the course of the conduct of this Inquiry, particularly in respect to the investigatory stages. It has made a number of consequential recommendations.

Chapter One outlines the background to the establishment of the Inquiry, together with the parameters and conduct of the Inquiry.

Chapter Two considers the legislative and process framework for the prosecution of sexual offences. In particular it reviews the independence of the Director of Public Prosecutions (DPP), comparing the situation prevailing in Western Australia with that in other states.

In Western Australia, cases are assessed by the DPP in accordance with the *Statement of Prosecution Policy and Guidelines 2005*. This chapter discusses these guidelines, together with prosecutorial decision-making, and police responses to sexual assault.

Chapter Three focuses on the non-reporting of sexual assault and some of the perceived and personal barriers to reporting.

Chapter Four There is a low rate of reporting of cases of sexual offences in Western Australia and a high rate of discontinuance once cases are reported. This chapter looks at both the legal and non-legal considerations behind the attrition rates in the investigation and prosecution process. For

instance, one non-legal factor is the impact on the victim of reporting a rape leading to feelings of re-victimisation.

Importantly, victim/complainant experiences with all aspects of the justice system affect the continuance of the case, as does evidentiary sufficiency. Both these elements are examined with a number of subsequent recommendations made as to the WAPOL and the DPP processes.

Chapter Five One of the reasons provided to the Committee as to why prosecutions might not proceed, or having commenced might then fail, was that of problems with the provision of forensics. In particular it was suggested that there are significant delays in the provision of forensics. This chapter reviews the processing of forensic evidence in the light of these concerns.

Chapter Six Central to the issue of sexual offences is the victim. The issue of the treatment and support of victims is multidimensional. As canvassed in this chapter, idiosyncratic issues apply to those victims who have special needs or have a decision-making disability; as well as to those who live in remote or regional communities, or for whom English is a second language. Additionally, children form a significant proportion of victims and the justice system has to respond to child complainant/victims whilst recognising their individual developmental ages and stages. Finally, there is a tension between the requirements of the justice system's procedures and processes and the complainant/victim's therapeutic requirements relative to recovery.

This chapter briefly reviews these and related issues, highlighting some of the prevailing deficits and making recommendations in response.

Chapter Seven A number of significant factors contributing to unsatisfactory outcomes in the justice system were highlighted to the Committee during the course of this Inquiry. This chapter reviews and makes recommendations on these, including:

- the poor level of knowledge management in such agencies as WAPOL, the ODPP, and the Department of Child Protection (DCP);
- the delays in the judicial process caused by the poor quality of briefs;
- the very poor levels of communication between all agencies and also between relevant agencies and the complainant/victims; and
- the gaps in service provision in rural remote areas of Western Australia.

FINDINGS

Page 30

Finding 1

The brief of the recently formed Sexual Assault Squad (SAS) is narrower than perceived by either the Committee or the public. The operations of the SAS are restricted to cases where the perpetrator is unknown to the victim or the inquiry is of a highly complicated nature.

Page 37

Finding 2

The *Evidence Act 1906 (WA)*, in relation to children, does not presently allow for child victims of internet and telecommunications crimes to have their evidence pre-recorded and then used in court.

Page 54

Finding 3

There is a low rate of reporting (10%) of sexual offences. On the Committee's data only 1% of all alleged sexual assaults (both reported and unreported) result in conviction. This stems in large part from perceptions of the justice system, a fact confirmed through national and international research and reinforced to the Committee by testimony of witnesses who felt let down by the legal process.

Page 66

Finding 4

- a) There is a significant attrition rate in the period between the reporting of a sexual offence and the offence being tried in a court of law.
- b) Re-victimisation during the process is one of the reasons why victims/complainants withdraw at the investigative stage.

Page 72

Finding 5

There are broad based community perceptions of shortcomings in the police investigatory approach to cases of sexual assault. Such perceptions are shared by members of the legal profession. This is often attributable to a lack of investigatory interest by the police in sexual offences where the alleged perpetrator may be known to the victim.

Page 73

Finding 6

Prevailing myths and stereotypes prejudice the individual police officer's objectivity in some cases of sexual assault.

Page 74

Finding 7

There are occasions where justice 'being seen to be done' is compromised by some of the investigating police officers due to their relationship with the alleged offender. There is a lack of a definitive policy in this area.

Page 77

Finding 8

Police under-resourcing and a lack of clear policy direction inhibit best practice in the investigation of sexual assaults.

Page 78

Finding 9

While there is an obligation on police to provide a professional and sensitive response to sexual assault cases, the work load placed on police leads to highly individualised experiences by victims.

Page 81

Finding 10

There is a tension between the requirements of the courtroom and the needs of a child in the recording of interviews. The consequence is that the recording of children's interviews, while attempting to satisfy the needs of the court, may be undertaken in a manner that does not fully recognise the developmental stages of the child witness.

Page 86

Finding 11

There were singular and as yet unexplained deficiencies in the investigation of Dante Arthurs in 2003. These deficiencies are likely to be systemic.

Committee Comment: The Committee applauds the Commissioner of Police's proactive response to the possibility of a systemic deficiency in the investigation of major crime and supports his inquiry into the United Kingdom's approach to dealing with this problem.

Page 89

Finding 12

There is a need for enhanced training to be provided for general duties police and detectives to ensure a more sensitive and supportive response to victims who report they have been sexually assaulted.

Page 90

Finding 13

The identified shortcomings of police dealing with people who have an intellectual or decision-making disability demonstrate that there is a need for specialised training to be provided. The training should extend to all other agencies involved.

Page 93

Finding 14

The Committee found evidence of a lack of adequate training for police interviewing officers engaged in major cases. This is compounded by the police culture regarding interview methods. This has led to subsequent difficulties with respect to the admissibility of evidence.

Page 93

Finding 15

There is a need for an experienced third party (senior police officer and/or lawyer) to monitor police interviews in sexual assault cases.

Page 96

Finding 16

The right to silence when questioned by police is understood by the general public to be a universal fundamental of Anglo Saxon law. In Australia, the common law right to remain silent is broadly recognised by State and Federal Crimes Acts and Codes. However notwithstanding the right to silence, in a number of overseas jurisdictions, including the United Kingdom, the court or jury is specifically permitted to draw strong adverse inferences where the accused person did not provide certain information to police when asked to do so. This applies when the accused fails, when questioned (under caution, charged, or officially informed that he or she might be prosecuted) to mention a fact later relied on in defence, which he or she could reasonably have been expected to mention when questioned.

Page 98

Finding 17

There are police practices and a culture that result in the preparation of briefs that are adequate for charges to be laid but are incomplete for trial purposes. Such deficiencies lead to delays in the prosecution of a case as the briefs are returned by the Office of the Director of Public Prosecutions to the Western Australia Police, sometimes repeatedly, to allow the police to remedy the deficient briefs. The Committee regards this as a fundamental failure of the system.

Page 103

Finding 18

The adversarial legal system does not deal adequately with the uniqueness of child sexual offences.

Page 105

Finding 19

There are major problems with communication between agencies and from the agencies to victims. This results in a very inefficient process and dissatisfaction amongst all parties and impacts most heavily on the victim.

Committee comment: The Committee strongly believes that there is an identified need for the development of a formalised framework for prompt and effective communication between agencies and individuals who deal with, or have contact with, sexual assault cases under the direction of a nominated lead agency.

Page 109

Finding 20

There is a need for specialised training of prosecution lawyers which could be provided by third party agencies specialising in the area of sexual assault. Such training would include victims' reactions during and after the sexual assault, child development, rape-related post-traumatic stress disorder, societal attitudes toward rape, the latest forensic information and place particular emphasis on the development of professionalism and sensitivity towards the victim and the victim's family.

Page 113

Finding 21

There is a major deficit in available medical services in regional areas in sexual assault cases. This is due in part to the implications for affected General Practitioners and leads to significant shortfalls in the quality of forensic evidence with negative outcomes on both victims and their cases.

Page 118

Finding 22

The varying requirements of the forensic processes are poorly communicated or understood leading to misconceptions around the timeliness of the production of results. However recent agreements between PathWest and the Office of the Director of Public Prosecutions for the production of results should provide timely reports.

Page 120

Finding 23

There is a lack of understanding in the community that the prosecuting authority does not act on behalf of the victim. This can lead to unrealistic expectations on the part of the victim.

Page 125

Finding 24

There is some evidence that therapeutic approaches in jurisprudence may work to the longer term benefit of the victim and also reduce recidivist behaviour. There is therefore a role for such alternative strategies, as is already recognised in some sectors of the court system. However there is a real tension between the possible advantages of therapeutic jurisprudence to the victim and the community's requirement for punishment in cases of major crime.

Page 132

Finding 25

Victim dissatisfaction with services provided was a common theme in submissions and evidence to the Committee.

Page 132

Finding 26

The legal culture and language of the Office of the Director of Public Prosecutions may prove contrary to the needs of the victim. This difficulty has been addressed in most states and overseas jurisdictions with the use of a witness assistance service that provides a broad based victim support role within the context of the judicial process and the Office of the Director of Public Prosecutions.

Page 139

Finding 27

Violence and child abuse have been reported for some years as being endemic in indigenous communities. There is a significant deficit in regional and remote areas in the provision of support services for indigenous communities.

Page 144

Finding 28

There is a clear case for the consideration of the establishment of specialist prosecutors in cases involving child victims.

Page 148

Finding 29

Adults with intellectual and decision-making disability are vulnerable to sexual assault and in need of special support. There is a lack of specific, dedicated and ongoing support/counselling services for victims of sexual assault who have intellectual and decision-making disabilities.

Page 149

Finding 30

Relatively high profile agencies providing support to victims of sexual assault may not be known to the victim. There is a need for a more strategic and coordinated approach to community education enhancing awareness of services and subsequent legal processes relating to sexual offences.

Page 157

Finding 31

The quality of police briefs going forward to the Office of the Director of Public Prosecutions is often inadequate leading to delays in the judicial process. In jurisdictions in the eastern states and the United Kingdom such shortcomings have been addressed through a variety of proactive strategies.

Page 159

Finding 32

There is significant disparity between the remuneration levels for senior lawyers working in the Western Australian Office of the Director of Public Prosecutions, vis-à-vis their counterparts in some eastern states offices. This is a contributory factor in the unsatisfactory ratio of senior and junior lawyers, to the detriment of prosecutorial services.

Page 161

Finding 33

There is an embedded culture of delay in the judicial process in Western Australia resulting from deliberate actions or inactions by one or more parties. The problematical nature of this culture has been recognised by the Director of Public Prosecutions and some steps have been taken to address this problem.

Page 165

Finding 34

There is an inability of both the Western Australia Police (WAPOL) and the Office of the Director of Public Prosecutions (ODPP) to meet the information requirements of their internal and external stakeholders. This impairs both organisations' performance in core areas. It is also affecting both WAPOL and the ODPP in the areas of innovation, the quality of available information and subsequent reporting.

Page 165

Finding 35

The acquisition by the ODPP of a case management system will address many of the difficulties faced in the collection and analysis of data. However, because the operational funding requirements will have to be met from within the provisions of existing budgets, there will be a negative impact on the legal services provided by the Office of the Director of Public Prosecutions.

Page 167

Finding 36

There are deficiencies in the collection of data by the Child Interview Unit and in the subsequent linking the data with police and Department of Child Protection data. This deficiency hinders the evaluation of outcomes from initiatives such as specialist child interviewing and the video recording of children's evidence.

Page 168

Finding 37

Integrated methods of delivering justice in Western Australia are impaired through the lack of common identifiers in the data systems. This limits the effectiveness of the exchange of information from the laying of charges to the finalisation of a case, that is between the ODPP, WAPOL, PathWest and the Courts.

Page 171

Finding 38

There is a lack of existing protocols that would support the exchange of information between agencies.

Page 175

Finding 39

Compromises in the level of service delivery and lack of adherence to policy is widespread and seemingly increases with distance from the Perth metropolitan area, to the detriment of a coherent response to sexual offences.

Page 178

Finding 40

There is a deficit in the Office of the Director of Public Prosecutions' (ODPP) ability to respond to the needs of regional Western Australia. The ODPP is attempting to address this through the piloting of an innovative judicial model.

RECOMMENDATIONS

Page 30

Recommendation 1

The operations of the Sexual Assault Squad be expanded to include investigations of all cases of sexual assault.

Page 38

Recommendation 2

Legislation amending the *Evidence Act 1906 (WA)* be expeditiously adopted and proclaimed.

Page 74

Recommendation 3

The Commissioner of Police immediately ensures that any officer be prohibited from investigating any offence where the investigating officer has or has had a familial or personal relationship or any other conflict of interest with the alleged offender, victim or their family.

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Recommendation 4

That the Western Australia Police, the Office of the Director of Public Prosecutions, the Sexual Assault Resource Centre, the Victim Support Service, the Office of the Public Advocate, and the Courts design reliable and valid victim satisfaction instruments appropriate for each agency. The results must be published in each agency's annual report or equivalent.

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Recommendation 5

The Office of the Director of Public Prosecutions, the Western Australia Police, the Child Protection Unit, the Department of Health and the Child Interview Unit review a range of formalised interagency collaborative models for working with victims of child sex offences with a view to improving the quality and recording of interviews, evidence, and briefs.

Page 85

Recommendation 6

The Office of the Director of Public Prosecutions, the Western Australia Police, the Child Protection Unit and the Child Interview Unit jointly explore the 'Extended Forensic Evaluation Interview Model', to assess its suitability in the Western Australian judicial environment.

Page 86

Recommendation 7

The Western Australia Police include on the list of exhibits collected a column denoting the action, if any, taken in respect to each piece of evidence and the status of that action. The list of exhibits will then be signed by a senior police officer and attached to the relevant brief before that brief is forwarded to the Director of Public Prosecutions.

Page 86

Recommendation 8

The Minister of Police and Emergency Services provides full support for the introduction of those systems that the Commissioner of Police recommends for the improvement of police investigatory process in Western Australia.

Page 89

Recommendation 9

The Government provides the additional funds required to implement the new curricula for ongoing training and professional development to investigating officers and detectives.

Page 89

Recommendation 10

The Government expedites the recruitment of extra security personnel, other than police officers, to manage the East Perth Watch House.

Page 90

Recommendation 11

That a review of training programs and practices undertaken in overseas jurisdictions be carried out with a view to providing specialised training in the areas of sexual assault, child development and people with intellectual or decision-making disabilities for all agencies involved with victims.

Page 93

Recommendation 12

The Western Australia Police installs suitable recording equipment (video and audio) in interview rooms to permit an experienced third party (senior police officer and/or lawyer) to monitor and advise on interviews conducted in those rooms.

Page 93

Recommendation 13

That the Director of Public Prosecutions and the Commissioner of Police develop protocols for the use of recording equipment (video and audio) fitted to interview rooms which will permit a third party to monitor and advise on interviews conducted in those rooms.

Page 96

Recommendation 14

The Attorney General implements changes to Western Australian legislation which incorporate the principles and safeguards of the United Kingdom's *Police and Criminal Evidence Act* which bear on the accused's right to remain silent.

Page 105

Recommendation 15

The Government establish a formalised framework for communication between relevant agencies and individuals, who deal or have contact with sexual assault cases, under the direction of a lead agency.

Page 109

Recommendation 16

The relevant staff of the Office of the Director of Public Prosecutions should be adequately trained and supported in their understanding of all aspects of sexual assault prosecutions, with an emphasis on the importance of appropriately communicating with the child complainant and his or her family on a regular basis.

The Office of the Director of Public Prosecutions should monitor and report on levels of training achieved by all relevant prosecutors in its Annual Report and the targets they have achieved in having all cases prosecuted by appropriately trained staff.

Page 110

Recommendation 17

An independent taskforce be established to analyse the incidence of withdrawal of complaints and make recommendations aimed at reducing such withdrawals. These recommendations should include the collection of data by police and the Office of the Director of Public Prosecutions regarding reasons as to why charges are withdrawn, charges not indicted or discontinuances entered.

This taskforce should be established by the Attorney General drawing on the Office of the Director of Public Prosecutions, Western Australia Police, Sexual Assault Resource Centre, Victim Support Service and the Aboriginal Legal Service together with victims of sexual assault.

The report of the taskforce be tabled in Parliament before the end of 2009 and thereafter in the annual report of each agency.

Page 114

Recommendation 18

The Minister for Health ensure that rural and regional GPs be provided with training and incentives to properly manage victims of sexual assault with a view to improving services in the regions.

Page 126

Recommendation 19

The Office of the Director of Public Prosecutions, in collaboration with the Department of the Attorney General, investigate and report on the merits of therapeutic justice.

Page 127

Recommendation 20

That the Office of the Director of Public Prosecutions, Western Australia Police, Sexual Assault Resource Centre, and the Victim Support Service, the Child Protection Unit, the Department of Child Protection and the Public Advocate of Western Australia

- (a) collaborate to implement the Child Advocacy Centre model of victim support for children; and
- (b) investigate the adoption of a similar model of victim support for adult victims of sexual assault.

Page 132

Recommendation 21

The Government provide funding to establish a victim/witness assistance service team in the ODPP based on a combination of New South Wales, Victorian and South Australian models. Indigenous victims and witnesses, and victims and witnesses with special needs, should be provided with officers dedicated to working with these groups.

Page 139

Recommendation 22

The Auditor General be asked to review again the implementation of the response to the Gordon Inquiry, and report to the Parliament on the progress made since his previous report in 2005.

Page 145

Recommendation 23

That the Office of the Director of Public Prosecutions expedites the appointment of a specialist to prosecute sexual offences against children.

Page 148

Recommendation 24

A whole of government approach, driven by the Premier's office, be immediately instituted to improve the adequacy and availability of services for people with intellectual and decision-making disabilities who come into contact with the criminal justice system (both as victims and perpetrators).

Page 150

Recommendation 25

A whole of government approach, driven by the Premier's office, be undertaken to:

- a) review current information available to sexual assault victims, with a view to developing specialist information (e.g. a booklet or visually recorded information) to facilitate sexual assault victims being properly informed about criminal justice processes; and
- b) ensure the development of appropriate information (e.g. pamphlets, booklet and visual aids) to facilitate sexual assault victims being properly informed.

Page 152

Recommendation 26

The Minister for Health ensure a victim support officer be made available to all victims of sexual assault as soon as the offence is reported to the police. This service to be provided by the Sexual Assault Resource Centre or related agency.

Page 157

Recommendation 27

A working party be established which includes the Western Australia Police (WAPOL) and the Office of the Director of Public Prosecutions (ODPP) and, where relevant, the DCP to:

- a) identify the critical issues of brief preparation and develop these by way of guidelines, and in training for WAPOL; and
- b) institute an ongoing formalised collaborative process that provides the ODPP with high quality briefs to maximise the prospects for a prosecution.

Page 159

Recommendation 28

The Director of Public Prosecutions investigate and report on mechanisms to attract and retain senior and experienced prosecution lawyers.

Page 161

Recommendation 29

The Attorney General initiates a reform process within the judicial system to eliminate the unacceptable embedded culture of delay.

Page 166

Recommendation 30

The Attorney General meet the additional operating and staffing costs of a case management system and identify this as a separate line item in the budget of the Office of the Director of Public Prosecutions.

Page 166

Recommendation 31

The Minister for Police and Emergency Services funds an upgrade of the existing police case management system so that it effectively interfaces with the proposed ODPP case management system. This upgrade should be funded as a separate line item in the WAPOL budget.

Page 167

Recommendation 32

- a) The Minister for Child Protection undertakes to develop a purpose built database for specialist child interviewing capable of linking to both Police and Department of Child Protection data collections and incorporating post-interview outcomes. The database should be capable of use across WAPOL and DPP offices.
- b) The Director of Public Prosecutions develops a database to support the evaluation of outcomes from initiatives such as specialist child interviewing and the video recording of children's evidence.

Page 168

Recommendation 33

The Attorney General continues to support and resource the development of a common file identification system for each of the affected agencies.

Page 172

Recommendation 34

The Office of the Director of Public Prosecutions, the Western Australia Police, the Office of the Public Advocate, the Sexual Assault Resource Centre and the Victim Support Service, PathWest, the Department of Child Protection and the Courts develop protocols to ensure the effective and efficient coordination of services. Such protocols would include procedures for the referral of victims and witnesses to support services. These protocols would also support the delivery of information to sexual assault complainants, including specification of the information that sexual assault complainants and witnesses should be provided with by prosecutors, the court and/or court support people to thereby inform and keep them informed.

This initiative to be driven by the Premier's office.

Page 176

Recommendation 35

The Department of Health, the Department of Indigenous Affairs, the Office of the Director of Public Prosecutions, the Western Australia Police, the Office of the Public Advocate, the Sexual Assault Resource Centre, the Victim Support Service, and the Department of Child Protection establish a task force which would review both the adequacy of the provision of services in response to sexual assault in regional and remote communities, and identify innovative and collaborative strategies to address the shortcomings.

This initiative to be driven by the Premier's office.

Page 178

Recommendation 36

The Attorney General ensures funds are available to extend the Kalgoorlie Project, and to implement the Chambers model in selected regional areas, commencing in Broome.

Page 178

Recommendation 37

The committees and task forces established as a consequence of this Inquiry report back to Parliament by 30 June 2009 on their outcomes.

MINISTERIAL RESPONSE

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Community Development and Justice Standing Committee directs that the Premier, the Attorney General, the Minister for Health, the Minister for Police and Emergency Services, the Minister for Indigenous Affairs and the Minister for Child Protection report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

CHAPTER 1 INTRODUCTION

1.1 Committees

Committees are a part of the Parliament and so have considerable powers granted by statute and delegated by the House which appoints them. The role of a parliamentary committee is to:

- scrutinise the process, practice and conduct of government and assist Parliament in its law-making function within the Committee's portfolio responsibilities;
- make findings and recommendations and report these back to the House; and
- ensure the Government will respond to a Committee report where appropriate.

At the commencement of each Parliament, the Speaker determines a schedule of the portfolio responsibilities for each committee.⁴

The functions of the Committee are to review and report to the assembly on:

- the outcomes and administration of the departments within the Committee's portfolio responsibilities;
- annual reports of government departments laid on the Table of the House;
- the adequacy of legislation and regulations within its jurisdiction; and
- any matters referred to it by the Assembly including a bill, motion, petition, vote or expenditure, other financial matter, report or paper.

The Committee may also initiate its own inquiries within the above terms of reference.

The Community Development and Justice Standing Committee has sixteen portfolio areas of responsibility; including that of Attorney General who, in turn, administers the *Director of Public Prosecutions Act 1991*.⁵

1.2 Background to this Inquiry

(a) The case of Sofia Rodriguez-Urrutia-Shu.

This Inquiry was established following concerns by the member for Hillarys⁶ in relation to a widely publicised case involving Mr Dante Arthurs who pleaded guilty, in 2007, to the murder and unlawful detention of 8-year-old Perth girl, Sofia Rodriguez-Urrutia-Shu.

⁴ Standing Orders of the Legislative Assembly of the Parliament of Western Australia, No. 287 (3).

⁵ Subsequently Reprinted 25 November 2005.

The member was concerned that, in 2003, prior to this tragic event, a police interview of Mr Dante Arthurs (on an unrelated case of aggravated indecent dealing with a child under the age of 13) was deemed inadmissible. This precluded the use of the interview by the Director of Public Prosecutions (DPP) leading to the subsequent discontinuance of the prosecution of that case by the DPP. The member expressed his feelings on this discontinuance saying “The reason I feel so strongly about this is that I believe in justice and the execution of justice,”⁷ and called for the establishment of an inquiry.

In particular this Inquiry was established to review the extent to which prosecutions of sexual offences were impeded by aspects of the investigatory and judicial process that were poorly executed, as exemplified in the 2003 case involving Dante Arthurs; and the extent to which investigations and prosecutions are negatively impacted by the prevailing justice culture and systems which make up the formal response to such crimes.

The purpose of the Inquiry was therefore to ensure that there would not be a similar tragedy in the future because of identified deficiencies in the justice system’s processes in Western Australia.

At the time of writing, the precise causes of what went wrong in the 2003 investigation are still to be determined. However the deficiencies of the police in their handling of the case shocked the Committee as they did the broader community. In particular the Committee was struck by the failure of the Western Australia Police to follow standard operating procedures in the interview, and their failure to have a key piece of evidence forensically analysed, until a cold case review was ordered by the DPP in 2007.

In the course of the Inquiry the Committee, amongst other things, examined all the discontinued cases of assaults and sexual offences that occurred between 2002 and 2006 for evidentiary insufficiency and/or indications of poor quality briefs. It also examined many facets of the 2003 investigation and the subsequent discontinuance of the case against Dante Arthurs on charges of indecent dealing of a child under 13, and deprivation of liberty. In the course of its review of the case the Committee viewed the video recording of the police interviews with Dante Arthurs, including those interviews that failed to follow laid down procedures resulting in an inadmissible confession.

Amongst the Findings and Recommendations of the Report, are a number that arise from the specifics of the two Dante Arthurs’ cases.

These include:

Finding 11 (page 86) *There were singular and as yet unexplained deficiencies in the investigation of Dante Arthurs in 2003. These deficiencies indicatively are systemic.*

⁶ Mr Rob Johnson MLA, Member for Hillarys, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 September 2006, pp6795- 6806.

⁷ Mr Rob Johnson MLA, Member for Hillarys, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 September 2006, pp6795- 6806.

Finding 14 (page94) *The Committee found evidence of a clear lack of adequate training for police interviewing officers engaged in major cases. This is compounded by a longstanding police culture relative to interviewing methods which leads on occasions to subsequent difficulties with respect to the admissibility of evidence.*

Finding 30 (page152) *The quality of police briefs going forward to the Office of the Director of Public Prosecutions is often of an inadequate standard in the first instance, leading to delays in the judicial process as the deficiencies are remedied. In jurisdictions in the eastern states and the United Kingdom such shortcomings have been addressed through a variety of proactive strategies.*

Recommendation 7 (page 87) *The Western Australia Police include on the list of exhibits collected a column denoting the action, if any, taken in respect to each piece of evidence and the status of that action. The list of exhibits will then be signed by a senior police officer and attached to the relevant brief before that brief is forwarded to the Director of Public Prosecutions.*

Recommendation 8 (page87) *The Minister of Police and Emergency Services provides full support for the introduction of those systems that the Commissioner of Police recommends for the improvement of police investigatory process in Western Australia.*

Recommendation 9 (page 89) *The Government provides the additional funds required to implement the new curricula for ongoing training and professional development to investigating officers and detectives.*

Recommendation 12 (page94) *The Western Australia Police install suitable recording equipment (video and audio) in interview rooms to permit an experienced third party (senior police officer and/or lawyer) to monitor and advise on interviews conducted in those rooms.*

Recommendation 13 (page 94) *The Director of Public Prosecutions and the Commissioner of Police develop protocols for the use of recording equipment (video and audio) fitted to interview rooms which will permit a third party to monitor and advise on interviews conducted in those rooms.*

Recommendation 27 (page161) *A working party be established which includes the Western Australia Police (WAPOL) and the Office of the Director of Public Prosecutions (ODPP) and, where relevant, the DCP to:*

- a) identify the critical issues of brief preparation and develop these by way of guidelines, and in training for WAPOL; and*
- b) institute an ongoing formalised collaborative process that provides the ODPP with high quality briefs to maximise the prospects for a prosecution.*

(b) The establishment of the Inquiry

As mentioned above, the Inquiry into the Prosecution of Assaults and Sexual Offences was initiated in response to a motion moved in the Legislative Assembly on 27 September 2006 by the Member for Hillarys, Mr Rob Johnson MLA. The original motion called on the Legislative Assembly to establish a select committee to inquire into and report on decisions made in the past five years by the Director of Public Prosecutions (DPP) not to proceed with prosecutions in cases which involve charges in relation to assaults or sexual offences.⁸

⁸ Legislative Assembly, *Parliamentary Debates*, (Hansard) 27 September 2006 pp6795-6806.

As the Community Development and Justice Standing Committee (the Committee) has responsibility for the portfolio of Attorney General, the motion was amended during debate and the Legislative Assembly referred the Inquiry to this Committee for investigation.⁹ Following the debate, the reporting date for the Committee was also amended from 29 March 2007 to 30 June 2007.¹⁰

The amended motion also provided for the Member for Hillarys, Mr Rob Johnson, the Member for Churchlands, Dr Elizabeth Constable and the Member for Maylands, Hon Dr Judy Edwards to be appointed to the Committee for the duration and purpose of the Inquiry. A subcommittee was formally established on 1 November 2006 with Mr Rob Johnson as Chair.¹¹

1.3 Inquiry Parameters

The role of the Office of the Director of Public Prosecutions (ODPP) is to conduct prosecutions for indictable offences on behalf of the State of Western Australia.¹² The *Director of Public Prosecutions Act 1991* provides that the Director is not subject to direction by the Attorney General or any other person in the performance of its functions.^{13 14} At present, no ODPP in Australia is oversighted by a specific Parliamentary Committee, and clearly it is not the role or function of this Committee to position itself in oversight of the Western Australian Office of the Director of Public Prosecutions.

Notwithstanding the above, the independence of the DPP is not unlimited. Legislative Assembly Standing Order 287 (2) (a) provides for this Committee to report to the Assembly on the outcomes and administration of the departments within the Committee's portfolio responsibility. The Speaker of the Legislative Assembly has allocated the portfolio of Attorney General to this Committee, giving it the authority to examine organisations within the Attorney General's portfolio, including the Office of the Director of Public Prosecutions.

As an independent prosecuting authority, prosecutorial discretion lies with the ODPP. This includes full authority to decide whether an indictment should be presented, the nature of charges to be laid, and how the prosecution will be conducted. The Office also has full discretion on the lodgement of any subsequent appeals. This Inquiry investigates past decisions made by the Office

⁹ The amended Motion as was passed on 25 October 2006. Legislative Assembly *Parliamentary Debates* (Hansard) 25 October 2006 pp7652-7654.

¹⁰ In subsequent amendments, the reporting date for the Inquiry has been further extended to 29 November 2007.

¹¹ Members of the Committee proper were also able to participate in the Inquiry.

¹² The Commonwealth Department of Public Prosecutions prosecutes offences committed against Commonwealth criminal laws.

¹³ *Director of Public Prosecutions Act 1991* Part 4 S25.

¹⁴ The Attorney General can issue directions to the Director on matters of general policy only (*Director of Public Prosecutions Act 1991* Part 4 S26). The last direction given by the Attorney General was in relation to the prosecution of matters in the summary courts. See the Office of the Director of Public Prosecutions for Western Australia *Annual Report 2004-2005* p30 for full text.

of the ODPP in relation to prosecutions of assault and sexual offences, in particular those that have had a Notice of Discontinuance, or *nolle prosequi*, lodged with the Court and have not proceeded to trial.

This Committee recognises the prosecutorial independence of the Director of Public Prosecutions and understands the decisions of the ODPP should be independent and free from political interference. The review of case records over the stipulated time period of five years allowed the Committee to determine if there were constants in a pattern of practice in the way the DPP discontinues with certain prosecutions, and whether processes in other agencies, such as the Western Australia Police, have an adverse impact on the ability of the ODPP to carry out its legislated functions.

1.4 Conduct of the Inquiry

The Inquiry's Terms of Reference were placed on the Parliament's web site and advertisements inviting submissions to the Inquiry were placed in *The West Australian* newspaper on 11 November 2006 and *The Sunday Times* newspaper on 12 November 2006. The Committee received 10 submissions following the initial call.

The Inquiry's Terms of Reference clearly prohibit the Committee from identifying "any individual who had not faced trial, directly as a result of the DPP's decision not to prosecute, whether or not any such individual has been charged and is currently before the court on any criminal matter..."¹⁵

With the above in mind, the Committee conducted closed hearings with both legal professionals and service providers. The Committee also afforded that same protection from identification to those victims of assault or sexual assault who provided evidence to the Committee. Those submissions and related evidence the Committee has agreed to make public are listed in the appendices to this report. All other submissions and evidence remain the property of the Committee and will not be published.

The Inquiry's Terms of Reference as initially passed by the Legislative Assembly proved too restrictive once the Inquiry had commenced. Early findings suggested that the issue of victim support was a concern that impacted on attrition rates and therefore the prosecution of cases. Consequently, the Committee sought to widen the Terms of Reference to capture this and other emerging issues. The Terms of Reference were then amended by the Legislative Assembly thus providing the Committee with a greater mandate to carry out its functions, and the reporting date further extended to 29 November 2007.¹⁶ Subsequently the final reporting date was extended to 10 April 2008 by motion in the Legislative Assembly.¹⁷

The amended Terms of Reference were advertised in *The West Australian* newspaper on 26 May 2007, and in the *North West Telegraph*, the *Pilbara News*, as well as in community newspapers,

¹⁵ *Inquiry into the Prosecution of Assaults and Sexual Offences*, Terms of Reference.

¹⁶ Legislative Assembly, *Parliamentary Debates*, (Hansard) 15 May 2007 p17.

¹⁷ Legislative Assembly, *Parliamentary Debates*, (Hansard) 21 November 2007 p7501.

throughout the following week. The Committee received further submissions following the re-advertising and the extension of the Terms of Reference. Thirty-two submissions in all were received in relation to the Inquiry.

As part of the evidence gathering process, the Committee visited both Queensland and New South Wales. Meetings were held with the Crime and Misconduct Commission, the Office of the Director of Public Prosecutions, and the Sex Crime Investigation Unit of the Queensland Police Service in Brisbane. In Sydney the Committee was briefed by the Office of the Director of Public Prosecutions and the Child Protection and Sex Crimes Squad of the New South Wales Police.

On a local level, the Committee was provided with information by the Office of the Director of Public Prosecutions, the Western Australia Police, the Sexual Assault Resource Centre, Princess Margaret Hospital for Children, PathWest Laboratory Medicine, Advocates for Survivors of Child Abuse, as well as private individuals. Upon invitation, criminal lawyers experienced in providing defence counsel for accused persons charged in matters of sexual assault also provided information to the Committee.

CHAPTER 2 LEGISLATIVE AND PROCESS FRAMEWORK FOR THE PROSECUTION OF SEXUAL OFFENCES IN WESTERN AUSTRALIA

2.1 Sexual Offences Legislation (The Criminal Code)

The laws relating to sexual offences applied in Australian courts today have their foundation in the English common law tradition. In Australia, criminal law is primarily a matter of jurisdiction for the states and territories rather than the Commonwealth. In the last 30 years there have been major changes to these laws in every State and Territory where every jurisdiction has created distinct legislation on sexual offences.¹⁸

In Western Australia the provisions of the criminal law are largely codified in what is known as 'the Criminal Code', established in the *Criminal Code Act 1913*, and it is one of the key instruments used in the administration of justice in Western Australia. The Code states:

*No person shall be liable to be tried or punished in Western Australia as for an offence, except under the express provisions of the Code, or some other statute law of Western Australia or under the express provisions of some statute of the Commonwealth of Australia.....*¹⁹

In exploring the principles of criminal liability, Halsbury's Laws of Australia say:

*It is not possible to provide a definition or set of criteria which will embrace the many acts and omissions which are criminal and which will at the same time exclude all those acts and omissions which are not. 'Crime' may be defined to include acts which are not criminal in any real sense, but which are acts prohibited under a penalty on the grounds of public interest. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community. There are, however, many crimes which exhibit neither of the above characteristics. An act may be made criminal by Parliament simply because it is criminal process, rather than civil, which is thought to offer the more effective means of controlling the conduct in question.*²⁰

In Western Australia, 'crime' is not defined; but the Criminal Code offers a definition of an 'offence'. In summary, conduct constitutes a criminal offence when it has been so defined by the law and is backed by penal sanctions.

¹⁸ *The law and sexual offences against adults in Australia*, Australian Institute of Family Studies Issues No 4, June 2005.

¹⁹ [The Code] along with some statutes of the Commonwealth of Australia and of the United Kingdom with express provisions to Western Australia.

²⁰ <http://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodeId=TABBAAC&pubTreeWidth=23%25>

Traditionally criminal law has taken its definition of rape (currently more commonly referred to as sexual intercourse or penetration without consent) as the archetypal sexual offence. The definition of rape was then varied to create and define distinct offences which prohibit indecency. Legal definitions of rape target acts of sexual penetration, whereas the legal definitions of indecent assault focus on polymorphous acts of sexuality where sexual penetration does not occur. In most jurisdictions, these two core offences are then varied according to the status of the victim to create further distinct offences.^{21 22}

Sexual offences in Western Australia are prosecuted under the provisions of Part V, Chapter XXXI of the Criminal Code, s319-331.

The nature of offences

The Western Australia Police (WAPOL) describes a sexual assault as one which involves:

*physical contact of a sexual nature directed toward another person where that person does not give consent, gives consent as a result of intimidation or fraud, or consent is proscribed (i.e. the person is legally deemed incapable of giving consent because of youth, temporary/permanent (mental) incapacity or there is a familial relationship).*²³

The nature of sexual offences covered under the Western Australian Criminal Code include:

- indecent assault
- aggravated indecent assault
- sexual penetration without consent
- aggravated sexual penetration without consent
- sexual coercion
- aggravated sexual coercion

In respect to further particularising some offences, the Code categorises separately sexual offences by relatives and the like, sexual offences against incapable persons, and sexual offences against children, with the following descriptions being employed to distinguish these acts:

- a child is any boy or girl under the age of 18 years;
- a relative can be either (a) “de facto child,” meaning a step-child of the offender or a child or step-child of a de facto partner of the offender or (b) a “lineal relative”; and

²¹ In recent years, the two main statuses have become children and people with intellectual disabilities.

²² Rush, P & Yeo, S, Criminal Law Sourcebook, 2000, Chatstwood, NSW, Butterworths p213.

²³ www.police.wa.gov.au/AboutUs/pdf/offencedescriptions, p2, accessed 12 June 2007.

- an incapable person is a reference to “a person who is so mentally impaired as to be incapable of understanding the nature of the act the subject of the charge against the accused person; or of guarding himself or herself against sexual exploitation”.²⁴

A range of penalties can be applied in relation to these offences depending upon the individual situation as defined in the Code. For example, further distinctions are made in relation to the actual ages of the child:

- Offences against children under 13 years are dealt with under s320, and are liable to higher maximum penalties.
- Offences against children between the ages of 13 years and 16 years are provided for in s321 and also include increased maximum penalties. It is also in this section that allowances are made for circumstances in which the accused person believed, on reasonable grounds, that the child was 16 years or older and is not more than 3 years older than the child. Further exemptions apply where the accused person is lawfully married to the child.
- The Code makes special provision for prosecution of assaults on children of or over the age of 16 years in circumstances in which sexual offences are committed by a person who has care, supervision of, or authority over the child in s322. However unlike the previously mentioned s321, which allows for a mistaken belief of age tied with the limitations with regards to age difference, it is no defence here for the accused to believe the child to be of or over the age of 18 years.

WAPOL also describes the factors which distinguish a sexual assault from an aggravated sexual assault. Circumstances of aggravation are ones which involve:

- sexual intercourse (i.e. oral sex and/or penetration of either the vagina or anus by any part of the human body or by any object);
- possession/use of a weapon;
- consent proscribed; or
- committed in company (i.e. by two or more persons).

Aggravated sexual assault includes incest, rape, unlawful sexual intercourse, unlawful fellatio/cunnilingus and carnal knowledge.

A non-aggravated sexual assault is an assault not involving any of the aggravated circumstances above and includes indecent assault not involving any aggravated circumstances.

²⁴

Part V Ch.XXXI.

2.2 Independence of the DPP - a jurisdictional comparison

In the courts, the prosecutor's principal role is to assist the court arrive at the truth and to do justice for the community. The prosecutor has no client as such, represents the community as a whole and must act in the spirit of fairness.²⁵

The ability of the Director of Public Prosecutions to work independently of political interference is crucial. This notion crosses jurisdictions and is embodied in the Standards of the International Association of Prosecutors. The Association has declared: 'The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.'²⁶

The importance of independence of the role of the Director of Public Prosecutions in Western Australia is recognised, and indeed was stressed, when the Bill to establish the Office of the Director of Public Prosecutions was making its passage through the Western Australian Parliament. The then Attorney General, Hon J.M. Berinson, said in his second reading speech:

*A significant advantage of the establishment of the office of director is that the legislation will make it absolutely clear that the director will act with complete independence from the Attorney General and the Government of the day.*²⁷

To further exemplify the aim of the bill, the then Attorney said:

*Under the Bill the director will have full legal authority to make all decisions concerning the prosecution of criminal offences. This will include full authority to decide whether an indictment should be presented, the nature of the charge to be laid and how the prosecution will be conducted, as well as decisions about appeals that may be brought, and all incidental matters....The important advantage of the Bill before the House is that it will ensure the continuance of independent professional decisions concerning the prosecution of criminal offences and that it will provide clear public assurance of that independence.*²⁸

²⁵ *Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey*, retrieved 14 February 2007 from <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/81FD2DC15268A7A6CA256ECF00081FA7>.

²⁶ As quoted in *Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey*. NSW Parliamentary Library Research Service. Briefing Paper No 9/2001, p2.

²⁷ Hon J. M. Berinson MLC, *Parliamentary Debates*, Legislative Council 28 March 1991, p699.

²⁸ Hon J. M. Berinson MLC, *Parliamentary Debates*, Legislative Council 28 March 1991, p704.

To compare the situation in Western Australia with that of other jurisdictions the following text summarises briefly the powers of the Director of Public Prosecutions (DPP) in each jurisdiction in Australia, with specific mention of the DPP's oversight role.²⁹

- In 1982, Victoria was the first jurisdiction in Australia to enact legislation for the establishment of a DPP. The Director's independence was reduced in 1994 when the original Act was repealed. Under the *Public Prosecutions Act 1994* (Vic), the Director is required to consult with a Director's Committee when making a 'special decision', such as not to continue a prosecution. Another prescribed internal body is the Committee for Public Prosecutions, which is the only DPP board in Australia to include a participant who may be from outside the criminal justice system. Its activities range from recommending the removal of a Crown Prosecutor, to advising on the efficiency of the prosecutorial system.
- Queensland's DPP was instituted by the *Director of Public Prosecutions Act 1984* (Qld). The Act allows the Director to conduct both indictable and summary prosecutions but, as in most Australian jurisdictions, the police handle the latter. The Director's supervision of legal decisions is clearly distinct from the Executive Director's control of finances and administration. There is no formal managerial committee.
- In South Australia, the *Director of Public Prosecutions Act 1991* (SA) grants the Director full prosecutorial powers, although in practice the Director focuses on indictable offences. There are two internal advisory committees: the Executive Committee deals with policy and legal issues, and the Management Committee is responsible for operational matters.
- Western Australia's DPP was established by the *Director of Public Prosecutions Act 1991* (WA), which does not make provision for the carriage of summary prosecutions. Two internal bodies contribute to the efficiency of management and office practices, the Corporate Executive and the Operations Committee.
- The Tasmanian DPP represents the State in civil litigation in addition to criminal proceedings for indictable offences. It does not have any formal internal committees.
- The DPPs in the Australian Capital Territory and the Northern Territory exercise a wider jurisdiction than the States as they conduct summary as well as indictable prosecutions. The ACT DPP has a Management Committee with an operational emphasis, while the NT DPP's Executive Committee is unique in including among its members two senior police officers. However, this reflects a cooperative arrangement for conducting summary prosecutions, rather than the involvement of 'external' participants.

²⁹ *Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey*, retrieved 14 February 2007 from <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/81FD2DC15268A7A6CA256ECF00081FA7>.

- Since 1984, the Commonwealth DPP has prosecuted indictable and summary offences against Commonwealth law. A Senior Management Committee is located in Sydney, Melbourne and Brisbane to assist the Deputy Director supervising each of those offices. Formal conferences among all the Deputy Directors from Canberra and the regional branches are held twice a year. The Commonwealth and the ACT are the only jurisdictions in Australia in which the legislation expressly authorises the Director to issue guidelines to the police and others on particular cases. The Commonwealth legislation, unlike any other in Australia, allows the Attorney-General to supply case-specific guidelines to the Director.

2.3 Jurisdictional guidelines for prosecution - Western Australia

Once a prosecution has commenced and been referred to the Office of the Director of Public Prosecutions, the decision whether to proceed with that prosecution is made by the Director of Public Prosecutions independently of those who are responsible for the investigation. Cases are assessed by a Prosecutor in accordance with the *Statement of Prosecution Policy and Guidelines 2005* (the guidelines).³⁰ The guidelines, issued by the Director of Public Prosecutions, set out those matters to be considered in the exercise of discretion in the conduct of the prosecution of criminal offences within the jurisdiction. The guidelines were established pursuant to the *Director of Public Prosecutions Act 1991*. Under s24 of that Act, the Director may:

- (a) issue a statement of guidelines intended to be followed in the performance of the Director's functions;
- (b) at any time issue a further statement amending, replacing, or revoking a statement under paragraph (a).

The current Statement of Prosecution Policy and Guidelines were established in 2005 and Gazetted on 3 June 2005.

The Statement reads:

STATEMENT OF PROSECUTION POLICY AND GUIDELINES 2005

INTRODUCTION

1. The office of the Director of Public Prosecutions (ODPP) controlled by the Director of Public Prosecutions (the Director) commenced on 3 February 1992 with the proclamation of the Director of Public Prosecutions Act 1991 (the Act).

2. The Act affected a number of significant changes to the Western Australian prosecution process. The most significant change was the effective removal of the

³⁰ The Guidelines can be accessed on the Office of the Director of Public Prosecutions web site http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf

prosecution process from the political arena by affording the Director an independent status in that process. The Attorney-General is responsible for the Western Australian criminal justice system and remains accountable to Parliament for decisions made in the prosecution process. However those decisions are now made by the Director and prosecutors of the ODPP, subject to any directions which may be given by the Attorney-General pursuant to s.27 of the Act. Such directions may only be issued after consultation with the Director, and must be in writing. The text of the direction must be included in the annual report of the Director pursuant to s.32 of the Act.

3. The Act has also ensured that there will be a separation of the investigative and prosecutorial functions of the Western Australian criminal justice system. Once a prosecution has been commenced and referred to the ODPP, the decision whether to proceed with that prosecution is made by the Director independently of those who were responsible for the investigation.

APPLICATION

4. This Statement of Prosecution Policy and Guidelines (Statement) is issued pursuant to s.24 (1) of the Act and will become operative from the date it is Gazetted. The policies expressed by this Statement apply to—

- (a) all prosecutions for offences on indictment;*
- (b) all summary prosecutions;*
- (c) all matters before the Children's Court;*
- (d) all appeals arising out of criminal proceedings;*
- (e) proceedings under the Criminal Property Confiscation Act 2000; and*
- (f) extradition proceedings.*

THE DECISION TO CHARGE

5. The primary responsibility for investigating and charging offences resides in investigative agencies, such as the Western Australia Police Service (WAPS).³¹

It is important to note that the guidelines are indeed “guidelines”. The closing paragraphs state:

³¹

Government Gazette Western Australia, No. 104, 03 June 2005, p2507.

An act or omission of the Director or a person acting on behalf of the Director shall not be called into question or held to be invalid on the grounds of a failure to comply with this Statement....and

While this Statement is intended to guide and assist prosecutors in the performance of their function, prosecutors must at all times have regard to their role as ministers of justice, and exercise their professional judgement and common sense in their decision-making consistent with that role.³²

Contrasting jurisdictional prosecution criteria

Prosecution guidelines therefore underpin the decisions made by the Director of Public Prosecutions (DPP) as to whether to proceed with a case or not. They provide an indication to the community at large of the nature of the task undertaken by the DPP in determining whether or not an indictment should be filed and a prosecution undertaken. In reviewing the basis for such decisions it is useful to contrast, briefly, the Western Australian guidelines with those applicable in other jurisdictions.

The following table reviews the prosecution guidelines across Australia. It should be noted that the various States and Commonwealth prosecution guidelines/policies are framed taking account of prevailing State and Commonwealth legislation, the provisions of which are articulated to a greater or lesser degree within those guidelines/policies. Differences may therefore be more apparent than real on occasion.

Table 2.1 Prosecution guidelines across Australia

Criteria	Comments
The premise for the decision to prosecute.	<p>All jurisdictions:</p> <p>The decision to prosecute, or otherwise, is premised in all instances on three main tests:</p> <ul style="list-style-type: none"> • the evidence supporting a <i>prima facie</i> case; • the reasonable prospect of conviction; and • public interest. <p>It is understood in all jurisdictions that a <i>prima facie</i> case is necessary but is not necessarily sufficient to proceed in its own right. The additional factors listed above are also critical. The factors determining public interest are not exclusively listed in the states' prosecution policies</p>

³²

Office of The Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines*, 2005 p27.

	and guidelines, but all jurisdictions canvas some 18 criteria in common together with some additional listed criteria in the case of the Commonwealth, SA, NSW, and Victoria. However neither Queensland's nor Western Australia's guidelines negate the consideration of the additional criteria contained variously in other jurisdictions. Additionally, Queensland's guidelines on dealing with sexual offences specifically note with respect to public interest that "where there is sufficient reliable evidence to warrant a prosecution, there will seldom be any doubt that the prosecution is in the public interest." ^{33 34}
Prosecuting Juveniles ³⁵	Australian jurisdictions have recently arrived at a uniform minimum age for criminal responsibility of 10 years. <i>Doli incapax</i> , or the maximum age of the presumption against criminal responsibility, is also uniform at under the age of 14. The maximum age of treatment as a child for criminal responsibility varies somewhat - in most jurisdictions it is under 18 years, except in Queensland where the maximum age is less than 17 years. (Table 2.2 further extrapolates).

Table 2.2 Ages of criminal responsibility by Australian jurisdiction (as at 12 July 2005)

Jurisdiction	No criminal responsibility	Presumption against criminal responsibility	Treatment as child/juvenile
Commonwealth	Under 10 years <i>Crimes Act 1914, s4M</i> <i>Criminal Code, s7.1</i>	10 to less than 14 years <i>Crimes Act 1914, s4N</i> <i>Criminal Code, s7.2</i>	Not specified
Australian Capital Territory	Under 10 years <i>Criminal Code, s25</i>	10 to less than 14 years <i>Criminal Code, s26</i>	Under 18 years <i>Children and Young People Act 1999, s8 and s 69</i> ("young person")
Northern Territory	Under 10 years <i>Criminal Code, s38(1)</i>	10 to less than 14 years <i>Criminal Code, s38(2)</i>	Under 18 years <i>Juvenile Justice Act, s3</i> ("juvenile")

³³ *Director's Guidelines*, retrieved 26 February 2006 from <http://www.justice.qld.gov.au/odpp/home.html>.

³⁴ Refer also to the *Western Australian Statement of Prosecution Policy and Guidelines 2005* for details of the evaluation of public interest.

³⁵ *Young People and Crime*, retrieved 14 February 2007 from <http://www.aic.gov.au/research/jjustice/definition.html>.

New South Wales	Under 10 years <i>Children (Criminal Proceedings) Act 1987, s5</i>	10 to less than 14 years Common law <i>doli incapax</i>	Under 18 years <i>Children (Criminal Proceedings) Act 1987, s3</i> ("child")
Victoria	Under 10 years <i>Children and Young Persons Act 1989, s127</i>	10 to less than 14 years Common law <i>doli incapax</i>	Under 18 years <i>Children and Young Persons Act 1989, s3</i> ("child")
South Australia	Under 10 years <i>Young Offenders Act 1993, s5</i>	10 to less than 14 years Common law <i>doli incapax</i>	Under 18 years <i>Young Offenders Act 1993, s4</i> ("youth")
Western Australia	Under 10 years <i>Criminal Code, s29</i>	10 to less than 14 years <i>Criminal Code, s29</i>	Under 18 years <i>Young Offenders Act 1994, s3</i> ("young person")
Queensland	Under 10 years <i>Criminal Code, s29(1)</i>	10 to less than 14 years <i>Criminal Code, s29(2)</i>	Under 17 years <i>Juvenile Justice Act 1992, Schedule 4</i> ("child")
Tasmania	Under 10 years <i>Criminal Code, s18(1)</i>	10 to less than 14 years <i>Criminal Code, s18(2)</i>	Under 18 years <i>Youth Justice Act 1997, s3</i> ("youth")

2.4 Prosecutorial Assessment

Suspected sexual offences are not automatically subject to prosecution and, given the finite resources of the criminal justice system, it is neither possible nor desirable to prosecute all complaints. Prosecutorial decision-making is therefore based on a policy of selective prosecutions.³⁶ The Director of Public Prosecutions, Mr Robert Cock QC, advised the Committee of the practice followed by his office in relation to the case assessment:

*The principal basis upon which I will not proceed in a case is where there is no prima facie case; that is, there is no evidence....Secondly, where the evidence is not strong enough - on an objective evaluation of the material...there is no reasonable prospect in our view of getting a conviction. That is an assessment of the strength of the evidence and includes matters like how long it was after the alleged offence the victim came and made a complaint; how good her identification of the alleged offender is - it may be based on photo identification, nothing else. There may be no forensic support for it and the alleged offender may well have some sort of alibi. If that is the case, even though there may be a prima facie case, in our view it would not be a sufficiently strong case to warrant prosecution because the evidence almost inevitably would make a jury acquit the person on the basis that the very high standard of proof that is needed to be attained is not possible.*³⁷

³⁶ Trends and issues in crime and criminal justice, No 288, *Victim credibility in adult sexual assault cases*, Denise Lievore, November 2004.

³⁷ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 22 November 2007, p4.

As noted, the decision to prosecute rests on an assessment of whether the prosecution of an offence has the following elements:

- (a) it is a *prima facie* case;
- (b) it is in the public interest; and
- (c) since the resources available to the prosecuting authority are finite, ‘evidentiary sufficiency’³⁸.

There is some ‘slippage’ in legal terminology and definitions around these three factors which is reflected in this chapter.

Such evidentiary considerations are reflective of “legal considerations relating to evidentiary sufficiency and the prospects of conviction. There is also substantial empirical evidence that, in some circumstances at least, prosecutors’ decisions are influenced by variables that are extraneous to the legal elements of the case.”³⁹ These variables might include socio-demographic factors, personal characteristics of the victim (including age) and/or the defendant, moral codes and so on.⁴⁰ As one example of an extraneous factor influencing the decision to prosecute, the recent Crown Procurator’s Review of the Investigation and Prosecution of Sexual Offences in Scotland noted that:

*The policy did not direct that issues of credibility or reliability should be ignored when taking decisions in rape cases. We did, however, detect that a legacy of this policy has been a shift away from an analysis of the quality of evidence, with an implicit understanding that proceedings should be recommended where there exists a bare sufficiency of evidence. We also sensed that this approach has been driven by a desire to create a culture of belief in the victim and a concomitant fear of revealing to her that there may be any difficulties with her account.*⁴¹

Generally the guidelines for prosecutions can be said to be congruent across all Australian jurisdictions.

(a) *Prima Facie* Case

Encyclopaedic Australian Legal Dictionary describes a *prima facie* case as, “a serious, as opposed to a speculative, case which has a real possibility of ultimate success;” and *prima facie* evidence as, “the sufficiency of evidence upon which a person could be convicted of an offence...taking the

³⁸ The issue of evidentiary sufficiency will be explored in several contexts throughout this report.

³⁹ *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study*, retrieved 14 February 2007 from <http://www.aic.gov.au/publications/reports/2004-10-decisions.pdf>.

⁴⁰ *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study*, retrieved 14 February 2007 from <http://www.aic.gov.au/publications/reports/2004-10-decisions.pdf>.

⁴¹ *Review of the Investigation and Prosecution of Sexual Offences in Scotland* Retrieved 14 February 2007 from <http://www.copfs.gov.uk/Resource/Doc/9/0000174.pdf>.

evidence of the prosecution at its highest, evidence which is capable of proving the elements of the offence beyond reasonable doubt.”⁴²

The Acting Director of Public Prosecutions advised the Committee:

*As early as practicable in the prosecution process, attention is given to whether the evidence discloses a prima facie case. The question whether there is a prima facie case is one of law. This involves consideration of whether on the available material there is evidence upon which a trier of fact could conclude beyond reasonable doubt that all the elements of the offence have been established. Where the available material does not support a prima facie case, the prosecution should not proceed under any circumstances.*⁴³

Where a *prima facie* case does exist, the Acting DPP advised “a prosecution should only proceed where a second test is satisfied, namely whether a prosecution is in the public interest. It is not in the public interest to proceed if other factors, singly or in combination, render a prosecution inappropriate.”⁴⁴

(b) Public interest

The guidelines list a number of factors that should be taken into account when evaluating the public interest.

Firstly, there should be a reasonable prospect of conviction. The evaluation of the prospects of conviction includes consideration of:

- (a) *the voluntariness of any alleged confession and whether there are grounds for reaching the view that a confession will not meet the various criteria for admission into evidence;*
- (b) *the likelihood of the exclusion from the trial of a confession or other important evidence in the exercise of a judicial discretion. In the case of an alleged confession, regard should be given to whether a confession may be unreliable having regard to the intelligence of the accused, or linguistic or cultural factors;*
- (c) *the competence, reliability and availability of witnesses;*
- (d) *matters known to the prosecution which may significantly lessen the likelihood of acceptance of the testimony of a witness;*
- (e) *the existence of an essential conflict in any important particular of the State case among prosecution witnesses;*

⁴² LexisNexis www.lexisnexis.com/au/legal/results/docview/docview, accessed 27 July 2007.

⁴³ Correspondence from Mr Ken Bates, A/Director of Public Prosecutions, 19 January 2007.

⁴⁴ Correspondence from Mr Ken Bates, A/Director of Public Prosecutions, 19 January 2007.

- (f) *where identity of the alleged offender is an issue, the cogency and reliability of the identification evidence;*
- (g) *any lines of defence which have been indicated by or are otherwise plainly open to the defence;*
- (h) *inferences consistent with innocence; and*
- (i) *the standard of proof.*

Other relevant public interest factors include:

- (a) *the trivial or technical nature of the alleged offence in the circumstances;*
- (b) *the youth, age, physical or mental health or special infirmity of the victim, alleged offender or witness;*
- (c) *the alleged offender's antecedents;*
- (d) *the staleness of the alleged offence including delay in the prosecution process which may be oppressive;*
- (e) *the degree of culpability of the alleged offender in connection with the offence;*
- (f) *the obsolescence or obscurity of the law;*
- (g) *whether a prosecution would be perceived as counter-productive to the interests of justice;*
- (h) *the availability or efficacy of any alternatives to prosecution;*
- (i) *the lack of prevalence of the alleged offence and need for deterrence, either personal or general;*
- (j) *whether the alleged offence is of minimal public concern;*
- (k) *the attitude of the victim/complainant of an alleged offence to a prosecution;*
- (l) *the likely length and expense of a trial if disproportionate to the seriousness of the alleged offending;*
- (m) *whether the alleged offender has cooperated in the investigation and prosecution of others or has indicated an intention to do so;*
- (n) *the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;*
- (o) *the likely effect on public order and morale;*

- (p) *whether a sentence has already been imposed on the offender which adequately reflects the criminality of the circumstances;*
- (q) *whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty, having regard to the totality principle, is remote.*

Against these factors may be weighed others which might require the prosecution to proceed in the public interest: -

- (a) *the need to maintain the rule of law;*
- (b) *the need to maintain public confidence in basic constitutional institution;*
- (c) *the entitlement of the State or other persons to criminal compensation, repatriation or forfeiture, if guilt is adjudged;*
- (d) *the need for punishment and deterrence;*
- (e) *the circumstances in which the alleged offence was committed;*
- (f) *the election by the alleged offender for trial on indictment rather than summarily;*
- (g) *the need to ensure consistency in the application of the law.*⁴⁵

Under the guidelines, special considerations apply to the prosecution of juveniles and the mentally impaired. The welfare of both groups is further balanced against public interest in proceeding to prosecution.⁴⁶

Further, with respect to ‘public interest’, whilst the broad criteria are substantially held in common across Australian legal jurisdictions, as outlined, there is some argument that there is a lack of transparency in the decision-making process. This means that there is little knowledge as to how those specific criteria apply to individual cases.⁴⁷ This can lead to a questioning as to how the prosecuting authority in any given jurisdiction might have arrived at the decision as to whether or not to prosecute.

In broad jurisdictional terms it is held that the public interest may be summarised as being not a question of political or popular pressure. There is a distinction between what is ‘*of*’ public interest and what is ‘*in the*’ public interest. That is to say that public interest is not synonymous with public curiosity or public opinion.

⁴⁵ Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, pp7-10.

⁴⁶ Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, pp10-11.

⁴⁷ *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study*, retrieved 14 February 2007 from <http://www.aic.gov.au/publications/reports/2004-10-decisions.pdf>.

(c) Evidentiary sufficiency

The Director of Public Prosecutions also determines whether there is sufficient evidence to justify a prosecution, on the basis that the prosecution should not proceed if there is no reasonable prospect of a conviction even though there may be a *prima facie* case.

Evidentiary difficulties in criminal cases can be attributed to the burden of proof principles where the prosecution must prove its case beyond reasonable doubt or, 'the persuasive burden'. This is a standard of 'certainty,' rather than of 'likelihood,' that the prosecution must establish with respect to all substantive elements of an offence. This differs from the quantum of proof that applies in civil cases where the primary goal is dispute resolution. In these cases the burden is on the plaintiff to prove the case on 'a balance of probabilities.' The higher standard in criminal proceedings is justified by the severe sanctions that can follow a conviction in the criminal courts and to minimise the risk of convicting an innocent person. All elements of the offence must be proved to this standard and in most cases the prosecution must rebut any defences raised by the accused to this same standard. Sufficient credible evidence must be admitted which satisfies the court to the requisite standard and a direction to consider whether the case has been proved beyond reasonable doubt is usually given to the jury without qualification.^{48 49}

In the past, Australian jurisdictions required that juries should be warned about the dangers of convicting people accused of sexual offences on uncorroborated evidence. A judge's failure to warn the jury about relying on uncorroborated evidence could result in a conviction being overturned on appeal.⁵⁰ However, now there is no legal requirement for evidence that independently confirms the evidence of a single witness in any Australian jurisdiction. This requirement also applies in cases of sexual assault. An accused person can be convicted on the evidence of a single witness, providing the jury accepts that his or her evidence proves the offence beyond reasonable doubt.

There is frustration and confusion where this does not occur. Indeed a submission to the Inquiry made the observation, "there is a discrepancy between stated government policy to say 'no' to violence against women and the interpretation of policy which seemingly presents huge obstacles to victims endeavoring to get their cases into court."⁵¹ In direct contrast, a witness appearing before the committee made the following observation:

It is my view that the current guidelines for making decisions about whether to prosecute sexual offences are quite adequate. If you are concerned about the interests of an alleged victim or complainant, in my view the DPP would tend to err on the side of the alleged

⁴⁸ This is the general practice unless there are special circumstances such as the need to correct misleading statements by counsel.

⁴⁹ Colvin, E. et al Criminal Law in Queensland and Western Australia. 3rd edition Butterworths, Chatswood NSW, pp12-13. Yeo, Stanley, et al, Australian Criminal Justice. 2nd edition, Oxford University Press, South Melbourne, pp171-172.

⁵⁰ *The law and sexual offences against adults in Australia*, ACSSA Issues No.4, June 2005, p12.

⁵¹ Submission No.2, p1.

*victim or the complainant....the vast majority of prosecutions are proceeded with even where the evidence could be said to be very weak or otherwise unsatisfactory.*⁵²

The issue of consent in sexual offences

Lack of consent is an element in some offences proscribed under the Code, where consent means consent being freely and voluntarily given. For these offences, consent distinguishes criminal from licit sexual relations. Set aside here is consent from a child or from a person with an intellectual disability, where victims so categorised are presumed unable to either give meaningful consent or their consent would be questionable. In particular, where children are concerned, a sexual offence occurs regardless of consent. For children over the age of 13 years consent may be a mitigating factor.

In Western Australia the statutory definition of consent is described in s319 of *The Criminal Code* where it is stated:

- a) *“consent” means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;*
- b) *where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;*
- c) *a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.*

Further to (a) above, an expression of consent induced by one of the proscribed means is simply treated as no consent at all, even if there has been an outward expression of consent.

In Western Australia, the prosecution must prove that the accused intentionally penetrated the victim/complainant. However, there is no additional requirement for the prosecution to prove that the accused knew the victim was not consenting; a defendant’s belief that a person consented is only a defence if it was an honest and *reasonable* belief. All jurisdictions recognise that some kinds of fraud, deception or mistaken belief should invalidate consent and so in Western Australia it is recognised that consent due to any kind of fraud or deceit invalidates any apparent consent.⁵³

⁵² *Transcript of Evidence* 19 February 2007, p7.

⁵³ *The law and sexual offences against adults in Australia*, ACSSA Issues No.4, June 2005, p22-25.

2.5 Prosecutorial Process

(i) *Police investigation*

The purpose of this section is to outline the response invoked when a report is made to the police in the first instance.⁵⁴ At the outset it is worth noting that sexual assault has the lowest reporting rate of any crime and this is discussed further in the report. In addition not every incident that is reported to police is cleared⁵⁵, and not every cleared offence involves the apprehension and processing of an offender. Furthermore, not all incidents of sexual assault are forwarded to the Department of Public Prosecution for prosecution.⁵⁶ There are a variety of reasons for cases not proceeding including instances in which a victim/complainant reports an offence and then elects not to proceed; a child victim being determined to be too young to articulate the circumstances of the offence; and historical cases with no corroborating evidence, as well as there being insufficient evidence to proceed against the suspect.⁵⁷ Similarly the case cannot proceed past a certain point in situations where an offender cannot be identified.

When a sexual assault complaint is received, the particular circumstances surrounding that complaint determine where the investigative responsibility lies: whether the case should be attended to by district detectives or specialist detectives.

The recently reconvened Western Australia Police Sex Assault Squad (SAS) forms part of the Specialist Crime Portfolio of the Western Australia Police.⁵⁸ The Committee was informed that the SAS investigates adult sexual assault cases where the offender is unknown, or inquiries of a highly complicated nature, such as the recent investigations at Halls Creek. The SAS Standard Operating Procedure Charter of Responsibility (the Charter) describes its responsibility to investigate matters involving adult sexual abuse. The list is said not be exhaustive and is a guide only. The SAS will investigate:

1. Reports of sexual penetration or coercion under Sections 325 to 328 of the Criminal Code where the offender is unknown or the inquiry is of a highly complicated nature (see attached classification model)

2. Reports of sexual offences committed against incapable persons as defined within Section 330 of the Criminal Code

⁵⁴ According to the Victorian Law Reform Commission, sexual assault has the lowest reporting rate of any crime.

⁵⁵ A cleared offence is one that sees an offender apprehended or arrested, or where, for some substantial reason, the police investigations cannot continue, for instance where the offender dies, or there is insufficient evidence to proceed.

⁵⁶ Western Australia Police Briefing Report to the Committee (undated).

⁵⁷ Western Australia Police, *Transcript of Evidence*, 29 November 2007 pp7-21.

⁵⁸ The original Sexual Assault Squad was closed in December 1998 in response to the recommendation of the Investigative Practices Review that focussed on the decentralisation of specialist police investigative services. A further review undertaken in 2006 recommended the creation of the Sex Assault Squad.

3. *Other serious on adult sexual offences where they are of a serialised nature*
4. *In conjunction with the ANCOR Unit assist with the targeting of high-risk on adult sex offenders in line with the Community Protection (Offender Reporting) Act 2004*
5. *Review all unsolved 'sudden attack' serious sex assaults by unknown offender/s since 2000.*

The Charter further explains: —

Where an alleged offence as outlined in the charter of responsibility is committed in a country area, the OIC of the Sex Assault Squad, in consultation with the Divisional Superintendent, Sex Crimes Division of the relevant District Officer, will consider all the circumstances of the case and determine whether the full investigative responsibility should be borne by the Sex Assault Squad or whether it is appropriate to provide squad Detectives to assist district Detectives or to provide alternative support and assistance.⁵⁹

The following classification model referred to above assists in determining what area might be best equipped to carry out the investigation; depending on circumstances.

⁵⁹ Western Australia Police Specialist Crime Portfolio, Sex Crime Division, *Sex Assault Squad Standard Operating Procedures*, p3.

Table 2.3 CLASSIFICATION MODEL FOR SEX ASSAULT INVESTIGATION (Metropolitan)⁶⁰

Classification	Victim / Offender Relationship	Contact	Allocation Filter	Investigative Responsibility
SUDDEN ATTACK (A)	Unknown offender (1)	No Prior Contact (1)	Nil	Specialist Detectives
		Short Term Prior Contact (2)	Nil	Specialist Detectives
	Known Offender (2)	Short Term Prior Contact (1)	Intel Holdings - Serial Offence (1)	Specialist Detectives
			No Intel Holdings (2)	District Detectives
		Long Term Prior Contact (2)	Intel Holdings - Serial Offence (1)	Specialist Detectives
			No Intel Holdings (2)	District Detectives
SEDUCTIVE / GROOMED ATTACK (B)	Unknown offender (1)	Short Term Prior Contact (1)	Intel Holdings - Serial Offence (1)	Specialist Detectives
			No Intel Holdings (2)	District Detectives
		Long Term Prior Contact (2)	Intel Holdings - Serial Offence (1)	Specialist Detectives
			No Intel Holdings (2)	District Detectives
	Known Offender (2)	Short Term Prior Contact (1)	NIL	District Detectives
		Long Term Prior Contact (2)		

⁶⁰Western Australia Police, *Sex Assault Squad Charter of Responsibilities*, p5.

The processes differ in respect to adult complainants and child complainants. Acting Superintendent Properjohn of the Major Crime Division described the process for an adult complainant to be as follows:

In the metro, a person would ring up and allege they had been sexually assaulted. Immediately, a car would be dispatched. In the main, it would be our major incident group, because they are our 24-hour serious crime response car. They would attend and talk to the victim. They would then secure the scene and have the forensic part of the actual scene examined. They would then proceed to dealing with the victim by way of medical treatment, if it was required - at a minimum forensic treatment. So, for the SARC⁶¹ unit, they would be forensically examined. A statement would be obtained outlining particulars of the incident, and then if the offender was nearby or at the scene, they would be arrested at that point. Failing that, if the offender was unidentified or had left the scene, our first priority is always the victim, so our effort needs to go into the victim at that point in time. So it could possibly be, depending on how long it took, that the case file that is put together, which is all the information already gathered for the investigation, would be immediately delivered to the local detectives' office to start on that investigation first thing that morning; and that would be a local CIB area where the offence occurred.⁶²

With respect to child victims, the processes again differ depending on whether the sexual assault was intra-familial or extra-familial and whether the assault occurred in the metropolitan area or a country region. Intra-familial sexual assaults will be investigated by the police Child Protection Squad, and the Department for Child Protection further investigates into the welfare of the child and family in both country and metropolitan areas. In essence there are two major differences in the investigation of sexual assault of a child depending upon locality:

- the medical or forensic examination is conducted by the Child Protection Unit⁶³ at Princess Margaret Hospital in the metropolitan area, and at the local hospital when the assault occurs in country areas; and
- the joint interview with Department for Child Protection and the Child Protection squad is conducted at the Child Interview Unit in the metropolitan area; and the interview, again joint, is conducted by either the local police or the Child Interview Unit in country areas.

Acting Superintendent Properjohn explained two specialist trained interviewers conduct the interview with the child: one from the Department for Child Protection, and one from the police:

Extra-familial - it would probably be referred to the local detectives' office of the area in which the offence occurred. They would immediately respond, and speak with usually the mother first and ascertain some details around it. There is a joint protocol in place. Once an offence has been established, it becomes a joint response, so police would then also possibly include the Department for Community Development. The child would have an

⁶¹ Refers to the Sexual Assault Resource Centre.

⁶² West Australian Police, *Transcript of Evidence*, 29 November 2007, p11.

⁶³ The Child Protection Unit provides services to children aged up to 16 years old who allege recent or past sexual assault.

interview booked at the child interview unit in the metro area. All children are interviewed at the child interview unit in the metropolitan area, and by trained specialist child interviewers in the country. An interview may be conducted, depending on the time because we do not want to re-traumatise the child; obviously, 10 o'clock at night for a child who has just made an allegation would most probably be an inappropriate time to interview that child, so the interview would be delayed to what we call a priority 1, and would need an immediate response first up the following morning. If there was again any medical or forensic requirement, they would be done by the child protection unit at Princess Margaret Hospital, with which we have a very good liaison. Once the child is interviewed, the detectives monitor the interview and refer any further questions they wish from the child through an earpiece.... Then post that information, if there is any further follow-up, the detective will talk to the interviewers through the earpiece about any further clarifications they want. From that, the child again is debriefed. The police and the DCD work out a plan of action, if you like to call it that. DCD will look after protective issues; police will then look after the prosecution side. Once the plan is established, the police will then normally go out and either gather other evidence, if required, or go and arrest the offender if there is sufficient evidence to proceed if a disclosure is made.

Intra-familial offending may occur and at times it may be perceived that there is a greater risk for the child to be re-offended against... All detectives are trained to a certain level of response. All interviews for children within the metropolitan area will be done by the child interview unit. We are providing specialist services to the districts but all detectives are trained at a certain level anyway to investigate all levels of offence.... There is consistency there because they are interviewed by specialists in the child interview unit.⁶⁴

Deputy Commissioner Dawson added:

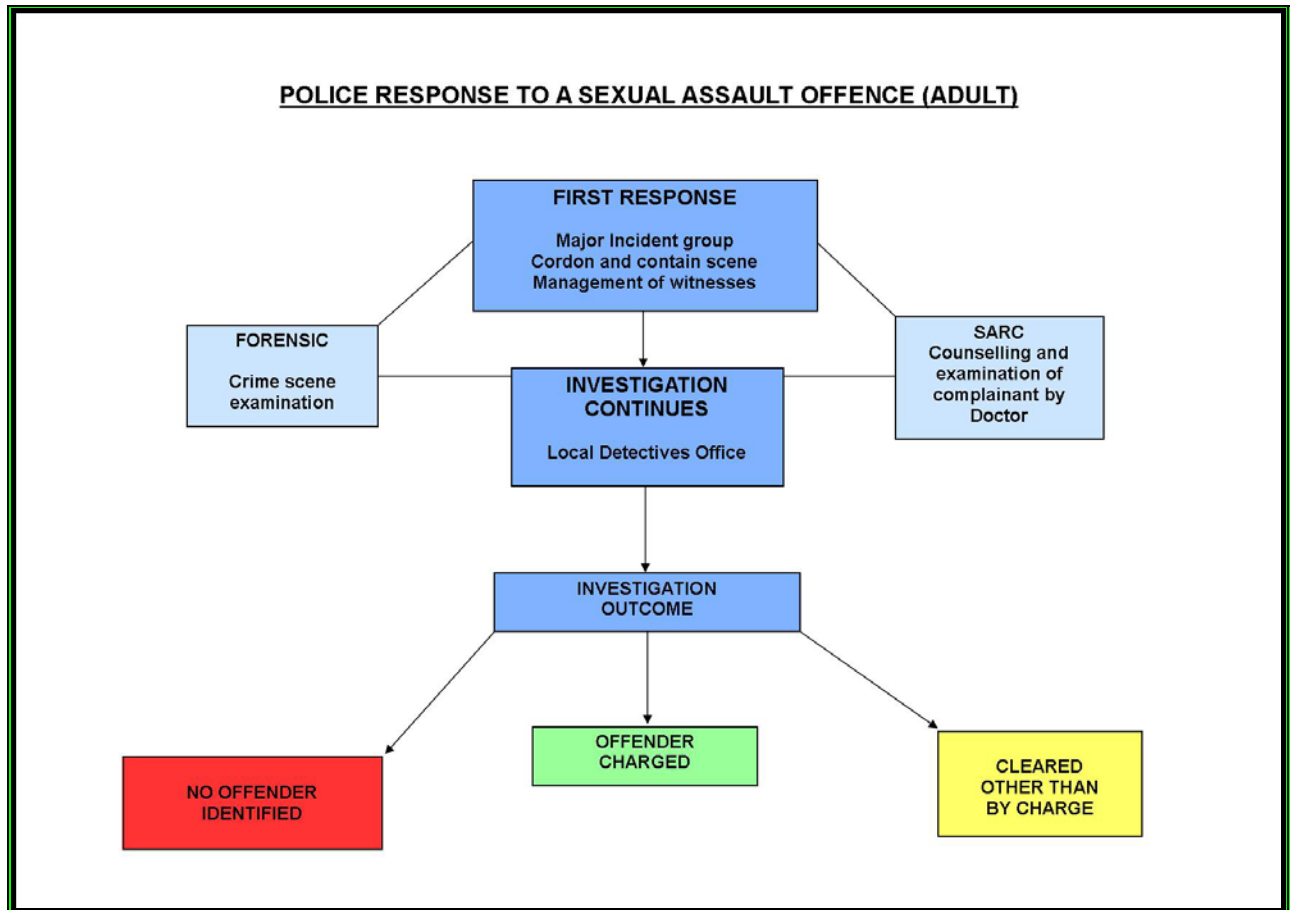
All victims are interviewed by the child interview unit in relation to child offences in the metropolitan area because of the speciality required. A number of offences are dealt with there. I will go back to the familial situation. We place a far higher priority on reported offences against child victims within the family unit to be dealt with by the child protection squad because there is a greater correlation that there will be continual offences against the child victim. That is why we dedicate that particular effort there. If there is an allegation against an extended friend or babysitter - this is not uncommon and it may happen in an external environment - where the child makes a disclosure.... there is a greater capacity for the care givers or their parents to maintain control and keep them separated from the alleged perpetrator. That is why we give greater priority to the child within the family construct.⁶⁵

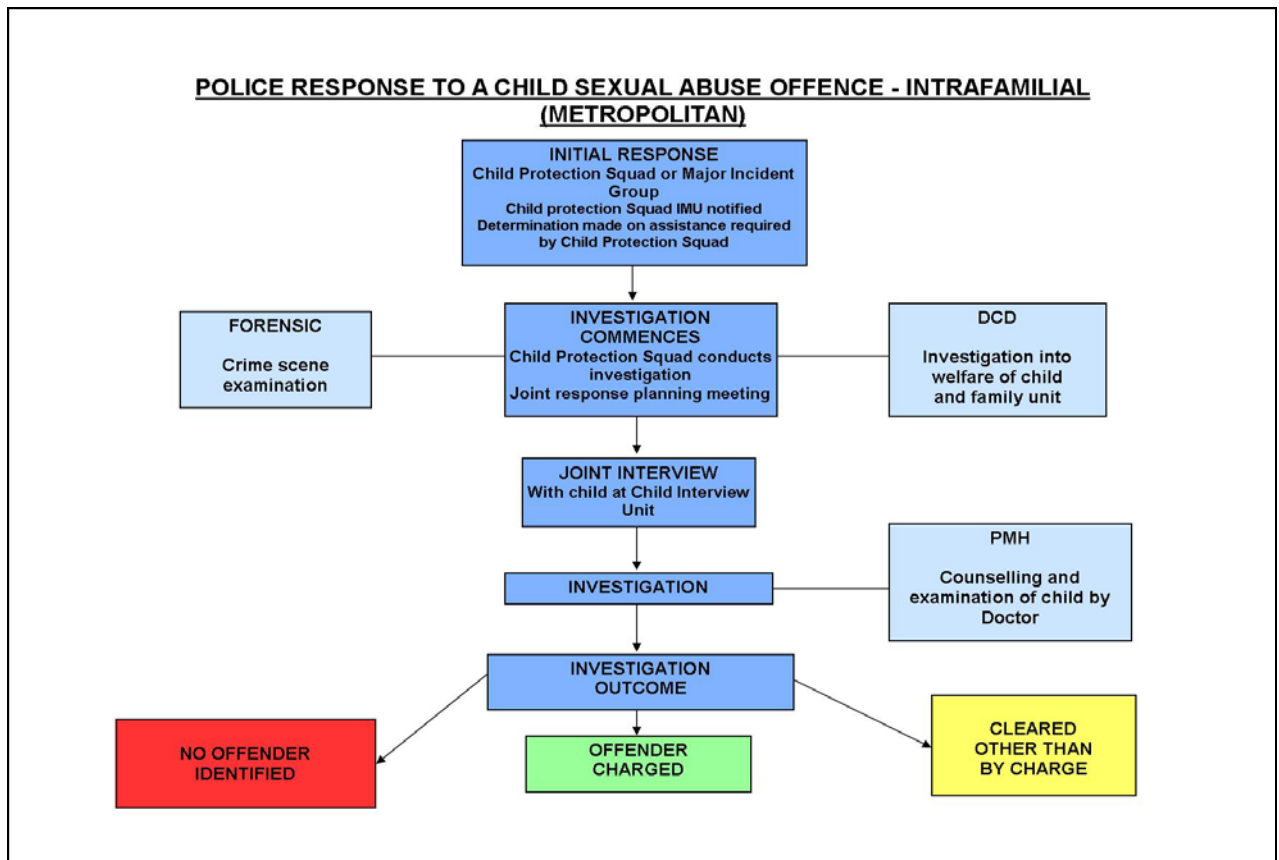
As noted, the police response to an assault can vary depending upon the age and location of the victim as well as the relationship of the victim to the offender. To illustrate, the following charts map the processes undertaken by the Police following a complaint regarding a sexual assault; taking into account the aforementioned factors:⁶⁶

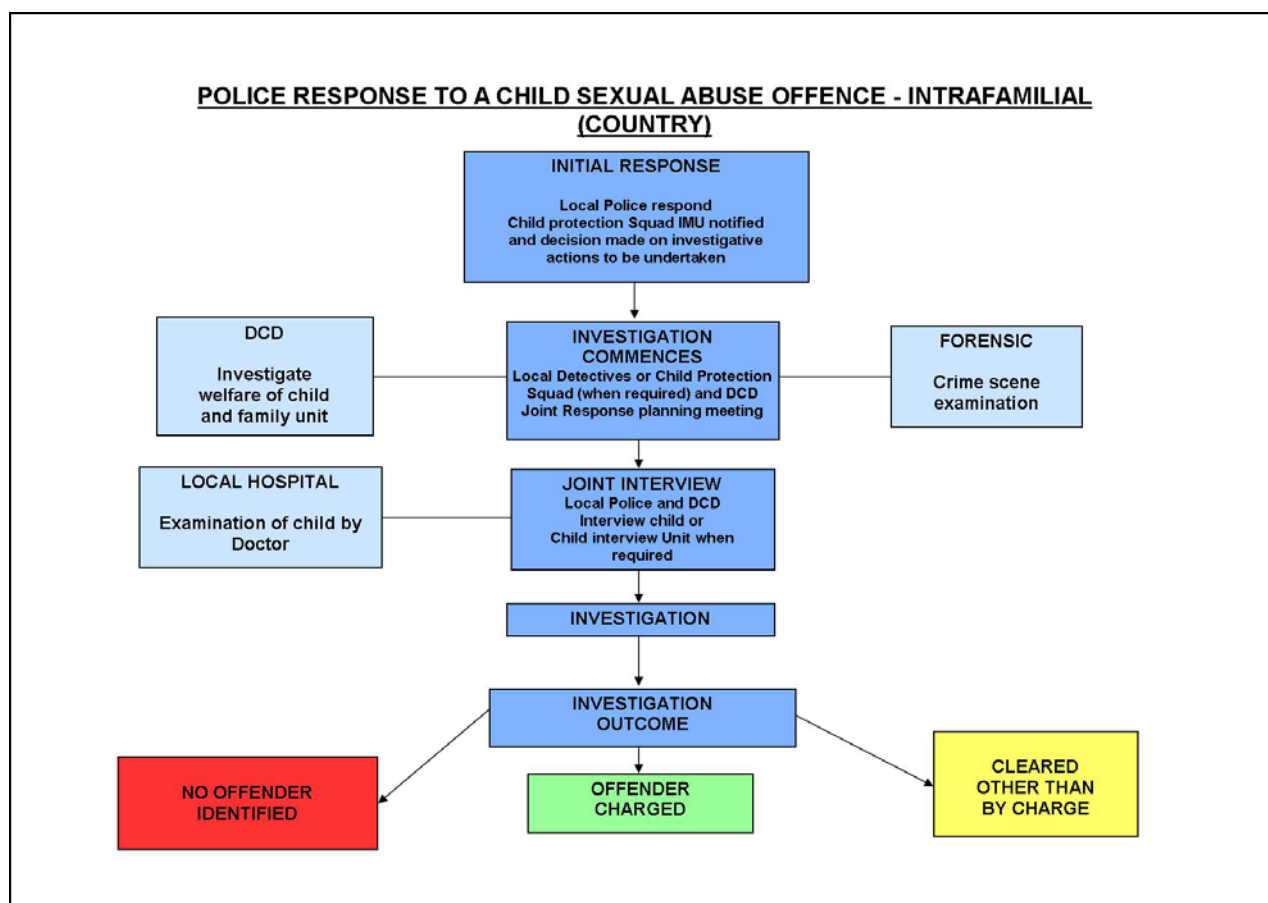
⁶⁴ A/ Superintendent Kellie Properjohn, *Transcript of Evidence*, 29 November 2007, p11-12.

⁶⁵ Deputy Commissioner Christopher Dawson, *Transcript of Evidence*, 29 November 2007, p11-12.

⁶⁶ Correspondence from Mr Christopher Dawson, Deputy Commissioner, Western Australia Police, 6 February 2007.





**Finding 1**

The brief of the recently formed Sexual Assault Squad (SAS) is narrower than perceived by either the Committee or the public. The operations of the SAS are restricted to cases where the perpetrator is unknown to the victim or the inquiry is of a highly complicated nature.

Recommendation 1

The operations of the Sexual Assault Squad be expanded to include investigations of all cases of sexual assault.

The Criminal Court System in Western Australia⁶⁷

Criminal cases in Western Australia are dealt with in the following courts:

- **The Magistrates Court of Western Australia** deals with adults, aged 18 or over, required to appear in court after being charged with a criminal offence. The Magistrates Court now has multiple registries located around the State.

Some criminal offences are known as 'simple offences' or 'summary offences' and will be dealt with in the Magistrates Court.⁶⁸ An example of a summary offence is unlawful fishing.⁶⁹ More serious criminal offences, known as 'indictable offences', commence in the Magistrates Court. While some of these offences (known as 'either way' offences)⁷⁰ may be dealt with in the Magistrates Court, the most serious offences must be sent on to be heard in the District or Supreme Courts. Impersonating a public officer is an "either way" offence.⁷¹

- **The District Court of Western Australia** is the intermediate court in Western Australia presided over by a District Court Judge. The Judges travel on circuit to regional areas on a regular basis. The court deals with serious criminal offences for which the maximum penalty is 20 years' imprisonment (for instance: serious assaults, breaking and entering, stealing and receiving). A jury of 12 community members decides whether a person accused of a criminal offence is guilty or not guilty. An accused person may choose to have a trial by judge alone, and not by a jury.
- **The Supreme Court of Western Australia** is the highest court in the State of Western Australia. Proceedings are presided over by a Supreme Court Judge. It has unlimited jurisdiction within the state in civil matters and hears the most serious criminal matters. The court consists of a General Division (equivalent to the Trial Division in other states) and the Court of Appeal.

(ii) Charges

After an arrest is made, the accused person is then processed through the court system. Criminal proceedings commenced against an accused person begin in the Magistrates Court. Following an investigation, the Western Australia Police (WAPOL) lodge a prosecution notice with the court and bring the accused before the court for hearing, either by arrest or by the issuing of a summons. In addition to summary charges, WAPOL is normally responsible for the conduct of any charge for an indictable offence while it remains in the Magistrates Court.

⁶⁷ [www.justice.wa.gov.au /A/aboutcourts](http://www.justice.wa.gov.au/A/aboutcourts), accessed 31 August 2007.

⁶⁸ A simple offence is defined in the *Criminal Procedures Act* s3 as an offence that is not an indictable offence.

⁶⁹ *Criminal Code* s436.

⁷⁰ An "either way" charge means an indictable charge that, by virtue of the *Criminal Code*, s5, or another written law, may be tried either on indictment or summarily, *Criminal Procedure Act*, s3.

⁷¹ *Criminal Code*, s87.

All committals for indictable offences to the higher courts proceed by way of ‘committal mention’ only, that is by way of the tender of statements and other relevant evidence. The Magistrate merely receives the evidence and then commits the defendant to the District or Supreme Court for trial or for sentence depending on the plea indicated.⁷²

Once the charge is committed to the District Court or the Supreme Court, also known as the higher courts, the Office of the Department of Public Prosecutions (ODPP) receives notification of the committal and assumes responsibility for the conduct of that prosecution from then on.⁷³

An exception to this arrangement was introduced in early 1997, where cases involving indictable offences that were to be committed to a higher court (from Perth Magistrates Court only) became the responsibility of the ODPP whilst still in Magistrates Court. This changed in 2004 with the introduction of the *Criminal Law Amendment Act* which created a number of ‘either-way’ offences, which allowed for a greater number of indictable offences to be dealt with summarily by a Magistrate.⁷⁴

Committals are the primary form of notification from the court to the ODPP of cases that have been remanded from Magistrates Court to the District or Supreme Court. This notification advises the ODPP that it now has responsibility for the conduct of the prosecution proceedings. Cases that have been committed proceed in the District or Supreme Court until they are resolved either by a plea of guilty by the accused or a verdict is delivered by a judge or jury as a result of a criminal trial.⁷⁵

If the Department of Public Prosecutions elects not to proceed before the case can be finalised by either of the two outcomes above, the court must be formally notified. This matter is further discussed in section (v) of this chapter.

(iii) Preliminary hearings

Preliminary hearings were abolished in Western Australia following the introduction of the Criminal Law (Procedure) Amendment Bill 2002 and the subsequent enactment of that legislation. The Committee heard evidence from one of Perth’s criminal lawyers of the positive value of preliminary hearings in states where preliminary hearings still formed part of the judicial process. It was argued such hearings allowed the evidence to be tested earlier on:

If you weed out the hopeless cases, you will see the statistics for convictions for sexual assault cases increase dramatically, because only cases that should go to court will go to court. If you had a preliminary system, you could put the witness in the box and have her answer questions. I know it is a dreadfully unfortunate thing for a person to have to testify twice, but it is a fact of life, and it really works wonders. We say that there ought to be a

⁷² *Criminal Procedure Act 2004*, s44.

⁷³ Office of the Director of Public Prosecutions for Western Australia Annual Report 2005/06.

⁷⁴ Office of the Director of Public Prosecutions for Western Australia Annual Report 2005/06.

⁷⁵ Office of the Director of Public Prosecutions for Western Australia Annual Report 2005/06.

*review as to whether the abolition of preliminary hearings in this state has worked - the evidence is that it certainly has not worked - and whether there is a case for re-introducing them.*⁷⁶

The Committee considered the comments but concurs with the recommendation made by the Law Reform Commission in their *Review of the civil and criminal justice system in Western Australia* which resulted in the abolition of the hearings here in Western Australia⁷⁷. In particular, as noted in the report, “it is undesirable for victims of and witnesses to crimes to be required to give evidence in court on more than one occasion.”⁷⁸

(iv) Trials

Following investigations by Police and the collation of any evidence arising from the investigation, the ODPP is able to file an indictment⁷⁹ which formalises the charges in the higher courts.

Where an accused person pleads guilty to the charges they attend either a ‘Pleas Day’ or ‘Fast Track Day’ hearing and are sentenced. The fast track system allows for a matter in which the accused wishes to plead guilty to be quickly transferred to the District or Supreme Court for sentencing.⁸⁰ The Court takes into consideration the reduced time taken to finalise the case and by doing this the accused is entitled to a significant sentence discount.⁸¹

Where an accused pleads not guilty to the charges, the case is remanded to further hearings where any legal, evidentiary or bail issues are determined until such time as the case is ready to proceed to trial. The trial process itself allows the ODPP to present the evidence against the accused and allows the accused to defend the charges that have been brought against them.

The following chart provides an outline of the legal process in relation to the appearance of the accused once they appear in court.⁸²

⁷⁶ *Transcript of Evidence*, 19 February 2007 p5-6.

⁷⁷ *Review of the civil and criminal justice system in Western Australia*, Law Reform Commission Final Report September 1999, p381.

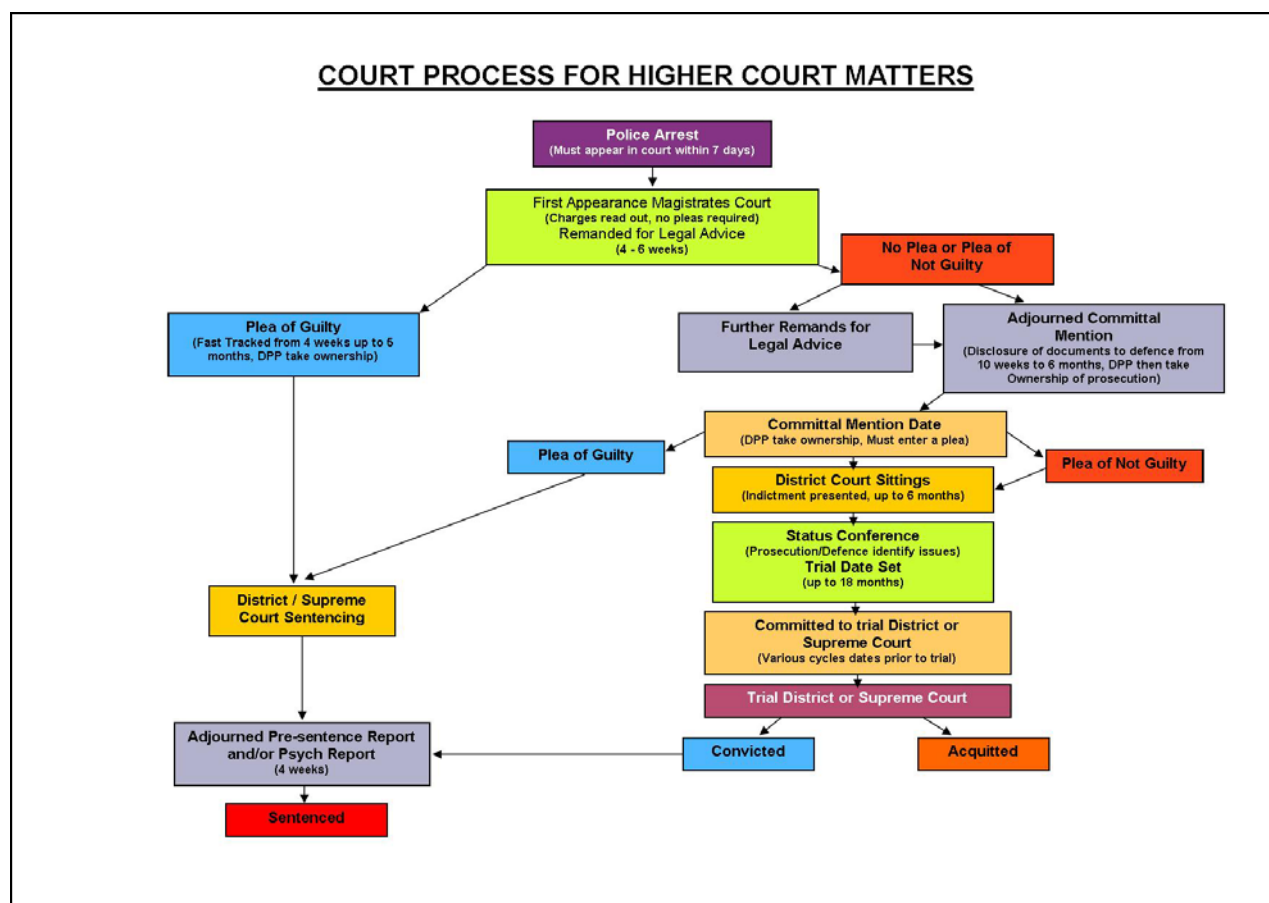
⁷⁸ *Review of the civil and criminal justice system in Western Australia*, Law Reform Commission Final Report September 1999, Chapter 28.

⁷⁹ An indictment is a written charge of an indictable offence presented in the Supreme or District Court in order that the person is tried by that court. The indictment permits the court to proceed.

⁸⁰ Deputy Commissioner Christopher Dawson advised the Committee that there is capacity for an offender who wishes to plead guilty under the Fast Track System to be dealt with within weeks and it was not uncommon for it to be within a fortnight. *Transcript of Evidence* 29 November 2007, p14.

⁸¹ The Fast Track procedure is otherwise known as an expedited committal and has existed in Western Australia for some years. The scheme was recognised as being worthy in the Report of the Standing Committee of Attorneys-General *Deliberative Forum on Criminal Trial Reform*, June 2000.

⁸² Correspondence from Mr Christopher Dawson, Deputy Commissioner, Western Australia Police, 6 February 2007.



(v) The Evidence Act in relation to children and other vulnerable people

Changes to legislation in the form of *Acts Amendment (Evidence) Act 2000* provide for children and vulnerable witnesses to give evidence on videotape to protect them from the trauma of giving evidence in open court.

The then Minister for Police, Hon. Kevin Prince, described the changes in the second reading speech:

Use of videotaped evidence given by children and vulnerable witnesses: In 1992 the Evidence Act and the Justices Act were amended to allow the videotaping of evidence given by children and other vulnerable witnesses. The effect of one of those amendments was to make mandatory the videotaping of pre-trial evidence. However, there was no obligation imposed to record evidence given by children or vulnerable witnesses through closed circuit television or through a screen that was not part of pre-trial proceedings. Furthermore, the court was not given the power to allow the use of videotaped evidence at the first trial, or pre-trial hearing, at any subsequent retrial or trial. This required the child or vulnerable witness to give evidence again, and subjected them to unnecessary distress.

*The Bill will overcome this problem by requiring the videotaping of evidence given through closed circuit television or through a screen. The Bill also allows the court to order that where the child or vulnerable witness has already given videotaped evidence, that evidence can be used again in any trial or subsequent retrial.*⁸³

As the second reading speech suggests, the videotaped evidence then becomes the evidence in chief for the purposes of any subsequent trial. During the course of the Inquiry the Committee heard both anecdotally and formally many favourable comments in relation to the fact that the complainant is not put through the trauma of having to give evidence a second time around.^{84 85}

Further amendments to the Evidence Act⁸⁶ have allowed the visual recording of an interview with a child to be admissible in criminal proceedings as evidence-in-chief. The interview must have been conducted by a person of a prescribed class who had reason to believe that the child suffered physical or sexual abuse.⁸⁷

The Attorney General described the impact of the legislation:

*The significant change that we are making here is that the initial interview by the police and social workers of the victim of sexual assault will become that person's evidence-in-chief, and no further evidence will need to be taken from that person. It is believed that this will result in more early pleas of guilty once the perpetrator of the offence is confronted with the evidence in the form of the initial complaint by the child....It will not change the provisions with regard to the prerecording of evidence, which can currently occur, and neither will it change the use of closed-circuit television at the trial if the victim is to give evidence from an adjoining court, except in one very important respect; that is, these provisions will be mandatory for children. However, in future these provisions will become routine.*⁸⁸

The system is now one in which the child's first interview (or evidence-in-chief) is played in front of the judge, prosecution and defence counsel, as well as the defendant, while the child is sitting in a CCTV room away from the proceedings. The child can then be cross-examined by the defence and further questioned by the judge and prosecutor. This evidence is also visually recorded to be shown on the day of the trial. The child does not appear in court on that day.

The Victorian Law Reform Commission has praised the system which allows the pre-recording of evidence:

⁸³ Hon Kevin Prince MLA, Legislative Assembly *Parliamentary Debates (Hansard)* 23 March 2000, p5487.

⁸⁴ *Transcript of Evidence*, 19 February 2007, p6-7; Submission No. 8, p7.

⁸⁵ As a balance, research has found no indication of unfairness to the defendant or presumed bias associated with the use of CCTV. Juries may show a preference for live witnesses but do not appear to allow that preference to influence their decision making. NSW Bureau of Crime Research Crime and Justice Bulletin No 102, September 2006.

⁸⁶ Introduced by way of the Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004.

⁸⁷ Evidence Act 1906 s106HA.

⁸⁸ Hon Jim McGinty MLA, *Parliamentary Debates (Hansard)*, Legislative Assembly 17 August 2004, p4995.

*The Commission was impressed by the innovative system operating in Western Australia that allows for the evidence-in-chief and cross examination of child witnesses and witnesses with a cognitive impairment, to be pre-recorded in the presence of the trial judge, the accused and the prosecution and defence counsel.*⁸⁹

Interviews with children

In the metropolitan area Specialist Child Interviewing (SCI) is carried out at the Child Interview Unit (CIU) located in Subiaco. The Child Interview Unit was established in June 2004 by the Department for Child Protection and the Western Australia Police. In other parts of the State it is carried out by Police and DCD officers trained by the Unit and occurs mostly in police stations.

The Specialist Child Interviewer Training Manual (Department for Community Development and Western Australia Police 2006) outlines the purpose of SCI as being:

to interview children who have experienced sexual and physical abuse. The safety and wellbeing of the child is the paramount concern of Specialist Child Interviewers (SCIs). The purpose of the SCIs is to interview all children in an anti-discriminatory, culturally aware, developmentally sensitive, objective and legally defensible manner. The interview techniques used are child centred with the purpose of determining the truth and where offences are disclosed the SCIs will strive to maximise the attainment of admissible evidence (SCIT1, p5).

*The Unit aims to achieve this purpose by conducting interviews using specially trained child interviewers who conduct a visually recorded interview with the child as soon as practicable after a disclosure is received. By conducting one recorded interview, which is admissible as evidence, it is intended that children be spared the further trauma of having to retell their story to a number of different people over an extended period of time.*⁹⁰

Interviewers follow the WA Four Phase Forensic Interview Model which allows for information to be obtained in a way that considers a child's developmental age and challenges any inconsistencies in the information given. The electronically recorded interview serves the purposes of:

- obtaining the truth about what has happened;
- gathering evidence for use in criminal proceedings;
- the examination in chief of the child witness; and

⁸⁹ *Sexual Offences Law and Procedure*, ACSSA Newsletter No. 5 January 2005, p2.

⁹⁰ Evaluation of Specialist Child Interviewing, report prepared by Cant, R., Henry, D., Simpson, T., Penter, C. December 2006, p3.

- gathering any relevant information to promote the child's welfare, and in some cases, the welfare of other children.⁹¹

In evidence given to the Committee, the Western Australia Police advised they have 83 police trained in the recording of children's evidence - 60 in the country and 23 in the metropolitan area. The training was targeted to officers who have an aptitude in the area with the ability to communicate with children. The apparent discrepancy between the number of specialist interviewers in regional and metropolitan WA is not a true indicator of resources available, as the numbers in the metropolitan area are supplemented by staff from the Department for Child Protection who form the 'other half' of the interview team.⁹²

Cyber Predation

The WAPOL Cyber Predator Unit was formed to combat on-line child exploitation being instigated over the internet by sexual predators. Sexual predators commonly use chat rooms to 'groom children by having sexually explicit on-line conversations and sending obscene images. Such grooming is designed to lower children's inhibitions; making them more amenable to sexual abuse.⁹³

The Committee was disturbed to learn that child victims of cyber predators do not have their evidence pre-recorded for use in court as do child victims of other forms of sexual assault. This necessitates the child having to give evidence in court with the potential trauma involved with that process.⁹⁴ This is the subject of remedy in the Criminal Law and Evidence Amendment Bill 2006 which was sent back to the Legislative Assembly by the Legislative Council with amendments for concurrence on the 21 February 2008.

Finding 2

The *Evidence Act 1906 (WA)*, in relation to children, does not presently allow for child victims of internet and telecommunications crimes to have their evidence pre-recorded and then used in court.

⁹¹ Submission No. 20, p1-2.

⁹² A/Superintendent Kellie Properjohn, *Transcript of Evidence* 29 November 2007, p3.

⁹³ http://www.police.wa.gov.au/Portals/11/PDFs/Newsbeat33_NovDec05.pdf accessed 13 November 2007.

⁹⁴ The Cyber Predator Unit is actively engaged in educating the community about the possible dangers of internet use. The Committee is aware the Unit has acquired federal funds to produce a CD ROM for parents/guardians in this regard.

Recommendation 2

Legislation amending the *Evidence Act 1906 (WA)* be expeditiously adopted and proclaimed.

(vi) Discontinuance or nolle prosequi

As mentioned in (i) above, there are many reasons for cases reported to the Police to be finalised prior to a trial. However, once the case has proceeded into the court system, formalities require a 'Notice of Discontinuance' to be lodged with the court if there has been a decision by the Director of Public Prosecutions not to continue with a prosecution on indictment. In essence, a notice of discontinuance is a document giving formal advice to the court that charges against an accused person will not be proceeded with.

The statement is an admission that in the DPP's opinion the charges cannot be proved. It could be that evidence has demonstrated either innocence or a fatal flaw in the prosecution's claim, or the DPP has become convinced the accused is innocent or that it is not in the public interest to proceed. A notice of discontinuance may be entered at any time before the verdict, with the effect that the accused is discharged from any further proceedings on that indictment.⁹⁵

Importantly, a *nolle prosequi* does not amount to an acquittal, and does not represent a verdict of not guilty. This means that an accused could be tried on the same or similar charges in the future.

2.6 Victims' Rights

The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* sets out the fundamental rights of victims of crime.⁹⁶ The principles provide for victims to be treated with compassion and respect for their dignity and to be provided compensation, restitution and assistance. Victims are entitled to information about the progress and disposition of their cases, to proper assistance throughout the legal process and to have measures implemented to protect their privacy and safety.⁹⁷

The Office of the Director of Public Prosecutions has no statutory responsibilities under the *Director of Public Prosecutions Act* to complainants in the course of prosecutions. However the ODPP is subject to the *Victims of Crime Act 1995 (VoC Act)*⁹⁸, including the guidelines contained therein, and the abovementioned UN Declaration.

⁹⁵ The Notice of Discontinuance is sometimes referred to as a *nolle prosequi* or, more colloquially as a *nolle*.

⁹⁶ See appendix eight for the full text of UN resolution 40/34 of 29 November 1985.

⁹⁷ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Adopted by General Assembly resolution 40/34 of 29 November 1985. http://www.unhchr.ch/html/menu3/b/h_comp49.htm, accessed 2/10/07.

⁹⁸ See appendix three for a copy of the guidelines as to how victims should be treated.

In Western Australia, the Director of Public Prosecutions *Statement of Prosecution Policy and Guidelines* spells out appropriate practices for dealing with victims of crime in a court context. The guidelines reflect the obligations of the agency under the *VoC Act* and encompass the International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors that have been adopted by the ODPP.

The current guidelines were reviewed in 2004. Amendments made at that time reflect the ODPP's desire to make processes and procedures more transparent to victims and witnesses. The appendices to the guidelines now include:

- Applying for Violence Restraining Orders Pursuant to the *Restraining Orders Act 1997*;
- Procedures for Dealing with Secondary Victims of Homicide;
- Victim Impact Statements;
- Policy and Guidelines for Confiscation of Property pursuant to the *Criminal Property Confiscation Act 2000*; and
- Media Policy.

The website for the Office of the Director of Public Prosecutions also contains a prominent link to issues of interest for victims of crime and provides information on:⁹⁹

- The Prosecution Process in Brief
- How long will it take?
- Victim Impact Statement
- Compensation & Restitution
- Criminal Injuries Compensation
- Information on the Progress of the Prosecution
- Your Contact Details
- Interpreter Services
- Commonly Used Terms

⁹⁹ <http://www.dpp.wa.gov.au/frames.asp?pageId=r4374724&content=/content/victims.htm>.
3/10/2007.

Accessed

The information available to victims reflects the ‘rights’ strand of response to victims of crime - the right to be informed and the right to participate in the process. Issues surrounding victims and victim support services are covered in Chapter Six of this report in greater detail, including the issue of the adequacy of victim support. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985 is contained in Appendix Eight

CHAPTER 3 SEXUAL OFFENCE RESEARCH AND THE REPORTING OF SEXUAL OFFENCES IN WESTERN AUSTRALIA

3.1 Introduction

The prosecution of sexual offences, whether successful or not, follows the reporting of an incident. However, the Committee noted that, for reasons touched on below, only a minority of victims of sexual offences report the matter to the police. When incidents are reported, police then become ‘gatekeepers’ to the subsequent criminal justice process. Recognising that this Inquiry is essentially concerned with the examination of reasons for prosecutions of sexual assaults not proceeding, this chapter seeks to explore both those contributory psycho-social and evidentiary difficulties leading first to non-reporting and then to subsequent non-prosecution. The relationship between reporting and conviction “has become a self perpetuating cycle, one that maintains both at unacceptably low levels.”¹⁰⁰ Therefore this consideration of the difficulties includes those factors that might weigh on the assessment of future prosecutorial success by the gatekeepers of justice and form the backdrop to subsequent events and outcomes in the judicial process.

3.2 Background

Sexual offences embrace a class of sexual conduct prohibited by the law. They cover a wide range of behaviours perpetrated against both male and female adults and children.¹⁰¹ There is however no single agreed definition of what constitutes a sexual offence/assault across the many national and international jurisdictions. For example the United States Department of Justice defines sexual assault as range of behaviours that might include

*A wide range of victimizations, separate from rape or attempted rape. These crimes include attacks or attempted attacks generally involving unwanted sexual contact between victim and offender. Sexual assaults may or may not involve force and include such things as grabbing or fondling. Sexual assault also includes verbal threats.*¹⁰²

By contrast, and in a significantly broader characterisation of the term, the Australian Bureau of Statistics provides the following definition:

Sexual assault is unwanted behaviour of a sexual nature directed towards a person: which makes that person feel uncomfortable, distressed, frightened or threatened, or which results in harm or injury to that person; to which that person has not freely agreed or given consent, or to which that person is not capable of giving consent; in which another

¹⁰⁰ Heath, M., ‘The law and sexual offences against adults in Australia’, *Issues*, No4, June, p1.

¹⁰¹ *Sexual Assault Information Development Framework*, Australian Bureau of Statistics, Canberra, 2003, p3.

¹⁰² United States Department of Justice, Available at: <http://www.ojp.usdoj.gov/bjs/abstract/cvus/definitions.htm> Accessed on 27 April 2007.

*person uses physical, emotional, psychological or verbal force or (other) coercive behaviour against that person. Sexual assault may be located on a continuum of behaviours from sexual harassment to life-threatening rape. These behaviours may include lewdness, stalking, indecent assault, date rape, drug-assisted sexual assault, child sexual abuse, incest, exposure of a person to pornography, use of a person in pornography, and threats or attempts to sexually assault.*¹⁰³

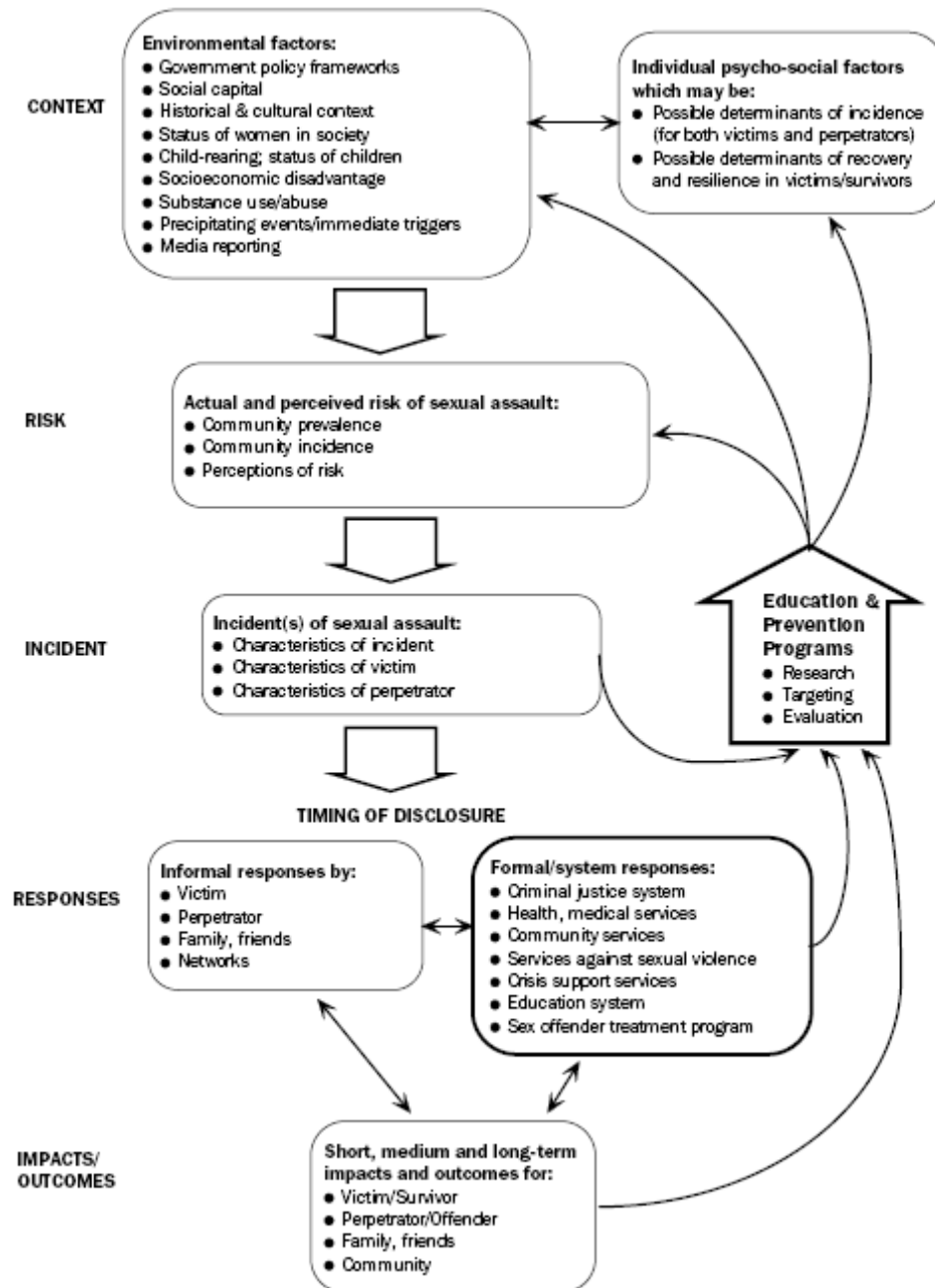
This lack of a standardised definition of sexual assault presents a major problem for researchers, law enforcement agencies and policy makers. The agreed features of sexual assault however “include its non-consensual nature and the use of physical and/or psychological tactics to force compliance.”¹⁰⁴

Sexual assault overlaps with a number of related areas of concern such as general assault, family and domestic violence, child abuse, and cyber predations. Sexual assault impacts the lives of many Australians. It occurs in a psycho-social context which frames the beliefs and actions of both the perpetrator and the victim.¹⁰⁵ In recent years there has been a greater understanding of the need for policies addressing broader interpersonal violence and institutional responses to individuals, families and communities. This psycho-social contextual framework is illustrated as follows:

¹⁰³ *Sexual Assault in Australia: A statistical overview*, Australian Bureau of Statistics, Canberra, 2004, p8.

¹⁰⁴ Non reporting and hidden recording of sexual assault in Australia, Available at: <http://www.aic.gov.au/conferences/policewomen3/lievore.pdf> Accessed on 27 April 2007.

¹⁰⁵ Medical Responses to Sexual Assault, Available at: <http://www.ranzcog.edu.au/publications/sam/Part-1-selection.pdf> Accessed on 27 April 2007.

Figure 3.1 Illustration of the conceptual framework for sexual assault¹⁰⁶

An emerging contextual issue is the use of computers and the internet, not outlined in the chart.

¹⁰⁶

Sexual Assault in Australia: A statistical overview, Australian Bureau of Statistics, Canberra, 2004, p7.

Sexual assault is a widespread problem within the general community. Dr Maureen Phillips from the Sexual Assault Resource Centre in her submission to the Inquiry noted that:

*Sexual assault and childhood sexual abuse are common problems with the literature indicating a prevalence of childhood sexual abuse experienced by one in three women and one in six men (Fergusson and Mullen, 1999). Some members of the community are particularly vulnerable to sexual violence and this group includes children, people with disabilities, mental illness and an Indigenous background.*¹⁰⁷

The Australian Bureau of Statistics (2003) has collected substantial information that shows that the social and economic costs of sexual abuse are expansive. This supports the findings of much existent research on both sexual assault and domestic violence. The World Health Organization reports that

*Studies from the United States, Zimbabwe and Nicaragua indicate that women who have been physically or sexually assaulted use health services more than women with no history of violence, thus increasing health care costs. A U.S. study indicated that rape or assault is a stronger predictor of health care use than any other variable. The medical care costs of women who were raped or assaulted were 2.5 times higher than the costs of non-victims in the year that the study was carried out. [There is a consequential] increase of sexual risk-taking among adolescents, the transmission of sexually transmitted diseases, including HIV/AIDS, [and] unplanned pregnancies.*¹⁰⁸

Renata Alexander writes that, “With the breakdown of familial relationships caused by domestic violence extra burdens are placed on society and more resources are required to provide support and education programs for children, young people and adults affected by sexual abuse, both victims and offenders alike.”¹⁰⁹

In addition all studies reflect a cost in relation to productivity, lost quality of life and mental health. One American study estimated that sexual assault cost the State of Michigan US\$108,447 per incident.¹¹⁰

Sexual assault occurs primarily in existing relationships. In the overwhelming majority of cases, it is perpetrated by adult and adolescent men and can result in significant trauma.

It can have enormous mental and physical health impacts on individuals and their relationships. It might be thought of as a misuse of power in interpersonal relationships

¹⁰⁷ Submission No. 9 from Sexual Assault Resource Centre, 23 April 2007, p1.

¹⁰⁸ World Health Organisation, Available at: <http://www.who.int/mediacentre/factsheets/fs239/en/index.html> Accessed on 27 April 2007.

¹⁰⁹ Alexander, R., ‘Wife-battering - an Australian perspective’, *Journal of Family Violence*, No. 8, 1993, pp229-251.

¹¹⁰ Morrison et al., ‘Ripple effects of sexual assault’, *Issues*, June 2007, p23.

with the sexual self and the sexual body as either the target or tool of the abusive behaviours. It arises within, and has impacts on, the personal and social ecology.¹¹¹

Significant research has been undertaken that clearly demonstrates the psychological impact of sexual assault on victims. The more common effects of this kind of traumatic experience include:

Re-experiencing the Traumatic Event

- *Recurring nightmares about the trauma*
- *Intrusive distressing memories or flashbacks about the trauma*
- *Becoming upset when something reminds you of the trauma*

Avoidance or Numbing

- *Efforts to avoid thoughts, feelings, activities, or situations associated with the trauma*
- *Difficulty remembering important parts of what happened during the trauma*
- *Decreased interest or participation in previously enjoyed activities*
- *Feelings of detachment, alienation, or disconnection from the world around you*
- *Inability to have loving feelings or feel any strong emotions*

Hyper arousal

- *Exaggerated startle response (e.g., feeling “jumpy”)*
- *Difficulty falling or staying asleep*
- *Difficulty concentrating*
- *Irritability or outbursts of anger*
- *Constantly feeling watchful or “on guard”*

Other Symptoms Associated with Experiencing Trauma

- *Depression, despair, hopelessness*
- *Fear and anxiety*
- *Anger self blame, guilt and shame*

¹¹¹ Where do you suggest we stand? Subject positions inherent in sexual assault prevention messages Available at: <http://eprints.qut.edu.au/archive/00003507/01/3507.pdf> Accessed on 27 April 2007.

- *Problems in interpersonal relationships*
- *Social isolation*
- *Problems with identity and self esteem*
- *Problems with sexuality*
- *Feeling permanently damaged*
- *Alcohol and/or drug abuse*
- *Problems with food and body image - e.g. eating disorders*
- *Physical health symptoms and problems*
- *Parenting problems*¹¹²

The extent and duration of such symptoms will be reflective of the affected individual's life experience prior to the trauma, their ability to cope and the level of support accessed.¹¹³

The mother of one rape victim described to the Committee the traumatic impact on her young daughter as follows:

The past 16 months have been the worst nightmare any parent could wish for. The trauma suffered by this now 16 year old beautiful girl is more than most people suffer in a lifetime.

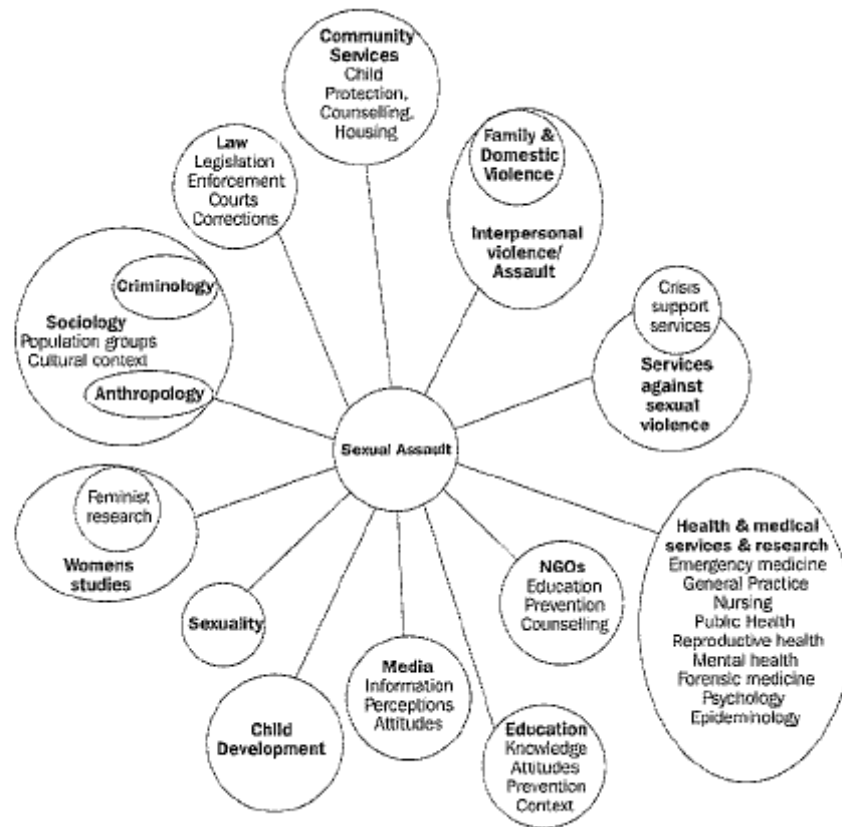
*She has been diagnosed with severe depression, anxiety and stress, which in turn also caused epileptic seizures; she has been diagnosed with extreme self-harm risks by way of eating disorders and medication miss-use Medically, yes he destroyed her, and there is chance she may not be able to have children in the future, and she still suffers stomach cramps and pains for which no diagnosis can be found causing medical practitioners to assume they are 'phantom' or anxiety related. At night, sleep is not often welcome due to horrifying nightmares. Her safe place is home...nowhere else is safe, and she has no trust in anyone*¹¹⁴.

Whilst the impact of sexual assault directly impacts the individual, it also affects the broader community. Because victims can suffer both short and long term psychological/physical effects there are vital connections between sexual violence and other social problems including homelessness, poverty, substance abuse, mental health, and overall physical health concerns as touched on earlier. The following diagram illustrates the ecological web of the services that consequently respond to sexual assault in our society. It is in this context that the reporting of sexual offences occurs.

¹¹² Submission No. 9 from Sexual Assault Resource Centre, Part 2, 23 April 2007, pp1-2.

¹¹³ Ibid.

¹¹⁴ Submission No. 21, 27 July 2007, p2.

Figure 3.2 Diversity of disciplines related to sexual assault¹¹⁵

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Sexual Assault Information Development Framework, Australian Bureau of Statistics, Canberra, 2003, p5.

3.3 Rates of reporting and non reporting

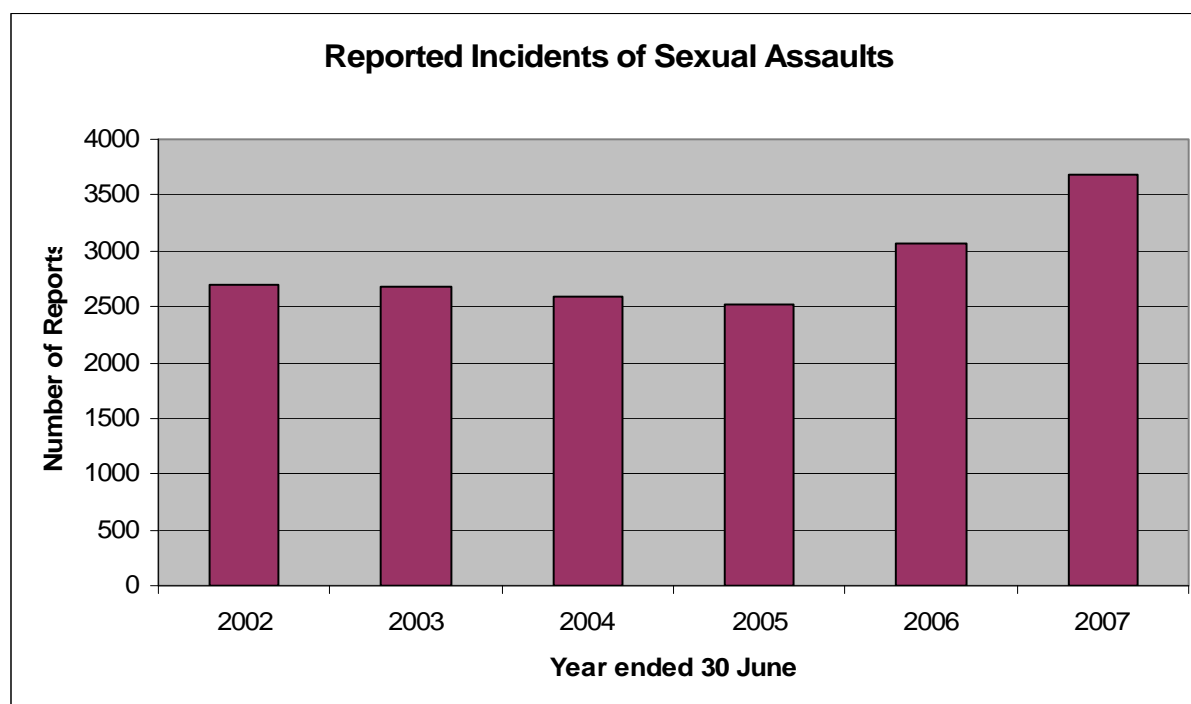
In recent years there has been a significant increase in the rate of reporting as the following table, which contains the official crime statistics for Assault and Sexual Assault offences in WA, shows.¹¹⁶

Table 3.1 Official Crime Statistics for Assault and Sexual Assault Offences, 2001 -02 to 2005-06¹¹⁷

Offence category	Financial year	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Sexual Assault <i>includes: aggravated sexual assault and non-aggravated sexual assault.</i>	Reported	2690	2679	2,587	2,527	3,059	3,688
Assault <i>includes: aggravated assault and non-aggravated assault</i>	Reported	15,519	15,688	16988	20,917	22,124	22,774

These figures are diagrammatically represented as follows:

Figure 3.3 Reported Incidents of Sexual Assaults

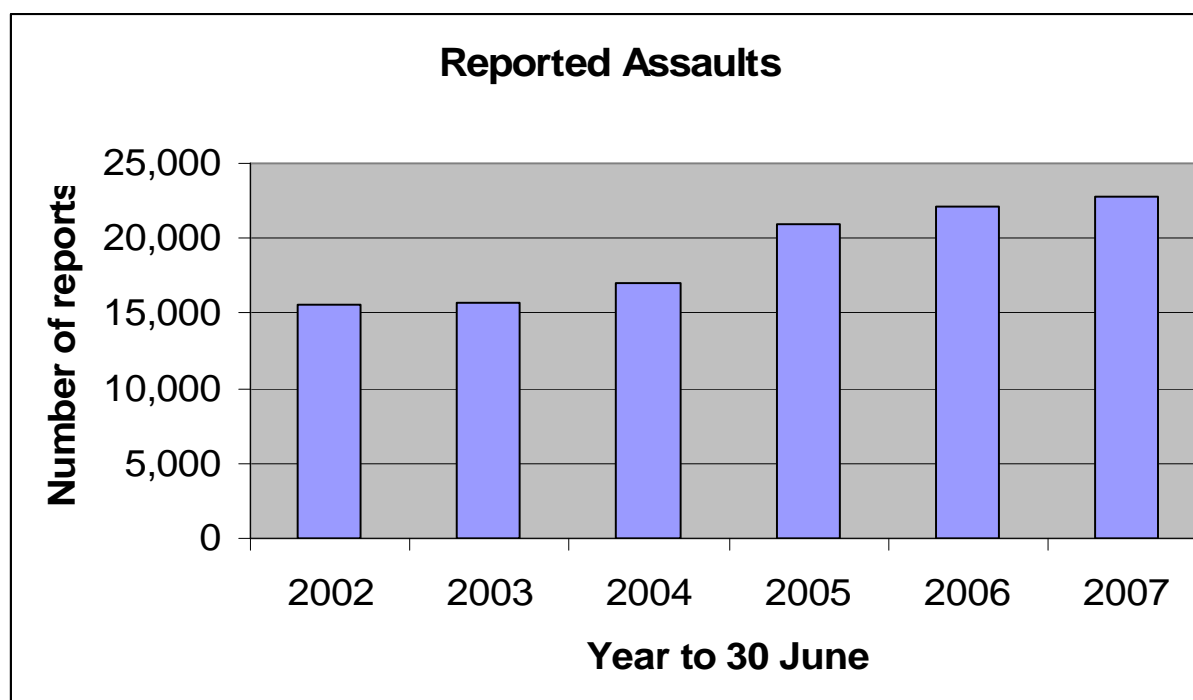


¹¹⁶ Letter from Deputy Commissioner (Specialist Services), 6 Feb 2007, p3.

¹¹⁷ Source: WA Police Annual Report 2006.

The preceding information shows that the number of reported Sexual Assault offences has remained stable between 2001-02 and 2004-05, with a 21.0% increase in 2005-06 and a further 20.5% increase in 2006-07.

Figure 3.4 Reported Assaults



Reported Assault offences were consistent in 2001-02 and 2002-03, with an increasing trend in ensuing years. (8.3% in 2003-04, 23.1% in 2004-05, 5.8% in 2005-06 and 2.9% in 2006-07).

The Western Australia Police advise that:

*The primary causal factor for the increase in reported offences in the above two categories has been the Domestic Violence legislation enacted in 2004, accompanied by a comprehensive media campaign. These Government initiatives both encouraged victims of domestic physical and sexual abuse to report the offences to police, as well as providing police with additional powers and responsibilities in the investigation of such crimes.*¹¹⁸

However regardless of this legislation there is evidence that only a minority of these offences are reported.

(a) Non- reporting

A major factor affecting the number of sexual offences prosecuted is the willingness, or otherwise, of complainants to participate in the judicial process.

¹¹⁸

Letter from Deputy Commissioner (Specialist Services), 6 Feb 2007, p3.

Many women do not choose to report, fearful of withstanding the police investigation and rigours of appearing on the witness stand (known as "trial by ordeal") and pessimistic about the likelihood of obtaining a conviction against the perpetrator.¹¹⁹

It is broadly recognised from many studies that sexual assault is less likely to be reported to law enforcement agencies than any other type of violence against the person.¹²⁰ The police can only count those cases of sexual offences that are actually reported to them. Consequently police statistics on the levels of sexual assault in the community are only of limited value. In acknowledging this, the World Health Organization adds that, "Data from medico-legal clinics, on the other hand, may be biased towards the more violent incidents of sexual abuse."¹²¹ This includes agencies such as Sexual Assault Resource Centre (SARC) who advise that, "Reports are not usually prepared for people who indicate that they have no intention to speak with the police. At other times reports are not prepared if the person has withdrawn their initial complaint."¹²²

Figure 3.5

Year	Number of cases seen	No of Reports sent to Police	% cases seen compared to Police Reports	No of Subpoenas received	Times Doctor gave evidence	Convictions
Oct 01-Sept 02	360	165	46	71	34	13
Oct 02 - Sept 03	337	138	41	80	21	4
Oct 03 - Sept 04	347	132	38	39	8	2
Oct 04 - Sept 05	352	158	45	72	14	8
Oct 05 - Sept 06	364	115	32	72	32	11
Total	1760	708	40	334	109	38

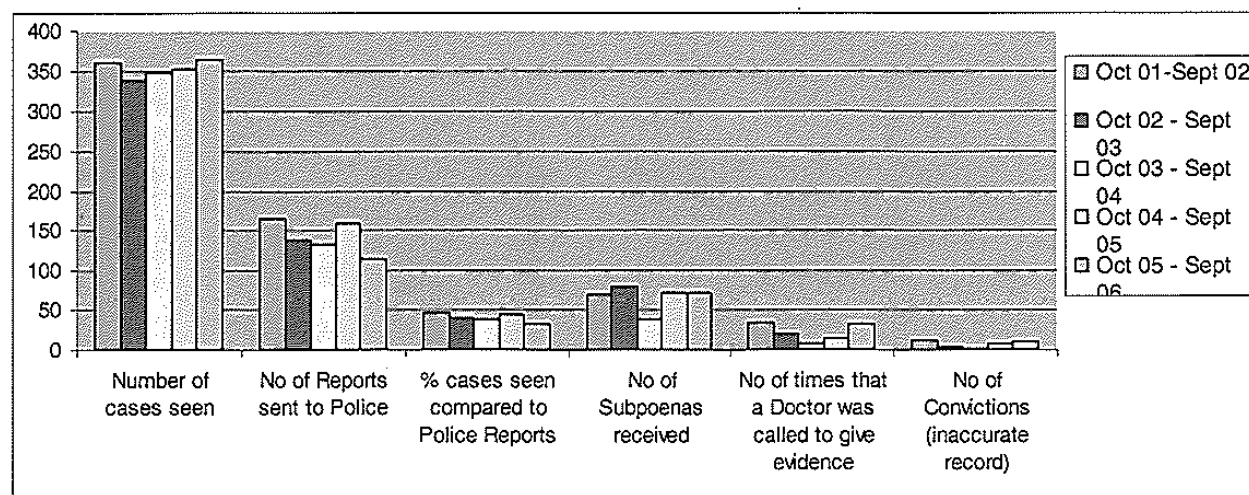
¹¹⁹ Submission No. 23 from Reclaiming Voices WA, 3 August 2007, p1.

¹²⁰ Australian Institute of Criminology, Available at: <http://www.aic.gov.au/conferences/policewomen3/lievore.html> Accessed on 7 June 2007.

¹²¹ World Health Organisation, Available at: <http://whqlibdoc.who.int/hq/2002/9241545615.pdf> Accessed on 30 April 2007.

¹²² Submission No. 9 from Sexual Assault Resource Centre, 23 April 2007, p2.

Figure 3.6



(b) Attitudes behind non-reporting

As Dr Denise Lievore writes, “Knowledge about victims and their reporting behaviour is primarily derived from nationally representative crime victim surveys.”¹²³ By contrast, data from the Women’s Safety Survey of 1996 reflected an 89.9% rate of non-reporting of sexual assault by women.¹²⁴ The reasons for non-reporting provided in that survey included:

- Dealt with the matter herself 54.6%
- Not serious enough to seek help 25.5%
- Received help from family and/or friends 4.3%
- Other 14.9%

The fact that the non-reporting of incidents constitutes such a large proportion of cases means that those that are reported are then seen as being only the tip of the iceberg. While a range of situational and personal factors influence non-reporting, one of the key impediments to reporting is a relationship between the victim and the perpetrator, as Figure 3.5 below illustrates.¹²⁵

¹²³ Non reporting and hidden recording of sexual assault in Australia, Available at: <http://www.aic.gov.au/conferences/policewomen3/lievore.pdf> Accessed on 27 April 2007.

¹²⁴ *Sexual Assault in Australia: A statistical overview*, Australian Bureau of Statistics, Canberra, 2004, p55.

¹²⁵ Non reporting and hidden recording of sexual assault in Australia, Available at: <http://www.aic.gov.au/conferences/policewomen3/lievore.pdf> Accessed on 30 April 2007.

Figure 3.7

%	Friend	Family	ex-partner	Partner	Acquaintance	Neighbour	colleague	Stranger
40								
35								
30	30%							
25								
20								17%
15		12%	12%	11%				
10					10%			
5						5%	5%	
0								

In line with these figures only approximately 17% of reported sexual assaults are followed up by the newly formed Sexual Assault Squad, recognising that the SAS deals mainly with cases where the perpetrator is unknown to the victim/complainant.

The following information from the Women's Safety Survey is reflected in international surveys, which state that personal barriers to reporting sexual assault include:

Figure 3.8

Personal Barriers	Perceptions of the Justice System
≈ Too trivial or inappropriate to report to police	≈ Police would not or could not do anything
≈ Dealt with it themselves	≈ Police would not think it was serious enough, or would not want to be bothered with the incident
≈ Regard it as a private matter	≈ Fear of not being believed by police
≈ Not a 'real' crime	≈ Fear of being treated hostilely by police or other parts of justice system
≈ Not clear that harm was intended	≈ Fear/dislike of police
≈ Shame, embarrassment	≈ Fear of the legal process
≈ Did not want family or others to know	≈ Lack of proof that the incident happened
≈ Fear of reprisal by assailant	≈ Did not know how to report
≈ Self-blame or blamed by others for the attack	
≈ Desire to protect offender, relationship, or children	

In addition, perceptions of the justice system clearly play a part in whether a victim of sexual assault will report the incident or not. Awareness by the potential complainant of the fact that the ultimate conviction rate is seemingly low anecdotally further contributes to non-reporting.¹²⁶

Such negative images of the justice system in this arena are supported in the community by victim/complainants who feel let down by the legal process:

I have completely lost faith in the legal system in Australia, because it can sit idly by as victims, like myself and my friends, are sexually assaulted and abused while our attackers

¹²⁶

Lievore, D., *Non-reporting and hidden recording of Sexual Assault: An International Literature Review*, Commonwealth Office of the Status of Women, Canberra, 2003, p40.

*are let off scot-free. I am still living in the prison that was made for me that night. Why isn't he?*¹²⁷

Or again:

*I'm not sure I will ever have any [faith in the legal system], and I don't see many other members of my community having any either. So many walk free from committing serious crimes, yet others are jailed for lesser.*¹²⁸

On this issue, a submission by the Child Interview Unit of the Department for Child Protection makes reference to the book *'Girls like you'* which considers the cases of four victims of sexual assault in Sydney and their submission notes that: "Every rape victim depicted in the book said she would never again look to the courts for justice should anything similar happen to them again."¹²⁹

More generally, a focus group stated that "the legal system lacks sensitivity - at all levels."¹³⁰

It is the Committee's view that the victim's ambivalence from the very outset towards the reporting of a sexual offence may well provide the backdrop to a victim's subsequent withdrawal from the judicial process prior to its protracted outcome, for reasons outlined in succeeding chapters. This ambivalence can also result in significant delays in reporting. This affects the subsequent collection of physical evidence, and consequently impacting the successful prosecution of the case.

Delays in reporting are particularly common in instances of child sexual assault. Children may well want to tell someone about the abuse so that it can be stopped, but they are often afraid that they will not be believed or protected if the abuser should seek retribution, or they are afraid of what might happen if they do tell. Consequently it is normal for children to delay telling about their abuse for a considerable time (years) after it occurs.¹³¹ Such delays in turn may contribute to the subsequent failure of a charge:

*Increasingly, incidents of sexual assault that may have occurred in a victim's childhood are being brought to trial when the victims reach adulthood. However, the delay in reporting works against them if doubts are raised by the presiding judge about the reliability of their evidence, because there has been a delay in reporting.*¹³²

¹²⁷ Submission No. 19, 26 July 2007, p4.

¹²⁸ Submission No. 21, 27 July 2007, p7.

¹²⁹ Submission No. 20, 27 July 2007, p4.

¹³⁰ Submission No. 23, from Reclaiming Voices WA, Survey Refer Appendix, 3 August 2007, p7.

¹³¹ Public Health Agency of Canada, Available at: http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/html/nfntsxagrsex_e.html Accessed on 4 May 2007.

¹³² Faculty of Law University of Tasmania, Available at: <http://www.law.utas.edu.au/reform/Publications/Warnings/Responses/Women%20Tasmania.pdf> Accessed on 4 May 2007.

The negative impact of the judicial process on victim/complainants, regardless of whether the prosecution of charges was successful, is recognised as an ongoing issue by the DPP.

From a policy perspective, in the short term such concerns may lead to complainants wanting to withdraw and impede recovery and in the long term, evidence suggests that it may discourage complainants from reporting at all. While ensuring a fair trial for the accused is essential, policy makers need be concerned that the process that exists to deal with wrongs allegedly caused to citizens, [also] causes the innocent party so much grief and angst.¹³³

Finally, while little research has been undertaken, reporting rates are considered to be even lower than those prevailing in the general population with respect to three groups in particular, namely:

- those from a culturally and linguistically diverse community;
- victims from an indigenous background; and
- people with disabilities.¹³⁴

Some of the reasons for the lower reporting rates in these population groups are discussed later in this report.

Finding 3

There is a low rate of reporting (10%) of sexual offences. On the Committee's data only 1% of all alleged sexual assaults (both reported and unreported) result in conviction. This stems in large part from perceptions of the justice system, a fact confirmed through national and international research and reinforced to the Committee by testimony of witnesses who felt let down by the legal process.

¹³³ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p26.

¹³⁴ Australian Centre for the Study of Sexual Assault, *Study of reported rapes in Victoria 2002-2003*, Office of Womens Policy, Victoria, 2006, p7.

CHAPTER 4 **ATTRITION IN THE COMPLAINT INVESTIGATION AND PROSECUTION PROCESS**

4.1 **Background**

As in many countries, reports of sexual assault are increasing but the conviction rates as a percentage of reported cases are falling.¹³⁵ Additionally there is a high rate of discontinuance or attrition, both in Australian and in overseas jurisdictions. This year-on-year increase in attrition represents a gap in the justice system.

For example, in the United Kingdom it is suggested that 80,000 women suffer rape and attempted rape every year. Yet in 2003, according to Home Office supplied figures, only 12,760 (or 15.95% of the suggested total) cases of rapes and attempted rapes were reported to police, with just 673 or 5.3% of the reported cases receiving a conviction.¹³⁶ In Scotland the attrition rate in rape cases between 1977 and 2001 is not dissimilar and is reflected in the following figures (Figure 4.1).¹³⁷

Figure 4.1 Attrition rate in rape cases in Scotland, 1977-2001

	1977	1987	1997	2001
Reported	178	241	570	589
Prosecutions	60	64	65	61
Prosecutions as a percentage against reports	33%	27%	11%	10%
Convictions	35	34	29	36
Convictions as a percentage of prosecutions	58%	53%	45%	59%
Convictions as a percentage of reports	20%	14%	5%	6%

¹³⁵ Australian Institute of Criminology, Available at: <http://www.aic.gov.au/publications/reports/2003-06-recidivism.pdf> Accessed on 6 June 2007.

¹³⁶ End violence against women, Available at: http://www.endviolenceagainstwomen.org.uk/facts_r.asp Accessed on 7 June 2007.

¹³⁷ Rape crisis in Scotland, Available at: www.rapecrisisscotland.org.uk/documents/JamesChalm. Accessed 7 June 2007.

In Western Australia the police reporting statistics (below) cover the financial year, that is to say twelve months from 1 July to 30 June; while those of the Office of the Director for Public Prosecutions (ODPP) cover a calendar year. This makes an accurate comparison with overseas agencies impractical. Additionally there are lags between the reporting of cases and their prosecution. This causes some discrepancy. Finally individual case tracking aggregated statistics are not available for reasons discussed in Chapter Seven of this report. However, while recognising all of these difficulties, the substantial attrition rate between cases being reported to the police and those being received by the ODPP may be readily recognised. It is noted that the Western Australia Police are unable to advise “the number of briefs put before the ODPP for consideration as there is no central database in place that records information such as is being sought.”¹³⁸ Therefore the figures provided of cases received by the ODPP are those cases reported as being received by them.

Figure 4.2 Crime Statistics- Western Australia

	2002	2003	2004	2005	2006
Western Australia Police official crime statistics for reported sexual assault, both aggravated and non aggravated, for financial year ended 30 June ¹³⁹	2,690	2,679	2,587	2,527	3,059
Analysis of total number of accused cases received by the WA ODPP on a calendar year basis, excluding children's court. ¹⁴⁰	342	412	445	470	376

The issue of inadequate data management systems is canvassed in greater detail in Chapter Seven of this report

¹³⁸ Mr C. J. Dawson Deputy Commissioner, Office of Deputy Commissioner, Specialist Services Western Australia Police, Correspondence, 6 February 2007.

¹³⁹ Mr C. J. Dawson Deputy Commissioner, Office of Deputy Commissioner, Specialist Services Western Australia Police, Correspondence, 6 February 2007.

¹⁴⁰ Mr Ken Bates, Acting Director of Public Prosecutions, Correspondence, 19 January 2007.

In common with overseas jurisdictions, there is in Australia an ongoing concern about both the attrition rate and trial outcomes in the legal process. Consequently there have been a number of reviews of the criminal justice process. For instance in the recent past there was Queensland's 'Seeking Justice' report into how sexual offences are handled by the Criminal Justice System (2003), South Australia's inquiry into sexual assault conviction rates (2005), and Victoria's Law Reform Commission's inquiry into sexual offences and the justice system (2004).

The Director of Public Prosecutions, Robert Cock QC, has observed that obtaining a conviction in a sexual assault matter is difficult, for various reasons including:

*the complex place of sexual assault in our society, ... the fact that whilst corroboration is not required there is usually no third party witness to confirm the complainant's story and thereby prove the matter beyond reasonable doubt, with the word of the complainant having to override the word of the defendant. Add to this, the high incidence of complainants wanting to withdraw without whom the matter cannot proceed.*¹⁴¹

As the figures supplied by the Office of the Director of Public Prosecutions (ODPP) show, in Western Australia the trial outcomes of cases reported to police reflect the overseas experience as follows:

¹⁴¹ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p3.

Figure 4.3 Analysis of the outcomes of Sexual Assault Cases received by the WAODPP from the police between 1 January 2002 to 31 December 2005¹⁴²

Dataset: All cases committed to the District or Supreme Court (does not include Children's Court cases).

Abbreviation: used in table	Full phrase:
PG	Plea of Guilty
CS	Convicted and sentenced
NOL	Notice of Discontinuance lodged
ACQ	Acquitted
HJ	Hung Jury
MTRL	Mistrial
DIS	Dismissed
BW	Bench Warrant issued (current state of case)
ASD	Adjourned Sine Die
COM	Custody Order made
INDQ	Indictment Quashed
DCERT	Death Certificate issued
UFTP	Unfit to Plead
NR	No results entered in Case Management system (case closed)
NFO	No final outcome entered in Case management system (case closed)
NFOA	No final outcome entered in Case management system (case still active)

Division of cases between trial and non-trial:

TRIAL: Cases proceeded to trial (i.e. at least one trial hearing was or has been listed)

NON-TRIAL: Cases that did or have not yet proceeded to trial (i.e. where no trial was or has been listed)

PERCENTAGES AS SHOWN IN GRAPHS

SEX CASES

TRIAL outcomes per accused

Outcomes of finalised cases	PG	CS	NOL	ACQ	HJ	MTRL	DIS	BW	ASD	COM	INDQ	DCERT	UFTP	NR	NFO	Total finalised cases
2002	9%	40%	10%	39%	0%	0%	0%	1%	0%	0%	0%	0%	0%	0%	0%	100%
2003	11%	37%	11%	41%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	100%
2004	9%	34%	8%	46%	2%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	100%
2005	15%	25%	14%	36%	3%	1%	0%	3%	0%	0%	0%	1%	0%	0%	1%	100%
Average 2002-2005	11%	34%	11%	41%	1%	0%	0%	1%	0%	0%	0%	0%	0%	0%	0%	100%

¹⁴²

Mr Ken Bates, Office of the Director of Public Prosecutions, correspondence, 19 January 2007.

SEX CASES

NON-TRIAL outcomes per accused

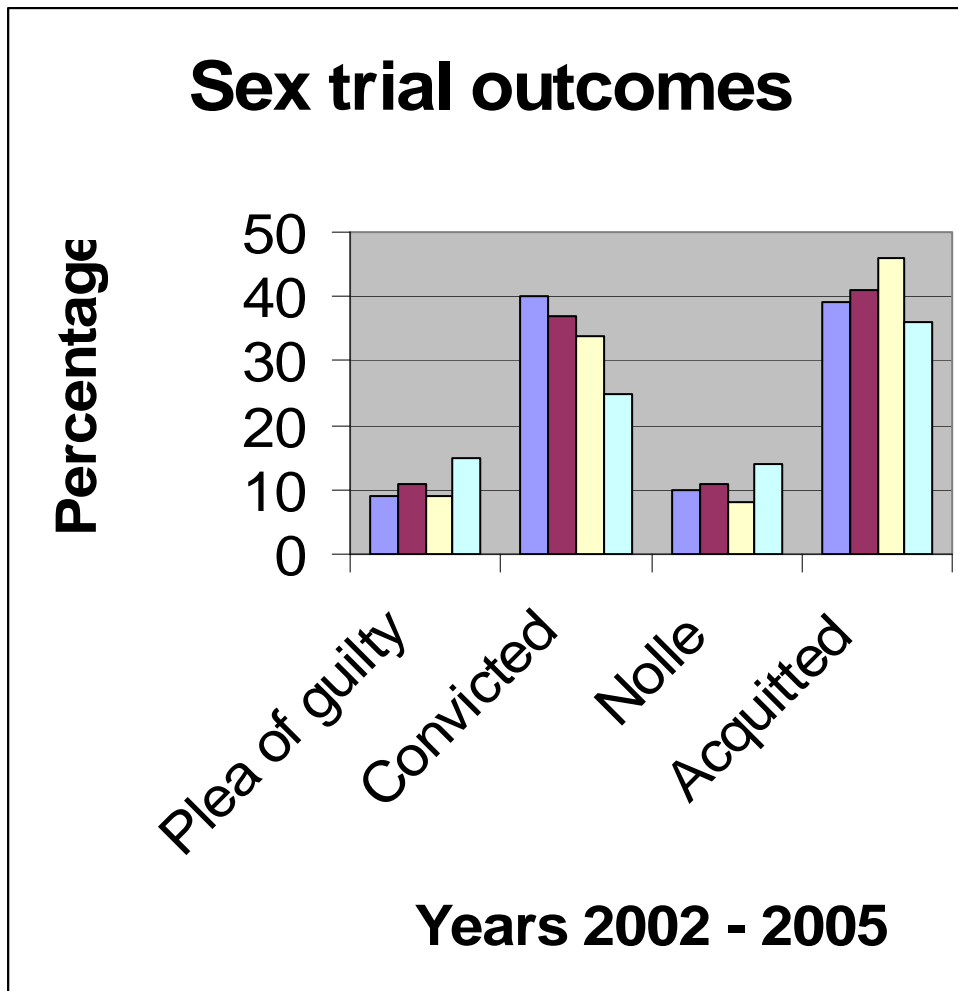
Outcomes of finalised cases	PG	CS	NOL	ACQ	HJ	MTRL	DIS	BW	ASD	COM	INDQ	DCERT	UFTP	NR	NFO	Total finalised cases
2002	76%	0%	16%	0%	0%	0%	0%	1%	0%	1%	1%	1%	0%	3%	1%	100%
2003	75%	0%	17%	0%	0%	0%	1%	1%	0%	0%	0%	2%	1%	2%	1%	100%
2004	77%	0%	18%	0%	0%	0%	1%	1%	0%	0%	0%	1%	1%	2%	1%	100%
2005	75%	0%	17%	0%	0%	0%	1%	5%	0%	0%	0%	0%	1%	1%	1%	100%
Average 2002-2005	76%	0%	17%	0%	0%	0%	1%	2%	0%	0%	0%	1%	0%	2%	1%	100%

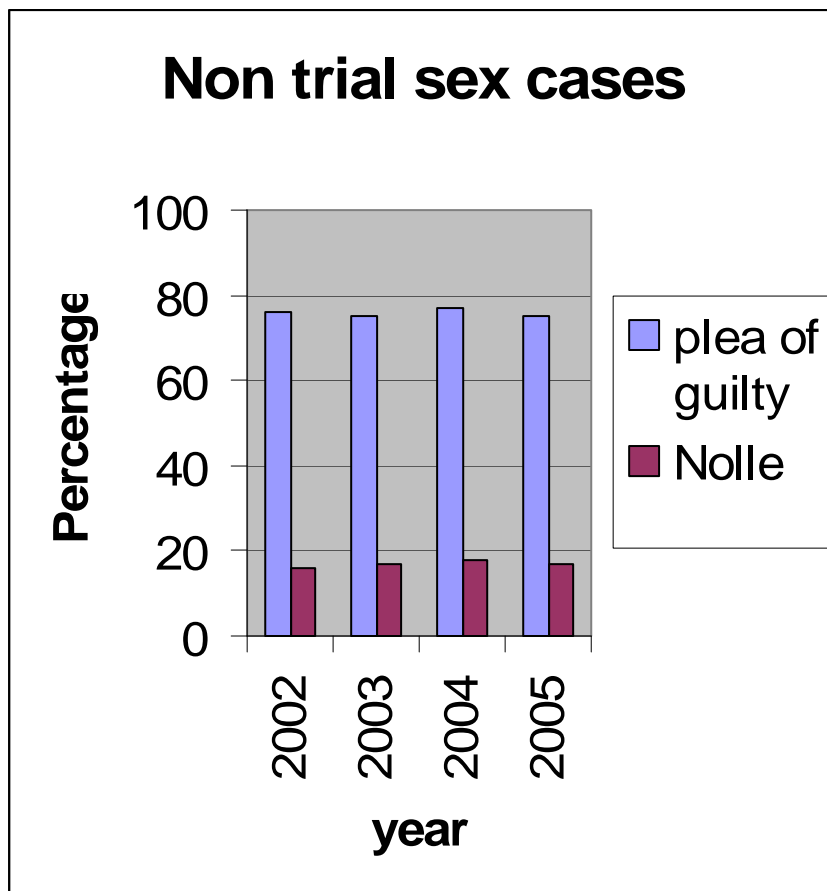
SEX CASES

ALL outcomes per accused

Outcomes of finalised cases	PG	CS	NOL	ACQ	HJ	MTRL	DIS	BW	ASD	COM	INDQ	DCERT	UFTP	NR	NFO	Total finalised cases
2002	37%	24%	13%	23%	0%	0%	0%	1%	0%	1%	0%	0%	0%	1%	0%	100%
2003	38%	22%	13%	24%	0%	0%	0%	0%	0%	0%	0%	1%	0%	1%	0%	100%
2004	37%	20%	12%	17%	1%	0%	0%	0%	0%	0%	0%	0%	0%	1%	0%	100%
2005	44%	13%	19%	19%	2%	0%	0%	4%	0%	0%	0%	0%	0%	0%	1%	100%
Average 2002-2005	39%	20%	13%	23%	1%	0%	0%	1%	0%	0%	0%	0%	0%	1%	1%	100%

Figure 4.4 Analysis of Sexual Assault Cases received by the WAODPP from the police between 1 January 2002 to 31 December 2005





By comparison with the trial outcomes of prosecuted sexual offences outlined above, the prosecution of cases of assaults reflect significantly enhanced outcomes over those of sexual assaults when going to trial, as the following tables demonstrate.

Figure 4.5 Analysis of Assault Cases received by the WAODPP from 1 Jan 2002 to 31 Dec 2005¹⁴³

PERCENTAGES AS SHOWN IN GRAPHS

ASSAULT CASES

TRIAL outcomes per accused

Outcomes of finalised cases	PG	CS	NOL	ACQ	HJ	MTRL	DIS	BW	ASD	COM	INDQ	DCERT	UFTP	NR	NFO	Total finalised cases
2002	21%	40%	11%	27%	0%	0%	0%	0%	0%	0%	0%	1%	0%	0%	0%	100%
2003	25%	28%	10%	34%	0%	0%	0%	1%	0%	0%	0%	0%	0%	0%	0%	100%
2004	26%	31%	11%	28%	1%	0%	0%	1%	0%	0%	0%	0%	0%	0%	1%	100%
2005	26%	27%	14%	27%	0%	0%	0%	4%	0%	0%	0%	1%	0%	0%	2%	100%
Average 2002-2005	25%	31%	12%	29%	0%	0%	0%	2%	0%	0%	0%	0%	0%	0%	1%	100%

ASSAULT CASES

NON-TRIAL outcomes per accused

Outcomes of finalised cases	PG	CS	NOL	ACQ	HJ	MTRL	DIS	BW	ASD	COM	INDQ	DCERT	UFTP	NR	NFO	Total finalised cases
2002	77%	0%	18%	0%	0%	0%	0%	1%	0%	0%	0%	2%	0%	1%	1%	100%
2003	75%	0%	14%	0%	0%	0%	4%	1%	1%	0%	1%	1%	1%	2%	1%	100%
2004	83%	0%	11%	0%	0%	0%	1%	1%	0%	0%	0%	0%	0%	3%	0%	100%
2005	76%	0%	16%	0%	0%	0%	1%	3%	0%	0%	0%	0%	0%	3%	1%	100%
Average 2002-2005	78%	0%	15%	0%	0%	0%	2%	2%	0%	0%	0%	1%	0%	2%	1%	100%

ASSAULT CASES

ALL outcomes per accused

Outcomes of finalised cases	PG	CS	NOL	ACQ	HJ	MTRL	DIS	BW	ASD	COM	INDQ	DCERT	UFTP	NR	NFO	Total finalised cases
2002	46%	22%	14%	15%	0%	0%	0%	1%	0%	0%	0%	2%	0%	0%	1%	100%
2003	47%	16%	12%	19%	0%	0%	2%	1%	0%	0%	0%	0%	0%	1%	1%	100%
2004	57%	14%	11%	13%	0%	0%	1%	1%	0%	0%	0%	0%	0%	2%	1%	100%
2005	57%	10%	15%	10%	0%	0%	1%	4%	0%	0%	0%	0%	0%	2%	1%	100%
Average 2002-2005	52%	15%	13%	14%	0%	0%	1%	2%	0%	0%	0%	1%	0%	1%	1%	100%

As reflected in the DPPs report and other reports, there are a broad and complex range of procedural, legal and non-legal considerations that contribute to the high attrition rate in sexual assault. The most significant non-legal consideration for example is that, more than with any other crime, the victim can experience reporting rape as a form of re-victimisation. In no other crime is the victim/complainant subject to so much scrutiny at trial, where the most likely defence is that the victim consented to the crime.

¹⁴³

Mr Ken Bates, Office of the Director of Public Prosecutions, correspondence, 19 January 2007.

Re-victimisation is described as the process of "reliving" an assault or abuse in a negative way by having to retell the circumstances of the assault or answer questions about it to others.¹⁴⁴

Additionally, the criminal justice system has finite resources and it is neither possible nor desirable to prosecute all reported crimes. There is therefore a process of selective prosecutions, based on factors discussed in this chapter.

Where a sexual assault is reported, the subsequent attrition rate between reporting and trial is stated by the Office of the Director of Public Prosecutions in Western Australia as being about 90% across Australia, not dissimilar to those of Scotland, as illustrated above:

I think it is pretty well known and very well documented in Australia that the attrition rate is in the order of 90 per cent. Of those cases in which a reportable incident occurs, only 10 per cent go to trial. The cases fall out at all stages. Sometimes no report is made to police. Sometimes a report may be made to a doctor but is not pursued to the police. Sometimes when a report is made to the police, they do not pursue it. Sometimes when it gets to my office, we do not pursue it. As I say, our attrition rate is only a minor part of the total attrition rate from the time of the incident until ultimately, a prosecution does not occur. That problem has existed for the 28 years that I have been practising and, I assume, previously. It is predominantly because there are rarely witnesses to a sexual assault and because of the personal nature of the offence. When there are no serious physical injuries, victims will often change their mind and not proceed because of the issues that Dr Edwards has referred to, such as embarrassment. A real concern is that the criminal justice system re-victimises victims. There is no doubt that it does that. It is also due to other people evaluating the prospects of a conviction; that is, the doctor, police officer or lawyer taking the view that despite their assessment that an offence may have occurred, there is insufficient evidence that is likely to persuade a jury beyond all reasonable doubt that this has occurred and this person is the offender.¹⁴⁵

The low (if slowly increasing) rate of reporting and the high discontinuance of cases experienced in Western Australia is therefore largely an experience shared with other criminal jurisdictions both nationally and overseas.

Some members of the community are particularly vulnerable to sexual offences, and there is perhaps a correlation between the level of the abuse suffered in a particular demographic and their ease of access to the justice system.¹⁴⁶ A particular group that suffers consequent attrition from the very outset are those with an intellectual or decision-making disability:

For some of the agencies who do receive reports of sexual assault against a person with a decision-making disability, this group can present communication or behavioural

¹⁴⁴ Advocates for Youth, 'Sexual Assault Glossary', 2007. Available at: <http://www.advocatesforyouth.org/youth/health/assault/glossary.htm>. Accessed on 27 November 2007.

¹⁴⁵ Mr Robert Enos Cock, Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 22 November 2006, p6.

¹⁴⁶ Submission No. 9 from Sexual assault Resource Centre, nd., p1.

*difficulties that are too challenging or too uncomfortable to deal with, so inaction can become the status quo.*¹⁴⁷

Yet this group, it is generally recognised, is particularly likely to be the victims of crime.¹⁴⁸ Under-reporting of crime by people with an intellectual or decision-making disability has often been commented upon. The Victorian *Silent Victims* report, amongst others, summarised the main reasons for non-reporting as:

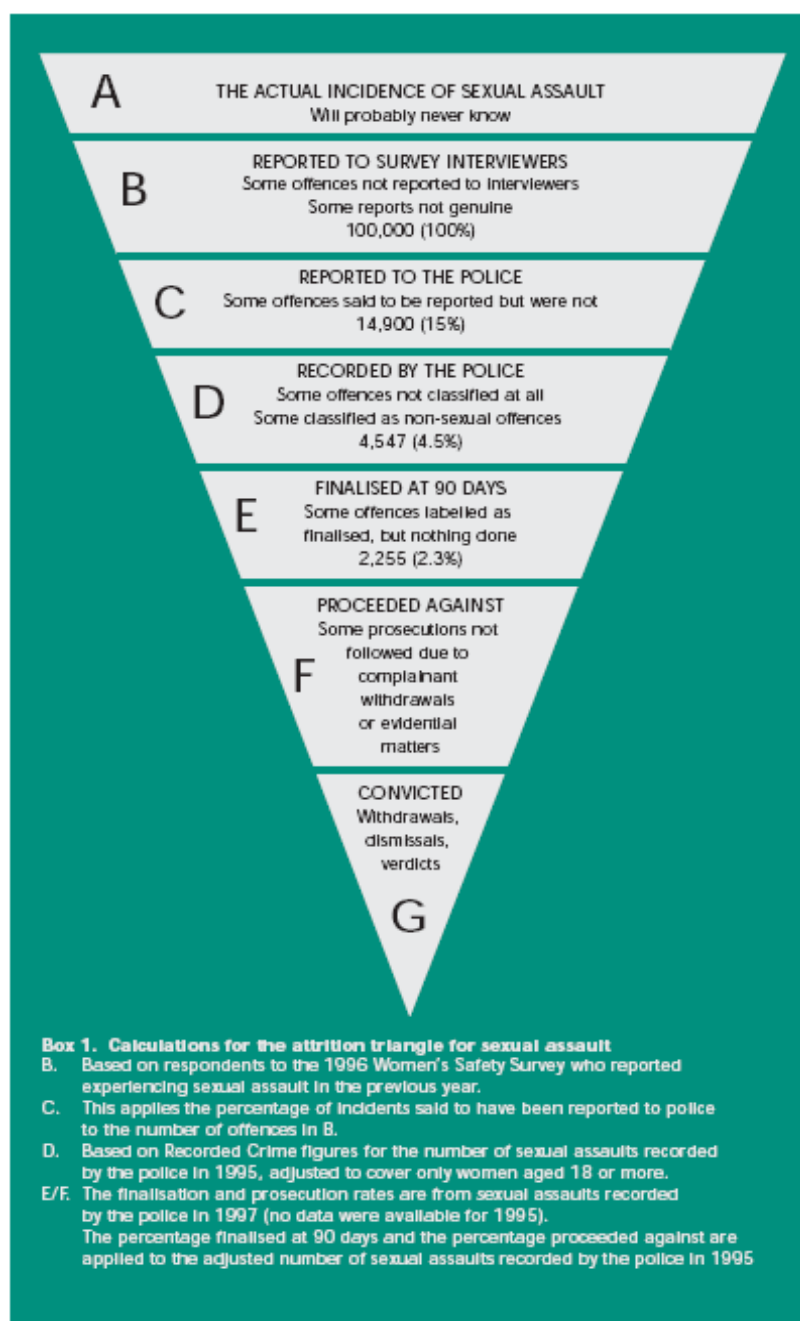
- *the nature of the crimes committed against people with an intellectual disability, predominantly sexual assault and physical assault, which are generally under-reported throughout the community;*
- *the characteristics of the victims, including lack of knowledge about offences and reporting crime;*
- *the victim's fear, either of the consequences of reporting, or of police and other people in authority; and*
- *the past responses from staff or service providers to reports of crime; for example, if no action was taken.*¹⁴⁹

The successive shrinkage between the number of sexual assaults that occur and those that proceed to trial and conviction can be depicted in terms of the 'attrition triangle'. This so called 'attrition triangle' (Figure 4.6) reflects what the attrition rate looks like in each stage of the legal process, that is comparing the number of sexual assaults that occur and those that are reported to police, recorded by them, and proceed to trial and conviction.

¹⁴⁷ Submission No. 18 from Office of the Public Advocate, 24 July 2007, p1.

¹⁴⁸ Law Reform Commission of NSW, Available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP29CHP9>. Accessed on 2 August 2007.

¹⁴⁹ Law Reform Commission of NSW, Available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP29CHP9>. Accessed on 2 August 2007.

Figure 4.6 Attrition of sexual assault cases¹⁵⁰

In terms of attrition the highest proportion of cases is lost at the earliest stages, with between half and two-thirds dropping out at the investigative stage. Withdrawal by victims/complainants is one of the most important elements.¹⁵¹

¹⁵⁰

Lievore, D., *Non-reporting and hidden recording of Sexual Assault: An International Literature Review*, Commonwealth Office of the Status of Women, Canberra, 2003, p41.

Finding 4

- a) There is a significant attrition rate in the period between the reporting of a sexual offence and the offence being tried in a court of law.
- b) Re-victimisation during the process is one of the reasons why victims/complainants withdraw at the investigative stage.

4.2 Attrition in the investigation stage

*While there are a range of reasons why people may not report sexual assault, the police are often the first port of call for those victims of sexual assault who choose to 'speak the unspeakable.'*¹⁵²

(a) Background

The New South Wales Bureau of Crime Statistics and Research estimates that more than 80% of sexual offences reported to police do not proceed to prosecution.¹⁵³ In Western Australia, based on the Director of Public Prosecution's statements and statistics quoted above, the figure is largely similar. This attrition is attributable to a range of factors some of which have already been outlined. This section of the report examines the influence of investigation on attrition.

When an assault or sexual offence is first reported, the police are the investigating body. Public perceptions of how their case will be handled by the police, as well as the Office of the Director of Public Prosecutions, will therefore, as evidenced in the previous chapter, significantly influence such reporting. Additionally, the quality and consistency of the police investigative and decision-making practices will have a major impact on subsequent prosecution and attrition patterns.

As a result of the findings of the 'Royal Commission into whether there has been any corrupt or criminal conduct by Western Australian police officers' in March 2004, there have been a number

¹⁵¹ Wilson, D. and Fowles, T., 'Penal Policy File No. 100', *The Howard Journal*, Vol.44 No.33, July 2005, pp326-332.

¹⁵² Victorian Law Reform Commission, Available at: [http://intranet/intranet/libpages.nsf/WebFiles/ITS+-+sexual+assault+report+Vic+LRC+final/\\$FILE/sexual+assault+report+Vic+LRC+Final+report.pdf](http://intranet/intranet/libpages.nsf/WebFiles/ITS+-+sexual+assault+report+Vic+LRC+final/$FILE/sexual+assault+report+Vic+LRC+Final+report.pdf) Accessed on 7 June 2007.

¹⁵³ Responding to sexual assault, Available at: [http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/CJSOT%20Report.pdf/\\$file/CJSOT%20Report.pdf](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/CJSOT%20Report.pdf/$file/CJSOT%20Report.pdf) Accessed on 7 May 2007.

of changes and significant flow on effects in general police work. A major reform project was undertaken to increase accountability and oversight into police procedures.¹⁵⁴

In parallel there have been significant changes to legislation, namely the introduction of the *Acts Amendment (Family and Domestic Violence) Act 2004*. There have also been significant changes in social attitudes which have seen an upsurge in reporting, not least in regional/remote communities. As the Deputy Commissioner of the Western Australian Police put it:

*There are certainly matters coming to our attention which previously were not. I am not necessarily stating that the incidence has increased, but certainly the reporting of it is now coming to the attention of police.*¹⁵⁵

Police processes are governed by the overarching Western Australia Police General Code of Conduct, below which sit the Commissioner's Operating Procedures. The latter includes a range of sexual assault procedures. However in recent months the Sexual Assault Squad has been formed. The SAS is developing Standard Operating Procedures, which are still being refined. Included in the objectives and processes of the Commissioner's Operating Procedures are the following priorities:¹⁵⁶

- *the coordination of the police service with the Sexual Assault Resource Centre in the handling of sexual assault cases;*
- *the safety of the complainant; and*
- *the care and support of the person who has been sexually assaulted.*

These procedures also require the Officer-in Charge of the investigation to ensure that the person who has been sexually assaulted is informed of:

- *the availability and value of medical examinations;*
- *the role of counsellors within SARC and the availability and importance of counselling;*
- *the police role and the need for a detailed statement;*
- *the expected length of time the statement taking will require;*
- *the interviewing of suspects and the use of bail conditions and restraining orders; and*

¹⁵⁴ Australian Bureau of Statistics, Available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4510.0Explanatory%20Notes12005?OpenDocument> Accessed on 7 June 2007.

¹⁵⁵ Mr Christopher John Dawson, Deputy Commissioner, Western Australia Police, *Transcript of Evidence*, 29 November 2006, p3.

¹⁵⁶ Clause OP-32.3 - 7 Commissioner's Operating Procedures as provided June 2007.

- *the court process and what is expected of witnesses.*

The investigation of sexual assaults reported under Section 325 to 328 of the Criminal Code¹⁵⁷ are undertaken by investigating officers in district offices of the Western Australia Police (WAPOL) where the offender is known to the victim (about 83 % of cases), and by the 'Sex Assault Squad' where the offender is not known, or the inquiry is seen as highly complicated (about 17% of cases). The original 'Sexual Assault Squad' was closed in December 1998 with personnel and resources being distributed between the then Child Investigation Unit and the district detective offices. However, following a review by the Major Crime Division into the effectiveness of WAPOL in investigating and solving sexual assaults since the closure of the 'Sexual Assault Squad', the 'Sex Assault Squad' was constituted on 1 May 2007.¹⁵⁸

Should an offence be committed in a country district, the Divisional Superintendent of the Sex Crime Division, having considered the circumstances of the case, will make a determination as to whether the Sex Assault Squad will carry out the investigation or play a support role.

The Standard Operating Procedures recommend that every effort be made to accommodate a victim/complainant's request for a male or female officer, and that a Victim Liaison Officer (VLO) is appointed early on in the proceedings. 'The primary role of the VLO from the outset is to provide a professional service in which the victim's needs are met but at the same time identify urgent and relevant information about the case. The VLO is not the investigating officer but is pivotal to the investigation as he or she acts on behalf of the Senior Investigating Officer and the investigation team.'¹⁵⁹

WAPOL works in partnership with the Victim Support Service and the Sexual Assault Resource Centre (SARC), to produce brochures outlining the entire judicial process. These brochures are made available to victims by the investigating officers.

Police policy requires the investigating officers to maintain contact with the victim. Standard number 10 of the WAPOL Corporate Service Delivery Standards 'Updating Victims of Crime' states, "We will aim to advise victims of crime on the progress or outcome of incidents they report to us within 30 days of incident report date."¹⁶⁰

The standard also states *inter alia* that officers are expected to:

- *notify all members of the public, for whom an investigation is undertaken, of the outcome of the investigation;*
- *in the case of a live file, inform the complainant of the progress;*

¹⁵⁷ 'Frontline First' Western Australia Police, *Sex Assault Squad Charter of Responsibility*, August 2007.

¹⁵⁸ 'Frontline First' Western Australia Police, *Sex Assault Squad Charter of Responsibility*, August 2007.

¹⁵⁹ 'Frontline First' Western Australia Police, *Sexual Assault Squad Standard Operating Procedures*, August 2007.

¹⁶⁰ Email Correspondence from WAPOL 24/10/07.

- *in the case of a closed file, inform the complainant of the outcome; and*
- *provide victims of crime with contact details for future reference.*

The method by which victim/complainants are informed of the outcome of an investigation varies. WAPOL advises notification can take place either over the telephone or in person and only in exceptional circumstances, when the victim cannot be contacted by other means, will be done in writing.¹⁶¹

Research has shown that changes to substantive law do not in themselves necessarily make it easier to report sexual assault to the police, or to improving the rate of convictions. Research shows that more intangible factors such as judicial, legal and police attitudes to victims/complainants in sexual assault matters can exert an influence on how effectively the criminal justice system responds to a victim's needs.

Police processes in themselves may also be seen on occasion as presenting a barrier.¹⁶² The 1988-89 Director of Public Prosecutions (DPP) study undertaken by the Victorian Law Reform Commission highlighted that police are the key filters in the prosecution process. This filtering by police occurs both in terms of recording reports and the charging of alleged offenders.¹⁶³ This filtering, leading to a significant attrition between reporting and charging, centres on several issues:

- inability to identify the offender;
- the victim/complainant subsequently not wishing to proceed;
- the police believing that there is a lack of evidentiary sufficiency; or
- the police not believing the offence has been committed.¹⁶⁴

As one witness to the Inquiry acknowledged

By far and away the biggest complaint that I hear is that the cases are not proceeding past police. That is no reflection on the service that the police are or are not providing. It is more a case that they are bound by legislation. They need to acquire a certain level of

¹⁶¹ Email Correspondence from WAPOL 24/10/07.

¹⁶² Victorian Law Reform Commission, Available at: [http://intranet/intranet/libpages.nsf/WebFiles/ITS+-sexual+assault+report+Vic+LRC+Discussion+paper/\\$FILE/sexual+assault+report+Vic+Law+Ref+Disc+P+aper.pdf](http://intranet/intranet/libpages.nsf/WebFiles/ITS+-sexual+assault+report+Vic+LRC+Discussion+paper/$FILE/sexual+assault+report+Vic+Law+Ref+Disc+P+aper.pdf) Accessed on 8 May 2007.

¹⁶³ Victorian Law Reform Commission, Available at: [http://intranet/intranet/libpages.nsf/WebFiles/ITS+-sexual+assault+report+Vic+LRC+Discussion+paper/\\$FILE/sexual+assault+report+Vic+Law+Ref+Disc+P+aper.pdf](http://intranet/intranet/libpages.nsf/WebFiles/ITS+-sexual+assault+report+Vic+LRC+Discussion+paper/$FILE/sexual+assault+report+Vic+Law+Ref+Disc+P+aper.pdf) Accessed on 8 May 2007.

¹⁶⁴ Ibid.

*evidence. It demonstrates the challenges they have in acquiring enough evidence to lay a charge.*¹⁶⁵

While there is a clear objective reality around the issue of evidentiary sufficiency, there are additional perceptions in relation to the issue of why the police contribute to the attrition rate. One “regular issue with victims is the frequency with which they have to repeat their story, due largely to a lack of continuity of police officers involved in a case.”¹⁶⁶

Previously mentioned research shows the importance of factors such as judicial, legal and police attitudes to victims/complainants in sexual assault matters. This report, *inter alia*, canvases the Committee’s understanding of some of those factors, including those relating to the quality of some police investigations as highlighted to the Committee during the course of this Inquiry.

(b) Victims experiences with police investigations

*Crime victims require a positive response from police. The intervention by police will come at a time when the victim is most likely to be suffering from the immediate shock of the offence. Their attitude will considerably influence not only what the victim decides to do but also what impression they receive of the administration of justice and of how the community as a whole regards the offence.*¹⁶⁷

There is some belief in both legal and community circles that police tend to show a lack of investigative interest in a sexual offence complaint when the perpetrator is known to the complainant; and that they pass it on to the DPP with only a cursory investigation, believing that the DPP will move to prosecution with little regard to evidentiary sufficiency, the complainant’s statement being taken at face value. As one witness to the Inquiry, a Queen’s Counsel, put it: “because the police do not show a lot of interest in sexual assault cases, they will all go to trial; and no investigation needs to be done. They take a complainant’s statement and that is that.”¹⁶⁸ Or again, “It is not because of the lack of resources that they do not follow it up; they are not interested because it will go to trial anyway.”¹⁶⁹

As another barrister put it:

It is undoubtedly the case that police take - I am perhaps being unfair to them, but on the face of it - a very slapdash approach to investigating sexual assaults. More often than not, they simply proceed on the basis of the complainant’s statement, without checking to see whether that statement adds up to other evidence that they could easily obtain - for example, telephone records; school records, showing when they were at school or may

¹⁶⁵ Ms Michelle Stubbs, *Transcript of Evidence*, 30 March 2007, p5.

¹⁶⁶ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p 25.

¹⁶⁷ Australian Institute of Criminology, Available at: http://www.aic.gov.au/publications/rpp/19/full_report.pdf. Accessed on 16 August 2007.

¹⁶⁸ Mr Thomas Percy, *Transcript of Evidence*, 19 February 2007, p9.

¹⁶⁹ Mr Thomas Percy, *Transcript of Evidence*, 19 February 2007, p8.

*have been on holidays; passport records to show whether the accused may or may not have been in town and that kind of thing.*¹⁷⁰

The mother of one victim also raised concerns over what she felt was the deficient attitude of the police investigating the case of sexual assault involving her daughter:

“Initially, it took even a week before we could get a female police officer to interview her and then the initial investigation was very basic.”

This was also reflected in another submission by a mother of a six year old girl assaulted and bound by an adult member of her family. In this instance the initial interview by non metropolitan police was reportedly twice deferred by many weeks because of other pressures on their time and interviews of the assailant was delayed by over a year:

*I have never had any contact from the police about this matter. I have always made the contact and have never been contacted even though I provided both home number and mobile.*¹⁷¹

*As it appears the police moved so slowly to make enquiries about the case [it took over one year], this really lessens its seriousness ... **** of Mandurah police said realistically only a small proportion of cases can go forward. In that case, the behaviour of the police affects people’s attitudes whether the case goes to court or not.*¹⁷²

In yet another submission a victim/complainant described her frustration with police process after being bounced from Midland police station to Fremantle and ending up finally at Wembley:

*I called Wembley detectives and was told that all of the detectives were out chasing an armed robber and that someone would have to call me back. He said I would have to give him my story, again. When I replied that SARC had told me I should not have to keep telling my story again and again to people who aren’t having anything to do with my case, he said I had to tell him. Later, a female Wembley detective called me. We made an appointment for the following morning for me to give a statement at the Wembley detective offices.The next day I was finally allowed to give my statement. It had taken 5 days of bowing and scraping to be allowed to make a statement. The endurance and fortitude required in a time of severe debilitation cannot be underestimated.*¹⁷³

A focus group of 13 ‘survivors’ of sexual assault conducted on 9 July 2007, the results of which are to be found in Appendix 1, raised several points with respect to the police investigation. *Inter alia* it was noted that there were positive experiences where police understood and specialised in working with children, but that there were significant negative experiences where the complainant

¹⁷⁰ Ms Belinda Lonsdale, *Transcript of Evidence*, 19 February 2007, p7.

¹⁷¹ Submission No. 22, 27 July 2007, p4.

¹⁷² Ibid p6.

¹⁷³ Submission No. 26, 6 August 2007, p24.

was, “shunted from one police officer and station to another before finding the right person.”¹⁷⁴ In addition some police officers were felt to be inappropriate to the case, for unstated reasons. The complainant’s position was not improved by the continual change in the identity of police officers working with the complainant.

The perception of a deficient attitude of the police investigating a case of sexual assault is seen as a type of re-victimisation and is often the cause of victims not proceeding with the complaint

Unsurprisingly perhaps, the lack of opportunity to be interviewed by a female officer was also seen as ‘problematic’ by some.

Finding 5

There are broad based community perceptions of shortcomings in the police investigatory approach to cases of sexual assault. Such perceptions are shared by members of the legal profession. This is often attributable to a lack of investigatory interest by the police in sexual offences where the alleged perpetrator may be known to the victim.

Secondly, for any interviewing officer there will be an inevitable subjective assessment factor of the case and the victim/complainant. Research suggests¹⁷⁵ that such assessment factors include both evidentiary matters and credibility factors such as whether there was a history of drug and alcohol abuse, whether a weapon had been used, whether the victim/complainant had reported the matter promptly, and was co-operative with the police.

As one victim reported to the Committee:

*When I finally made a time to arrange a statement, the officer told me that being drunk meant that I could have given consent and just not remember. I told her that my drink was spiked, but got a similar response. She told me that a woman just recently was raped by five different men, and because she was drunk, of her own accord, the charges she had laid against the men couldn’t lead to prosecution because she had brought it on herself. This was crushing to say the least. A rape, with witnesses, is un-prosecutable because of the victim purchased and consumed alcohol? I was so confused and disillusioned that I put off making a statement for a little while longer.*¹⁷⁶

Such research also suggests that police officers will generally stereotype offenders and victims as well as offence situations. These typifications influence subsequent police decisions and actions,

¹⁷⁴ Submission No. 23 from Reclaiming Voices WA, Survey Refer Appendix, 3 August 2007, p6.

¹⁷⁵ Frazier, P.A. ‘Sexual Assault cases in the Legal System: Police Prosecutor, and Victim Perspectives’, *Law and Human Behaviour*, Vol. 20 No.6, 1996, pp607-628.

¹⁷⁶ Submission No. 19, 26 July 2007, p2.

even though they may be based on stereotypical behaviour.¹⁷⁷ This was exemplified in one witness's testimony to the Committee:

I asked whether they had interviewed the older boys and they were not interviewed until we got the other detective involved. I am trying to think that this is not the detectives [attitude] - this particular mindset. When we went early on the [first] detective said to us, "I can tell when people are telling me the truth or not." He is telling this to a mother whose girl has just been assaulted!! He said, "I can tell. For example, a few months ago there were two girls who came in to me and they said that they had met some boys at a pub and had gone back to their house with them and they had all been drinking and they were sexually assaulted." He said, "They came in and they told me that." He said, "We interviewed both of them and both of their stories were all over the place. One said this and one said that, so we rang the men up and a few days later they came in and their stories matched; they corroborated each other. We can tell." This is the story he told me and I thought, hang on, it does not take much grey matter to know that these boys have got together and made sure it is corroborated and the girls are traumatised. Anyway, that was the attitude.¹⁷⁸

Finding 6

Prevailing myths and stereotypes prejudice the individual police officer's objectivity in some cases of sexual assault.

(c) Police conflict of interest

In three instances that came to the Committee's attention, the police investigation was seriously compromised in the victim/complainant's eyes by the investigating officer's relationship with members of the accused or their family. In one instance the chief suspect was the investigating detective's son, and it was not until the victim's mother lodged a formal complaint with the Western Australia Police that any action to remedy this situation was undertaken.¹⁷⁹

In another instance the victim withdrew because of such a pre-existing relationship between the investigating officer and the offender.

To hear the policewoman 'may' have slept with a family member absolutely prevented me carrying through with my complaint. I feel the Police handling of my case by this lady was

¹⁷⁷ Soulliere, D.M. 'Pathways to attrition: A qualitative comparative analysis of justifications for police designations of sexual assault complaints', *The Qualitative Report*, Vol. 10 No. 3, 3 September 2005, pp416-438.

¹⁷⁸ *Transcript of Evidence*, 30 March 2007, p5.

¹⁷⁹ *Transcript of Evidence*, 30 March 2007, p9.

*totally unprofessional. The need for properly trained Police persons so that survivors are not re-victimised is imperative.*¹⁸⁰

In a third instance the relationship appears to have possibly contributed to the case subsequently not going forward.

*Another thing that concerned me was that I was aware that [name of the accused] had a friendship with a policeman and that [name of the accused] had really wanted to be in the police force but had colour blindness that made him ineligible. One interview had to be cancelled at the last minute because [name of the accused] wife had a friendship with the interviewer's wife. One could get paranoid about this but I decided that I could only hope that these human factors would not influence objectivity.*¹⁸¹

The police policy in this area of impartiality appears to be lacking and the practice is one of what 'ought to happen' rather than what 'must happen'. This implicitly allows a police officer to continue with the investigation, despite a pre-existing relationship, without disqualifying themselves. This is so even as the perception of a lack of impartiality is acknowledged by the Commissioner.

*My view would be that the police officer should disqualify himself in a situation like that. That can only lead to criticism about lack of independence. We are more careful these days to make sure that there is a degree of independence; that offenders and investigators are not known to each other*¹⁸²

Finding 7

There are occasions where justice 'being seen to be done' is compromised by some of the investigating police officers due to their relationship with the alleged offender. There is a lack of a definitive policy in this area.

Recommendation 3

The Commissioner of Police immediately ensures that any officer be prohibited from investigating any offence where the investigating officer has or has had a familial or personal relationship or any other conflict of interest with the alleged offender, victim or their family.

¹⁸⁰ Submission No. 24, n.d., p2.

¹⁸¹ Submission No. 22, 27 July 2007, p6.

¹⁸² Dr Karl O'Callaghan, Police Commissioner, *Transcript of Evidence*, 19 September 2007, p9.

(d) Police attitudes towards the victim in the investigation

As outlined previously, there are a number of victims' experiences of the justice system, most notably with the police, that led to the non-reporting in a number of cases of sexual assault. These included:

*Experiences of the Justice System*¹⁸³

- *Police would not or could not do anything*
- *Police would not think it was serious enough, or would not want to be bothered with the incident*
- *Fear of not being believed by police*
- *Fear of being treated hostility by police or other parts of justice system*
- *Fear/dislike of police*
- *Fear of the legal process*
- *Lack of proof that the incident happened*
- *Did not know how to report*

The Committee found that the experiences of a number of those making submissions to this Inquiry reinforce more generally held public perceptions:

*Some police officers ask questions in a way that is very intimidating and non-believing.*¹⁸⁴

Some other perceptions arise from the differing positions of the two parties, the victim and the police. As an example it has been suggested by the Attorney General's Department of NSW that victims may perceive a lack of commitment by police.¹⁸⁵ However police will sometimes feel the need to warn victim/complainants of potential weaknesses in their case, especially evidentiary deficiencies, as in this example given to the Committee:

¹⁸³ Australian Institute of Criminology, Available at: <http://www.aic.gov.au/conferences/policewomen3/lievore.pdf> Accessed on 7 June 2007.

¹⁸⁴ Submission No. 23 from Reclaiming Voices WA, Survey, Refer Appendix, 3 August 2007, p6.

¹⁸⁵ *Responding to sexual assault: the way forward*, Attorney General's Department of NSW, Oxford Publishing Sydney, 2005, p12.

*There was a boy who had come forward and said that he saw someone putting something in her drink. I said to the detective why do not [sic] you go and interview him. He said, "Oh no, that is all hearsay".*¹⁸⁶

Warnings on the quality of evidence and police officers' early assessments of the difficulties of prosecution and conviction may be interpreted by complainants as discouragement to continue and such warnings can deter some and even lead to withdrawal by other complainants.¹⁸⁷

Police attitudes in some cases were hard to interpret as a result of concern for the victim in the prosecution process as, from the victim's perspective, they appeared to be aimed at discouraging the complaint:

*We ended up ringing the police and asking them if we could have a forensics number so that we could check it out ourselves and we felt quite intimidated because we were told that because we had rung and asked for the number that could be used in court against us in that we were trying to do something with the forensics. The detective said that he would have to write down that we had contacted him to get hold of that. A lot of the way through it - at one point we ended up getting legal advice ourselves to see why it was like this because we were worried about it being the detective's son. The lawyer sent a letter to them asking for information on whether they could send anything. That was taken very negatively; in fact, the police officer came over to my husband with another police officer and said, "This could work against you by getting a lawyer involved." It was a really horrible time.*¹⁸⁸

For some witnesses, there was a strong understanding that police were far too busy to meet the needs of the victim/complainant:

*He [father of young sexually assaulted girl] was given the impression that the police are very busy, they have lots of matters to attend to and taking up their time by providing this information is potentially detracting, for want of a better word, from their proper work. I understand that victims of crime are not the core business of the police. Whose core business are they?*¹⁸⁹

or again:

*The detective involved in it repeatedly told us how busy he was, that this was a serious case, but he had a lot of other cases that he was working on as well. I really felt that he was - at times I felt sorry for him because he seemed to have a lot of work on as well.*¹⁹⁰

Often this heavy work load was reflected in police responses to new information:

*When he came and met [name of detective] and said about being quite shitty about the lawyer being involved, he said, "And now I've got a doctor's report saying she was too intoxicated to give consent!" It was like, "Oh no, now I've got another problem."*¹⁹¹

¹⁸⁶ Transcript of Evidence, 30 March 2007, p4.

¹⁸⁷ Wilson, D. and Fowles, T., 'Penal Policy File No. 100', *The Howard Journal*, Vol.44 No.33, July 2005, pp326-332.

¹⁸⁸ Transcript of Evidence, 30 March 2007, p4.

¹⁸⁹ Ms Michelle Stubbs, Victim of Crime Advocate, *Transcript of Evidence*, 30 March 2007, p7.

¹⁹⁰ Transcript of Evidence, 30 March 2007, p3.

Finding 8

Police under-resourcing and a lack of clear policy direction inhibit best practice in the investigation of sexual assaults.

The Committee notes in contrast to the difficulties previously cited, some witnesses were complimentary about the manner in which individual police officers conducted themselves, for example:

On a positive note, I want to praise the detective [name of detective], who worked on this case. He was so nice and made me feel very good about my choices. The police have been wonderful in my experience and a positive part of the process¹⁹²

and:

After we had been to police complaints, we got hold of a very good district office detective who became involved and suddenly it was a very serious case and, within a few months, things were dealt with.¹⁹³

The mother of one rape victim commented:

*Detectives [name of detective] and [name of detective] were amazing from the very first moment my daughter met them at ***** School. They were professional and did their job quickly and efficiently to obtain the maximum amount of evidence. My daughter was and is very grateful for their care and support throughout the immediate events, and I appreciate very much their continuous contact with me and their promise to care for and protect my daughter throughout the immediate events and personally drive her home to ***** (in an un-marked car) to meet with me. It was a difficult time, but their professionalism and genuinity was warm under the circumstances and I appreciate that so very much.¹⁹⁴*

or more generally:

[It's] particularly great when officers go out of their way to keep the victim informed of what is going on and they can have ready access to the officer should problems arise.¹⁹⁵

¹⁹¹ Transcript of Evidence, 30 March 2007, p6.

¹⁹² Submission No. 11, 17 May 2007, p2.

¹⁹³ Transcript of Evidence, 30 March 2007, p3.

¹⁹⁴ Submission No. 21, 27 July 2007, p1.

¹⁹⁵ Submission No. 23 from Reclaiming Voices WA, Survey Refer Appendix, 3 August 2007, p6.

Finding 9

While there is an obligation on police to provide a professional and sensitive response to sexual assault cases, the work load placed on police leads to highly individualised experiences by victims.

In the United Kingdom a number of pilot programs have been established which look at the reasons for victim/complainant withdrawal from the judicial process. These include determining victim satisfaction rates at each stage of the process. The purpose is to improve quality and identify gaps.¹⁹⁶ In California, a similar survey form is distributed to victims of sexual offences which seeks to evaluate the police response to individual rape or sexual assault cases. It can be also be used as a means to provide feedback to a police department on how police response to rape and sexual assault can be improved. The form is divided into three sections:

*The Initial Police Response, the Victim Interview, the Investigation Follow-Up. The majority of questions focus on the police interview of the victim. This is because, compared to other crimes, the investigation of sexual assault relies more heavily on the victim interview. In addition, many of the questions pertain to the victim's comfort and safety in the investigation process.*¹⁹⁷

The Western Australia Police, while running satisfaction surveys from time to time on general policing services such as property crimes, burglaries, and assaults, have not done any work on a specific survey instrument for victims of sexual offences, although indicating to the Committee that they would be amenable to undertaking this and viewing it as a worthwhile initiative.¹⁹⁸

Recommendation 4

That the Western Australia Police, the Office of the Director of Public Prosecutions, the Sexual Assault Resource Centre, the Victim Support Service, the Office of the Public Advocate, and the Courts design reliable and valid victim satisfaction instruments appropriate for each agency. The results must be published in each agency's annual report or equivalent.

¹⁹⁶ Mr David Gee, Advisor, Home office, *Transcript of Evidence*, 3 September 2007, p9.

¹⁹⁷ Women's Justice Centre, 'Form for Evaluating Police Response to Rape and Sexual Assault', Available at: http://www.justicewomen.com/help_rape_evaluation.html. Accessed on 27 September 2007.

¹⁹⁸ Dr Karl O'Callaghan, Police Commissioner, Western Australia Police, *Transcript of Evidence*, 19 September 2007, p11.

(e) How the age of the victim impacts on police investigation and subsequent prosecution

The Child Interview Unit (CIU) was established in 2004 as a joint initiative by the Department of Community Development (now Department for Child Protection) and the Western Australia Police. It was established to interview children to assess their ongoing safety needs and gather evidence for court proceedings. Trained specialist interviewers are engaged to reduce trauma in the children. In particular the CIU will interview:

- Children who have made a disclosure that they have been sexually or physically abused; and
- Children who have witnessed a serious physical or sexual assault of another child or an adult.¹⁹⁹

In contrast to adult victims, measures are in place to reduce the need for child victims to retell their experiences:

In November 2004 the unit moved from handwritten question and answer format interviews into electronically recorded interviews that become statements of evidence that can be presented in court by virtue of amendments made to the Evidence Act during 2004. The gathering of evidence in this way reduces the number of times a child needs to retell his or her story (evidence) and also reduces, but does not eliminate, subsequent need for attendance in court.²⁰⁰

These interviews are child centred, and while prosecutions of offences against children under six years of age are exceptional without additional physical or witness evidence, the CIU interviews all children regardless of age, sometimes as young as two years old.²⁰¹

Interviews are conducted according to world's best practices with the 'Forensic Four Phase Interview'. This is generally considered the current benchmark. The four phases include:

- rapport building;
- free narrative;
- clarification; and
- closure.²⁰²

¹⁹⁹ Australian Institute of Family Studies, Available at <http://www.aifs.gov.au/acssa/docs/WAFSAS/voyez.pdf>. Accessed on 3 August 2007.

²⁰⁰ Department of Premier and Cabinet, Available at <http://www.gordonresponse.dpc.wa.gov.au/docs/GordonNewsletterJune2005.pdf>. Accessed on 3 August 2007.

²⁰¹ Submission No. 20, 27 July 2007, p6.

The WA Four Phase Forensic Interview model has combined elements from the US, Baltic States and England and Wales to ensure the model meets the unique needs of WA.²⁰³

The interview is designed to make the child feel as comfortable as possible in retelling his or her account.

However there are several pressures on the CIU that affect the conduct and subsequent playback of the interviews that are at odds with both how some children disclose abuse, not least having regard to their various developmental stages, or trauma experienced. Such pressures also conflict with the Four Phase Interview process outlined above.

Submission 20 notes that:

[There is an] expectation by prosecutors and judicial officers that child witnesses need to behave like mini adults when being interviewed: This is demonstrated by requests to make sure the children are wearing appropriate clothing (like they are going to court or somewhere important), that children behave well, that interviews contain no frivolous behaviour or humour (often a part of relaxing the child and building or maintaining rapport).

[There are] requests to keep the duration of interviews short and to record only certain parts of the interview (to save editing and minimise the length of the recording): This request impacts on the interview process placing additional stress on interviewers. There was no similar requirement on interviewers prior to visual recordings, written statements could be taken in a relaxed environment and manner. Acceptance of lengthy interviews is certainly not being advocated, rather this is being used as an example of the expectation of making children fit court perceptions of how all witnesses will behave and speak in a succinct and sequential manner.²⁰⁴

Submission 20 comments that feedback from the DPP is that both jury members and even judicial officers become bored with long interview tapes and that this 'boredom' then dictates the interview process so as to make the tape 'court friendly'.²⁰⁵ The problem is that children need to tell the story at their own pace.

Consideration was given in 2007 by the DPP to possible editing of interviews however this resulted in confusing or disjointed recordings which would have impacted on the quality of evidence.²⁰⁶

²⁰² Department of Premier and Cabinet, Available at <http://www.gordonresponse.dpc.wa.gov.au/docs/GordonNewsletterJune2005.pdf>. Accessed on 3 August 2007.

²⁰³ Australian Institute of Family Studies, Available at <http://www.aifs.gov.au/acssa/docs/WAFSAS/voyez.pdf>. Accessed on 3 August 2007.

²⁰⁴ Submission No. 20, 27 July 2007, p6.

²⁰⁵ Submission No. 20, 27 July 2007, p5.

²⁰⁶ Submission No. 20, 27 July 2007, p8.

Finding 10

There is a tension between the requirements of the courtroom and the needs of a child in the recording of interviews. The consequence is that the recording of children's interviews, while attempting to satisfy the needs of the court, may be undertaken in a manner that does not fully recognise the developmental stages of the child witness.

(f) Child development and the reliability of evidence

Delays in getting a case of child sexual assault to trial may have significant bearing on the evidentiary process and consequent attrition.

There are many issues around the cognitive and behavioural development of children that carry implications for the reliability of the evidence of child witnesses.

*Children under the age of six have not yet learned about relative size... A child will experience a given time period not according to its actual duration, measured objectively by calendar and clock, but according to his purely subjective feelings of impatience and frustration... The child's recall of events is surprisingly deficient.*²⁰⁷

Yet time, for instance, is often of a critical issue in establishing a defendant's alibi:

*Two years is a long time for a child who was six at the time of the offence and is eight when he rocks up in court. I arrive as a witness and think, "Who on earth is that?" It is the child I saw two or three years ago. The difference between a five-year-old and an eight-year-old is profound.*²⁰⁸

Consequently, there is the issue of the appropriate time frame from when the offence occurred to when the case comes before the courts, which one witness suggested as ideally being:

*Probably two or three months, that would not be unreasonable as the child's rehabilitation is otherwise impaired. ...because often the child is in a limbo state of what he or she can do. The criminal justice system and the protective system are two different systems. The protective system might want to move but cannot actually move until the criminal justice system is sorted, because you cannot contaminate the child. No-one does anything for the child for two years while we are waiting to go to court to try Fred Smith.*²⁰⁹

Interviewing children is recognised as a difficult task. The Queensland Sexual Crime Investigation Unit for instance uses a 'free narrative' approach.²¹⁰ In Western Australia, in line

²⁰⁷ IPT Forensics, Available at: http://www.ipt-forensics.com/journal/volume1/j1_2_5.htm Accessed on 7 June 2007.

²⁰⁸ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p6.

²⁰⁹ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p8.

²¹⁰ Detective Inspector Cameron Harsley and Detective Acting Inspector George Marchesini, Queensland Sexual Crime Investigation Unit, *Briefing*, 3 July 2006.

with the comments made by Submission 20, Dr Peter Winterton, Medical Director of the Child Protection Unit at Princess Margaret Hospital for Children attended a Hearing having come straight from a meeting of affected mothers. He advised that the interview process was (in his and these mothers' view) still far from perfect:

What the ladies this morning were complaining about, and in my humble opinion with validity, is that kids are expected to spill their guts in a one-off interview. As you and I know, that is totally far-fetched. As I mentioned earlier, I have been in active clinical practice for 30 years. It is amazing what you think you know about your patients but do not have a clue about, because they have never told you or, I daresay, you have never asked them. The fundamental belief that someone is going to give their whole story in a one-off interview is unfounded. The whole idea of the CIU interview process in the first place was to minimise the number of times children had to disclose. That is sound, but it has reached the point where I was criticised by my social work colleagues for asking kids questions. I rebelled at the kids' hospital. I caused open revolt, because I maintained, will continue to maintain and will continue to practice the fundamentals that I was taught; that is, following the Hippocratic tradition of taking a history and performing an examination. The history is part of the process of ascertaining what is wrong. From the legalistic point of view, of course, I am told by my legal colleagues that I am "possibly contaminating the evidence". For example, Freddy Smith tells me that Uncle Bill assaulted him in the shed at the back where the tractor is. If Freddy Smith has told the coppers that Uncle Bill assaulted him in the shed where the car is, of course this is just "hay" for the legal profession, because Freddy Smith does not know the difference between a tractor and a car. How can you believe what Freddy Smith says about Uncle Bill if he cannot tell the difference between a tractor and a car? I am told that you are not allowed to particularise things. There is a lot of discussion about this.

A kid may come along and say, "My dad beat the shit out of me." You ask, "Can you tell me with what?" So Johnny Smith tells you, "With a belt." You then ask, "What colour was the belt?" "It was brown." When the police have spoken to Johnny Smith and he has told them that it was a black belt, I may again have caused another heyday for some happy lawyer, because he can now use the inconsistencies. There are problems even before you get to court.

Dr Winterton was then asked whether there had been a change in practice in recent years and if in particular he now had to submit the exact questions he had asked the child:

It was looser, but now it has become a lot tighter. I suppose there are more lawyers around and they are all a lot hungrier. I honestly do not know. I think everyone is trying to be more politically correct than they were, but it has created problems. In essence, when you are talking in a clinical setting to a child, if you are going to break the ground and break the ice you have to ask some of these questions. If you sit there in a stereotyped manner with a dicta-phone or with note and question, no child is going to tell you anything..... As you can see, there are problems even before you get to court.²¹¹

²¹¹Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p6-7.

Deficiencies in interview techniques will inevitably affect the quality of evidence and the subsequent decision as to whether to proceed to prosecution.

Some other jurisdictions have sought to overcome the potential deficiencies in handling child related sexual offences, together with the subsequent deficiencies in briefs, by developing a formalised collaborative interagency approach.

Most notably in New South Wales (NSW), the 'Joint Investigation and Response Team' (JIRT) has been established as a response to operational deficiencies. JIRTs are made up of Department of Community Services (DoCS), NSW Police and NSW Health professionals who undertake joint investigation of child protection matters. They link the risk assessment and protective interventions of DoCS with the criminal investigation conducted by Police.

JIRT's focus is, in part, to achieve for children, young people and families better outcomes from the joint investigation. This is achieved by conducting investigative interviews in an environment that is focused on the child or young person, promoting their participation and enhancing the standard of briefs of evidence presented to Court jurisdictions.²¹² The latter together with the operational details of JIRT are fully covered in Chapter Five. At all times a high level of communication is maintained between DOCS, Health and JIRT. The response process to complaints is interagency and formalised.²¹³

By contrast, in Western Australia allocation and decision-making is largely police driven. All police child abuse investigations are the responsibility of the Child Protection Squad OIC (a separate unit of WAPOL). The Child Interview Unit provides a service to this Squad and it is considered by some that investigating officers (detectives) can be a law unto themselves (as long as they get the job done) and routinely cut corners, and ignore policy. Additionally the connection to the Department of Health is much weaker in this state.²¹⁴

In NSW there is a mandated response to any child interviewed by JIRT in terms of an assessment of protectiveness. This is not the case in WA with Department of Child Protection (DCP) generally only acting where protective factors are more obviously absent.

Submission 20 argues that, with respect to interviewing children, the interview process is further weakened at times

by the lack of coordination across agencies, lack of information gathered and lack of preparation of the child and family about the process of interview and what will happen next. Task focus - 'get her in and have a go at talking to her' - will be the preferred method rather than spending time visiting, providing information, or cancelling the

²¹² NSW Department of Community Services, Available at http://www.community.nsw.gov.au/html/comm_partners/childprotection_jirt.htm. Accessed on 8 August 2007.

²¹³ Detective Superintendent Helen Begg - Commander Child Protection and Sex Crime Squad and Detective Chief Inspector Janice Stirling Briefing, 4 July 2006.

²¹⁴ Submission No. 20 27 July 2007, addendum p4.

*interview and trying another day because of the fear and anxiety a child may have (usually due to lack of preparation).*²¹⁵

There is a feeling that the different cultures of the Western Australia Police and CPU reflect some of the difficulty with “social workers seen to be ‘fluffing about’ vs. police ‘have a go’ response.”²¹⁶

Recommendation 5

The Office of the Director of Public Prosecutions, the Western Australia Police, the Child Protection Unit, the Department of Health and the Child Interview Unit review a range of formalised interagency collaborative models for working with victims of child sex offences with a view to improving the quality and recording of interviews, evidence, and briefs.

Submission 20 has recommended that a United States model for child interviewing known as ‘Extended Forensic Evaluation’ be considered as an alternative method. Designed by the National Children's Advocacy Center, this model recognises that not all children are able to disclose offences against them in a single interview and is designed for those cases where:

- 1) the child does not disclose abuse to investigators, but exhibits behaviours or other indicators strongly suggestive of victimisation,
- 2) the extent or nature of abuse is not disclosed by the child during the initial investigative interview, or
- 3) when the information gathered in the initial investigative interview needs further clarification.²¹⁷

Despite the self evident difficulties prevailing in these situations the resultant judicial outcomes for ‘Extended Forensic Evaluation’ appear promising:

Following a 2-year pilot study at the NCAC (Carnes, Wilson, and Nelson-Gardell, 1999), 22 professionals at approximately 20 sites across the United States adopted the model and collected data on its efficacy for a two-year period. The pilot study had shown that 47% of children referred for forensic evaluation ultimately disclosed in a credible manner, and that a court finding supported 71% of those cases further. The multi-site study replicated pilot study findings: in 44.5% of the cases, a credible disclosure was obtained, with 73% of these cases supported in the legal system. Combining cases with credible disclosures and

²¹⁵ Submission No. 20, 27 July 2007, addendum p2.

²¹⁶ Submission No. 20, 27 July 2007, addendum p2.

²¹⁷ National Children's Advocacy Center, Available at http://www.nationalcac.org/professionals/model/forensic_eval.html. Accessed on 3 August 2007.

*cases where abuse was determined unlikely, the forensic evaluation procedure yielded credible factual information to be used in child protection and prosecutory decisions in 64% of the cases.*²¹⁸

Such an option would, it is believed, overcome the presenting issues of interview length and editing.

Recommendation 6

The Office of the Director of Public Prosecutions, the Western Australia Police, the Child Protection Unit and the Child Interview Unit jointly explore the 'Extended Forensic Evaluation Interview Model', to assess its suitability in the Western Australian judicial environment.

(g) Police training needs

*The reality is that we have an ill trained police force with no time to deal with this crime*²¹⁹

The information provided to the Committee from many different sources strongly highlights the need for a more focussed approach to police training both in general and in all areas relating to sexual offences.

(i) Training needs identified by the Dante Arthurs case

For instance, in the area of investigatory competence, the case of Dante Arthurs highlighted a clear failure of process. It shocked both the Committee and the community at large that critical forensic evidence (the victim's blood on Dante Arthurs' shorts) was overlooked in the 2003 investigation until the cold case review, ordered by the DPP, was conducted in September 2007. This came about as a result of the murder of Sofia Rodriguez-Urrutia-Shu.

The conduct of the officers during the 2003 interview resulted in that recorded interview being rejected by the Director of Public Prosecutions and the case being discontinued. This rejection of the recorded interview was compounded by the failure of the police to process all available forensic evidence. This fact was not conveyed to the ODPP. These failures meant that there was insufficient evidence to proceed to prosecution in 2003.

With respect to the interviewing detectives' failure to follow standard operating procedures with Dante Arthurs in 2003, the Commissioner of Police candidly commented that

²¹⁸ National Children's Advocacy Center, Available at http://www.nationalcac.org/professionals/model/forensic_eval.html. Accessed on 3 August 2007.

²¹⁹ Submission No. 3, n.d., p2.

*My gut feeling is that this is not a one-off incident. It is nice to say it happens rarely and we do not have any evidence of it happening more often, but if it happens like that, then my gut feeling is that it can happen again, and may be happening again. We need to do something to mitigate that problem.*²²⁰

He went on to state that he was “so concerned about it that I have spoken to the UK police about the systems in place over there. I have recently been there to talk to them. I wanted to do that because I wanted to understand how they have dealt with this problem.”²²¹

Finding 11

There were singular and as yet unexplained deficiencies in the investigation of Dante Arthurs in 2003. These deficiencies are likely to be systemic.

Committee Comment: The Committee applauds the Commissioner of Police’s proactive response to the possibility of a systemic deficiency in the investigation of major crime and supports his inquiry into the United Kingdom’s approach to dealing with this problem.

Recommendation 7

The Western Australia Police include on the list of exhibits collected a column denoting the action, if any, taken in respect to each piece of evidence and the status of that action. The list of exhibits will then be signed by a senior police officer and attached to the relevant brief before that brief is forwarded to the Director of Public Prosecutions.

Recommendation 8

The Minister of Police and Emergency Services provides full support for the introduction of those systems that the Commissioner of Police recommends for the improvement of police investigatory process in Western Australia.

²²⁰ Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008 p9.

²²¹ Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008 p9.

(ii) Training and the need for a change of police culture

The Commissioner of Police whilst recognising this need for improved training of his investigatory officers also acknowledged that there is a linkage to the need to change police culture at the same time. “This issue is partly training and partly cultural in my mind. We can say that a lot of things can be solved by training, but they also need to be solved by cultural change and an attitude that, in all instances, the quality of these interviews is of paramount importance.”²²²

It is recognised that currently much of existent police training focuses on recruit training, and when the recruits go into the police workforce they “hit a bit of cultural hurdle. They are told, “Forget about what you learnt at the academy; this is the way we do business.”²²³ It is recognised that to overcome this hurdle the police will need to provide ongoing training at supervisory and detective level to ensure that “You do business the proper way, you do it professionally, you do not cut corners, you do not do things unlawfully, and these are the sanctions that will apply if you do not do that.”²²⁴

Areas of training shortfalls were identified by respondents to the Inquiry more specifically as follows:

(iii) General training needs

The need for additional police training was seen as particularly pertinent in a number of specific areas such as investigatory competence, the lack of empathy and the lack of knowledge of their own police processes. It is vital that police have training providing an understanding of children’s physical and psychological development . All these factors were raised at different points in the Committee’s investigation.

In another example relating to police training needs, the previously mentioned focus of group of 13 ‘survivors’ of sexual assault believed that police dealings with complainants would be substantially improved if there was specific training on the trauma and subsequent psychological issues and needs of victims of sexual assault:²²⁵

Sexual assaults are (and in 95% of cases are still) handled by whatever local detective was unfortunate enough to be assigned the “rape case”. The police have stated that the officers that handle sexual assaults usually have taken a couple of extra courses. It is manifestly inadequate to assert that a few extra hours means the detectives know what they are doing, but more importantly, it means that any detective can be assigned to sexual

²²² Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008 p9.

²²³ Mr Christopher Dawson, Deputy Commissioner of Police, *Transcript of Evidence*, 13 February 2008 p16.

²²⁴ Mr Christopher Dawson, Deputy Commissioner of Police, *Transcript of Evidence*, 13 February 2008 p16.

²²⁵ Submission No. 23 from Reclaiming Voices, 3 August 2007, p2.

*assault cases. This clearly flies in the face of logic. Not every detective is suited to investigating and charging sexual offences.*²²⁶

Yet another submission suggested that “Police and other legal and forensic workers need education and training about the ways in which therapy can work without compromising evidence and, conversely, therapists need education and training to ensure that they do not overstep evidentiary process.”²²⁷

Training overseas in the United Kingdom and the United States around child protection and offences against children is significantly in advance of the training offered Western Australian justice personnel working in the area of sexual abuse. Detectives in the Child Protection Squad WA have no training in child development, child abuse, or perpetrator research.

In the United Kingdom, training in investigating child abuse is layered - all members of the Metropolitan Police Child Protection Squad (including Inspectors and Superintendents) attend a week’s training on child abuse issues. Further joint training with social workers takes one week, interviewing another week, and advanced interviewing another, all essential for the squad. Additional training is available for interviewing disabled children.

In the United States the American Prosecutors Research Institute (APRI) is leading training. In 2003 APRI entered into an historic relationship with Winona State University (WSU) to create the National Child Protection Training Centre (NCPTC).²²⁸ The intent is that by 2010 half the nation will have adopted a training program for all of its child abuse investigators, prosecutors, CP workers, in forensic interviewing.²²⁹

There is recognition, by the Commissioner of Police and WAPOL, of the need to develop a training regime based on the English model. To this end the WAPOL have recently invested \$500,000 in curriculum development.²³⁰ However there is also an issue of scarce resources, both human and financial. The difficulties of creatively addressing the human resource issue was exemplified by an as yet unfulfilled promise of the Government to release the majority of police officers from the East Perth watch house by outsourcing that work. Those officers so released would backfill 21 detectives who would then make up a task force meeting the needs of rural remote areas, in particular the Kimberley. Whilst WAPOL views the matter as urgent it is their view that the sense of urgency is not shared by those departments responsible for the change of arrangements.²³¹

²²⁶ Submission No. 26, 6 August 2007, p7.

²²⁷ Submission No. 25 from SafeCare, 6 August 2007, p11.

²²⁸ The American Prosecutors Research Institute, Available at http://www.ndaa-apri.org/publications/newsletters/apri_highlights_ncptc_autumn_2003.html. Accessed on 7 August 2007.

²²⁹ Hall, N. ‘Advocacy Centres in Australia - A way forward’, Paper presented to the Winston Churchill Memorial Trust, 2006.

²³⁰ Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008, p16.

²³¹ Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008, p15.

The ongoing operational cost of providing layered training to the police force in the manner envisaged is estimated at approximately \$2 million *per annum*. At the present time the police do not have the financial resources to conduct the training in the manner proposed.²³²

Finding 12

There is a need for enhanced training to be provided for general duties police and detectives to ensure a more sensitive and supportive response to victims who report they have been sexually assaulted.

Recommendation 9

The Government provides the additional funds required to implement the new curricula for ongoing training and professional development to investigating officers and detectives.

Recommendation 10

The Government expedites the recruitment of extra security personnel, other than police officers, to manage the East Perth Watch House.

(iv) Training with respect to those with an intellectual or decision-making disability

As noted in Chapter Six, the Office of the Public Advocate comments that police may believe, wrongly in many cases, that a victim with an intellectual or decision-making disability will be unable to make a statement and follow the complaint through the criminal justice system. However, the Law Reform Commission of New South Wales argues that because it is difficult to prevent such mistaken beliefs through legal reform, the issue largely becomes one of appropriate training in relation to identification and questioning of the perpetrator.²³³ This would equally apply to the questioning of the victim.

In addition, it is generally accepted that children who suffer sexual assault require specialist services. There are no similarly trained staff provided for adults with intellectual or decision-making disabilities according to the Office of the Public Advocate. In particular this includes

²³² Dr Karl O'Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008, p17.

²³³ Law Reform Commission of NSW, Available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP29CHP9>. Accessed on 2 August 2007.

those who work with the Sexual Assault Squad of the Western Australia Police, but also extends to the police at the initial interview, the DPP and the courts at the prosecution stage.²³⁴

There is a need for the Sexual Assault Squad to receive training on how to work with people with decision-making disabilities. The absence of this specialised training is a significant and critical gap in the area of victim support for people with decision-making disabilities. In the same way that people working with children must be trained appropriately, it is important that the Squad is equipped with the necessary expertise to do their job effectively and to provide the support that is appropriate for the client group. Training is also necessary (and currently lacking or inadequate) for staff at all other levels of the process—including the police at the initial reporting stage, courts and the Office of the Director of Public Prosecutions.²³⁵

Finding 13

The identified shortcomings of police dealing with people who have an intellectual or decision-making disability demonstrate that there is a need for specialised training to be provided. The training should extend to all other agencies involved.

Recommendation 11

That a review of training programs and practices undertaken in overseas jurisdictions be carried out with a view to providing specialised training in the areas of sexual assault, child development and people with intellectual or decision-making disabilities for all agencies involved with victims.

4.3 Attrition in the prosecution stage

In the last few decades the law relating to sexual offences has undergone significant changes and reform as attitudes, values, and beliefs about appropriate and inappropriate behaviour have evolved. This has resulted in the implementation of new rules of evidence, changes to procedure, and new approaches to the investigation and prosecution of sexual offences. These have sought to improve the experience of the legal process for the victim/complainant.

“Sexual assault accounts for about 20% of the work of the DPP.”²³⁶ However, as outlined in Chapter Two the prosecutorial guidelines require a *prima facie* case, with evidentiary adequacy,

²³⁴ Submission No. 18 from The Office of the Public Advocate, 24 July 2007, p2.

²³⁵ Submission No. 18 from The Office of the Public Advocate, 24 July 2007, p2.

²³⁶ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p1.

and prosecution to be in the public interest. These guidelines, together with the availability of limited resources, self evidently demand an appraisal of the quality and reliability of the information available with respect to the substance of a possible case. Therefore, it is not surprising that it was intimated by witnesses to the Inquiry that they felt that the DPP acted as judge and jury in determining which cases would proceed. In part this perception is due to the fact that the course of a reported case in the justice process is affected by, first and foremost, the need for the prosecution to prove its case beyond reasonable doubt. In criminal law in Australia, the accused is considered innocent until proven guilty. This principle is illustrated in its description of it by the Lord Chancellor of England in the 1935 case of *Woolmington v DPP*:²³⁷

*Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...*²³⁸

Consequently, the decision as to whether to proceed with charges is based on a belief that there is sufficient evidence to justify prosecution and reasonable prospects of conviction. This decision-making process leaves some complainants strongly dissatisfied with their experience of the judicial process. As one submission put it:

*As stated by Lievore (2004), the issue of prosecutorial discretion was one of the most important but least understood aspects of the justice system. Complainants often felt a decision by the DPP to not proceed with a prosecution was often not explained well to them which only left them feeling not believed and dismissed. For example, one complainant was devastated when she was advised by the 'formal' means of a letter that the DPP had decided to discontinue the charge for a sexual crime as opposed to initially advising her of this information verbally (by telephone or interview dependent on the nature of the circumstances) with some explanation of prosecutorial discretion. If complainants were informed early in the process that case decisions were primarily based on legal and evidentiary considerations related to the ability to secure a conviction they would be potentially better informed and prepared when the DPP advises them of the decision and reasons for not proceeding.*²³⁹

However, whether communicated or not, in making an assessment the authority in question, whether the police or the DPP, will take into account a range of factors such as the competence, credibility and availability of witnesses, the admissibility and quality of evidence, together with any other factors that could affect the likelihood of a conviction.²⁴⁰

These factors may be influenced by a range of elements, some of which were examined by the Committee, as follows:

²³⁷ Australian Centre for the Study of Sexual Assault, Available at: <http://www.aifs.gov.au/acssa/conferencepapers.html> Accessed on 7 May 2007.

²³⁸ Australian Centre for the Study of Sexual Assault, Available at: <http://www.aifs.gov.au/acssa/conferencepapers.html> Accessed on 7 May 2007.

²³⁹ Submission No. 9 from Sexual assault Resource Centre, n.d., pp4-5.

²⁴⁰ Australian Institute of Criminology, Available at: <http://www.aic.gov.au/publications/tandi2/tandi291t.html> Accessed on 8 May 2007.

(a) Inadequacy of prosecution briefs and admissibility of evidence**(i) *Quality of the police interview of an alleged offender and admissibility of evidence***

This Inquiry was initiated in the Legislative Assembly following concerns expressed by the Member for Hillarys²⁴¹ in relation to a widely publicised case involving a Mr Dante Arthurs who subsequently pleaded guilty, in 2007, to the murder and unlawful detention of 8-year-old Perth girl, Sofia Rodriguez-Urrutia-Shu.

The Member for Hillarys's concern was that, in 2003, a police interview of Mr. Dante Arthurs (on an unrelated case of aggravated indecent dealing with a child under the age of 13) was deemed inadmissible. This precluded the use of the evidentiary material gathered in the course of the interview and the subsequent prosecution of that case by the Director of Public Prosecutions. Such decisions taken by the DPP are based, as outlined earlier, on, amongst other things, evidentiary sufficiency, and that in turn rests in the quality of the briefs received.

The issues surrounding the quality of police interviews (and subsequent quality of briefs) was highlighted again in 2007 following the 2005 murder of Sofia, when Justice Peter Blaxell ruled that the bulk of the admissions made by Arthurs in a video-recorded interview with Police on the morning after the alleged offence would be inadmissible at his trial on grounds of "persistent importunity, or sustained or undue insistence or pressure."²⁴²

Such failures by the police occur despite the fact that the police officers are given strict guidelines and policies to which they are supposed to adhere. These guidelines are relatively unchanged since 2003 and are based on national standards.²⁴³

One of the contributory factors to such failures was seen by the police to lie in the process itself.

*Often those things are not evident to detectives when they are in the process of interviewing a serious offender for anything. The interview just goes on like a rolling stone.*²⁴⁴

The problem is also perceived by the Western Australia Police to be part of a long-term culture in policing that could be overcome with the use of a concealed presence of a suitably qualified officer or a lawyer from the Office of the Director of Public Prosecutions. This person would monitor the course of the interview of major crime suspects to check the admissibility of evidence.

I would be supportive of that. My view is thatit would not be a police officer in there. It needs to be someone who is well qualified legally. It could be from the DPP; it could be

²⁴¹ Mr Rob Johnson, Member for Hillarys, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 September 2006, pp6795- 6806.

²⁴² *Arthurs v The State of Western Australia* (2007) WASC 182 Retrieved 25 September 2007 from <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASC/2007/182.html>.

²⁴³ Dr Karl O'Callaghan, Police Commissioner, *Transcript of Evidence*, 19 September 2007, pp2-3.

²⁴⁴ Dr Karl O'Callaghan, Police Commissioner, *Transcript of Evidence*, 19 September 2007, p3.

*someone who is employed by police. I think at least some of the things we see raised in these interviews are cultural. It is part of a long-term culture in policing about the way investigations are conducted. That changes over time. My preference would be for a completely independent reviewer on the other side of that mirror if that is what we are going to do. I am very receptive to that as an idea.*²⁴⁵

Finding 14

The Committee found evidence of a lack of adequate training for police interviewing officers engaged in major cases. This is compounded by the police culture regarding interview methods. This has led to subsequent difficulties with respect to the admissibility of evidence.

Finding 15

There is a need for an experienced third party (senior police officer and/or lawyer) to monitor police interviews in sexual assault cases.

Recommendation 12

The Western Australia Police installs suitable recording equipment (video and audio) in interview rooms to permit an experienced third party (senior police officer and/or lawyer) to monitor and advise on interviews conducted in those rooms.

Recommendation 13

That the Director of Public Prosecutions and the Commissioner of Police develop protocols for the use of recording equipment (video and audio) fitted to interview rooms which will permit a third party to monitor and advise on interviews conducted in those rooms.

(ii) Police interviews and the right to remain silent

As is discussed below, there is no legal requirement for evidence that independently confirms the testimony of a single witness (corroborating evidence) in any Australian jurisdictions. However a

245 Dr Karl O'Callaghan, Police Commissioner, *Transcript of Evidence*, 19 September 2007, p6.

lack of corroboration of the victim's story with other evidence, for instance forensic evidence, visible injuries, bruises, eyewitnesses, medical evidence creates a barrier to the successful prosecution of sexual assault cases. The alleged offender may therefore choose to believe that, in these circumstances, the less said during the police interview the better, reducing the strength of any subsequent case against them.

This right to silence when questioned by police is understood by the general public to be a universal fundamental of Anglo Saxon law reinforced by a series of legal developments in the last four centuries of jurisprudence. It is in fact a right that is recognised in all Australian jurisdictions and all other common law countries. There is additionally a general prohibition on adverse inferences being drawn at the hearing or trial from the accused's silence throughout Australia.²⁴⁶

However, notwithstanding the right to silence and in contrast to the Australian position, in Singapore, Northern Ireland, England and Wales, the court or jury is specifically permitted to draw strong adverse inferences from evidence that the accused person did not provide certain information to police when asked to do so. This applies when the accused fails, when questioned (under caution, charged, or officially informed that he or she might be prosecuted) to mention a fact later relied on in defence, which he or she could reasonably have been expected to mention when questioned.

Adverse inferences are also permitted in these jurisdictions where, after arrest, the accused person fails or refuses to account for objects, substances, marks, or his or her presence, in circumstances which the police reasonably believe are attributable to participation in an offence. In jury trials in these countries, the judge and the prosecution can also comment to the jury on the adverse inferences which can be drawn in these situations.²⁴⁷

Recognising the high attrition rate in the prosecution of sexual offences and the low rate of convictions, as outlined in the preceding chapter, the Committee is of a view that changes to Western Australian legislation mirroring the United Kingdom is warranted. This view is supported by relevant law enforcement authorities in their advices to the Committee:

The legislation we are referring to in the UK is the Police and Criminal Evidence Act, the PACE legislation. If a person does not answer questions that may adversely affect the outcome in a court and police have to declare that upfront. You might have seen incidents of that on British TV programs. The WA Police have advocated for a long time that that is an important thing to have included in our Evidence Act or our Criminal Code if that is where it properly belongs. The defendant or the offender ought to be advised of those sorts of things. If they later rely on material that they did not raise at their video interview, that can also have an adverse effect. In Western Australia in recent times, particularly on retrials and things, we have seen defendants relying on new information that they did not

²⁴⁶ Law Reform Commission, 'Research Report 10 (2000) - The Right to Silence and Pre-trial Disclosure in New South Wales'. Available at: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/rr10chp2>. Accessed on 22 October 2007.

²⁴⁷ Law Reform Commission, 'Research Report 10 (2000) - The Right to Silence and Pre-trial Disclosure in New South Wales'. Available at: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/rr10chp2>. Accessed on 22 October 2007.

*produce at the original interview and that being taken into account. Sometimes that has an adverse effect on the outcome of the trial. We have been advocating for a long time that the principles of the PACE legislation should be adopted in their entirety and made to fit the Western Australia legal situation.*²⁴⁸

Such changes to Western Australian legislation would allow for negative inferences to be made if a defendant fails to mention a fact later relied on in defence that could have reasonably be given earlier, or to be seen as evidence of later fabrication. Inferences can also be made from a refusal to account for objects, substances or marks.

The Office of the Director of Public Prosecutions notes in respect to this issue that

*There are several safeguards in the law in the United Kingdom which were introduced as part of the reform to the law regarding the drawing of negative inferences from an accused's failure to mention early a matter later raised at trial. These include a requirement that in certain circumstances no inference can be drawn unless the defendant had been allowed an opportunity to consult a solicitor prior to being questioned, charged, or informed.*²⁴⁹

Subject to the introduction of such safeguards, the Director of Public Prosecutions “strongly support[s] legislative reforms that would make the use of questioning more effective in investigating allegations of sexual assault and other assaults.”²⁵⁰

In supporting such legislative reforms, it is recognised by the DPP that this approach works through the availability of both the prosecution service advising the police on site and legal aid lawyers being made available to accused people in the watch-house. This makes the process quite different to that prevailing in Western Australia. However,

*I say, critically, the trial delays and conviction rates are all better [in the UK] then we have in Australia and I assume that is because of the way in which they manage the system. [and] there are downstream savings to all the other agencies, including the courts and corrective services, and in not having huge numbers of accused people on remand. There are savings because both victims' families and the families of the abused are not disrupted.*²⁵¹

The Commissioner of Police similarly supports such changes to legislation: “Certainly I would like to see the principles of PACE enshrined in Western Australian legislation.”²⁵²

²⁴⁸ Dr Karl O’Callaghan, Police Commissioner, Western Australia Police, *Transcript of Evidence*, 19 September 2007, p4.

²⁴⁹ Mr Robert Cock QC, Director of Public Prosecutions, Correspondence, 16 November 2007.

²⁵⁰ Mr Robert Cock QC, Director of Public Prosecutions, Correspondence, 16 November 2007.

²⁵¹ Mr Robert Cock QC, Director of Public Prosecutions, Transcript of evidence, 5 February 2008 p11.

²⁵² Dr Karl O’Callaghan, Police Commissioner, Western Australia Police, *Transcript of Evidence*, 13 February 2008, p10.

Finding 16

The right to silence when questioned by police is understood by the general public to be a universal fundamental of Anglo Saxon law. In Australia, the common law right to remain silent is broadly recognised by State and Federal Crimes Acts and Codes. However notwithstanding the right to silence, in a number of overseas jurisdictions, including the United Kingdom, the court or jury is specifically permitted to draw strong adverse inferences where the accused person did not provide certain information to police when asked to do so. This applies when the accused fails, when questioned (under caution, charged, or officially informed that he or she might be prosecuted) to mention a fact later relied on in defence, which he or she could reasonably have been expected to mention when questioned.

Recommendation 14

The Attorney General implements changes to Western Australian legislation which incorporate the principles and safeguards of the United Kingdom's *Police and Criminal Evidence Act* which bear on the accused's right to remain silent.

(iii) Quality of the police investigation

In the course of its Inquiry this Committee ascertained a real concern across Australia of the adequacy of prosecutorial briefs prepared by some police officers.

The issue of quality of briefs was raised in the Queensland report 'Seeking Justice'.²⁵³ Subsequent to that report, regular meetings now take place at both the Commissioner of Police level and the operational level enabling the quality of briefs that come from any particular police district to be addressed. The Queensland DPP also provides police with a checklist of what is required. This has helped to overcome delays that would inevitably arise out of the inadequacy of initial briefs.²⁵⁴

As the Deputy Solicitor for Public Prosecutions NSW emphasized, the police need to realise that for a successful prosecution it's not only about truth it's about proof.²⁵⁵

In Western Australia the Director of Public Prosecutions advised that:

²⁵³ Crime and Misconduct Commission, Available at: <http://www.cmc.qld.gov.au/data/portal/00000005/content/12867001131403329213.pdf> Accessed on 13 July 2007.

²⁵⁴ Paul Davey - Director of Public Prosecutions, Queensland Office of The Director of Public Prosecutions, Briefing, 3 July 2006.

²⁵⁵ Claire Giroto - Deputy Solicitor for Public Prosecutions, Office of The Director of Public Prosecutions, Briefing, 4 July 2006.

One of the biggest problems we have in prosecuting generally is being satisfied that a full investigation is provided to the prosecution so we can provide it to the defence so that both lawyers are fully cognizant of the dispute. At one stage all police had to do was establish that there was enough evidence to charge and prosecute and then they would wait like everyone else for the trial before getting the material together. We are all having trouble with that old culture. The police briefs almost always have enough information to justify a charge, but often do not have enough information without further inquiry to conduct the trial. That is causing some problems. The police brief is adequate to justify a charge, but not adequate to let the defence lawyer know what inquiries he should make.²⁵⁶

Witnesses and submissions both referred to this issue.

In response to a question on the adequacy of briefs, a barrister stated that:

There should be an investigation. With sexual assault there is essentially no investigation at all... it is a policy issue. Someone has told them [the police] that, if there is a complaint of sexual assault, to be very careful before they do not pursue it because they will end up in trouble, and if there is a complaint to say to the person laying the charge, 'Sorry, mate, go and see a lawyer and a jury will sort it out' They exercise no discretion.²⁵⁷

Another barrister present in the same hearing supported these statements.²⁵⁸

One 'accused' whose case became the subject of a *nolle prosequi* following the withdrawal of the complaint stated that: "the Acting Senior Sergeant in charge of the Child Abuse Unit – opined that the Police 'probably wouldn't have bothered' on the basis of the evidence but that they were 'keen to make an example of someone who'd used the internet' to solicit this type of offending."²⁵⁹

One witness to the Inquiry pointed out how a poor police brief impacts the process.

I believe there was a lot of toing-and-froing between the police and the DPP in that particular case. The police would do a bit of work and send the file to the DPP. The DPP would say, "That's not enough" or "We want more information in this regard or that regard" and send it back again.²⁶⁰

As shown in this instance, the DPP in WA, in line with those in other jurisdictions, will go back to the police officers involved with the brief to seek additional evidence:

We give them an opportunity to try to remedy the deficiency. If, for example, we say there is not sufficient forensic support for the case, we will obviously allow the police officer time, if he or she thinks it is necessary to do some more research, or maybe to their knowledge material that they have has not yet been analysed and could be processed. That

²⁵⁶ Mr Robert Cock Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p7.

²⁵⁷ Mr Thomas Percy, *Transcript of Evidence*, 19 February 2007, p11.

²⁵⁸ Ms Belinda Lonsdale, *Transcript of Evidence*, 19 February 2007, p7.

²⁵⁹ Submission No. 15, 29 May 2007, p3.

²⁶⁰ Ms Michelle Stubbs, *Transcript of Evidence*, 30 March 2007, p5.

*can happen with a later decision. If that cannot happen, after consulting those two, we will advise the defence lawyers and the court. That is the process through which we get feedback to the police about why a particular case cannot proceed.*²⁶¹

In New South Wales, the ODPP has taken a number of steps to address the issue. Firstly, a protocol was signed between the NSW ODPP and the NSW Police on 28 October 2005 revising an earlier agreement. This covered the provision of advice to the police where there is an indictable offence involving child sexual assault. Other indictable offences are at the discretion of the ODPP. Advice as to the sufficiency of evidence will generally be provided within a few weeks unless urgent.²⁶²

Secondly, the

*DPP now provide an extended advising service to police in defined indictable matters prior to charge and after charge where advice is not sought. This will in some way address the need for proper briefs and appropriate charges. In addition it will allow a weeding out of charges where no evidence available.*²⁶³

This issue is further addressed in the final chapter of this report.

Finding 17

There are police practices and a culture that result in the preparation of briefs that are adequate for charges to be laid but are incomplete for trial purposes. Such deficiencies lead to delays in the prosecution of a case as the briefs are returned by the Office of the Director of Public Prosecutions to the Western Australia Police, sometimes repeatedly, to allow the police to remedy the deficient briefs. The Committee regards this as a fundamental failure of the system.

(b) Number of different prosecutors handling a case

One of the difficulties experienced by many victims is the frequent change of prosecutor handling their case:

*What I did struggle with was that at each and every court appearance a different DPP lawyer would be assigned to in the court that day. In a survivors eyes the DPP lawyer is the only hope that their story will be told. It severely lessens your confidence to know your file will be handled by someone different for every court appearance.*²⁶⁴

²⁶¹ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 22 November 2006, p5.

²⁶² Protocol for Advice between NSW Police and the Office of the Director of Public Prosecutions October 2005.

²⁶³ Giroto, C. and O'Connor, S. 'Criminal Case Conferencing', n.d., p3.

²⁶⁴ Submission No. 15 from Ms Philippa Brennan, n.d., p1.

or again:

*We had 3 legal teams over the 3 years that it took to come to trial ([name of defendant] defence even used this to imply to the court that we had trouble getting people to represent us).*²⁶⁵

The Office of the Director of Public Prosecutions is very aware of the impact of discontinuity on victims of sexual offences and has instituted a model to improve the handling of cases since 2005. Since that date the Office has monitored the allocation of files through the progress of the case. In the first instance the allocation of a file to a lawyer who is correctly qualified to conduct the trial occurs in only 70% of the cases. The current profile of prosecutorial workforce does not allow the allocation of files to a prosecutor of the level appropriate to allow him/her to conduct a trial. Although ODPP currently employs approximately the desired number of prosecutors, they have an inadequate number at the higher levels of experience. The shortage of senior prosecutors means that the ODPP has had no alternative but to employ prosecutors often with minimal experience.

Although file management in 30% of the cases is not assigned to a prosecutor at the level perceived to be appropriate, the actual conduct of the trial is allocated to an employed prosecutor of the required experience, or it is briefed out if a sufficiently experienced prosecutor is not available in-house.²⁶⁶

For these reasons and factors such as staff turnover and leave requirements only half of the cases get conducted by the lawyer from allocation to finalisation. This is a significant improvement on previous years where the figure was 5-10%.

(c) Time

(i) Timeliness of reporting

The issue of timeliness of reporting has been discussed previously. This is a core issue in the prosecution of cases. Time is said to be the enemy of justice. As Nicholas Cowdrey AM QC wrote, “The later an event is reported and prosecuted the less chance of a spontaneous (and therefore more specific, detailed, consistent and credible) account of scientific evidence in support of convincing testimony in court.”²⁶⁷ There is also a difficulty for the accused that will have some level of credibility with a jury. As one ex-police officer put it to the Inquiry:

*Yes, basically, the DPP was saying that if it was such a long time ago, how could that accused person possibly remember, and how could they be expected to come up with an alibi or whatever.*²⁶⁸

²⁶⁵ Submission No. 31, 20 October 2007, p1.

²⁶⁶ Ms Nuala Keating, Office of the Director of Public Prosecutions, Electronic Mail, 24 September 2007, p1.

²⁶⁷ Parliamentary Library, Available at: <http://intranet/intranet/piframesi.nsf/iframewebpages/Library+Spotlight> Accessed on 8 May 2007.

²⁶⁸ *Transcript of Evidence*, 30 March 2007, p5.

Such delays in reporting further contribute to attrition due to the attendant difficulties of evidentiary sufficiency.

(ii) Timeliness of the judicial process

As noted previously, there are significant delays in bringing a case to trial. Jason Payne, commenting on his report *'Criminal trial delays in Australia: Trial listing outcomes'* advised the Committee that:

*The legal profession has a culture where they leave things to the last minute before addressing the issues that may lie in the case on the basis of 'why would I prepare early if the other party won't be ready.' Therefore delay is embedded in the culture and they rely on delays to manage their case loads.*²⁶⁹

Such delays have an impact on the victim. It has been suggested to the Committee that this is not generally recognised by those involved in the judicial process.²⁷⁰ Delays in getting a case to court may result in the victim losing the will to proceed and therefore withdrawing from the case:

I am in the early stages of a court process. For the record, I was very enthusiastic to go with it initially – it was great to have my plight recognised after all these years. That has changed over time....The court process is way too drawn out and long winded. It gives the person pressing charges way too much time to think and dwell on the situation. The process needs to be like ripping off a band-aid—quick, painful but over in a short time...

*So, in the meantime I have way too much time on my hands to feel guilty, and think about withdrawing my charges. I also feel terrible for his (the defendant's) family (who are also my family and friends). I have heard stories about his family being victimised, his children harassed at school, and his house vandalised. This is terrible for me as I grew up in this town and understand how hard that must be for them — the family have done nothing wrong. It goes on for too long. He should be able to serve his time right away and minimise the impact on his/my family. Also, the more people see him and his family victimised and in the process of an awful court case, the more time it gives people to accuse me of being unfair in bringing this all up again after so many years; too much time to think and speculate all round.*²⁷¹

In one instance, as reported by a rape victim's mother, the delays were non-legal:

*The offender pleaded not guilty throughout 2006 at each of his Court appearances and a trial date was set for January. This was cancelled due to the Judge wanting to go on holidays, and was further cancelled later for a conference. This in itself was a little devastating for our daughter it was sad to watch her take a 'step backwards' each time.*²⁷²

²⁶⁹ Jason Payne, Office of the Director of Public Prosecutions Queensland, *Briefing*, 3 July 2006.

²⁷⁰ Jason Payne, Office of the Director of Public Prosecutions Queensland, *Briefing*, 3 July 2006.

²⁷¹ Submission No. 11, 17 May 2007, p1.

²⁷² Submission No. 21, 27 July 2007, p2-5.

The reason for some of these delays is further explored in a subsequent chapter of this report.

(d) Corroboration

There is no legal requirement for evidence that independently confirms the evidence of a single witness (corroborating evidence) in any Australian jurisdictions. A lack of corroboration of the victim's story with other evidence, for instance forensic evidence, visible injuries, bruises, eyewitness statements, or medical evidence, creates a barrier to the successful prosecution of sexual assault cases. This is notably so where, in the absence of other evidence, the judge may need to point out that:

*as the evidence of the complainant could not be adequately tested in the trial after the passage of time which has elapsed, it would be dangerous to convict on the evidence of the complainant alone unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.*²⁷³

The fact that only a small proportion of childhood sexual assault cases will ever result in prosecution has been blamed, at least partially, on structures within the justice system that continue to prejudice the outcomes of sexual offence cases. This is a fact that proponents of law reform have particularly criticised

*'the continued use of corroboration warnings, where judges routinely caution juries against convicting unless other evidence can independently support the victim's version of events. This substantially impacts on cases involving adult survivors who in recounting . . . childhood sexual assault often have nothing more than their sworn testimonies to convince juries of the accused's guilt.'*²⁷⁴

There is some support amongst the legal profession for the argument that corroboration should be a mandatory precedent to going to trial:

*My recommendation would be that before any case goes to trial, there would need to be some form of corroboration, and, if there was no corroboration, then except in an exceptional case, the matter should not proceed to trial.*²⁷⁵

The Committee does not necessarily agree with this view and is of the opinion and supports the trial process as the arena in which to test the evidence.

²⁷³ Australian Centre for the Study of Sexual Assault, Available at: <http://www.aic.gov.au/conferences/2003-abuse/cossins.pdf> Accessed on 9 May 2007.

²⁷⁴ Australian Centre for the Study of Sexual Assault, Available at: <http://www.aifs.gov.au/acssa/pubs/wrap/w1.html#eight> Accessed on 8 May 2007.

²⁷⁵ Mr Thomas Percy, *Transcript of Evidence*, 19 February 2007, p5.

(e) Age, attrition and the decision to prosecute

*A child's evidence must meet the same legal standards as that of an adult; an almost impossible task.*²⁷⁶

Attrition rates for children are significantly higher than for adults. In part this is because of evidentiary sufficiency reasons relating to children's ages. For instance, prosecutions of offences against children under the age of six are exceptional, unless there are third party witnesses²⁷⁷. Dr Anne Cossins of the University of New South Wales, who has been recognised for her work into why conviction rates in NSW for child sexual assault are so low, notes that decisions to prosecute, as has been discussed previously in this report, are largely influenced by the difficulties in securing a conviction. "Although few cases go to trial, the difficulties in securing convictions have a feedback effect on decisions to investigate and to prosecute. What happens at trial therefore has a significant effect on cases further up the line."²⁷⁸

Decisions as to whether to prosecute may be linked to perceptions that children are unreliable witnesses, prone to fantasy, easily manipulated with incomplete and inaccurate memories of what they have experienced.²⁷⁹

Disadvantages suffered by child victims and child witnesses in giving evidence in the criminal courts are well documented and legislation now exists in most states of Australia, including Western Australia, to mitigate some of these disadvantages.²⁸⁰

In Western Australia, one feature of the changes made is the use of a recorded interview and CCTV. The recorded interview can then be played as part of the child's evidence but they must still appear in court (by CCTV) for cross examination. Often cross examination is lengthier than presentation of the recorded evidence.²⁸¹ A further requirement under the regulations in Western Australia centres on 'not badgering the witness'. Defence lawyers will generally refrain from this although one submission suggested that this regulation was more honoured in the breach than in the observance.²⁸²

However the defence lawyers:

²⁷⁶ Kids in Distress Australia Inc, Available at <http://www.kidsindistress.org.au/childrens-evidence.htm>. Accessed on 8 August 2007.

²⁷⁷ Submission No. 20, 27 July 2007, p6.

²⁷⁸ Kids in Distress Australia Inc, Available at <http://www.kidsindistress.org.au/childrens-evidence.htm>. Accessed on 8 August 2007.

²⁷⁹ Ibid.

²⁸⁰ Commission for Children and Young People, Available at http://www.kids.nsw.gov.au/uploads/documents/childwitnesses_commsub.rtf. Accessed on 8 August 2007.

²⁸¹ Submission No. 20, 27 July 2007, addendum p4.

²⁸² Submission No. 20, 27 July 2007, addendum p6.

*can still cross examine for lengthy periods, attempt to confuse a child (not that hard with the language used) etc to make a child appear to be an unreliable witness. In addition the time between the child's interview and court or pre-recording is routinely in excess of 12 months, regardless of the research about memory development and retention in children. It also makes it difficult for children/victims to "get on with life" when they know they have court processes looming.*²⁸³

It is arguable that the adversarial system is not designed to deal with the uniqueness of child sex offences. "Rather than being a process that aims to protect the victim (or other children) from future abuse, the adversarial system has a well documented history of transforming a child sexual assault trial into an inquiry about the credibility of the complainant."²⁸⁴

The Director of the NSW Bureau of Crime Statistics, Dr Don Weatherburn attributes the low prosecution and conviction rates in NSW in part to reluctance on the part of sexual assault victims to put themselves through the trauma of a court process.²⁸⁵

Finding 18

The adversarial legal system does not deal adequately with the uniqueness of child sexual offences.

(f) Communication within the judicial process

The Committee found that all parties (whether victims, the legal profession or the specialist support agencies) universally felt that there was a serious gap in the way communication was undertaken by both the Western Australia Police and the office of the Director of Public Prosecutions. The following anecdotes express the experiences of a diversity of professionals:

I get this happy little letter telling me to rock up to the Central Law Courts at nine o'clock in the morning on such and such a date. In fact, if it were not for my endeavours to ring the lawyer, many a time the lawyer would not ring me. You can then be outside court for three days waiting to appear. I have this pretty well finetuned now, because I ring the lawyer and ask what time I am wanted and I go through it with him or her. If he or she appears to be in need of some anatomy lessons, I give those lessons on the phone as well. I would say that the number of lawyers whom I have met a few days before a trial over the

²⁸³ Submission No. 20 27 July 2007, addendum p6.

²⁸⁴ NSW Rape Crisis, Available at <http://www.google.com.au/search?hl=en&q=children+evidence+attrition+prosecution+Sexualandmeta=>. Accessed on 8 August 2007.

²⁸⁵ Bureau of Crime Statistics and Research, Available at http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb92. Accessed on 8 August 2007.

*past 30 years could be counted on two hands. As for the defence counsel, it is equally as bad.*²⁸⁶

In the following exchange between two barristers appearing as witnesses before the Committee, the sometimes extraordinarily short notification of proceedings and subsequent access to witnesses is apparent:

Thomas Percy: I have not prosecuted for a while. Perhaps you can tell the committee, when the DPP phones you and asks you to prosecute, say, a sexual assault case for it, how long before the case starts do you receive the phone call, the brief and access to the witnesses?

Belinda Lonsdale: You might get it a month before but you might also get it the week before and sometimes only a couple of days before.

Thomas Percy: It has been in the system for two years and you get the call to prosecute it a week beforehand.

*Belinda Lonsdale: That has happened to me.*²⁸⁷

In responding to a question on the issue of communication from DPP, one former police officer expressed her frustration with the lack of feedback:

*Just frustration ... I just thought it was a big thing for someone to have to go through and then have me just ring up the week before and say "No, sorry, it's not happening". I would like to know why, because I put all the work into it, and it did not seem to make any sense to me.*²⁸⁸

PathWest suffers from the same issue to the detriment of their service provision:

*What tends to happen, to be honest, is they set the trial date and proceed no matter what, whether we know about it or not. Unfortunately - this is one of the issues before us at the moment that we are trying to grapple with - we have demanded a minimum of 12 weeks' notice of a trial date so that we have adequate time to deal with the case. In some instances, the police or the DPP has rung and said they need a report in four to six weeks' time and we find that the trial date had been set two or three months earlier, but no-one had told us. Because of that, we then have to rush.*²⁸⁹

By contrast it was noted by the Committee that with respect to case reviews, in the JIRT teams in NSW, the police officer contacts the victim every month (phone/visit or email). Such victim

²⁸⁶ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p8.

²⁸⁷ Mr Thomas Percy and Ms Belinda Lonsdale, *Transcript of Evidence*, 19 February 2007, p13.

²⁸⁸ *Transcript of Evidence*, 30 March 2007, p4.

²⁸⁹ Dr Gavin Robert Turbett, *Transcript of Evidence*, 16 May 2007, p8.

contact is required and results in a massive drop in complaints. As Commander Begg put it “we need to manage people’s expectations.”²⁹⁰

In Western Australia, from a police perspective, the police were of the view that where the DPP was prosecuting the case “they[should] have to explain; particularly if it is “not in the public interest”, exactly why it is not in the public interest, instead of leaving it to the police to try and relay that information to the victim. The police get caught as the meat in the sandwich.”²⁹¹

Finding 19

There are major problems with communication between agencies and from the agencies to victims. This results in a very inefficient process and dissatisfaction amongst all parties and impacts most heavily on the victim.

Committee comment: The Committee strongly believes that there is an identified need for the development of a formalised framework for prompt and effective communication between agencies and individuals who deal with, or have contact with, sexual assault cases under the direction of a nominated lead agency.

Recommendation 15

The Government establish a formalised framework for communication between relevant agencies and individuals, who deal or have contact with sexual assault cases, under the direction of a lead agency.

(g) Experiences with the DPP

Both from a police and a victim perspective there are some difficulties that arise from existent processes.

The Western Australia Police advised of the existence of tensions and concerns between themselves and the Office of the Director of Public Prosecutions (ODPP), “It is clear from some of our comments about this case (Dante Arthurs) that tensions exist between the Police and the DPP. There is no secret about that.”²⁹²

²⁹⁰ Detective Superintendent Helen Begg - Commander Child Protection and Sex Crime Squad and Detective Chief Inspector Janice Stirling, NSW, *Briefing*, 4 July 2006.

²⁹¹ Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008, p21.

²⁹² Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008, p11.

As noted above, these tensions centred around a lack of communication between the ODPP and the police and *vice versa*. In particular there is a lack of advice from the ODPP on why cases are discontinued. This puts the police on the back foot with the victim. It also precludes developmental training for the investigating detectives.

The Commissioner of Police believes that the Scottish model which places police liaison officers, of the rank of inspector, inside the ODPP would provide a simple remedy to the current difficulties being experienced.

*There is a fair degree of tension. I think we can improve it; indeed, it can be improved fairly simply. We can improve it with better relationships and better coordination and by working more closely together by having staff out-placed in the DPP. By the same token, there is no reason that the DPP cannot work with us a bit more. We have been talking about having more legal counsel inside policing to provide advice on prosecutions, complex cases, organised crime and major crime issues. We must think about the independence of the DPP in all of that. The DPP and the police have to work together more closely. We must receive advice much earlier in the process and not wait until the end of the process to have it nolle-ed. If we can do that, and if we can adopt 50 per cent of the Scottish model, we would be doing quite well.*²⁹³

Another of the issues facing the ODPP, reflected in third party impressions of the ODPP in all states, is the consequences of ‘briefing out’ cases where the DPP is unable to handle the prosecution in-house because of lack of resources. The Queensland Crime and Misconduct Commission (CMC) advised that they recognised that part of the issue for victims may arise where briefs are sent to external counsel, that is to say when they are ‘briefed out’. However the reality is that in these cases the Queensland DPP has little control²⁹⁴. The CMC also commented that there was general agreement that briefing out can lead to delays as there is often a breakdown in communication between the victim, the courts and the lawyers.

In Western Australia there was similar evidence provided as to the problem of briefing out:

*Occasionally, the file is briefed out to somebody who is usually a defence counsel, and often that person does not really have a lot of empathy with the case. We have rung up and said, “Would you like to discuss our evidence?” and have not even been able to meet with the prosecutor until the hour before we go into court - that sort of thing. It leaves us feeling that really we were not able to put our case adequately to the jury. At those times we have felt that this is not good.*²⁹⁵

By contrast when commenting on the DPP’s in-house prosecutors, there is a different view:

²⁹³ Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008, p11.

²⁹⁴ Susan Johnson: Director, Research and Prevention and Dr Margot Legosz of the Crime and Misconduct Commission, QLD, Briefing, 3 July 2006.

²⁹⁵ Dr Maureen Phillips, *Transcript of Evidence*, 2 March 2007, p14.

*There certainly have been some outstandingly good prosecutors as well, who have really taken a lot of time and trouble to do everything they possibly can to put the case to the court.*²⁹⁶

The Director of Public Prosecutions advised the Committee that there is currently no mechanism in place to determine a victim's experience with a 'brief out lawyer', although he is currently reviewing the Office's key performance indicators, including a victim survey.²⁹⁷ Where there are adverse observations by the judiciary, or critical observations from file managers about their previous work the Director of Public Prosecutions will drop lawyers off his 'brief out list'.

There are a number of factors that contribute to the victim/complainant's difficulties with the judicial process that will contribute to the attrition of cases in the prosecution stage. One victim/complainant was put off by her very first contact with the ODPP:

*In my very first contact by phone with DPP I was asked, or rather snarled at to offer either a file number or perpetrator name before any service could be offered. I felt genuinely shocked. I had never asked to be thrust into this nightmare.*²⁹⁸

Another factor is a lack of certainty insofar as the victim/complainant is concerned as to what constitutes the DPP's evidentiary requirements:

*A friend of mine, whose brother-in-law worked in the DPP, told us that we had a good case and should keep fighting for it, but we were told by the police that the DPP would not do this or that. I wonder what sort of pressure the DPP is putting on police officers.*²⁹⁹

This is further discussed in Chapter Seven.

(h) Training needs

In an environment of increasing technological, legal and social complexity the need for ongoing training of prosecutors is recognised in Western Australia,³⁰⁰ nationally and internationally. For example, in Western Australia the DPP invests both in the ongoing training and professional development of law students, as well as the ongoing recruitment and training of prosecutors. The Queensland Office of the Director of Public Prosecutions similarly provides in-house training. It also sends staff to National District Attorneys Association in the USA where training is free.³⁰¹

²⁹⁶ Dr Maureen Phillips, *Transcript of Evidence*, 2 March 2007, p14.

²⁹⁷ Mr Robert Cock, Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence* 5 February 2008 p4.

²⁹⁸ Submission No. 15 from Philippa Brennan, n.d., p1.

²⁹⁹ *Transcript of Evidence*, 30 March 2007, p10.

³⁰⁰ Director of Public Prosecutions, Available at: http://www.dpp.wa.gov.au/content/Annual_Report_05-06.pdf Accessed on 23 July 2007.

³⁰¹ Paul Davey - *Director of Public Prosecutions*, Queensland Office of The Director of Public Prosecutions, *Briefing*, 3 July 2006.

Training of prosecutors may variously cover technology, the law and child development. As Tom Morgan, vice-president of The National District Attorneys Association and a prosecutor said with respect to DNA,

*I want especially to emphasise the need to train prosecutors in this invaluable technology. Prosecutors who advise law enforcement agencies and forensic laboratories, as well as actively try cases involving DNA, need to be fully versed in the capabilities, and vulnerabilities of this technology. This is not something you learn in law school nor is it something that most of us can “bone up on” the night before trial. DNA technology is complex. Training in the use of DNA evidence in a criminal investigation or a trial is crucial.*³⁰²

Despite the emphasis placed on training, both the Sexual Assault Resource Centre³⁰³ and the Child Protect Unit (CPU) at Princess Margaret Hospital³⁰⁴ expressed the need for, and the value of, specialised education of DPP lawyers in the area of sexual assaults:

*In our experience, anecdotal feedback indicates that because of the DPP’s limited resources and problems attracting staff, it is really difficult at times. If an inexperienced prosecutor is not up with the area of sexual violence, that person is less able, particularly if the case goes to court, to be on the mark for pulling up the defence than are those who are very experienced. I suppose the issue is that in an ideal world it would be great to always have people who are specialists in this area.*³⁰⁵

And:

*I have been asked in court by a senior counsel to tell him about the anal glands. Really all you can answer is, “You should have done veterinary science and not law because only dogs have anal glands.” You really wonder how much homework the lawyer has done.*³⁰⁶

Further, the CPU believes that in addition to understanding the idiosyncrasies of sexual assault, the DPP lawyers need to understand the importance of a child’s developmental age in being able to explain abuse:

The DPP lawyers obviously do their best, but in essence they need to understand the techno terms. To be prosecuting arson one day, child sexual abuse the next day and computer crime the following day is inordinately difficult for anyone. That would be like asking me to be one day a neurosurgeon and the next day an eye surgeon. You need training to be an effective eye surgeon as you need training to be a neurosurgeon. They need training. I think the judiciary needs training to understand the vagaries of children’s behaviour. If Johnny Smith tells me a brown belt or a black belt and there is some degree

³⁰² Committee on the Judiciary, Available at: http://judiciary.senate.gov/testimony.cfm?id=252andwit_id=513 Accessed on 23 July 2007.

³⁰³ Submission No. 9 from Sexual Assault Resource Unit, n.d., p6.

³⁰⁴ Submission No. 10 from Child Protection Unit Princess Margaret Hospital, 23 May 2007, p2.

³⁰⁵ Ms Tania Towers,, *Transcript of Evidence*, 2 March 2007, p10.

³⁰⁶ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p6.

*of discrepancy, that has to be understood for what it is, especially depending on the youth of the child. When all of this is brought up two and a half years later, it is a farce.*³⁰⁷

The CPU would be prepared to conduct such training.³⁰⁸ Similarly, SARC supports the need for specialist training and if resourced would be keen to provide it:

*Yes, [you need specialist people] people who want to work and specialise and really hone their knowledge and experience in this area. One thing that we have done on one occasion with the DPP, but are more than willing to do on a regular basis - but, again, it is just about time and resources - is actually provide education and training in the nature of, I suppose, the psychological impact of trauma, so that they have a greater understanding when they are preparing cases, and also can educate the jury and also be more aware of when they are going to potentially be more proactive in the defence questioning in court. It really is about people working in this area needing the legal knowledge and the psychological knowledge. At SARC, that is part of our role. We are more than happy to provide regular education and training.*³⁰⁹

Finding 20

There is a need for specialised training of prosecution lawyers which could be provided by third party agencies specialising in the area of sexual assault. Such training would include victims' reactions during and after the sexual assault, child development, rape-related post-traumatic stress disorder, societal attitudes toward rape, the latest forensic information and place particular emphasis on the development of professionalism and sensitivity towards the victim and the victim's family.

Recommendation 16

The relevant staff of the Office of the Director of Public Prosecutions should be adequately trained and supported in their understanding of all aspects of sexual assault prosecutions, with an emphasis on the importance of appropriately communicating with the child complainant and his or her family on a regular basis.

The Office of the Director of Public Prosecutions should monitor and report on levels of training achieved by all relevant prosecutors in its Annual Report and the targets they have achieved in having all cases prosecuted by appropriately trained staff.

³⁰⁷ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p8.

³⁰⁸ Submission No. 10 from Child Protection Unit Princess Margaret Hospital, 23 May 2007, p2.

³⁰⁹ Ms Tania Towers, *Transcript of Evidence*, 2 March 2007, p15.

Recommendation 17

An independent taskforce be established to analyse the incidence of withdrawal of complaints and make recommendations aimed at reducing such withdrawals. These recommendations should include the collection of data by police and the Office of the Director of Public Prosecutions regarding reasons as to why charges are withdrawn, charges not indicted or discontinuances entered.

This taskforce should be established by the Attorney General drawing on the Office of the Director of Public Prosecutions, Western Australia Police, Sexual Assault Resource Centre, Victim Support Service and the Aboriginal Legal Service together with victims of sexual assault.

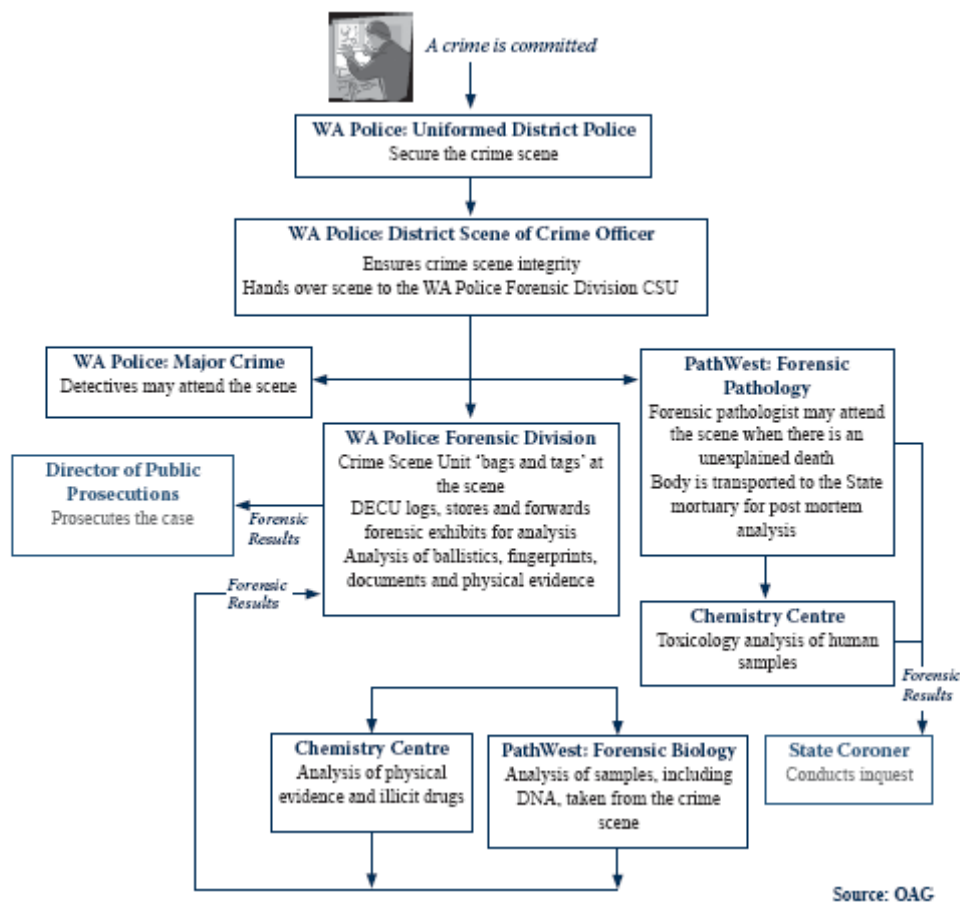
The report of the taskforce be tabled in Parliament before the end of 2009 and thereafter in the annual report of each agency.

CHAPTER 5 FORENSICS

In considering reasons as to why prosecutions might not proceed, or having commenced then fail, the Committee's attention was drawn to the issue of forensic evidence through a number of submissions and witnesses testimony.

Forensic investigation and analysis in Western Australia engages several agencies and is used to guide investigations and develop prosecution cases as outlined below.

Figure 5.1 Forensic Investigation and analysis in Western Australia³¹⁰



Source: OAG

Forensic science therefore plays an important role in the judicial process of the twenty-first century and may be useful in two ways in cases of sexual assault:

- Firstly, it may establish facts or corroborate testimony by showing links between the victim, the attacker and the scene of the crime. These links consist of physical traces of the

³¹⁰

Auditor General for Western Australia, Available at: http://www.audit.wa.gov.au/reports/report2006_04.html
Accessed on 27 July 2007.

offender and victim during the course of the assault or sexual offence. Today, exploitation of this kind of evidence makes the quality of forensic evidence of paramount importance.

- Secondly, taking into account the existing levels of recidivism in this kind of crime, systematic forensic investigation can point to links between cases otherwise having no obvious relation in terms of time or location.

In addition to whatever intrinsic value the forensic evidence of a case might offer there is the so called 'CSI' effect (named after the popular crime-related show) on jurors which leads to a popular view that 'DNA testing is the best piece of evidence in any type of case'.³¹¹

Concerns expressed about forensic services in Western Australia centred on two issues:

- The adequacy of forensic services in non-metropolitan areas; and
- The delays in the processing of forensic evidence by PathWest.

5.1 The adequacy of forensic and related services in the regions:

The process for the collection of forensic evidence in cases of sexual assault in non-metropolitan areas varies from that of the metropolitan area because agencies such as Sexual Assault Resource Centre (SARC) and the Child Protection Unit do not provide the same level of service in non-metropolitan areas. Therefore, the first concern is related to the response/training of general practitioners and hospitals in rural and regional areas. SARC provides a range of kits and materials to regional and remote hospitals. These include the SARC manual, female and male forensic sample collection kits that contain, for example, the appropriate swabs, labels, slides and a guide to maintaining an intact chain of evidence in the collection and handling of forensic samples.³¹² Nevertheless, the Committee heard evidence that members of the medical profession in these areas are often reluctant to become involved in the collection of forensic samples. As one witness put it:

The GPs in the area refer people to the major hospital that is closest. That raises lots of issues and it is a huge issue for us at SARC because a number of those hospitals are short-staffed; they are under-resourced and really busy; the person is usually seen in ED. Some of these cases take three to five hours. They do not have the time and resources to do it and they do not want to have to take the forensic evidence and then appear in court, for all sorts of reasons. Often it involves the GPs who are doing a session in the hospital and, again, they do not want to touch it. There is a state-wide operational circular from the chief medical officer in the Health Department that basically says that in rural and remote

³¹¹ Royal Canadian Mounted Police, Available at: http://www.gazette.rcmp.gc.ca/article-en.html?andarticle_id=335 Accessed on 25 July 2007.

³¹² Australian Institute of Family Studies, Available at: <http://www.aifs.gov.au/acssa/pubs/issue/i2.html> Accessed on 27 July 2007.

*areas major hospitals have an obligation; it is their role to do a medical forensic, but it does not happen.*³¹³

The disengagement of rural and regional GPs from the whole process was underlined by the Child Protection Unit with the advice that:

There are a number of holes [in the forensic service]. Firstly, rural and remote communities are not adequately served. Another example is that we had a 14-year-old girl in Leonora who was sexually assaulted by someone. In essence, it took five days for us to get to see this girl. No-one would see her locally. The local doctors in Kalgoorlie refused. Yes, they refused.

The local hospital in Kalgoorlie, the doctors likewise were unwilling to be involved. By the time we finally got to see the girl she actually refused to be examined.

*She finally came to Perth. It is what you would call an absolute therapeutic failure at every level. I must say that the doctor who was involved - one of my colleagues - was devastated. We were all devastated, in fact, by what had happened, including the girl. Why did they refuse you ask. It is quite simple. Firstly, there is an unwillingness by a lot of members of the medical profession to get involved in anything that smells of legality. I suppose being involved in an inquiry into sexual assaults and the idea of going to court frightens doctors very much off. Secondly, there is the time factor. As you well know, when you are involved in these sorts of cases, especially in a general practice-type setting, they take a lot of time.*³¹⁴

The Director of Public Prosecutions also supported the reality of the difficulty obtaining forensic medical assistance in regional Western Australia:

*In country towns there are particular problems in obtaining forensic samples because to my knowledge no regional towns have doctors that are trained in getting evidence in these types of cases. One simply relies on the local hospital generally or less frequently the local GP to take swabs as best they can.*³¹⁵

Finding 21

There is a major deficit in available medical services in regional areas in sexual assault cases. This is due in part to the implications for affected General Practitioners and leads to significant shortfalls in the quality of forensic evidence with negative outcomes on both victims and their cases.

³¹³ Ms Tania Towers, *Transcript of Evidence*, 2 March 2007, p7.

³¹⁴ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p4.

³¹⁵ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 22 November 2006, p3.

Recommendation 18

The Minister for Health ensure that rural and regional GPs be provided with training and incentives to properly manage victims of sexual assault with a view to improving services in the regions.

5.2 Delays in the processing of forensic evidence by PathWest

As outlined above, forensic analysis in Western Australia is undertaken by PathWest Laboratory Medicine WA (PathWest), a part of the Department of Health.

*PathWest was formed about two years ago when the government of the day decided to amalgamate all the public sector pathology agencies into one. It has about 1,400 employees and encompasses the pathologies of Royal Perth Hospital, Fremantle Hospital, King Edward Memorial Hospital, Princess Margaret Hospital for Children and the old PathCentre laboratories, plus laboratories throughout regional and rural Western Australia.*³¹⁶

The primary client of the forensic analysis facility is the Western Australia Police (WAPOL). The police attend and control the crime scene and collect the evidence at the scene.³¹⁷ At the conclusion of testing, PathWest passes the results back to the police and through the police to the Director of Public Prosecutions (DPP).

Since the inception of the DNA database and the use of DNA analysis in the courts, an exponential increase in the number of specimens sent for analysis has taken place.³¹⁸

In May 2006 the Auditor General for Western Australia (WA) published a performance examination which reviewed the efficiency and effectiveness of forensic investigation in WA. Amongst its key findings relevant to this Inquiry was one that related to delays in the judicial process, namely the finding that read: "Delays in obtaining forensic evidence are adversely affecting the justice system, one of the most significant issues being a large backlog in DNA analyses, resulting in delayed prosecutions and court adjournments."³¹⁹

Several witnesses attested to receiving forensic reports after a significant time had elapsed which, at face value, appeared to support the Auditor General's finding:

The SARC doctor receives feedback from Forensic Biology for quality assurance purposes, about the quality of specimen collection and labelling. Some information is also received

³¹⁶ Dr Gavin Robert Turbett, *Transcript of Evidence*, 16 May 2007, p1.

³¹⁷ Ibid, p2.

³¹⁸ Dr Maureen Ann Phillips, *Transcript of Evidence*, 2 March 2007, p8.

³¹⁹ Auditor General for Western Australia, Available at: http://www.audit.wa.gov.au/reports/report2006_04.html Accessed on 27 July 2007.

*indirectly about the outcomes of microscopy, chemical testing for sperm and whether or not the specimens were subjected to DNA analysis. Often this information is not received by SARC until close to the trial dates. Anecdotally, forensic biology results are only available to the prosecution within a similar timeframe.*³²⁰

A defence lawyer advised of two cases where “[t]hey gave [the DNA] to us after he had been in jail for almost a year.”³²¹

Another witness reported, “Yes, it was a low priority. We never got the forensics. I do not even know if the forensics were done in the end.”³²²

The Director of Public Prosecutions advised that a number of trials were delayed in 2007 because DNA evidence was not available at the trial, or in a timely fashion prior to the trial, to enable the defence lawyers to conduct their own investigations.³²³

The implication in these comments, that there are delays in the production of forensics reports, is one that is disputed by PathWest.

By way of background to the process issues facing PathWest in handling forensics as they affect timely outcomes, the Committee was advised by PathWest that:³²⁴

- All forensic laboratories world wide are faced with similar issues. In Western Australia the workload increased threefold in 2001 to 2004 and has only just plateaued now;
- PathWest believes that it is a victim of its own success;

*As we do more, as we can achieve more, as we give better turnaround times, I think the number of exhibits will actually increase as well. So, in a sense, I believe that we are victims of our own success The Western Australian DNA database is actually brilliant, quite honestly; it is one of the best in the country. Three per cent of the Western Australian population is on this database. I am not trumpeting that as a thing to necessarily be proud of, but it is a fact. At the moment for every four burglary cases that we get in, we give the police the name of one of those four.*³²⁵

- The resource issue that PathWest faces is not a monetary one but one of a lack of trained staff;

We have recruited 26 extra personnel in the past year, and we will be recruiting more. However, it takes in excess of three years to train an experienced medical scientist before he or she can take a case to court..... The laboratory has grown from about 18 staff in 1998 to more than 70 today, and

³²⁰ Submission No. 9 from Sexual Assault Resource Centre, n.d., pp3-4.

³²¹ Mr Thomas Percy, *Transcript of Evidence*, 19 February 2007, p12.

³²² *Transcript of Evidence*, 30 March 2007, p3.

³²³ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p9.

³²⁴ Mr David Roy Taylor and Dr Gavin Robert Turbett, , *Transcript of Evidence*, 16 May 2007.

³²⁵ Dr Gavin Turbett, *Transcript of Evidence*, 16 May 2007, p14.

*we are still training. If we take on a lot of people, we actually slow down our outputs while we are training, so we have to do it with a balanced approach, and that is what we have been doing over the past few years, but trying to crank it up.*³²⁶

To manage the personnel difficulties PathWest is also investing heavily in robotics and automating a significant amount of their DNA extraction work; and

- While some cases may have only five DNA exhibits, some individual cases may have up to 500 DNA exhibits; each one of which is counted in the Auditor General's Report on the size of the backlog. In total, PathWest receives about 5 000 crime cases a year of which about 1 000 are major crimes.

Despite operational pressures faced by PathWest, the suggested tardiness in the provision of results has been disputed by the General Manager. He advised that they can provide police with a piece of intelligence (INTEL) on urgent matters within days. His perspective on this matter is so strong that when the Auditor General's report came out on forensic services in Western Australia, he responded immediately to the points raised by seeking evidence of significant delays adversely affecting trial dates:

*Dr Gavin Turbett and I went and met with the president of the Criminal Lawyers' Association, representatives of the Director of Public Prosecutions, and the Chief Judge. Not one of them could detail one trial that we had delayed at that time. All three of them said that drug trials had been delayed, but we made it quite clear that we are not responsible for drugs; that is a different agency altogether.*³²⁷

What is acknowledged is that a significant growth in demand has occurred because police cannot revisit crime scenes some months down the track to collect evidence. They therefore "collect more exhibits than they ever used to. An expectation has been placed on us by the entire system that we will examine everything".³²⁸ For example, "It does not become so much about what we did do and did find but rather the risk that the defence will allege that we did not look at something. The safest option, from the DPP's point of view, is to look at everything, without exception."³²⁹

The nature of this growth in demand has lead to what is reported to be a backlog. The Auditor General's reports states, "There is currently a large and increasing backlog of crime scene exhibits waiting for DNA analysis. In December 2005, PathWest had 37,309 requests for DNA analysis of crime scene exhibits waiting to be processed."³³⁰

³²⁶ Mr David Taylor, *Transcript of Evidence*, 16 May 2007, p5.

³²⁷ Mr David Taylor, *Transcript of Evidence*, 16 May 2007, p5.

³²⁸ Dr Gavin Turbett, *Transcript of Evidence*, 16 May 2007, p4.

³²⁹ Ibid.

³³⁰ Auditor General for Western Australia, Available at: http://www.audit.wa.gov.au/reports/report2006_04.html Accessed on 27 July 2007.

PathWest argues that where the exhibits have been examined, but a report has yet to be issued, this is not a backlog although treated as such by the Auditor General. This is because the report is not prepared until the trial date is known:

*I do not believe that that paints a true picture of the circumstances of the situation. That figure of 37 309 includes items that we have not looked at, but it also includes items on which DNA has not been found and that, in fact, are waiting to be reported; items on which DNA was found but was not linked to a known person on the database; items on which DNA was found and linked to another crime scene but not to a known person; items on which DNA was found and linked to a known person, but were awaiting an evidentiary swab from the police; items or cases for which the court reports were being produced but had not yet gone to trial. I do not believe that the report painted a true picture of the circumstances. As Dr Gavin Turbett has just told you, the particular trial we are talking about involves some 400 items. Under the Auditor General's definition of "backlog", those 400 items are included in the backlog. They are not in backlog; that is not my definition of a backlog. I do not believe the report paints a true picture of the circumstances... If we receive exhibits for a case and it is judged to be low priority, we will treat it exactly that way, and it will always take a backseat to today's major case. We do have exhibits that have been sitting in the lab, probably for years, and have not yet been looked at, but they are a low priority, and they will sit there until such time as we are advised otherwise. If we are told that the trial is coming up in three months time, we will then process those exhibits and issue a report.*³³¹

However while the report is not prepared prior to a scheduled trial date, PathWest feeds INTEL information back to the Police early on, to assist them with their investigation. Additionally PathWest will provide a short version report within a month and a full report within six months, although in many cases the accused pleads guilty and a full court report is not required.

*[The Chief Justice] has an undertaking from PathWest now, that it will produce - within one month of request, which is effectively that charge - a short version report. It is not just a matter of matching the DNA, they can do that within a day and tell the police we think the suspect is here or there or not, but to produce a report requires, as your question implies, analysis of other exhibits. However, that is not enough for evidential purposes because it has not been peer reviewed, and it has not been tested against the sorts of databases, to which reference has to have been had to ensure that you are really confident of some of your assumptions. PathWest, it may sound odd, has promised that within six months it can produce a full report. Although that may seem like a long time that is much quicker than it was before. PathWest are now saying "look, within a month we can produce a short version report; within six months we will produce a full report". With our backlog, that is now enough to enable us to conduct these trials with some degree of certainty.*³³²

³³¹ Mr David Taylor, *Transcript of Evidence*, 16 May 2007 p5.

³³² Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p9.

Finding 22

The varying requirements of the forensic processes are poorly communicated or understood leading to misconceptions around the timeliness of the production of results. However recent agreements between PathWest and the Office of the Director of Public Prosecutions for the production of results should provide timely reports.

CHAPTER 6 ADEQUACY OF VICTIM SUPPORT

The issue of the treatment and support of victims who are called on to be witnesses in criminal trials is a matter of international concern. In 1985, the United Nations adopted a Declaration of Basic Principles of Justice for Victims of Crime:

*The declaration recognized that victims of crime, and often their families, witnesses and others who aid them, experience, as a result of the crime, loss, damage, injury or trauma which require attention. It also recognized that they often suffer additional hardship when they are assisting in the investigation, prosecution and adjudication of the offender.*³³³

In 2005 ‘victim support’ formed the focus of the annual conference of the International Association of Prosecutors held in Denmark. This conference concluded that:

*Prosecutors can alleviate the feeling of being victimized a second time by ensuring that the victim is informed, by not using legal jargon outside the court room and by treating the victim with the friendliness and dignity he/she deserves. Prosecutors have a key role in changing the culture within the justice system and, in order to recognize that victims deserve to be treated with dignity, deserve protection and support.*³³⁴

In Australia, as elsewhere, the victim who feels personally traumatised by the events that have transpired may well feel re-traumatised once a sexual abuse allegation is framed as a legal problem, that is, once a criminal prosecution is initiated. This is so in large part because in the justice system only a legal solution can be provided (that is, conviction and sentence, discontinuance or acquittal), and other issues become secondary.

*The issue of necessity becomes one centred on proof of very specific allegations. Other aspects of the overall context of the offending behaviour — prevention, rehabilitation, the welfare of the child [or adult], family dynamics and the integrity of the family [or other relationships] for example, are not the primary concerns of the legal process. This is principally a consequence of the legal system’s focus on ‘justice’ rather than welfare or protection, as well as its adversarial nature.*³³⁵

The current criminal justice system is often criticised for displacing the victim, as the focal point:

Gradually the State took increasing interest in regulating these matters and eventually crimes came to be seen as offences primarily against the Crown and the victim faded into

³³³ The International Association of Prosecutors, Available at http://www.iap.nl.com/victims_bps5.pdf. Accessed on 14 August 2007.

³³⁴ Ibid.

³³⁵ Crime and Misconduct Commission, Available at: <http://www.cmc.qld.gov.au/data/portal/00000005/content/12867001131403329213.pdf> Accessed on 13 July 2007.

*the background. Thus it is commonly acknowledged that the victim has been the 'forgotten' party in the criminal process.*³³⁶

The legal system is a 'justice' system and all the parts have to work within the framework of that system:

*The victim no longer decides who is to be prosecuted but is usually the key witness in criminal proceedings. The prosecutor does not investigate crimes but must rely on the police (or other regulatory agency) to do so and obtain sufficient evidence to demonstrate the guilt of the person accused of a crime to the requisite standard. Similarly, the courts have no power to direct that charges be laid and must await the decision of the parties to refer a case to them.*³³⁷

Once in the justice system the victim becomes a witness for the prosecuting authority and to that extent is no longer the central focus of the legal process. The prosecuting authority does not act on behalf of the victim and so does not have a client/lawyer relationship with them. The prosecuting authority is acting on behalf of the state. In fact the legal system must not assume the truth of the allegations. As a consequence the victim may feel a real lack of support through the legal process. As one submission stated:

*We can not rely on police involvement and prosecution to provide closure or resolution for victims. Children and their families need to know where they can turn to for help when they are harmed and they need assistance.*³³⁸

The need for compassionate support of victims is therefore a matter resulting both from the trauma of the original offence and also the judicial process established to deal with that offence.

Finding 23

There is a lack of understanding in the community that the prosecuting authority does not act on behalf of the victim. This can lead to unrealistic expectations on the part of the victim.

³³⁶ Keating, N., 'Review of services to victims of crime and crown witnesses provided by the Office of the Director of Public Prosecutions for Western Australia', April 2001. Available at <http://www.dpp.wa.gov.au/frames.asp?pageId=r4370124&content=/content/publications.htm>. Accessed on 10 August 2007.

³³⁷ ACT Parliament, Available at: <http://www.parliament.act.gov.au/downloads/submissions/PAC%2008%20-%20DPP.pdf> Accessed on 29 July 2007.

³³⁸ Submission No. 20, 27 July 2007, p4.

6.1 Themes on best practice responses to victims of sexual offences arising from national and international literature.

In August 2006 the Federal Department of Health and Human Services published a KPMG report which reviewed the sexual assault support service system in Australia. *Inter alia* this report canvassed national and international literature in terms of best practice responses to sexual assault victims. The report states:

Clients of sexual assault services may be recently assaulted adults and children or adults who have been assaulted in the past. For recently assaulted clients, medical services are a critical element to the service response. An effective medical service for victims of recent sexual assault incorporates:

- *a swift response, preferably within one hour of attendance;*
- *provision of a private, dedicated space, away from the hospital accident and emergency department;*
- *trained and skilled practitioners, with predominantly female examiners;*
- *allowing the victim to control the pace of the medical examination, and providing time to discuss the process, to debrief and to provide support; and*

appropriate medical and counselling referral or follow-up.

Sexual assault nurse examiners have been introduced in Britain, Canada and the United States (US) as a means of improving the experiences of sexual assault victims.

Themes arising from the literature suggest that effective counselling, support and advocacy services for all victims of sexual assault, whether the incident is recent or has occurred in the past, should have:

- *a clear philosophical basis;*
- *privacy;*
- *integrated services, including forensic examiners;*
- *optimal access using websites and other marketing tools;*
- *strong inter-agency partnerships;*
- *'case-tracking;' and*
- *out-of-hours information and support.*³³⁹

³³⁹

Department of Health and Human Services, *Review of the Sexual Assault Support Service System*, report prepared by KPMG, August 2006, pp6-7.

The co-location of multiple services has been a model adopted in the United States (US), the United Kingdom (UK), South Africa, Malaysia and Scandinavia. The concept has been implemented extensively in the UK, where service users have rated the more integrated services very highly. The proportion of incidents resulting in a medical examination of the victim/complainant were markedly higher in areas which had implemented a multi-service model, as were the proportions of victims accessing counselling and support services.

The desirability of co-locating services was a theme reiterated by a number of witnesses and is typified in the following statement:

*I would want a one-stop shop that a person can go to when she has been assaulted to have the forensics done and to make her statement. Such a place would have really good ongoing referral information so that victims could have access to information about the court system. I had no idea how the court system worked until 14 months after my assault when the perpetrator was finally caught. I was sent something from the DPP and that is when I realised how the system worked. I had no sense of what was involved. It was frightening and at the time I did not know what was going to happen. Like most victims, I had had no contact with the legal justice system and no prior knowledge of it. A one-stop shop would provide relevant information to victims and the agencies would sing in tune and there would be no big gaps to fall down.*³⁴⁰

This was reinforced in the KPMG report:

*Sexual assault service provision needs to accommodate the specific experiences and needs of all potential clients... [including] indigenous people, people from culturally and linguistically diverse backgrounds, those residing in rural and remote locations and adults with cases of historical abuse. Service providers should be aware of and plan around the barriers to accessing services that some groups of clients may experience.*³⁴¹

It is in the context of such researched best practice that the services and issues canvassed by witnesses both in Committee hearings and in submissions are considered in this chapter.

6.2 Personal recovery versus the evidentiary process

Evidentiary failure and attrition may occur because requirements of the justice system are counter-therapeutic. For example the victim/complainant's recovery process is hindered when their expectations of the justice system, are not matched by the reality of the justice system itself:

Prosecuting counsel has no interest in securing a conviction – 'Its only interest is that the right person should be convicted, that the truth should be known and that justice should be done'. The role of the prosecutor is therefore markedly different to the duty of defence counsel. It is a role necessarily directed toward attaining justice rather than a conviction

³⁴⁰ Ms Philippa Brennan, *Transcript of Evidence*, 15 August 2007, p5.

³⁴¹ Department of Health and Human services, *Review of the Sexual Assault Support Service System*, report prepared by KPMG, August 2006, pp6-7.

*in any particular case – and relieves, to some extent, the imbalance between the resources of the State and the resources of the individual in any criminal proceedings.*³⁴²

As canvassed at the beginning of this chapter, there may be severe psychological trauma associated with cases of sexual offence. The victim is then faced with the possibility of two responses which are potentially at odds with each other, namely:

- Reporting to the police and proceeding through the justice system in the hope that a fair and just outcome is achieved; and
- Attempting to deal with the psychological impact of the trauma either through informal therapeutic methods or seeking out therapeutic counselling.³⁴³

The Sexual Assault Resource Centre (SARC) describes the difficulties faced by the victim in reconciling the two responses as follows:

*The clinical research evidence indicates that the most therapeutic way to process the traumatic event and hence reduce symptoms of hyper-arousal, re-experiencing the event, avoidance and numbing is to allow the victim to tell their story in their own way and at their own pace so they feel they are able to regain some control over a situation that was out of their control. However, in gathering ‘evidence’ the justice system (police, prosecutors) often require the victim to tell the story all at once in a logical manner, recalling all aspects of the event/s in detail and to repeat it a number of times to people they do not know. Hence victims, who initially reported the alleged crime and wanted to pursue the justice system, may subsequently withdraw from the process due to the fact that the requirements of the justice system are counter therapeutic and in fact can exacerbate the traumatic reaction by the justice system, repeatedly re-traumatising them.*³⁴⁴

(a) Therapeutic jurisprudence

In recent years there has been discussion, both in Australia and overseas, of alternative models of justice. These include restorative and therapeutic alternatives to traditional sentencing in order to manage crime in our community in a more holistic, humane and cost effective manner than has been the case to date. Whilst such approaches are relatively innovative, there is some evidence that therapeutic approaches in justice may yield positive longer term outcomes than traditional punitive approaches. The Canadian Department of Justice meta-analysis of various restorative justice

³⁴² Submission No. 27 from The Office of the Director of Public Prosecutions for Western Australia, July 2007, p10.

³⁴³ Submission No. 9 from Sexual Assault Resource Centre, n.d., p2.

³⁴⁴ Submission No. 9 from Sexual Assault Resource Centre, n.d., p2.

program evaluations found that "...restorative justice programs, on average, yielded reductions in recidivism compared to non-restorative approaches to criminal behaviour."³⁴⁵

In Australia such approaches, where they exist, are generally found in the development of specialist courts or tribunals that deal with a particular problem, such as drugs, or the Family Court. There is no precedent for such initiatives in Australia for major crimes like sexual assault. On the contrary, the courts seek to preserve public confidence in the justice system as a necessary and key element of maintaining the rule of law.³⁴⁶ As such there is seen to be a retributive requirement in sentencing.

It is these tensions between the traditional legal retributive approach of the justice system and the aims of restorative or therapeutic justice that make the latter problematical in cases of major crime, such as sexual assault. Additionally there are some concerns regarding the appropriateness of applying restorative justice:

*both because of doubts that restorative methods can benefit victims in this context and because of the perceived incompatibility of restorative justice with the women's movement goal of establishing violence against women as a serious public criminal law issue.*³⁴⁷

Notwithstanding this, it is argued that therapeutic approaches to justice do not diminish or compromise a defendant's rights but would seek to "alleviate much of the disappointment and disquiet that sexual assault victims feel about the criminal justice process."³⁴⁸ This disquiet includes the delays experienced and the sense of disempowerment leading to the victim's abandonment of proceedings.

The DPP, in its submission, acknowledged that there are a range of issues in the current judicial process that work against keeping victims in the process. These include victims:

*Not being kept informed, feeling powerless and ashamed and having no control, exacerbated by the length of time it takes to progress a matter through the criminal justice system..... From a policy perspective, in the short term such concerns may lead to complainants wanting to withdraw and impede recovery and in the long term, evidence suggests that it may discourage complainants from reporting at all.*³⁴⁹

³⁴⁵ Caxton Legal Centre, 'Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs: Inquiry into crime in the community.', 2002. Available at: <http://www.aph.gov.au/house/committee/laca/crimeinthecommunity/subs/sub82.pdf>. Accessed on 27 November 2007.

³⁴⁶ Australian Legal Information Institute, 'Court transparency and public confidence', n.d.. Available at: <http://www.austlii.edu.au/au/journals/DeakinLRev/2003/1.html>. Accessed on 27 November 2007.

³⁴⁷ Canadian Forum on Civil Justice, 'Mediating sexual assault', 2005 Available at: <http://cfcj-fcjc.org/clearinghouse/drpapers/2005-dra/schroeder.pdf>. Accessed on 27 November 2007.

³⁴⁸ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p iv.

³⁴⁹ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p iii.

These factors, taken in conjunction with the need to minimise victim trauma, are seen to commend an alternative approach to the current judicial process in some instances.

Not all victims want the outcomes delivered by our criminal justice system. We might be better off looking at what the victim wants, or what can best satisfy or assist the victim to overcome the trauma and psychological impact that the offence has had on him or her. Sometimes you will find, and it has been my experience, that an apology by the offender is more valuable and more important to the victim than it is for me to burden everybody with a four or five-day criminal trial and send the offender to jail.³⁵⁰

One proposed solution to the rate of attrition in the current system is to build a more therapeutic process into it, recognising that the law is a social force that produces behaviours and consequences and that:

Sometimes these consequences fall within the realm of what we call therapeutic; other times anti-therapeutic consequences are produced. Therapeutic jurisprudence wants us to be aware of this and wants us to see whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected.³⁵¹

Both the DPP and management in other agencies support the further development of initiatives that would incorporate strategies which may be categorised as therapeutic jurisprudence.^{352 353}

Finding 24

There is some evidence that therapeutic approaches in jurisprudence may work to the longer term benefit of the victim and also reduce recidivist behaviour. There is therefore a role for such alternative strategies, as is already recognised in some sectors of the court system. However there is a real tension between the possible advantages of therapeutic jurisprudence to the victim and the community's requirement for punishment in cases of major crime.

³⁵⁰ Mr Robert Cock, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 5 September 2007, pp10-11.

³⁵¹ The University of Arizona, http://www.law.arizona.edu/depts/upr-intj/intj-o.html#N_5_#N_5_. Accessed on 13 August 2007.

³⁵² Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p iv.

³⁵³ Submission No. 20, 2 August 2007, pp1-9.

Recommendation 19

The Office of the Director of Public Prosecutions, in collaboration with the Department of the Attorney General, investigate and report on the merits of therapeutic justice.

(b) Child Advocacy Centres

In the context of therapeutic jurisprudence one submission recommended the Child Advocacy Centre (CAC) model. This model was first introduced into the United States in the 1980s to try and address the criticism of judicial system induced trauma in children.

The model is supported by the KPMG report which states that “service users have rated more integrated services highly”.³⁵⁴

In particular the CAC model provides:

- child-focused services;
- a tested multidisciplinary team model;
- timely responses;
- information sharing and planned joint responses;
- comprehensive assessments and service provision; and
- case review and tracking, with children being less likely to fall through service gaps.

The aim of this service is that, together with justice outcomes, the process becomes all inclusive in meeting goals focused on the child’s wellbeing in the immediate and long term.³⁵⁵ It is a model that has been used and applied to a range of judicial client groups most notably:

- child victims of physical and sexual assault;
- adult victims of sexual assault;
- victims of elder abuse; and
- victims of domestic violence.

³⁵⁴ Department of Health and Human Services, *Review of the Sexual Assault Support Service System*, report prepared by KPMG, August 2006, pp6-7.

³⁵⁵ Submission No. 20, 2 August 2007, p4.

As outlined and described in this report, there are presently shortfalls in therapeutic responses for victims of all ages in Western Australia. One submission provides an important response,

*delays in referral to this service often exist for both children and families and the service is only available to those cases where charges are laid. For victims who are informed charges will not be preferred, the search for counselling or support services is left to the individual family. ...[By contrast] under the CAC model there is a dedicated and consistent contact worker for each family from the moment they require the interview/investigation service through to the point at which they no longer require services (e.g. counselling) or the court outcome is concluded.*³⁵⁶

Recommendation 20

That the Office of the Director of Public Prosecutions, Western Australia Police, Sexual Assault Resource Centre, and the Victim Support Service, the Child Protection Unit, the Department of Child Protection and the Public Advocate of Western Australia

- (a) collaborate to implement the Child Advocacy Centre model of victim support for children; and
- (b) investigate the adoption of a similar model of victim support for adult victims of sexual assault.

6.3 Adult victim support

Victim support is achieved by addressing those processes in the judicial system which negatively impact on the victim, and providing appropriate services to provide support.

(a) Victim support within the law enforcement context

One of the key government support agencies is the Victims Support Services (VSS) working within the Department of the Attorney General. The VSS provides victims of crime with a level of support in Western Australia through the provision of a range of services. As such the VSS is seen as an important service provider and as having a crucial role in helping victims with victim impact statements. It mainly deals with serious personal offences like sex assault and homicides. While its services are arguably under publicised³⁵⁷ and under promoted it nonetheless offers to:

³⁵⁶ Submission No. 20, 2 August 2007, p8.

³⁵⁷ Keating, N., 'Review of services to victims of crime and crown witnesses provided by the Office of the Director of Public Prosecutions for Western Australia', April 2001. Available at

- *provide information on the status of police investigations;*
- *provide information about court proceedings;*
- *help write a victim impact statement;*
- *provide counselling and support either at home or at the office;*
- *have someone support victims at court;*
- *provide information and referrals for other services;*
- *help with enquiries about criminal injuries compensation claims;*
- *help victims understand your rights within the criminal justice system.*³⁵⁸

In 2004, in reference to processes within the judicial system, research examining ways to enhance the victim's psychological functioning found that a:

*crucial, but common, finding ... was the lack of understanding by many working in the criminal justice system of what a victim was going through and also the, too often, negative impact on victims of what officers said or how they operated, reinforced by work practices, processes, and procedures.*³⁵⁹

The judicial authorities in Western Australia are sensitive to the dichotomous nature of the victims' needs (justice and therapy) and in 2001 the DPP commissioned a 'Review of Services to Victims of Crime and Crown Witnesses provided by the Office of Director of Public Prosecutions for Western Australia' to look at existent services.

Since 2001 a number of developments in services to victims have been initiated which have seen several new bodies established or existing ones reformed to improve the delivery of services. These are detailed in Appendix 2.

In recent years there have also been a number of significant reforms by the DPP in the actual court process aimed at reducing the trauma on victims. Most notably:

sexual assault victims are effectively deemed to require special witness status, with all its protective entitlements (screens, CCTV or support persons), unless they do not want it. This includes pre-recording, which reduces greatly encountering alleged offenders and family on court day and minimises issues of delay, resulting in earlier dealing with the

<http://www.dpp.wa.gov.au/frames.asp?pageId=r4370124andcontent=/content/publications.htm>. Accessed on 10 August 2007.

³⁵⁸ Department of the Attorney General, 'Victim Support Service', Available at: http://www.justice.wa.gov.au/V/victim_support_service.aspx?uid=7319-1784-3819-2199. Accessed on 29 August 2007.

³⁵⁹ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p21.

*matter from the victim's perspective. It also deals with the possibility that victims were not being invited to avail themselves of such aids.*³⁶⁰

However, whether appearing as a 'witness', or a 'special witness', within the context of the legal processes a core issue is that the victim is simply a witness in the formal proceedings. Consequently, one of the difficulties encountered is that the victim does not have constant legal representation, although the following legal services are available to some defendants and victims, depending on the need:

- *Legal Aid WA represents or provides aid for defendants and can act for victims regarding criminal injuries claims, as well as running the Domestic Violence Prevention Unit.*
- *The Aboriginal Legal Service, like Legal Aid, represents or provides aid for defendants and can act for victims regarding criminal injuries claims, subject to no conflict of interest.*
- *Apart from acting for clients regarding the Mental Health Act 1996, the Mental Health Law Centre can provide legal advice on other matters.*
- *Victims can instruct private lawyers to represent their interests, although such a lawyer would not have standing in any State prosecution.*³⁶¹

One of the key issues flowing from the lack of having legal representation that has consistently been raised by both victims and the Victim Support Service³⁶² is the need for timely information:

*Issues of time and timeliness regarding provision of information to victims are very complex. There are many aspects to time: victims not being told information on time or in a timely manner, prosecutors running short of time, the overriding pressures of prosecutorial work which can preclude sensitive treatment, at least for victims who are not witnesses, law clerks giving time to priority court work, and the time limits set by court dates. Time is a perennial problem in law offices. It is compounded in the DPP, which is basically a court based legal practice, where the imperative of court dates is overwhelming.*³⁶³

There is a clear and established need for 'witness assistance officers' to be provided to help address victim's issues. This should include the provision of information dealing with:

³⁶⁰ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p11.

³⁶¹ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p6.

³⁶² Keating, N., 'Review of services to victims of crime and crown witnesses provided by the Office of the Director of Public Prosecutions for Western Australia', April 2001. Available at <http://www.dpp.wa.gov.au/frames.asp?pageId=r4370124andcontent=/content/publications.htm>. Accessed on 10 August 2007.

³⁶³ Keating, N., 'Review of services to victims of crime and crown witnesses provided by the Office of the Director of Public Prosecutions for Western Australia', April 2001. Available at <http://www.dpp.wa.gov.au/frames.asp?pageId=r4370124andcontent=/content/publications.htm>. Accessed on 10 August 2007.

- facing the perpetrator in court,
- fears of cross examination and public exposure,
- lack of involvement in the process and the ensuing powerlessness and
- threat of withdrawal of the case.

The case for the provision of information being an unmet need was strongly articulated in the *Review of services to victims of crime and Crown witnesses provided by the Office of the Director of Public Prosecutions for Western Australia*.³⁶⁴

Variants of these witness assistance services (WAS) are commonplace in most DPP offices in other jurisdictions in Australia. The New South Wales DPP has modelled its' witness service (staffed by 16 officers) on the internal witness assistance services found in most District Attorney Offices in the United States:

*NSW DPP has a highly organised and professional WAS that had its genesis in the Wood Royal Commission's recommendation that every child victim of sexual assault should have access to WAS, resulting in a witness assistance officer in every DPP office. This was followed by the Gordon Samuels Report recommendation that WAS be involved in every matter of substance. WAS is now staffed by about 33 witness assistance officers (WASOs) who have tertiary qualifications in either social work, psychology or a related field, with the most recent State budget allocation for WAS was \$3.3million. Since 2004 there have been three Aboriginal WAS Officers at the ODPP who provide services for Indigenous victims of crime and witnesses and also assist with general service provision.*³⁶⁵

In other states the witness assistance programs and the internal witness assistance officers deliver services that in Western Australia are provided by both the Victim Support Service and the Child Witness Service. They also:

*provide extra services to victims of serious and sensitive matters and to disadvantaged groups in particular. From recent discussions and correspondence it is clear that such services remain intrinsic and fundamental to the work of most interstate DPP offices, being a major part of assisting victims and witnesses, particularly of sexual assault, in their dealings with the criminal justice system, thereby minimising the trauma associated with it as much as possible.*³⁶⁶

In Western Australia, there are currently no formal protocols for the liaison by the ODPP with victims of sexual assault as exist, for instance, with the relatives of homicide victims. The reason for the lack of protocols is insufficient resources within the ODPP to provide the higher level of

³⁶⁴ Keating, N., 'Review of services to victims of crime and crown witnesses provided by the Office of the Director of Public Prosecutions for Western Australia', April 2001. Available at <http://www.dpp.wa.gov.au/frames.asp?pageId=r4370124andcontent=/content/publications.htm>. Accessed on 10 August 2007.

³⁶⁵ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p 57.

³⁶⁶ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p30.

service that would be required to implement these protocols in sexual assault cases. In fact the Director of Public Prosecutions considered that three to four victim assistance officers, remunerated at PSA level 4, would be required. It used to be the case that SARC provided a similar liaison service in cases of sexual assault.

The need for communication protocols and a victim or witness liaison officer was highlighted in one submission as follows:

*I also want to be kept updated on the case. I lodged a form with the DPP several months ago which was meant to ensure that I was kept updated but nothing so far. Keeping me updated would keep me on track. I especially wanted to know if he changed his plea of 'not guilty' at the last court hearing. That would hearten me a little.*³⁶⁷

It was contended by the DPP that having the witness or victim assistance officers within the ODPP would be singularly advantageous in the context of victim support. These officers would be victim focused compared with most staff within the DPP whose focus is the litigious legal process of preparation of the brief for prosecution, going to trial and dealing with sentence.³⁶⁸

In general, the model witness assistance services program use trained social workers or counsellors to deliver services whose main benefits for the ODPP would be to:

- *improve delivery of information to victims;*
- *complement and assist implementation of the witness specific aspect of Case Tracking and Practice Management System (CASES) being the Witness Assistance Service System;*
- *enable prosecutors to focus more on legal work;*
- *provide more specialised and focused assistance for victims of serious and sensitive matters or with special needs;*
- *better manage victims' understanding of the justice system and their particular matter, particularly regarding serious and sensitive matters;*
- *provide support to prosecutors including sitting in on witness proofings*³⁶⁹, *and*
- *provide support to ODPP staff who may be at risk of vicarious traumatisation.*³⁷⁰

³⁶⁷ Submission No. 11, 17 May 2007, p1.

³⁶⁸ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p31.

³⁶⁹ Barrister preparation of the witness.

³⁷⁰ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p31.

Finding 25

Victim dissatisfaction with services provided was a common theme in submissions and evidence to the Committee.

Finding 26

The legal culture and language of the Office of the Director of Public Prosecutions may prove contrary to the needs of the victim. This difficulty has been addressed in most states and overseas jurisdictions with the use of a witness assistance service that provides a broad based victim support role within the context of the judicial process and the Office of the Director of Public Prosecutions.

Recommendation 21

The Government provide funding to establish a victim/witness assistance service team in the ODPP based on a combination of New South Wales, Victorian and South Australian models. Indigenous victims and witnesses, and victims and witnesses with special needs, should be provided with officers dedicated to working with these groups.

(b) Non-judicial victim support services

There are a range of non-judicial victim support services. These include:

- Princess Margaret Hospital – Child Protection Unit (assessment and medical examination);
- Princess Margaret Hospital Therapeutic Services (only for children seen at PMH - CPU);
- Services funded by the Federal and State Governments – general counselling services (vs. specific witness support) in the community provided by agencies such as Anglicare, SafeCare, Relationships Australia (some have waiting lists, referral/information provided to families re these services is variable);
- Child Witness Service - Department of the Attorney General (support to child victims/witnesses only – where charges are not laid service is not available);

- Department for Child Protection – principally provide assessment and support services to children where their families are considered non- protective or need support to protect their children. Families where the offender is outside the family and the family is protective of the child are generally not offered support services;
- Sexual Assault Referral Centre – teenagers/adults;
- ASCA (Advocates for Survivors of Child Abuse); and
- Incest Survivors Association.

These last three specialist services, mostly in the metropolitan area, also offer short term support for adult survivors of childhood abuse.

The two agencies that offer the most comprehensive support service, including forensics, in the support of victims are the Child Protection Unit of Princess Margaret Hospital, and the Sexual Assault Resource Centre (SARC). Both of these agencies work closely with the Western Australia Police and the Director of Public Prosecutions:

For most adults, the first non law enforcement support agency contacted is often SARC. SARC is a metropolitan-based sexual assault service within the Department of Health. It provides assistance for any person, female or male, aged 13 years and over “who allege recent sexual assault. SARC also provides ongoing individual and group counselling to people with a history of sexual violence as well as an Education and Training Service and Aboriginal Liaison.”³⁷¹ SARC can also refer people to another service that may be either more appropriate for their needs and/or more accessible to where people live, whether it is in the city or in regional Western Australia.

The comprehensive approach of this agency to the provision of support is well illustrated by the following quote:

*I now have to provide a very supportive and caring medical service for the 95 or 98 per cent of cases for which conviction will never follow from what the victim has perceived to be a sexual assault. I have almost slanted my practice to be absolutely certain that the person has emotional psychological support, to ensure that the person does not get pregnant if the person does not want to, and to make sure that the victim has not caught a sexually transmitted infection. I also make sure that the people I treat are respected as people with regard to what has happened to them.*³⁷²

The service is available all hours, seven days a week. During office hours two duty phones are staffed to take any calls on issues related to sexual violence. After hours SARC has a team on-call, comprising two counsellors, who are either a social worker or a psychologist, and a doctor. The team does an initial assessment to determine the needs of the caller:

³⁷¹ Submission No. 9 from Sexual Assault Resource Centre, 23 April 2007, p1.

³⁷² Dr Maureen Phillips, *Transcript of Evidence*, 2 March 2007, p9.

*During office hours a doctor and counsellor are on site. If there are any issues or concerns about the medical situation, they will go to the doctor who is on duty at SARC. If it is after hours and they are concerned about issues regarding a person's mental state, level of toxication or significant physical injury relating to the assault, they will then triage them through to the nurses in ED at King Edward Memorial Hospital for Women. Our line management is that we report to the executive director of the King Edward Memorial Hospital for Women. We are a stand-alone service. An identifying sign is not located at the front of our section. We try to remain very discrete so that people are not aware of the service. Obviously, that is for safety reasons, but we are attached to the hospital.*³⁷³

At the initial contact SARC will inquire how recently the offence occurred. Those that involve a sexual assault that has occurred within the past 14 days are high priority cases, having regard to the victim's possible requirement for a medical and forensic examination. Those offences that have occurred more than 14 days previously are important "and we triage them, but they are less critical in terms of seeing the client quickly."³⁷⁴

In those cases where the sexual assault occurred within 14 days of contact the victim may choose which service they want to access.

*They come in and they are met by doctor and a counsellor. It is a team - always the two of them. A further assessment is carried out at that stage. They are asked what their medical needs are ... They are also asked, "Do you want a forensic examination to be used if, later on, there is the potential for you to go down the criminal justice path", or "Do you want counselling and psychosocial support, given the trauma of what has just happened to you?" At that point, police might accompany the person because they have been notified and involved, and the person wants the police involved.*³⁷⁵

SARC responds on average to one emergency case per day. An emergency case is defined as a sexual assault occurring in the past fortnight. On presentation, a medical/forensic examination and counselling support is provided. Most of these people will have been sexually penetrated without their consent. Many of these will choose not to report to the police.³⁷⁶

The following table reflects both the emergency cases seen and the police reporting rate and therefore the percentage of those who came only for support.³⁷⁷

³⁷³ Ms Tania Towers, *Transcript of Evidence*, 2 March 2007, p2.

³⁷⁴ Ms Tania Towers, *Transcript of Evidence*, 2 March 2007, p2.

³⁷⁵ Ms Tania Towers, *Transcript of Evidence*, 2 March 2007, p2.

³⁷⁶ Submission No. 9 from Sexual Assault Resource Centre, 23 April 2007, p2.

³⁷⁷ Submission No. 9 from Sexual Assault Resource Centre, 23 April 2007, p2.

Table 6.1

Year	Number of emergency cases seen	Number of reports sent to the police	% of police reports as against emergency cases seen
Oct 01 - Sept 02	360	165	46
Oct 02 - Sept 03	337	138	41
Oct 03 - Sept 04	347	132	38
Oct 04 - Sept 05	352	158	45
Oct 05 - Sept 06	364	115	32
TOTAL	1760	708	40

However, for adult victims, while SARC is invaluable it is felt to have clear limitations. Reclaiming Voices attributed their own existence in part to these limitations. “SARC holds a seven-week group course. However, when that is finished there is no ongoing group. Women come to us because there are a lot of gaps.”³⁷⁸

As implied in the above review of SARC’s services, adult victims of childhood sexual offences are amongst those who fall into these gaps:

*In relation to adult victims who were abused as a child, typically the feedback that I get from victims is that they are not able to source assistance from SARC, because, as I have said, its focus is recent sexual assaults, and once we start talking about historic cases, it gets difficult. There might be a bit of assistance available from SARC, but people generally have to join a waitlist to access it.*³⁷⁹

In addition, groups such as Reclaiming Voices appear to operate in relative isolation from each other. The desirability of drawing the different non-judicial support agencies together under a peak body that could also actively advocate on behalf of its member agencies and their clients was suggested as a solution:

*What would address many of the gaps right now is advocacy in terms of drawing together all the different agencies.*³⁸⁰

The second comprehensive government non-judicial support agency that interfaces with the police and the judiciary is the Child Protection Unit (CPU) of Princess Margaret Hospital. These services are discussed below.

³⁷⁸ Ms Philippa Brennan, *Transcript of Evidence*, 15 August 2007, p4.

³⁷⁹ Ms Michelle Stubbs, *Transcript of Evidence*, 30 March 200, p2.

³⁸⁰ Ms Philippa Brennan, *Transcript of Evidence*, 15 August 2007, p5.

6.4 Victim support and Indigenous communities

Fergusson and Mullen suggest that the incidence of sexual assault is one in three women and one in six men in the mainstream population. The Sexual Assault Resource Centre reports that “from communications with both medical practitioners and indigenous community health workers in the north of Western Australia, the incidence of sexual violence in some regional and remote communities is much higher than Fergusson and Mullen suggest.”³⁸¹ This is also articulated in the Gordon Inquiry 2002 Report.³⁸² The report found that “violence and child abuse are grave social problems that are endemic in many Aboriginal communities.”³⁸³

In November 2005 the Auditor General Report 11 examining the ‘*Progress with Implementing the Response to the Gordon Inquiry*’ found that at that time, much still remained to be done. In particular it found inadequacies in the action plan developed in response to the Gordon Inquiry report.

In more recent times the issues of sexual offences against indigenous children in Halls Creek and other Western Australian communities have been a major public issue. At the same time (April 2007) as these events were unfolding in the media, the Chief Minister of the Northern Territory released the Northern Territory Government report, ‘Little Children are Sacred’, which was the result of an inquiry into the protection of indigenous children from sexual abuse. This report further highlighted the levels of sexual abuse in indigenous communities and lack of adequate support, noting that:

*Best practice responses and solutions to Aboriginal family violence, and particularly Aboriginal sexual abuse, are difficult to find due to a dearth of programs and the lack of documented evaluations about the effectiveness of such programs.*³⁸⁴

That Inquiry emphasised that there was an urgent need to change the way that both government and non-government agencies work with Aboriginal people. Both this need and the lack of support for indigenous communities was also recognised by those agencies and individuals that responded to the Committee’s Inquiry:

The [indigenous] mother, obviously, needs the support. The perpetrator may or may not be found. The community becomes completely disempowered by the process because all the agencies do what they should do or are charged to do but this leaves the community pretty depleted - devastated -- that is a good word. This is one of their pleas. ... The folk were telling me half an hour ago that they would like far greater involvement by community health workers in supporting the family and for them to not just think that they

³⁸¹ Submission No. 9 from Sexual Assault Referral Centre, 27 April 2007, p5.

³⁸² Gordon, Hallahan and Henry Gordon Inquiry report WA (2002).

³⁸³ Gordon, Hallahan and Henry - Gordon Inquiry report WA (2002).

³⁸⁴ Northern territory Government, *Little Children are Sacred*, April 2007, p48. Available at: http://www.nt.gov.au/dcm/InquirySaac/pdf/bipacsa_final_report.pdf. Accessed on 27 August 2007.

*have treated the kid, got rid of the baddie and it is all done. As one lady told me, that is the bandaid job - you have not really fixed the broken bone underneath.*³⁸⁵

*There are shockingly high rates of sexual abuse among Aboriginal children, and incest. It is just truly shocking. Broome lacks everything - I mean, the North West lacks everything.*³⁸⁶

One Perth based agency expressed the view to the Committee that to be effective in addressing these needs it should also be located in the regional areas where the problems arise and would also need to modify their program design to meet the cultural requirements of the communities. However, it was reported that funding is very difficult to secure even though approaches have been made by a number of the Northern Territory, Queensland and Western Australian communities for this agency to run support programs for Indigenous families, groups and communities.³⁸⁷

The Department of Child Protection advised the Committee that they had significantly expanded their presence in regional and remote areas of Western Australia; however the biggest challenge is that of human resources.

*There has been quite a significant expansion in remote community child protection workers since the Gordon Inquiry reported, and there is a continuing role now at multifunction police stations, all of which are staffed by both police and community child protection workers. So there is an expansion there and that means we are having a presence in more remote communities, and I think with the current plans we are getting very close to having all major Aboriginal communities with a multifunction police agent's service station and child protection service. Our challenge is filling those positions.*³⁸⁸

The DCP highlighted the inadequacy of funding and the limited extent of services in regional communities of Western Australia.

*The Aboriginal services are Anglicare in Derby, funded to the total tune of \$90 000 at this stage; Carnarvon Family Support Service Incorporated, which is funded for about \$124 000; Yaandina, in Roebourne, funded for about \$96 000; Yorgum, here in Perth, funded for \$223 000; and Wirraka Maya, also in Port Hedland, which is an Aboriginal medical service funded for \$80 000. I mentioned those amounts of funding to show the scale of these services. Where they are \$80 000 or \$90 000, they are a single counsellor, operating as part of a larger service. These are not big outfits at all. As indicated in our submission, we do not believe these services are sufficient to meet demand.*³⁸⁹

³⁸⁵ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p5.

³⁸⁶ Ms Belinda Lonsdale, *Transcript of Evidence*, 19 February 2007, p8.

³⁸⁷ Ms Christabel Chamarette, *Transcript of Evidence*, 15 August 2007, p14.

³⁸⁸ Mr Terry Murphy, Director General Department for Child Protection, *Transcript of Evidence*, 5 February 2008 p5.

³⁸⁹ Mr Terry Murphy, Director General Department for Child Protection, *Transcript of Evidence*, 5 February 2008 p4.

Where a case involves child sexual abuse, the child will find a very alien environment with its own rules and practices.

*Let us deal with sexual assault because physical injury is somewhat different in this whole scenario. Let us say that a 13-year-old girl goes to the health centre in Fitzroy Crossing and is complaining of a vaginal discharge. Lo and behold, she has gonorrhoea. That immediately becomes notifiable as part of the Gordon initiative. The problem the community faces is that the response is so legalistically driven - this is what they were complaining - it does not support the community. The girl becomes, in fact, frightened by what has happened.*³⁹⁰

In a paper presented to the Australian Institute of Criminology conference in 2003 it was argued that, "the extent of child sexual abuse in indigenous communities is not recognised as it should be, partly because of a failure to report, and a failure to respond to many assaults."³⁹¹

The causes for such failures are also indicative of the difficulties faced in providing support and are enumerated as follows:

- *a fear of racism and due to reasons of shame;*
- *a fear of reprisal from the perpetrator in small, closed communities, or pay-back from relatives;*
- *a perceived need to protect the perpetrator due to reasons such as the high number of Indigenous deaths in custody. Fitzgerald (2001) writes that this is a realistic fear, particularly in Cape York;*
- *communities where a death in custody would be seen as the women's (victim's) fault;*
- *a fear of the police response;*
- *difficulties in communicating with legal staff. It is difficult for some Indigenous people to translate their experience into terminology required for legal processes;*
- *the absence of someone to report to in remote communities. There may be no means of reporting in remote communities where poverty, isolation and the relatively small size of the community means there is no public transport and no private vehicles to provide access to support and secure shelter; and*
- *a lack of trust of the 'white' system.*³⁹²

³⁹⁰ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p2.

³⁹¹ Stanley, J. 'Child Sexual Abuse in Indigenous Communities', Child Sexual Abuse: Justice Response or Alternative resolution Conference, Adelaide, 2003, p3.

³⁹² Stanley, J. 'Child Sexual Abuse in Indigenous Communities', Child Sexual Abuse: Justice Response or Alternative resolution Conference, Adelaide, 2003, p3.

As Hon Tom Stephens MLA stated in March 2006, “we have ... got a pot-pourri of organisations that seem to be completely adrift, do not know what to do in response to the challenges of Aboriginal people in remote communities like Halls Creek or the surrounding areas of which they are a part.”³⁹³

Finding 27

Violence and child abuse have been reported for some years as being endemic in indigenous communities. There is a significant deficit in regional and remote areas in the provision of support services for indigenous communities.

Recognising the particular issues of the regional and remote areas, the Office of The Director of Public Prosecutions recently commenced a pilot strategy to respond more appropriately to the needs of indigenous victims and witnesses. This is known as the Kalgoorlie Project:

*The Pilot particularly focused on improving the DPP’s handling of matters involving Aboriginal victims and witnesses, to ensure that they are dealt with in a more culturally sensitive manner. This Project involved reviewing the Keating Report (particularly paras 7.2-7.4, 114-125), extensive consultation with local Aboriginal service groups, and other government agencies in the region, as well as with regional police, and examination of external and internal practices and procedures. Following the consultation process, special internal protocols were developed to improve service delivery. The consultative process of developing the protocols was of itself beneficial in developing relationships with various relevant stakeholders and interest groups, and also facilitated a focus on the needs of Aboriginal victims and witnesses, including compulsory cross cultural training and changing the ways of communicating to make them more appropriate for Aboriginal people in remote communities.*³⁹⁴

Recommendation 22

The Auditor General be asked to review again the implementation of the response to the Gordon Inquiry, and report to the Parliament on the progress made since his previous report in 2005.

6.5 Victim support and the needs of children

Sexual violence and childhood sexual abuse represent a psychological as well as physical violation of a child. In the United Kingdom, a recently published (April 2007) Cross Government

³⁹³ SBS, Available at: <http://news.sbs.com.au/livingblack/index.php?action=proginfoandid=321>. Accessed on 27 August 2007.

³⁹⁴ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p16.

Action Plan on Sexual Violence and Abuse highlighted research which showed the following features relative to that abuse:

- **Age:** *Research indicates that childhood sexual abuse is most prevalent in the 5 to 14 age group;*
- **Multiple abuse:** *33% of those childhood sexually abused had been abused by more than one abuser and 60% were repeatedly sexually abused;*
- **Family violence:** *Families experiencing physical violence were more likely to include a child who had been sexually abused;*
- **Runaway children:** *A 2001 study found that 21% of young runaways will be physically or sexually assaulted while missing (Rees, 2001). A 2002 study of 55 sexually exploited young women found 53 had a history of going missing or running away from home or care.³⁹⁵*

Research by the National Society for the Prevention of Cruelty to Children (NSPCC) (2000, 2002) found that only 25% of those who experienced sexual abuse as a child reported it. For those who report sexual abuse, how they are subsequently supported on the journey to recovery becomes critical.

(a) Clinical and therapeutic support

Child victims are the least likely to understand both their feelings and the complexities of the legal system. Both child abuse and the subsequent prosecutorial process are also likely to evoke intense emotions in the affected families. There is therefore a need to provide a child centred approach to reduce the apprehensions held. “Even a successful [judicial] outcome will make little difference to the victim and her family if the process was itself not positive and responsive.”³⁹⁶

As with adults there are conflicting issues between the requirements of the justice system and the therapeutic needs of the child victim. Some of these have been touched on elsewhere in this report. The tension is in meeting the support needs of the child victim and maintaining the validity of evidence.

Minimising the impacts of both sexual abuse and the subsequent legal processes is in part dependent on the level of support found at home and whether the child:

- feels believed;
- is in a safe place;

³⁹⁵ HM Government, *Cross Government Action Plan on Sexual Violence and Abuse*, April 2007, p3. Available at: <http://www.homeoffice.gov.uk/documents/Sexual-violence-action-plan?view=Binary>. Accessed on 29 August 2007.

³⁹⁶ American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse*, Sage Publications, USA, 2004, p10.

- is offered therapy at the earliest time; and
- is supported in the process of being a witness.³⁹⁷

In the metropolitan area the Child Protection Unit (CPU) of Princess Margaret Hospital offers a medical and forensic assessment of children and young adolescents who are suspected of being victims of a sexual offence. As the primary response to child victims, the CPU service provided to affected children is open ended. The only gate keeper on the service is the age of the child. The CPU does not admit child victims over 16 years of age. The CPU will offer support to parents but it is limited to the needs of the 'child victim'. Should other support be needed for the parent the unit will advise on where and whom to see.

The CPU accepts referrals from throughout the state and, using telephone assessments, provides advice to non-metropolitan medical practitioners.³⁹⁸ Drawing on a small number of staff (approximately 11),³⁹⁹ the CPU fields some 1,400 calls a year and assesses 550 children and young adolescents a year. Those not seen comprise "concerned members of the community - grandmothers, mothers, fathers and parents - who want advice and counselling. There are a whole range of concerns pertaining to child protection."⁴⁰⁰ The most important of these concerns is determining how safe the living environment is for the child victim. Another special consideration in such cases is the stance of caregivers with regard to the charges.⁴⁰¹

One of the realities of child sexual offences is that offences against children impact on their families in a variety of ways and may even place children themselves at further risk.

*Children who disclose intra-familial child sexual abuse take a huge risk, the full implications of which may not be clear to them for many years to come. They need immediate treatment and support that is non-intrusive, non-interrogative and non-invasive. Because children (and their non abusive family members) don't understand the implications of a disclosure, they need child focused explanations and support about what is happening legally, emotionally and psychologically. Children need support to see adults taking responsibility for their behaviour.*⁴⁰²

Support strategies will therefore need to be both therapeutic and delivered in recognition of the context of the child's family:

³⁹⁷ Bacon, H and Richardson, S., *Creative Responses to Child Sexual Abuse*, Jessica Kingsley Publishers, UK, 2003, pp84-85.

³⁹⁸ Submission No. 10 from Child Protection Unit Princess Margaret Hospital, 23 April 2007, p1.

³⁹⁹ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p2.

⁴⁰⁰ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2007, p2.

⁴⁰¹ National Crime Victims Research and Treatment Center, Available at: http://academicdepartments.musc.edu/ncvc/resources_prof/OVC_guidelines04-26-04.pdf. Accessed on 28 August 2007.

⁴⁰² Submission No. 25 from SafeCare, 6 August 2007, p8.

*We believe that using families to support victims of child sexual abuse is one of the most crucial interventions we can make in keeping our community safe.*⁴⁰³

One agency specifically works with mothers in at risk families to teach them to identify those behaviours that might put their children at risk and to teach them to recognise the early signals of a child's distress. In particular the mother may not recognise

*behaviours that their partner might be doing to isolate the child, or to separate the child from the rest of the family. The partner may be dominating the wife so that she cannot make decisions and cannot institute protection measures. We also make sure that offenders are not living with the family, of course, and that their contact with the family is limited in safe ways.*⁴⁰⁴

However support agencies such as this, where they exist at all, have limited resourcing and there is a view that there is a large unmet need in service provision to victims and their families:

*We put so much into investigation, prosecution and locking up and we are not providing that to families who could actually put so much more into keeping children safe.*⁴⁰⁵

(b) Child victim support through improved judicial processes

In addition to the initial trauma of the sexual offence, there are ongoing issues in relation to judicial processes where child victims are involved, not least because "many children who have been sexually abused continue to suffer further unnecessary trauma during the justice process."⁴⁰⁶

In recent years there has been an increased recognition of the need to introduce measures to reduce the incidence of system based trauma. These include:

- *A child victim's first interview with police being pre-recorded and used as primary evidence;*
- *Allowing the child victim to give further evidence in court via closed circuit television or from behind a screen;*
- *Strengthening the laws relating to the offence of procuring, inciting or encouraging a child to perform an indecent act;*
- *Increasing the judge's capacity to intervene in excessive examination of witnesses if they feel it has reached the point where they believe that it is not assisting the court; and*

⁴⁰³ Ms Christabel Chamarette, *Transcript of Evidence*, 15 August 2007, p2.

⁴⁰⁴ Ms Christabel Chamarette, *Transcript of Evidence*, 15 August 2007, p5.

⁴⁰⁵ Ms Christabel Chamarette, *Transcript of Evidence*, 15 August 2007, p11.

⁴⁰⁶ Eastwood, C. et al., 'Child Sexual Abuse and the Criminal Justice System', *Trends and Issues in Crime and Criminal justice*, no.99, December 1998, p1.

- *Expanding the judge's discretion to join multiple sexual assault charges on a single indictment so as to allow juries to assess the credibility of all the evidence.*⁴⁰⁷

In a significant reform aimed at reducing trauma and improving evidentiary outcomes, the Child Interview Unit (CIU) was established in 2004. "All children are interviewed at the CIU in the metropolitan area, and by trained specialist child interviewers in the country."⁴⁰⁸ The unit has as a primary focus the safety and well being of the child. Additionally,

*Meeting the needs of these children is the single most important reason to improve services to them. While prosecution of offenders is an important goal, and forensic interviews or medical examinations for this purpose may assist, services need to be designed with the children and young people in mind and become all-inclusive in meeting goals focused on the child's well being in the immediate and long term.*⁴⁰⁹

The Child Interview Unit was the subject of an evaluation report published in December 2006. That report found that there was a generally good level of satisfaction by third party agencies and client families with respect to their experience of the work of the CIU. Nonetheless, the Department of Community Development staff felt that "The length of some interviews, delays in arranging in interviews and the fact that sometimes families had to wait in the waiting room for an extended period before the interview" were ongoing issues.⁴¹⁰

The Child Interview Unit sees as its paramount concern the safety and wellbeing of children.⁴¹¹ Such a concern, it has been suggested to the Committee, could be better addressed by the Courts than the present system permits.

For instance, Submission 20 argues⁴¹² that the judicial processes would be further enhanced by the introduction of specialist prosecutors for cases involving child victims. Such specialist prosecutors operate in many overseas jurisdictions. The Department of Health and Human Services KPMG report which reviewed the sexual assault support service system in Australia noted that in South Africa, such specialist prosecutors have reportedly provided better support for the victims and significantly shortened the judicial process.⁴¹³

⁴⁰⁷ Submission No. 9 from Ms Michelle S Stubbs, 15 January 2007, p8.

⁴⁰⁸ Mr Christopher Dawson, Deputy Commissioner; Ms Kellie Properjohn, A/Detective Superintendent *Transcript of Evidence*, 29 November 2006, p11.

⁴⁰⁹ Submission No. 20, 2 August 2007, p3.

⁴¹⁰ Evaluation of Specialist Child Interviewing, report prepared by Cant, R., Henry, D., Simpson, T., Penter, C. December 2006, p23.

⁴¹¹ Evaluation of Specialist Child Interviewing, report prepared by Cant, R., Henry, D., Simpson, T., Penter, C. December 2006, p9.

⁴¹² Submission No. 20, 2 August 2007, p3.

⁴¹³ Department of Health and Human Services, *Review of the Sexual Assault Support Service System*, report prepared by KPMG, August 2006, p35.

The ‘Evaluation of Specialist Child Interviewing’ report supports the concept of specialist prosecutors who would undertake training in the Four Phase Forensic Interview and related aspects. They quote the American Prosecutors Research Institute in support of their argument as follows:

*If a child reveals abuse, the civil child protection and criminal investigations will be for naught unless the interview can be defended in court. To this end, the prosecutor must be on the same page with the interviewer in order to ask the necessary questions on direct and re-direct. The prosecutor must also be able to educate judges and cross examine defense experts on child abuse issues. Moreover, the prosecutor will often have to call the child to the witness stand and must be able to ask developmentally and linguistically appropriate questions.*⁴¹⁴

Further supporting this argument, in a related area of crime, is an independent evaluation of the Australian Capital Territory Family Violence Intervention Program which suggested that “the appointment of a specialist prosecutor had been ‘a major success’ regarding the management of domestic violence charges” in that Territory.⁴¹⁵

There are in fact tentative moves in the direction of the establishment of a specialist sexual assault team in the Office of the Director of Public Prosecutions. The recent announcement by the Director, Robert Cock QC, of the Kimberley Work Group in response to highlighted incidences of sexual offences in some Aboriginal communities, “will likely be modelled on the Kalgoorlie project and will see the first specialist sexual assault unit in the WA DPP.”⁴¹⁶

Finding 28

There is a clear case for the consideration of the establishment of specialist prosecutors in cases involving child victims.

⁴¹⁴ Evaluation of Specialist Child Interviewing, report prepared by Cant, R., Henry, D., Simpson, T., Penter, C. December 2006, p9.

⁴¹⁵ Australian Domestic and Family Violence Clearing House, ‘Issues Paper 10’, Available at: http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper_10.pdf. Accessed on 28 August 2007.

⁴¹⁶ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p17.

Recommendation 23

That the Office of the Director of Public Prosecutions expedites the appointment of a specialist to prosecute sexual offences against children.

6.6 Victim support and the needs of people with disabilities

Research from the early to mid nineties showed that the experience of sexual abuse by people with a learning disability affects future relationships and general well being and is a cause of depression, self harming, eating disorders, soiling and challenging behaviours.⁴¹⁷

The Disability Services Commission provides some direct services and support to people with intellectual and decision making disabilities. It also funds about 150 non-government agencies to provide services to people with disabilities and their families. DSC also publishes two booklets covering issues relating to people with an intellectual disability in the justice system. The first booklet relates to issues arising for consideration of courts. The second was directed at court staff on the distinction between intellectual disability and mental illness and the characteristics of people with an intellectual and decision making disabilities. These booklets form the basis of education sessions for the judiciary and court officers in the Supreme Court, the District Court and the Magistracy.

Notwithstanding this education police may have difficulty identifying disability issues:

In some jurisdictions in Australia and overseas, the development of Independent Third Person Programs have been implemented to assist Police to identify disability issues and to ensure that people have adequate support at the earliest point in their contact with the justice system. Such services are successful in ensuring that people with disabilities understand the process and are provided with support when they are interviewed. Such protections for people with disabilities mean that better evidence is available to the Director of Public Prosecutions when they are involved in the prosecution of cases.⁴¹⁸

The second significant government body providing support to people with intellectual and decision making disabilities is the Office of the Public Advocate. The Public Advocate is an independent statutory officer with a mandate to inquire into allegations that an adult with a decision-making disability has been sexually assaulted. The Public Advocate ascertains whether an application to appoint a guardian should be made, and if so, decides on the protective strategies needed to prevent abuse. The Public Advocate has an ongoing role ensuring services and the maintenance of significant relationships while protecting the client. The Public Advocate can be

⁴¹⁷ HM Government, *Cross Government Action Plan on Sexual Violence and Abuse*, April 2007, p3. Available at: <http://www.homeoffice.gov.uk/documents/Sexual-violence-action-plan?view=Binary>. Accessed on 29 August 2007.

⁴¹⁸ Submission No. 17 from Disability Services Commission, 17 July 2007, p3.

appointed ‘guardian of last resort’ by the Guardianship and Administration Board. It is often the case with people with these disabilities that the allegations are against persons in a relationship implying trust to the adult with decision making disability, including family members or friends as paid or unpaid carers.⁴¹⁹

According to the Public Advocate, there are some 65,000 Western Australians with decision-making disabilities which may make them vulnerable to sexual assault.⁴²⁰ As the Office of the Public Advocate noted in relation to this group:

*Of all new matters of alleged abuse investigated by my office in 2005-2006, nine per cent were allegations of sexual abuse. It is likely that many more incidences of sexual abuse are going unreported, some because the victim’s lack of capacity may mean that they are unaware that a crime has been committed, in other cases they may be uncomfortable about reporting it, unsure about the details of the incident or, because of their disability, they may be unable to provide an account of the incident that is compelling enough for police investigation or prosecution.*⁴²¹

The Office of the Public Advocate goes on to point out that this group of people are significantly over represented in the justice system.⁴²²

Research has not been undertaken that specifically has as its focus the actual prevalence of violence or sexual offences against women with disabilities. It is not therefore possible to quantify. However, the broader research that has been conducted

indicates that women with disabilities:

- *experience violence at higher rates and more frequently;*
- *are at a significantly higher risk of violence;*
- *have considerably fewer pathways to safety;*
- *tend to be subjected to violence for significantly longer periods of time;*
- *experience violence that is more diverse in nature; and*
- *experience violence at the hands of a greater number of perpetrators.*⁴²³

⁴¹⁹ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p5.

⁴²⁰ Submission No. 18 from Office of the Public Advocate, 24 July 2007, p1.

⁴²¹ Submission No. 18 from Office of the Public Advocate, 24 July 2007, p1.

⁴²² Submission No. 18 from Office of the Public Advocate, 24 July 2007, p3.

⁴²³ Women with Disabilities Australia, ‘submission to the South Australian Government ‘Review of South Australian Domestic Violence Laws’, May 2007. Available at: <http://www.wwda.org.au/sthaustviol07.htm#vio>. Accessed on 23 August 2007.

The Committee notes that men with intellectual and decision-making disabilities are also vulnerable to sexual assault.

The Disability Services Commission advises that staff in regional areas provide information on victim support services. However staff reported:

*that if a person with a disability was linked to Victim Support Services there was more likelihood of the case going to court. Staff reports also indicated that problems may arise early in the process, with a lack of support to victims with intellectual disability, where their disability had not been identified together with problems with Police interviewing people with disabilities where their disability was not known.*⁴²⁴

For those people with an intellectual disability, the issues surrounding the provision of support together with the needs of the police/judiciary are further complicated by the question of consent and the issue of a capacity to give consent. Additionally, there may be a difficulty in differentiating between consent and exploitation.⁴²⁵

*When dealing with allegations of sexual assault there may be additional problems where the victim may have given consent but not had the capacity to give consent, or where the perpetrator is not considered to be capable of making decisions. The issues of consent and capacity to give consent are complex and are possibly not well understood. The issues are further complicated where both the victim and the alleged perpetrator have intellectual disability. Police officers may not have the training to deal with issues of consent and capacity. It appears that the earlier that the Victim Support Service is involved and that disability support services are engaged, the better the outcomes for people with disabilities.*⁴²⁶

Police, in their role of judicial gatekeepers, have some difficulty responding to people with intellectual and decision-making disabilities, particularly when there are communication and behavioural issues.⁴²⁷ While children have dedicated services, there is no comparable established service with specifically trained staff for adults with intellectual and decision-making disabilities who are victims of sexual assault. The position is compounded by a dearth of ongoing counselling support services:

Another gap for victims of sexual assault who have a decision-making disability is the lack of appropriate and ongoing counselling. Due to their diminished capacity, some people with decision-making disabilities have a care network around them so if they become victims of sexual assault they can lean on that existing network for support. However, for those who do not have these established networks, support is starkly inadequate. Currently, the Sexual Assault Resource Centre (SARC) medical and forensic service provides an effective and expert counselling service at the initial crisis point—usually in hospital, when a person has recently been sexually assaulted. However, once SARC has

⁴²⁴ Submission No. 17 from Disability Services Commission, 17 July 2007, p3.

⁴²⁵ Submission No. 18 from Office of the Public Advocate, 24 July 2007, pp2-3.

⁴²⁶ Submission No. 17 from Disability Services Commission, 17 July 2007, p3.

⁴²⁷ Submission No. 18 from Office of the Public Advocate, 24 July 2007, pp1-2.

completed its initial work, victims can be left with no further assistance to come to terms with the trauma they have experienced. In the aftermath of a sexual assault, it is essential that victims have continuity of care as they find a way to move forward positively. Victims with a decision-making disability are currently not provided with that continuous support. There are some agencies (such as the Sexuality Education Counselling and Consultancy Agency (SECCA)) that offer counselling services to people with a disability but their lack of resources can mean that a victim may be put on a waiting list and charged fees for the service.⁴²⁸

Finding 29

Adults with intellectual and decision-making disability are vulnerable to sexual assault and in need of special support. There is a lack of specific, dedicated and ongoing support/counselling services for victims of sexual assault who have intellectual and decision-making disabilities.

Recommendation 24

A whole of government approach, driven by the Premier's office, be immediately instituted to improve the adequacy and availability of services for people with intellectual and decision-making disabilities who come into contact with the criminal justice system (both as victims and perpetrators).

6.7 Victim Support and Community Education

Support services would generally become involved with victims - at the crisis response stage - if a victim contacts a service for crisis intervention. Victims may need to continue into the long term with ongoing emotional support and counselling. However, contact with support services is always going to be contingent on victims knowing of the availability of these services in the first place, or on adequate referral from the police or other agencies.⁴²⁹

Even a relatively high profile agency that sits at the core of the provision of victim support can be unknown to the victim when most needed. For one victim the need for community awareness raising and education is central to providing an effective response:

Education is important. Not just for the people who are meant to provide help and services to victims of assault, but for women themselves. At the time of my assault, there was no information about SARC at uni, and even now, there is only a tiny section devoted to SARC

⁴²⁸ Submission No. 18 from Office of the Public Advocate, 24 July 2007, pp2-3.

⁴²⁹ Australian Institute of Criminology, Available at: http://www.aic.gov.au/publications/rpp/19/full_report.pdf. Accessed on 16 August 2007.

in the medical centre, which would be intimidating to access due to its very open placement in the centre. I think more information needs to be provided to victims themselves, so that a victim will know exactly who to turn to if they are assaulted. Not just in universities and high schools, but in work places, advertising campaigns, and in simple ways like fridge magnets or something that can get into family homes. If I had known that there was a facility to take medical samples, other than a police station, I would have perhaps made a different choice about showering and submitting to medical tests..... I think that advertising the services available to victims is important. The 'Australia says no' campaign is not nearly enough.⁴³⁰

Awareness and consciousness-raising should engage both the government and non-government sector. The United Kingdom cross government action plan advocates just such a collaborative response:

The Voluntary and Community Sector is ideally placed to contribute to the development and delivery of awareness-raising sessions in schools. They can also support teachers and education staff to handle potential disclosure of sexual abuse.⁴³¹

The engagement of the broader community in such initiatives allows for the voices of the abused to be heard and the impact of these crimes understood:

Victim support must also involve community education: Along similar lines to domestic violence campaigns the voice of victims should be presented in a way that is accurate and compassionate. The community should be made aware of the impact of crime on victims and the potential impact on them of prosecution processes. Jury education needs to include challenging assumptions about how victims will behave. Creative and innovative ways to support victims should be encouraged and supported for example camps for female victims with strong women in the Aboriginal community, restoring communication post disclosures and building self esteem and well being of the girls.⁴³²

Finding 30

Relatively high profile agencies providing support to victims of sexual assault may not be known to the victim. There is a need for a more strategic and coordinated approach to community education enhancing awareness of services and subsequent legal processes relating to sexual offences.

⁴³⁰ Submission No. 19, 26 July 2007, p4.

⁴³¹ HM Government, *Cross Government Action Plan on Sexual Violence and Abuse*, April 2007, p3. Available at: <http://www.homeoffice.gov.uk/documents/Sexual-violence-action-plan?view=Binary>. Accessed on 29 August 2007.

⁴³² Submission No. 20, 2 August 2007, p9.

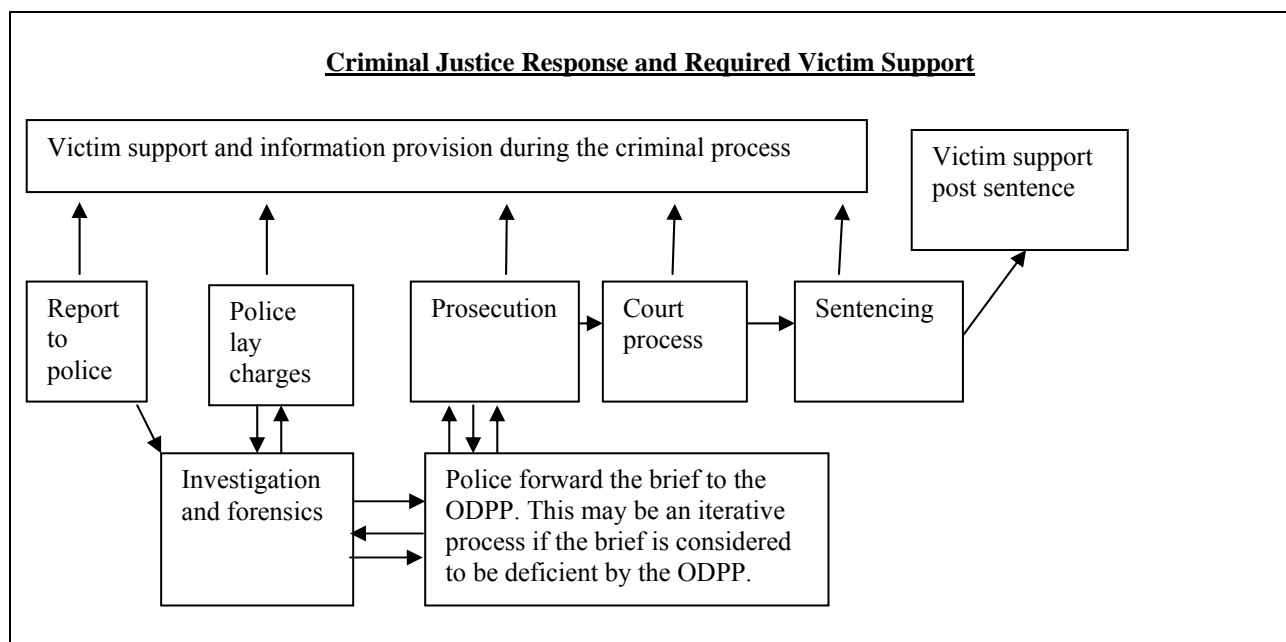
Recommendation 25

A whole of government approach, driven by the Premier's office, be undertaken to:

- a) review current information available to sexual assault victims, with a view to developing specialist information (e.g. a booklet or visually recorded information) to facilitate sexual assault victims being properly informed about criminal justice processes; and
- b) ensure the development of appropriate information (e.g. pamphlets, booklet and visual aids) to facilitate sexual assault victims being properly informed.

6.8 Closing comments on victim support

As described in earlier chapters the attrition rates in sexual offence cases, and rape in particular, are very high. Sexual offences are very difficult to prosecute. Notwithstanding this, there needs to be an improvement in the criminal justice response to victims of sexual offences. In particular there is a need to increase reporting and improve the way in which sexual offence cases are handled at all stages. The low rates of reporting, and some of the attrition that occurs subsequent to reporting are implicitly attributable to experiences and perceptions of inadequate support in the justice system. Work in relation to delivering these objectives can be broken down into a number of key stages, illustrated in the diagram below, each one of which must be underpinned by support for victims. Bringing more offenders to justice appropriately feeds directly into the prevention of further sexual offences, due to the increased certainty of successful prosecution. The provision of adequate victim support during this process plays a critical role in enhancing the outcomes of finalised cases.



In terms of the current provision of services for victim support there are a range of health services such as SARC, and Princess Margaret Hospital, alongside other non-medical initiatives such as the Victim Support Service and a number of non-government agencies. Nonetheless, as is reflected in this chapter, there are a number of gaps between the services on offer and the needs of victims of sexual assault for support in Western Australia, as outlined in this chapter.

In particular, the Committee found that regional Western Australia is under-resourced in terms of support services. This was compounded by gaps that exist to a significant degree for specific population groups, notably people with disabilities and indigenous people, and to a somewhat lesser degree for other sections of the community. Where charges are not preferred there are notable gaps that occur. In such instances, which are numerous, counselling and support is left to the individual and/or their family to resolve.

The consequent cost to the community of inadequate support services for victims is substantial⁴³³ - in mental and physical health problems and productivity as outlined in the article, *“Childhood Trauma, psychosis and schizophrenia: a literature review with theoretical and clinical implications.”*⁴³⁴

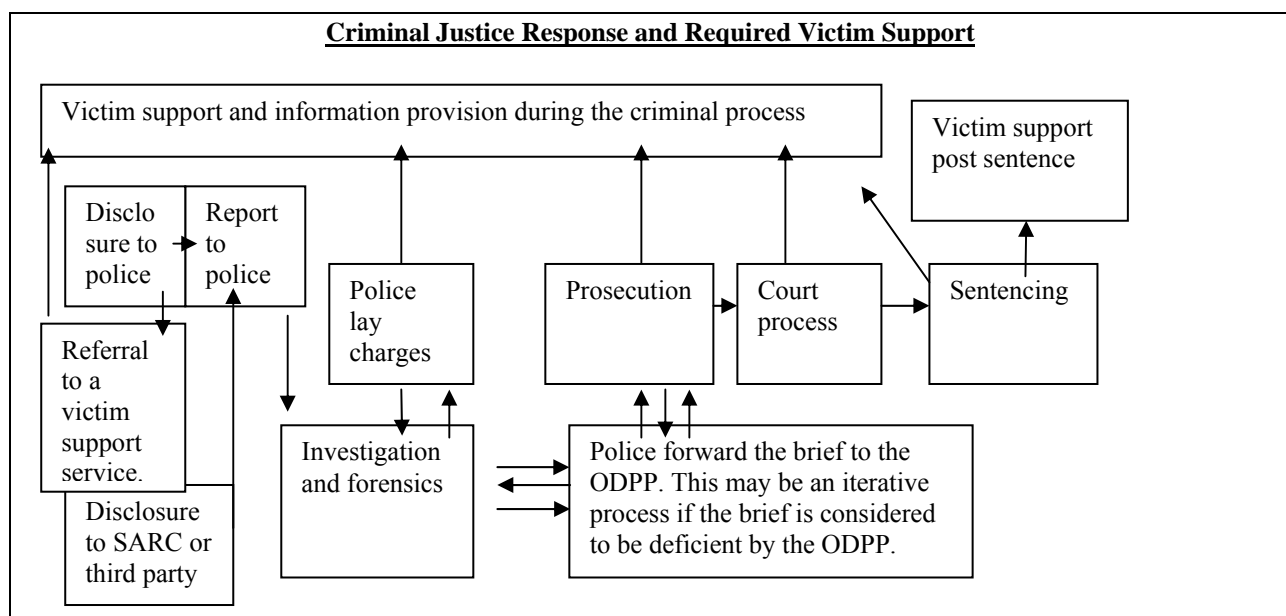
The Committee believes that the onus of ensuring victim support should be removed from the victim/complainant and given to the police. This is the case having regard to both the generally

⁴³³ In a news release of July 2007 The Minnesota Department of Health estimated the cost of sexual assault per sexual attack at \$184,000 for children and \$139,000 for adults

⁴³⁴ Submission No. 25 from SafeCare, 6 August 2007, p8.

distressed state of the victim/complainant and the lack of awareness of existing support services, as outlined above.

The flow chart of the response of the criminal justice system would then appear as follows:



Recommendation 26

The Minister for Health ensure a victim support officer be made available to all victims of sexual assault as soon as the offence is reported to the police. This service to be provided by the Sexual Assault Resource Centre or related agency.

CHAPTER 7 FURTHER ISSUES ARISING OUT OF THE PROSECUTION OF SEXUAL OFFENCES IN WESTERN AUSTRALIA

In the context of the terms of reference of this Inquiry, notably those factors that are prejudicial to the prosecution or contribute to the attrition rate in the prosecution of charges, there are a number of additional non-legal issues that are canvassed in this chapter. These include:

- the delay between a charge being laid and a trial outcome;
- the inadequacy of data systems;
- the lack of interagency collaboration;
- the need to improve the ease with which victims can give evidence;
- poor communication;
- resourcing; and
- inadequate services in regional areas.

7.1 The need to shorten the judicial process

Delays in the judicial system consume significant resources. There are consequences for the attrition rate, the compounding of trauma and the perception of justice not done with respect to the victim. In the words of British Prime Minister William Gladstone, ‘Justice delayed is justice denied’.⁴³⁵

In Western Australia, the average duration of a charge relating to major crime coming to trial is eighteen months.⁴³⁶

*I say that because I know that in some trials in which we have reasonable evidence against a particular accused person, the delay in our criminal justice system is about 18 months between arrest and trial.*⁴³⁷

In recent years the issue has also been acknowledged by the Attorney General’s office, and the Law Reform Commission Review.⁴³⁸ More recently the importance of the issue in judicial eyes is

⁴³⁵ Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes*, 2007, p45 Available at: <http://www.aic.gov.au/publications/rpp/74/rpp74.pdf>. Accessed on 11 September 2007.

⁴³⁶ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 22 November 2006, p9.

⁴³⁷ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 22 November 2006, p9.

evidenced by the establishment of Criminal Trial Delay Reduction Working Group Magistrates Case Conference Pilot, supported by a Practice Direction.

Significant delays are commonplace both in Australia and overseas, and many jurisdictions have made serious attempts to address the contributory factors. Similarly, the Western Australian Office of the Director of Public Prosecution recognises the need for an early or expeditious processing of cases.⁴³⁹

*The time a matter takes to be dealt with by the criminal justice system, from laying of the complaint to completion of that matter, has many reverberating implications. This time has an impact along the prosecution chain, involving and affecting both the micro management of a matter by, particularly, a prosecutor as well as the how quickly a matter progresses though the courts and thus the court system.*⁴⁴⁰

The contributory factors to delays arising and existing responses to them may be summarised as follows.

(a) Quality of briefs: ‘it’s not about truth, it’s about proof’⁴⁴¹

In an earlier chapter, the inadequacy of police prepared briefs was considered. Such inadequacies will result in delays as the briefs go back and forward between the Office of the Director of Public Prosecution (ODPP) and the Western Australia Police (WAPOL) until they are considered strong enough to proceed. WAPOL has advised the Committee that they support the closer involvement of the DPP in assessing the quality of briefs before charges are laid.⁴⁴²

The following table reflects the number of briefs referred to the Office of the Director of Public Prosecutions (ODPP), by WAPOL, relating to serious assaults and sexual assaults for the years 2001 -2006.⁴⁴³ It should be noted that there is not a one-to-one correlation between incidents and briefs. A single brief may contain charges relating to a number of incidents, and a single incident may list multiple offenders leading to multiple briefs. Additionally, because multiple briefs may

⁴³⁸ Keating, N., ‘Review of services to victims of crime and crown witnesses provided by the Office of the Director of Public Prosecutions for Western Australia’, April 2001. Available at <http://www.dpp.wa.gov.au/frames.asp?pageId=r4370124andcontent=/content/publications.htm>. Accessed on 10 August 2007.

⁴³⁹ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, pp16-17.

⁴⁴⁰ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p17.

⁴⁴¹ Claire Giroto - Deputy Solicitor for Public Prosecutions, Office of The Director of Public Prosecutions, NSW, Briefing, 4 July 2006,

⁴⁴² Email correspondence WAPOL 24/10/07.

⁴⁴³ C J Dawson, Office of Deputy Commissioner, Specialist services Western Australia Police, Correspondence, 6 February 2007.

be combined in a single indictment, the number of court outcomes will generally be less than the corresponding number of briefs.⁴⁴⁴

Offence Category		2001-02	2002-03	2003-04	2004-05	2005-06
Sexual Assault	Incidents	431	475	543	578	589
	Briefs	n/a	561	587	599	629
	Charges	n/a	3028	2430	2592	2437
Assault	Incidents	2956	2779	2523	3014	3002
	Briefs	n/a	3121	3491	4329	4422
	Charges	n/a	5810	6273	7757	8433

Delays, as has been previously noted, result both in higher rates of attrition and also adversely affect a victim's recovery.

In the United Kingdom (UK) and the eastern states concerted efforts are being made to significantly improve the quality of briefs and thereby shorten the judicial process.

The UK model of police/DPP liaison sees the Crown Prosecution Service (CPS) (the UK equivalent of the DPP) in every police station. Australian jurisdictions recognise that this is impractical in large states such as WA or Queensland. In the UK police do not charge and the CPS there will not charge until an adequate brief is received. Prosecutors there "decide on whether a charge is laid in all but the most minor of charges, facilitated by co-location with police, usually by working out of police stations and being on call after hours."⁴⁴⁵ The offender may be placed on conditional bail in the interim. This 'quality' process cuts local court time by 80% as the offender does not have to keep appearing in court until the brief is properly prepared.⁴⁴⁶

In New South Wales (NSW), the DPP provides, on request, advice to police about the adequacy and sufficiency of evidence and the complications that may arise if the police proceed in a certain way. While the DPP in NSW does not have an officer in every police station (British model) they can offer an after hours advisory service to assist police where custody time is running out.⁴⁴⁷

While in NSW in 2007, the Committee met with Detective Superintendent Helen Begg, Commander Child Protection and Sex Crime Squad and Detective Chief Inspector Janice Stirling who have responsibility for Joint Investigation Response Teams (JIRTs). JIRTs are comprised of Department of Community Services (DoCS), NSW Police and NSW Health professionals who

⁴⁴⁴ C J Dawson, Office of Deputy Commissioner, Specialist services Western Australia Police, correspondence, 6 February 2007.

⁴⁴⁵ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p17.

⁴⁴⁶ Claire Giroto - Deputy Solicitor for Public Prosecutions, Office of The Director of Public Prosecutions, NSW, Briefing, 4 July 2006.

⁴⁴⁷ Claire Giroto - Deputy Solicitor for Public Prosecutions, Office of The Director of Public Prosecutions, NSW, Briefing, 4 July 2006.

undertake joint investigation of child protection matters. Joint investigations link the risk assessment and protective interventions of DoCS with the criminal investigation conducted by Police.

Commenting on the effectiveness of JIRTs the Office of the Director of Public Prosecutions in the Australian Capital Territory, in 2005, noted that:

The evaluation of the JIRTs found that prosecutors rated briefs prepared by the JIRTs to be of higher quality than police briefs prepared outside the JIRT model. The majority of prosecutors questioned said the success rate of prosecutions had improved. Conviction rates for some of the JIRTs included in the evaluation were as high as 100 per cent for one year (40 cases coming out of three offices) and remained very high for other years. Of 86 matters from two offices over three years, only 14 per cent resulted in an acquittal.⁴⁴⁸

This is an impressive outcome and possibly reflects both the collaboration between the DPP and the three key agencies of DoCS, Health, and the police as well as reflecting the processes involved in the investigation that are necessitated by that collaboration.

The nature of the collaboration engages the different agencies in the investigation of an incident and subsequent response in an ongoing fashion. Indeed some units are co-located with DoCS. All units respond 24 hours a day, seven days a week. JIRT is activated by the DoCS helpline and from there an assessment is made as to whether the issue is one for DoCS or JIRT. DoCS ensures referrals are made within two hours. The decision to investigate is made by the police team leader and DoCS. It then goes to an investigator, onto a police briefing and then the DoCS and JIRT bring the resultant information to a meeting and create an interview strategy. Two investigators (one DoCS and one JIRT) make a decision as to which party will lead the interview process. The child is interviewed and a course of action is decided on. Throughout the process a high level of communication is maintained between DoCS, Health and JIRT.⁴⁴⁹

Police personnel are responsible for the entire investigation including the interview. Ongoing specialist training occurs for a fortnight every three months. Until the training has been completed a JIRT officer may not interview a child.

Due to the nature of the work and its effects, staff rotate in and out of JIRT every three years or less to avoid burn out. Entry also requires psychological testing to be carried out. This assessment is repeated quarterly throughout the officer's engagement in the unit. The staff generally comprises women who must have completed an investigators course. Critical incident debriefing is a key factor in staff management.⁴⁵⁰

⁴⁴⁸ Office of the Director of Public Prosecutions and the Australian Federal Police, Available at: [http://www.dpp.act.gov.au/pdf/DPP%20SARP%20report%20\(11Feb05\).pdf](http://www.dpp.act.gov.au/pdf/DPP%20SARP%20report%20(11Feb05).pdf) Accessed on 24 July 2007.

⁴⁴⁹ Detective Superintendent Helen Begg - Commander Child Protection and Sex Crime Squad and Detective Chief Inspector Janice Stirling Briefing, 4 July 2006.

⁴⁵⁰ Detective Superintendent Helen Begg - Commander Child Protection and Sex Crime Squad and Detective Chief Inspector Janice Stirling Briefing, 4 July 2006.

Since the inception of this Inquiry, the ODPP and WAPOL have held talks on the possibility of the ODPP providing a lawyer who would act as a third party umpire during the interviews of suspects engaged in a major criminal offence. There is, however, a clear need for protocols covering the process to be developed. These are anticipated to be available by the middle of 2008. Additionally, the Commissioner of Police is now “seeking to have legal people involved in the actual investigation of the case as it progresses.”⁴⁵¹ It is the Committee’s view that both these initiatives, when taken together will significantly improve the quality of police briefs to the DPP.

Finding 31

The quality of police briefs going forward to the Office of the Director of Public Prosecutions is often inadequate leading to delays in the judicial process. In jurisdictions in the eastern states and the United Kingdom such shortcomings have been addressed through a variety of proactive strategies.

Recommendation 27

A working party be established which includes the Western Australia Police (WAPOL) and the Office of the Director of Public Prosecutions (ODPP) and, where relevant, the DCP to:

- a) identify the critical issues of brief preparation and develop these by way of guidelines, and in training for WAPOL; and
- b) institute an ongoing formalised collaborative process that provides the ODPP with high quality briefs to maximise the prospects for a prosecution.

(b) Juniorisation

In a study into the causes of criminal trial delays in Australia, Jason Payne found that

*a consistently identified criticism of the legal profession was that fewer and fewer experienced legal professionals were available for practicing in criminal trials. As a result, key agencies have developed procedures that see junior legal and paralegal staff handling the pre-trial preparation of criminal matters.*⁴⁵²

⁴⁵¹ Dr Karl O’Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008, p12.

⁴⁵² Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes*, 2007, pxi. Available at: <http://www.aic.gov.au/publications/rpp/74/rpp74.pdf>. Accessed on 11 September 2007.

However, such junior staff have limited experience and authority to assess critically and negotiate during the early stages of the trial process. This is the case in Western Australia (WA).

In September 2007, the Office of the Director of Public Prosecutions (ODPP) had 102 lawyers on staff. This might appear adequate when the service model calls for 103 or 104, however the preponderance of these are at junior levels, and there were vacancies at senior levels.

*My numbers are about the same but the levels of experience are not adequate. At the moment, we are employing younger lawyers and I do not have as many experienced ones as I need.*⁴⁵³

According to the DPP one of the reasons is that Western Australia pays some 20% less than, for instance, New South Wales to which jurisdiction they have lost several staff. Additionally, on average it takes three years to train young lawyers to handle a reasonably difficult case and on average they only stay with the ODPP for four years.⁴⁵⁴

Jason Payne's research across Australia found that in a number of jurisdictions "it was becoming increasingly difficult to attract and maintain qualified and experienced legal practitioners well versed in criminal trial procedure."⁴⁵⁵ This was confirmed by the WA ODPP:

*Salary is always an issue. However, with respect, and out of fairness, I think it is more of a reflection of the ability of the Western Australian community to generate only so many criminal lawyers.*⁴⁵⁶

Consequently the Western Australia ODPP, as with other criminal justice agencies, has suffered in recent years from the 'juniorisation' of their legal staff. The reason for the consequent disadvantage to the prosecuting agency is that

*experienced practitioners have developed a sense of intuition about the likely outcome of a criminal matter and are well placed to thoroughly assess a brief. They are competent in their understanding of the law and what is needed to secure a positive outcome for their client and organisation. The overwhelming majority of respondents to this review regarded experience as an essential ingredient to an effective trial.*⁴⁵⁷

There are ramifications in raising salary levels in Western Australia as the Director of Public Prosecutions points out, due to the limited pool of experienced lawyers in Western Australia.

Clearly I would be able to attract more if I offered them more money, but I would create problems downstream for agencies such as the Aboriginal Legal Service and the Legal Aid

⁴⁵³ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p3.

⁴⁵⁴ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p3.

⁴⁵⁵ Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes*, 2007, p45 Available at: <http://www.aic.gov.au/publications/rpp/74/rpp74.pdf>. Accessed on 11 September 2007.

⁴⁵⁶ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p3.

⁴⁵⁷ Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes*, 2007, p45 Available at: <http://www.aic.gov.au/publications/rpp/74/rpp74.pdf>. Accessed on 11 September 2007.

*Commission because I would end up employing their criminal lawyers. There are no experienced criminal lawyers who they could use to backfill those positions.*⁴⁵⁸

However, by raising salary levels the DPP would be able to attract experienced lawyers from other jurisdictions thereby increasing the pool in Western Australia. “Clearly I could do with more money, but to attract people from the east I would need a lot more.”⁴⁵⁹

Finding 32

There is significant disparity between the remuneration levels for senior lawyers working in the Western Australian Office of the Director of Public Prosecutions, vis-à-vis their counterparts in some eastern states offices. This is a contributory factor in the unsatisfactory ratio of senior and junior lawyers, to the detriment of prosecutorial services.

Recommendation 28

The Director of Public Prosecutions investigate and report on mechanisms to attract and retain senior and experienced prosecution lawyers.

(c) Judicial Culture

*There needs to be a change in attitude from seeing delays as being facilitary to seeing it as a problem. They don't recognise the impact of delays on the victims.*⁴⁶⁰

Due to over-listing of court cases, and a lack of early communication between the prosecution and defence counsel, and juniorisation, referred to above, there is across all Australian jurisdictions there is a culture that supports delays in the trial process. This is also true in Western Australia as was confirmed by the DPP. “That culture exists in my office at the moment, I am sad to say.”⁴⁶¹

Over-listing of court cases contributes to the culture of delay because with a heavy over-listing of cases to be heard “there is consequently a lack of certainty that any given case will get up on the

⁴⁵⁸ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p3.

⁴⁵⁹ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p3.

⁴⁶⁰ Jason Payne, Queensland Office of the Director of Public Prosecutions, *Briefing*, 3 July 2006.

⁴⁶¹ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p7.

day. Therefore ‘why prepare, let’s call for an adjournment’”⁴⁶² The reason for over-listing is the reality reflected in quantitative data from courts across a number of Australian states and territories which demonstrate that more than half of all listed criminal trials fail to commence on the listed day. The number varies between courts and across the states and territories from 61% to 86%.⁴⁶³

In Western Australia, the Director of Public Prosecutions is proactively seeking to change the culture “to a more pragmatic, assertive and more of a front-end loading culture so that lawyers evaluate the brief when they first get it and negotiate with the defence to determine whether a resolution is possible at the early stage when it is fresh in everyone’s mind.”⁴⁶⁴

“Front-ending” as described above is not a new concept to criminal trial practitioners. In many jurisdictions, practices and procedures have been developed in an attempt to achieve earlier discussion, case review and case management. This has been driven primarily from the judiciary. If prosecution and defence counsels talk earlier then the evidence is seen and assessed by experienced legal practitioners at an earlier stage, avoiding last minute surprises.⁴⁶⁵

In Western Australia there have been some positive outcomes from the DPP’s initiatives. In 2005 some 4-5% of all cases were resolved in the Magistrates court; this has risen to about 12% or so of cases ... before they even come on indictment.⁴⁶⁶

The process has seen the ODPP develop a protocol with the police. Additionally:

*All the files are now allocated to the lawyers before they are committed for trial. Now all lawyers get the files before they have even come to the District Court and I tell them that must negotiate with the defence lawyer and be satisfied they can prepare the indictment before they are allowed to go before the District Court. That was designed specifically to change that culture. I regret that it has not been entirely successful. The Department of the Attorney General conducted a subjective evaluation that asked a number of defence lawyers, prosecutors and magistrates to fill out a questionnaire about whether they agreed or disagreed with various statements. My level of concern was raised when I learned that a lot of people were agreeing with the statement that prosecutors do not approach cases with an enthusiastic attempt to resolve them and that some do not appear to have the authority to make a settlement. That caused me to reflect on the directions I give my staff to make sure that they do not put it off until trial; they must try to resolve earlier. I am doing work to ensure that we can improve that process.*⁴⁶⁷

⁴⁶² Jason Payne, Queensland Office of the Director of Public Prosecutions, *Briefing*, 3 July 2006.

⁴⁶³ Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes*, 2007, p64 Available at: <http://www.aic.gov.au/publications/rpp/74/rpp74.pdf>. Accessed on 11 September 2007.

⁴⁶⁴ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p7.

⁴⁶⁵ Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes*, 2007, p64 Available at: <http://www.aic.gov.au/publications/rpp/74/rpp74.pdf>. Accessed on 11 September 2007.

⁴⁶⁶ Mr Robert Cock Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p7.

⁴⁶⁷ Mr Robert Cock Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p7.

The difficulties experienced by the Director of Public Prosecutions in driving attitudinal change in his staff are not dissimilar to those experienced elsewhere in Australia. The same is true with respect to defence counsel whose participation is critical.⁴⁶⁸

The consequences of such a culture for the successful prosecution of sexual offences are significant. Research has established that:

- *the more tardy either party is in the preparation of a criminal matter, the less likely they are to be able to proceed;*
- *the fewer incentives for early disposition, the fewer matters that will be disposed early; and*
- *the more disconnected a victim or witness becomes during the trial preparation process, the less likely they are to be willing to participate and the more likely that their actions or inactions will result in adjournment or withdrawal.*⁴⁶⁹

Finding 33

There is an embedded culture of delay in the judicial process in Western Australia resulting from deliberate actions or inactions by one or more parties. The problematical nature of this culture has been recognised by the Director of Public Prosecutions and some steps have been taken to address this problem.

Recommendation 29

The Attorney General initiates a reform process within the judicial system to eliminate the unacceptable embedded culture of delay.

⁴⁶⁸ Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes*, 2007, pp66-67 Available at: <http://www.aic.gov.au/publications/rpp/74/rpp74.pdf>. Accessed on 11 September 2007.

⁴⁶⁹ Australian Institute of Criminology, *Criminal trial delays in Australia: trial listing outcomes*, 2007, pxi Available at: <http://www.aic.gov.au/publications/rpp/74/rpp74.pdf>. Accessed on 11 September 2007.

7.2 Knowledge Management - 'Who Knows Wins'⁴⁷⁰

(a) Practice management system

Knowledge Management has in recent times emerged as an inter-disciplinary framework to assist organisations such as the DPP and Western Australia Police. It is recognised that technology is only one element in this engagement. Content, process and people aspects also need to be considered. The Committee was struck by the difficulty in obtaining data sets from both the Western Australia Police and the Office of the Director of Public Prosecutions. These often had to be manually prepared when they were available at all. It is also noted that the review of the Western Australia Police effectiveness in investigating and solving sexual assaults, undertaken in 2006, was hampered because of the absence of appropriate records.⁴⁷¹ The report went on to note that:

*As a result of the inability to interrogate the data systems it is unknown how many predator style sexual offences have been committed since the closure of the Sexual Assault Squad [in 1998]. It is also then not possible to determine how many of these offences remain unsolved and whether or not multiple offences were committed by offenders.*⁴⁷²

Additionally, with respect to information sought by the Committee, the Deputy Commissioner, Western Australia Police noted,

*Some of this information will require manual extraction, because the way in which the data is collected does not mean that the reports are easily obtained.*⁴⁷³

Difficulties of this nature are widespread. In an example of the difficulty in securing statistical data, information relating to the number of briefs put before the Director of Public Prosecutions for consideration of the prosecution of charges was unobtainable. Statistics on the victim/offender relationship are unreliable. In 2004 changes were made requiring the record of that information to be a characteristic of the offender, rather than the victim. If the offender is not arrested, there is no record of the relationship.

The need for better data analysis was also exemplified in many submissions and hearings. For example, in an issue previously addressed in this report, the question of delayed forensic results was hypothesised as an unquantified problem.

Late DNA evidence also delays the commencement of trials. As the reason for trial delays is not routinely recorded by the courts or prosecutors, we were not able to quantify the extent of this problem, however consultation with the courts, prosecutors, and defence

⁴⁷⁰ CCH Asia Ltd, Available at: <http://www.cch.com.sg/cchweb/fileUploads/productLaunch/348/ringtail.htm>. Accessed on 20 August 2007.

⁴⁷¹ Major Crime Division Review/Analysis Establishment of a sexual assault squad October 2006, p4.

⁴⁷² Major Crime Division Review/Analysis Establishment of a sexual assault squad October 2006, p8.

⁴⁷³ Mr Christopher Dawson, Deputy Commissioner, Ms Kellie Louise Properjohn, A/ Detective Superintendent, Transcript of Evidence, 29 November 2006, p7.

*counsel suggests that DNA evidence is one of the most significant areas of delay in the justice system.*⁴⁷⁴

Or again:

*As interviewers/service providers we have no access to this information or involvement in these decisions. There is no consistent information flow to interviewers as to why prosecutions did or did not proceed. Furthermore there is no data base across the agencies to gather consistent information about the services provided to a child and his/her family and the outcomes of the services. Each agency keeps records but the systems are not compatible and comparing data across the systems is problematic and does not occur routinely due to these difficulties. For example, there is no system that is capable of identifying the number of children who are interviewed, the number of these that are examined at PMH, the number where charges are laid, prosecution proceeds or prosecution outcomes. Neither comprehensive nor qualitative data exists. There is an urgent need for a data base across government systems to gather such data, to inform planning (e.g. numbers of children being interviewed in rural areas and services provided) and to also analyse connections across services (e.g. do medical examinations or therapeutic services have a positive affect on prosecution outcome?)*⁴⁷⁵

With the development of better technology there is a parallel requirement for the more effective use of data both for management and practice and to provide evidence to inform policy. With respect to the DPP, the current difficulty appears to rest with the DPP's old practice management system that is unable to meet the requirements placed on it.

*One of the problems we have in responding to the committee is an old practice management system which was introduced in 1992, which does not have the functionality to enable us to identify electronically the outcomes from our database. We have a file management system, but it is an old system, and while it enables me to track the file and it tells me where the file is and what stage the file has reached, it does not enable me to interrogate the file as to outcomes.*⁴⁷⁶

In the course of its Inquiry, the Committee reviewed the existing and proposed case tracking and practice management software systems in use in Queensland and New South Wales (NSW). The system was developed by ITEC Software in conjunction with the NSW DPP.⁴⁷⁷

Queensland is developing software for its own case management system rather than buying and adapting the NSW system. The Western Australian DPP gave serious consideration to purchasing the NSW system but found that the computer language that was used to write the programs is a language that is not in much use any more. The present position is that

⁴⁷⁴ Auditor General for Western Australia, Available at: http://www.audit.wa.gov.au/reports/report2006_04.html Accessed on 27 July 2007.

⁴⁷⁵ Submission No. 20, 27 July 2007, p7.

⁴⁷⁶ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 22 November 2006, p3.

⁴⁷⁷ Claire Giroto - Deputy Solicitor for Public Prosecutions, Office of The Director of Public Prosecutions, NSW, *Briefing*, 4 July 2006.

*The IT manager strongly feels that while the concept of the system itself is a terrific one, he believes that we can get a system somewhat similar to it but written in a modern language with which not only he but other people in Perth are more familiar as a package system through a US retailer. So what I have done is to now employ on a six-month contract an IT project officer who is now writing up specifications pretty much based on the CASIS system in New South Wales for what my office needs are. That project has now commenced. My present purpose is to have that developed as like a tender of specifications and then invite preferred tenderers to submit tenders to supply a system that will provide the functionality.*⁴⁷⁸

The CASES Case Tracking and Practice Management System, as it is called, is designed to assist legal offices, departments and tribunals in the conduct of their case and practice workload. The system, as designed, fits naturally into the work flow of solicitors, legal clerks, barristers and other case managers so that their interaction with the system becomes an integral component of their work. This means that when police charge someone they will, if it is an indictable offence, feed the details into the system by way of an encrypted email and the details of the case are then available to the DPP the following morning. A lawyer may enter their case notes into the system and all relevant submissions and reports may be scanned in and attached. The 'Practice Review' component allows a manager to check case loads and apportion accordingly. Witness notes go on a separate system as they are confidential communications.

The two major components of the system are:

- Case tracking
- Practice management.

The case tracking elements of the system are concerned with areas such as the registration and maintenance of details and tasks associated with a particular matter. This includes the registration and tracking of files, the allocation of responsibility for a matter and the linking together of related matters through a network of associations.

The practice management elements of the system are concerned with the management of matters by the various functional groups within the DPP. It also offers a range of management review functions and reports. These are designed to ensure the efficient conduct of a large office department or tribunal, including the diary scheduling of courts, witnesses and legal staff, the establishment of deadlines and the monitoring of progress, plus the tracking of particular important matters or tasks.⁴⁷⁹

The information contained in the system cascades from a strategic to an operational level as required. When a trial is entered into the system, the system will detail all the relevant tasks that

⁴⁷⁸ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 February 2008, p2.

⁴⁷⁹ ITEC Software, *CASES*, report prepared, Unpublished, July 2007, p5.

require completion before proceeding. The system prioritises tasks across all cases within a practice. The system is understood to be very user friendly.⁴⁸⁰

In recent months,

*Treasury approved funding for a project to review the long term strategic IT needs of the DPP, including a review of the capacity of the current case management system to meet the long term information needs of the organisation. The review found that the existing case management system needed to be replaced with a more effective system. Since the Director attended the Committee's hearing, funding has been approved for the 2007/08 ODPP budget for installation of the CASES information management system.*⁴⁸¹

Given the latest developments outlined above, the DPP now anticipates going to tender in the third quarter of 2008. However, while capital funding for the acquisition of the system has been provided, no additional funding was granted to cover the six additional staff required to operate the system. Consequently the ODPP will have to draw those salaries out of existing budgets, reducing its ability to increase the number of senior lawyers on staff with consequences outlined above.

Finding 34

There is an inability of both the Western Australia Police (WAPOL) and the Office of the Director of Public Prosecutions (ODPP) to meet the information requirements of their internal and external stakeholders. This impairs both organisations' performance in core areas. It is also affecting both WAPOL and the ODPP in the areas of innovation, the quality of available information and subsequent reporting.

Finding 35

The acquisition by the ODPP of a case management system will address many of the difficulties faced in the collection and analysis of data. However, because the operational funding requirements will have to be met from within the provisions of existing budgets, there will be a negative impact on the legal services provided by the Office of the Director of Public Prosecutions.

⁴⁸⁰ Claire Giroto - Deputy Solicitor for Public Prosecutions, Office of The Director of Public Prosecutions, Briefing, 4 July 2006.

⁴⁸¹ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p23.

Recommendation 30

The Attorney General meet the additional operating and staffing costs of a case management system and identify this as a separate line item in the budget of the Office of the Director of Public Prosecutions.

Recommendation 31

The Minister for Police and Emergency Services funds an upgrade of the existing police case management system so that it effectively interfaces with the proposed ODPP case management system. This upgrade should be funded as a separate line item in the WAPOL budget.

The Committee noted that the 'Evaluation of Specialist Child Interviewing' report found similar deficiencies in the data collection for the Child Interview Unit, including:

- *no unique identifiers for interviewees making repeat interviews hard to track statistically;*
- *inconsistent data collected in each six month period;*
- *no data on SCI external to the CIU;*
- *incomplete data recorded in some fields;*
- *no capacity to link to CCSS data via client ID although there may be some capacity to link to the Police database by report number; and*
- *no electronic or other 'sure-fire' process for updating data on arrests, charges, pleas, use of DVD in court processes and court outcomes.*⁴⁸²

The consequences of such deficiencies are that the evaluation and the monitoring of outcomes is very problematic.

⁴⁸² Evaluation of Specialist Child Interviewing, report prepared by Cant, R., Henry, D., Simpson, T., Penter, C. December 2006, p23.

Finding 36

There are deficiencies in the collection of data by the Child Interview Unit and in the subsequent linking the data with police and Department of Child Protection data. This deficiency hinders the evaluation of outcomes from initiatives such as specialist child interviewing and the video recording of children's evidence.

Recommendation 32

- a) The Minister for Child Protection undertakes to develop a purpose built database for specialist child interviewing capable of linking to both Police and Department of Child Protection data collections and incorporating post-interview outcomes. The database should be capable of use across WAPOL and DPP offices.
- b) The Director of Public Prosecutions develops a database to support the evaluation of outcomes from initiatives such as specialist child interviewing and the video recording of children's evidence.

(b) Common data tagging

In line with the need for a new practice management system is the related issue that cases dealt with by the DPP, forensics, the courts, and the Western Australia Police have no common identifier. This can result in a significant loss of time contributing to delays in the legal process and, on occasions, adds to the work load of agencies supporting the DPP such as PathWest. For example the Committee was advised of work still being undertaken by PathWest where, unknown to PathWest, a case has already been finalised.

We record everything. We do the work. We send a report back to the police. We then get something from the DPP or maybe police prosecutions that says "The State v Joe Bloggs." However, we have no idea who they are talking about.....There is no common identifier between us, the police, the DPP or the courts. This is what we have been trying to work at; that is, to try to get them all to use the police identification number as some means of keeping track.⁴⁸³

The issue is made more complex by the competing demands of the different agencies.

We record the police identifying details - the IMS number - into our computer system so we can always cross-reference. However, we assign our own case numbers to things. We find the police number is of value because it contains a lot of information, but it is too long and

⁴⁸³

Mr David Taylor and Dr Gavin Turbett, *Transcript of Evidence*, 16 May 2007 p8.

*cumbersome for us to use in a laboratory environment. We cannot write a 15-digit number on the side of a tube a few centimetres big, so we apply our own identifiers, but we cross-reference to the police numbers*⁴⁸⁴

For the past twelve months the various stakeholders have been working to resolve the issues surrounding the development of a common identifier. The issue was raised in the Legislative Assembly 3 April 2007, when the Attorney General advised that:

*The issue of linking the police, the Director of Public Prosecutions and PathWest records has been pursued particularly by the new Chief Justice, Wayne Martin, and has arisen out of a number of trials in which the lack of coordination and the presentation of DNA in particular, but also other forensic evidence, has been criticised. As a result of the Chief Justice raising this matter with me, I have had discussions with both the head of PathWest and the DPP about doing exactly what the member has proposed; that is, to link the recording system to the common numbering system between each of the agencies involved in the presentation of forensic evidence to the courts. It is important not only that they have a common numbering system, but also that priorities be clearly established.*⁴⁸⁵

The estimated cost for the development and implementation of this system is \$8 million.⁴⁸⁶

Finding 37

Integrated methods of delivering justice in Western Australia are impaired through the lack of common identifiers in the data systems. This limits the effectiveness of the exchange of information from the laying of charges to the finalisation of a case, that is between the ODPP, WAPOL, PathWest and the Courts.

Recommendation 33

The Attorney General continues to support and resource the development of a common file identification system for each of the affected agencies.

⁴⁸⁴ Mr David Taylor and Dr Gavin Turbett, *Transcript of Evidence*, 16 May 2007 p8.

⁴⁸⁵ Hon Jim McGinty MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 April 2007.

⁴⁸⁶ Dr Karl O'Callaghan, Police Commissioner, *Transcript of Evidence*, 13 February 2008, p4.

7.3 Collaboration between agencies

In recent years there has been an increasing move towards a ‘whole of government’ approach to crime prevention. This is an example of a more general shift in public administration away from a command and control mode of governance and towards governance through multiple stakeholders working together to deliver integrated solutions. In the United Kingdom (UK) for instance, the government has recently implemented a ‘Cross Government Action Plan on Sexual Violence and Abuse’.

The Action Plan is the work of six Government Departments at a strategic level. It engages the Home Office, Department of Health, Department for Constitutional Affairs, Crown Prosecution Service, Department for Education and Skills and the Department for Communities and Local Government.⁴⁸⁷

In operational terms this means that

*at a local level we are setting up steering groups within every police force area, (43 areas), with police, CPS [Crown Prosecution Service, which is the United Kingdom equivalent of the DPP], forensic experts, voluntary sector, health people, to monitor the implementation of the rape action plans. It is absolutely multi-agency and everybody has got a stake in it.*⁴⁸⁸

In another overseas example of collaboration in the area of sexual offences, the United Kingdom has instituted a level of data exchange between government and non-government agencies. These draw on a common data base that allows for the identification of repeat offenders and their victims. In practice this means that once the police have charged an offender with a sexual offence, an agency can make separate approaches to a victim who chose not to report to the police when they had been assaulted by the same offender. The victim can then determine whether they now wish to make an official report.⁴⁸⁹

In Australia, the advantages of collaboration were made evident to the Committee. This is readily demonstrated by the Joint Investigation and Response Team (JIRT). Similarly, the reduced outcomes achieved, when such collaboration is absent, are also apparent.

The Committee was advised that there were no comparable formalised collaborative processes mirroring JIRT in Western Australia:

Allocation and decision-making is largely Police driven. ...The Child Interview Unit provides a service to the Child Protection Squad OIC (a separate but linked unit). and Investigating Officers (Detectives) can be a law unto them selves (as long as they get the job done) and routinely cut corners, and ignore policy...Connection to Health is much weaker in this state. In NSW there is a mandated response to any child interviewed by

⁴⁸⁷ A2 Media Group, Available at: <http://www.a2mediagroup.com/?c=129anda=14273>, Accessed on 5 September 2007.

⁴⁸⁸ Mr David Gee, *Transcript of Evidence*, 3 September 2007, p8.

⁴⁸⁹ Mr David Gee, *Transcript of Evidence*, 3 September 2007, pp12-14.

*JIRT, in terms of an assessment of protectiveness. This is not the case in WA with DCP generally only acting where protective factors are more obviously absent.*⁴⁹⁰

In Western Australia the lack of a formalised collaborative multi-agency approach is seen as resulting in missed opportunities for comprehensive assessment, planning and decision-making.⁴⁹¹

*Each agency is only interested in what they need e.g. police – interview, evidence, offender interview, health, provision of medical, etc. Each agency is sitting on a lot of information about these children that could be shared e.g. health clinic information and other agencies are not regularly involved e.g. education – how has child been presenting at school. Basics only are gathered PMH examination, interview, DCP info. The initial interview process is weakened at times by the lack of coordination across agencies, lack of information gathered and lack of preparation of the child and family about the process of interview and what will happen next.*⁴⁹²

There is, however, a level of information exchange that occurs between certain agencies. This is not generally formalised and information exchange is undertaken on an ‘as seen to be fit’ determination as shown in the following submission:

*It is important that victims and witnesses are made aware of the services provided by VSS and the CWS. The VOC Act was amended in 2003 to enable the Commissioner of Police and Director of Public Prosecutions to provide certain information defined therein as “prescribed”, to the relevant Department responsible for administering the Act, thereby facilitating delivery of services by VSS and the Victim-Offender Mediation Unit. The Act provides that the DPP may provide such information in relation to victims as the DPP thinks fit.*⁴⁹³

All agencies whether government based, or funded by government operate as a confidential treatment service provider. Non-government agencies submit reports to their funding bodies in line with their funding contract.⁴⁹⁴ While there is contact with other agencies information is only exchanged where there is a pre-negotiated release of information form between the agencies. As one agency put it, the reason for this is that “there is a community or public interest need to provide safety to those who confide in us, because otherwise they would not, and we would be less able, to protect children.”⁴⁹⁵ The current lack of coordination and cooperation between services is well expressed in the submissions by the Child Interview Unit, Department for Child Protection and the Western Australia Police:

⁴⁹⁰ Submission No. 20, 27 July 2007, addendum p4.

⁴⁹¹ Submission No. 20, 27 July 2007, addendum pp1-2.

⁴⁹² Ibid.

⁴⁹³ Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, p20.

⁴⁹⁴ Ms Christabel Chamarrette, *Transcript of Evidence*, 15 August 2007, p2.

⁴⁹⁵ Ms Christabel Chamarrette, *Transcript of Evidence*, 15 August 2007, p2.

While services exist, they do so principally in isolation from each other and in isolation from key agencies involved in the initial assessment, investigation, prosecution (i.e. Police and DCP).⁴⁹⁶

This lack of cooperation reduces the potential effectiveness of ‘offered support’ as outlined in the ‘Best Practice’ model in the KPMG report (4.1 above).

Some formal, if high level, channels of communication do exist between the relevant agencies which seek to work continuously to improve the judicial process. Less formal relationships exist at operational levels between the DPP and WAPOL. However there would appear to be room for significant enhancement of communication and collaboration.

A police and DPP liaison committee is in place. In relation to child protection matters, a DPP prosecutor sits on that committee with the police, and the DCD is also represented on that committee. Through that committee, we can work out ways we can work more professionally in dealing with offences against child victim. ... In terms of the general relationship between the DPP and the police, a senior officer has been the point of contact with the DPP for 15 years. That is done at an agency-to-agency level to try to overcome any difficulties, whether they be trends or particular issues, in the way the police and the DPP operate. It also raises ways we can better enhance our roles. That is a two-way matter. Sometimes the police do not get it right and sometimes, in our view, the DPP does not get it right. Those matters are often sorted out at the committee level. That forum enables us to have frank and robust discussions. At the same time, the DPP will deal directly with the case officers.⁴⁹⁷

The need for a ‘whole of government’ approach was also highlighted by the Office of the Public Advocate who stated there needs to be “a whole of government approach to improving the adequacy and availability of services for people with decision-making disabilities who come into contact with the criminal justice system (both victims and perpetrators).”⁴⁹⁸

Finding 38

There is a lack of existing protocols that would support the exchange of information between agencies.

⁴⁹⁶ Submission No. 20, 27 July 2007, addendum p1.

⁴⁹⁷ Mr Christopher Dawson, Deputy Commissioner, *Transcript of Evidence*, 29 November 2006, p19.

⁴⁹⁸ Submission No. 18 from Office of the Public Advocate, 24 July 2007, p2.

Recommendation 34

The Office of the Director of Public Prosecutions, the Western Australia Police, the Office of the Public Advocate, the Sexual Assault Resource Centre and the Victim Support Service, PathWest, the Department of Child Protection and the Courts develop protocols to ensure the effective and efficient coordination of services. Such protocols would include procedures for the referral of victims and witnesses to support services. These protocols would also support the delivery of information to sexual assault complainants, including specification of the information that sexual assault complainants and witnesses should be provided with by prosecutors, the court and/or court support people to thereby inform and keep them informed.

This initiative to be driven by the Premier's office.

7.4 Issues in rural and remote areas

Consideration of the issue of the rural/metropolitan divide is not simply that of one demographic group over another, rather it is acknowledged that the issues are found in context of different population groups living in differing geographical settings across the state. It is however beyond the scope of this report to micro-analyse services to each of these demographic groups in their distinct settings.

Generally,

*many of the problems faced by rural communities in responding to sexual assault mirror those that confront victims and service providers who live in cities. However, issues of isolation, the levels of rural conservatism, and the denial of sexual assault within rural communities remain distinct. Rural women continue to suffer the impact of sexual assault in ways that uniquely compromise their capacity to remain anonymous, their right to access culturally appropriate services, and their rights to seek a police and/or a legal response.*⁴⁹⁹

The recent charging of large numbers of offenders in some Aboriginal communities in the North West reflects the fact that until recently few women in these communities considered accessing mainstream service support. The distance of services from some of these communities is a contributory factor.⁵⁰⁰ One submission noted that the “child protection system has failed to build trust with much of the community and thus the women felt it had limited influence as a source of support. We need someone who is here and involved in the community.”⁵⁰¹

⁴⁹⁹ Australian centre for the Study of Sexual assault, *Responding to sexual assault in rural communities*, report prepared by Neame, A. and Heenan, M., Australian Institute of family Studies, Melbourne, June 2004, p1.

⁵⁰⁰ Submission No. 30 from Kapululunga Aboriginal Women's Association, August 2007, p17.

⁵⁰¹ Submission No. 30 from Kapululunga Aboriginal Women's Association, August 2007, p17.

(a) Lack of anonymity in regional WA

There are a number of issues that people living in regional communities face that work against both the reporting of a sexual offence in the first instance, and then the subsequent prosecution of the case. This is the situation even though some reports would indicate that in parts of regional Western Australia, sexual offences occur at twice the rate of the Perth metropolitan area.⁵⁰²

For instance, the capacity to remain anonymous is an issue of some significance given the reality that the complainant lives in a small community where they will more than likely see the accused going about his/her daily business.

*They have had victims tell them that they have seen the accused in the streets during the course of the trial and that the accused has called out or laughed at them. It is also very difficult to be invisible in a country town after a trial as just about everyone knows the details.*⁵⁰³

The lack of anonymity also has indirect consequences for the victim's family in a small community that will further support attrition in the lengthy period leading to a trial.

*My parents went to church up in the town not so long ago and my mum could not talk to half the people that she normally would since the police and the courts have said that we can't communicate with them or they with us. This can't go on for too long..... I want this to be over.*⁵⁰⁴

(b) Gaps between policy and practice in regional areas of Western Australia

Contributing to a lack of evidentiary sufficiency, and therefore the failure of charges, is the gap between policy and practice which becomes very evident when the rural and remote areas of the state are considered. A number of instances have been referred to previously. However, it is worth highlighting some of those gaps where it specifically affects regional Western Australia.

*In the recent larger scale investigations in Aboriginal communities, it appears that in crisis mode, policies and protocols are adhered to even less and the operations are less focused on quality of evidence and more on short term results (quantity of charges and arrests). The ramifications of this "ends justifies the means" approach are not immediately evident due to the time taken for these matters to reach the courts.*⁵⁰⁵

⁵⁰² Australian centre for the Study of Sexual assault, *Responding to sexual assault in rural communities*, report prepared by Neame, A. and Heenan, M., Australian Institute of family Studies, Melbourne, June 2004, p9.

⁵⁰³ Western Australian Federation of Sexual Assault Services, 'The Realities of the justice system for victims of sexual assault and abuse from a remote / rural outlook', October 2005. Available at: <http://www.aifs.gov.au/acssa/docs/WAFSAS/stephens.pdf>. Accessed on 17 September 2007.

⁵⁰⁴ Submission No. 11, 17 May 2007, p1.

⁵⁰⁵ Submission No. 20, 27 July 2007, addendum p4.

This problem is also exemplified by forensic services, where previously in this Report the difficulties in obtaining a forensic examination in more distant regional centres such as Kalgoorlie were examined. Similar difficulties also arise in towns that are in relatively close proximity to Perth.

There is a state wide operational circular from the chief medical officer in the Health Department that basically says that in rural and remote areas major hospitals have an obligation; it is their role to do a medical forensic, but it does not happen. I think the wording of the operational circular says "ensure provision of a service". It does not actually say it has to be done in the emergency department. It says the doctors must ensure that the person has a service. They cannot just say, "Sorry, we don't do that." [None the less] We receive referrals from hospitals in regional areas around the metropolitan area, such as Northam and Narrogin and those sorts of places, where the GPs feel that due either to time constraints or inexperience they would not like to do that.⁵⁰⁶

In those remote areas where English may be a second language the position may be compounded by the need to use overseas-trained medicos, unfamiliar with local conditions, to collect forensic specimens.

You must not forget that there has always been a shortage of medicos in rural and remote areas, but if you get a Nigerian doctor from Lagos who suddenly finds himself in Kununurra, it is nothing short of a Mr Bean situation.⁵⁰⁷

What is true for forensics is also true for the ODPP's prosecutors,

The only people who visit those towns [in the North West or South West] from my office are the prosecutors who have a trial in a circuit town on the week that they are there. There is only a one in 100 chance that it is the person who has the file. The chance for them to go out and speak to victims in remote areas, who are also victims in their file, is very remote indeed.⁵⁰⁸

Additionally, because of such resource issues such as a lack of staff, the requirement to travel significant distances, and the lack of existing facilities, 'practice' in rural and remote areas varies and will dictate or excuse a different approach. As an example both the Western Australia Police and DCP "agree that interviewing children in a police station is not appropriate or acceptable, in most country locations there are not alternative facilities or the only equipment is in the police station."⁵⁰⁹

In WA, regional hospital emergency departments are required to ensure provision of medical, forensic and counselling services to patients who present after a recent sexual assault. However, many regional emergency departments are staffed by recently qualified

⁵⁰⁶ Dr Maureen Phillips, *Transcript of Evidence*, 2 March 2007, p7.

⁵⁰⁷ Dr Peter Winterton, *Transcript of Evidence*, 16 May 2005, p5.

⁵⁰⁸ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p12.

⁵⁰⁹ Submission No. 20, 27 July 2007, addendum p4.

*or overseas-trained graduates who have little understanding of forensic practice or the complex needs of Indigenous patients. The problem of staffing is compounded by workforce shortages affecting both medical and nursing staff.*⁵¹⁰

As recent well publicised events have confirmed, services for victims of child abuse in Indigenous communities, their families and offenders are almost non-existent.⁵¹¹ Such an absence of support exacerbates an already difficult situation.

*From an Indigenous perspective, sexual assault can be viewed as 'another layer of trauma', on the background of many assaults to the respect and dignity of Aboriginal people. Trauma results from the assault itself and from inadequacies in the response to the assault by the police, the justice system, health services and local Indigenous communities.*⁵¹²

The Western Australia Police expressed a level of frustration with the inability to access key services after hours in a crisis in the metropolitan area, a difficulty that is exacerbated in regional Western Australia.

*One of the constant complaints that police have is the lack of availability of support services after hours, whether that is psychiatric, intervention teams, SARC, DCW or anybody else. It is even worse in regional Western Australia. It is very difficult to get any support from any other government agency post business hours. We have been complaining about it for years and years. We have seen some of the issues at Halls Creek. There are some major issues up there with child sex abuse. We could not get any of the support crew from community welfare to help us out or even be in the town. Those are really important issues for us where there are high profile clients of this nature or where there is a particular problem. We do need those extra support agencies to be available to us.*⁵¹³

Finding 39

Compromises in the level of service delivery and lack of adherence to policy is widespread and seemingly increases with distance from the Perth metropolitan area, to the detriment of a coherent response to sexual offences.

⁵¹⁰ Submission No. 9 from Sexual Assault Referral Centre - Department of Health, 27 April 2007, p6.

⁵¹¹ Submission No. 25 from SafeCare, 6 August 2007, p12.

⁵¹² Submission No. 9 from Sexual Assault Referral Centre, 27 April 2007, p6.

⁵¹³ Dr Karl O'Callaghan, Police Commissioner, *Transcript of Evidence*, 19 September 2007, p12.

Recommendation 35

The Department of Health, the Department of Indigenous Affairs, the Office of the Director of Public Prosecutions, the Western Australia Police, the Office of the Public Advocate, the Sexual Assault Resource Centre, the Victim Support Service, and the Department of Child Protection establish a task force which would review both the adequacy of the provision of services in response to sexual assault in regional and remote communities, and identify innovative and collaborative strategies to address the shortcomings.

This initiative to be driven by the Premier's office.

(c) Legal response to the gap in policy and practice in regional Western Australia

There is a unique challenge that both Western Australian geography and demographics present to the provision of legal and related services. For victims in country areas the need for timely, culturally appropriate and easily accessible prosecutorial services is no different to that of the Perth metropolitan area, yet the Committee heard of many instances where there is a deficit in existing service provision. For small towns, even 100 kilometres and certainly one thousand kilometres outside of Perth, legal and related services are often scarce at best, and non-existent at worst. The position is exacerbated where victim/complainants live in remote communities or on farms outside local towns.

The Queensland Director of Public Prosecutions, in an attempt to address some of the issues that arise out of managing regional requirements, has introduced what is known as the 'Chambers system' into both the Brisbane and the regional areas. This involved a restructure of personnel into small legal teams of 'prosecution chambers' in different precincts which has proved successful. Staffing includes prosecutors, case lawyers and support staff including victim support staff. The tiered experience levels within chambers are designed to equip DPP staff with the skills and support they need to do their job as well as it can be done. In all, there are 14 Chambers with some eight based in regional areas. This 'restructure into small legal teams of prosecution chambers has proved successful. The tiered experience levels within chambers are designed to equip our people with the skills and support they need to do their job as well as it can be done.'⁵¹⁴

In Western Australia, the Director of Public Prosecutions acknowledges that such a system would produce a better standard of service for victims, especially in remote areas, as the ODPP would be able to monitor and aid the victim personally and not simply through correspondence.⁵¹⁵ As an example, such a system could be located in Broome where most trials are conducted in the northern Kimberley.

⁵¹⁴ Office of the Director of Public Prosecutions, *Annual Report 2005-2006*, p4. Available at: <http://www.justice.qld.gov.au/odpp/annualreport/anrep0506.pdf>. Accessed on 17 September 2007.

⁵¹⁵ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p12.

*Naturally if you had Chambers in Broome and two or three lawyers there; then they would be doing the Broome cases and of course they would naturally be able to meet the victims of those cases at an early stage, interview them and go through their statement to make sure that they are happy with what has been taken down by the police, and that there is nothing further to be done. You would produce a far higher standard of service and response.*⁵¹⁶

The Kalgoorlie region is a good example of a region where the Director of Public Prosecutions believes that, due to the volume of cases, an argument for a regional Chamber could be mounted. Additionally, recent developments in the active pursuit and prosecution of assaults and sexual offences in the North West have seen a significant increase in the ODPP case load in that area, although in previous years the case load was insufficient to justify the creation of a local Chamber. The major constraint in creating such Chambers is that

*....it would be hideously expensive because there is no accommodation and there are no facilities available at the moment for prosecutors. Anecdotally, I hear that prosecutors, magistrates and judges who go up there have trouble even finding temporary accommodation... [However] because I can offer a career path for my lawyers ...I could employ people to work in Broome, yes I could. I would have to have not just one person there; I would probably have to have an office of two or three - a work group with a secretary. If I did that, yes, I am sure it would be an attractive place for my lawyers, but it would be very expensive.*⁵¹⁷

In the absence of regional Chambers and in an endeavour to address the distinct requirements of some indigenous communities in a cost effective manner, the ODPP has established what is known as the 'Kalgoorlie Pilot Project'. Commenced in April 2004, the Kalgoorlie Project has since established itself as an effective case management system with respect to superior court prosecutions conducted at the Kalgoorlie courthouse.⁵¹⁸

Originally the project was established to address the logistical and regional challenges that arise from distances covered and the isolation of many Indigenous communities and the fact that many prosecution witnesses are drawn from such communities. In practice this has meant dedicated experienced State Prosecutors and clerical staff have managed prosecutions from an early stage and ensured greater continuity from initial charge through to trial and final determination.⁵¹⁹ The project has examined and addressed the continued loss of court time on circuit in regional centres. It has seen the development and implementation of new procedures that can be rolled out to other circuits.

⁵¹⁶ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p12.

⁵¹⁷ Mr Robert Cock, Director of Public Prosecutions, *Transcript of Evidence*, 5 September 2007, p12.

⁵¹⁸ Office of the Director of Public Prosecutions for Western Australia, *Annual Report 2006*, p19. Available at: http://www.dpp.wa.gov.au/content/Annual_Report_05-06.pdf. Accessed on 18 September 2007.

⁵¹⁹ Office of the Director of Public Prosecutions for Western Australia, *Annual Report 2006*, p19. Available at: http://www.dpp.wa.gov.au/content/Annual_Report_05-06.pdf. Accessed on 18 September 2007.

The Economic Research Centre (ERC) confirmed the effectiveness of this judicial model in addressing, in particular, the logistical and regional challenges that arise from distances covered and the isolation of many Indigenous communities. The provision of timely advice resulted in greater certainty for victims through ‘getting the charges right first time because of this project.’ It has also resulted in improved witness attendance at trials and the outcomes of those trials.⁵²⁰

The success of the Project is reflected in the recent announcement by the Director of Public Prosecutions of a Kimberley Work Group that will be modelled on the Kalgoorlie project and will see the first specialist sexual assault unit in the WA DPP.⁵²¹

Finding 40

There is a deficit in the Office of the Director of Public Prosecutions’ (ODPP) ability to respond to the needs of regional Western Australia. The ODPP is attempting to address this through the piloting of an innovative judicial model.

Recommendation 36

The Attorney General ensures funds are available to extend the Kalgoorlie Project, and to implement the Chambers model in selected regional areas, commencing in Broome.

Recommendation 37

The committees and task forces established as a consequence of this Inquiry report back to Parliament by 30 June 2009 on their outcomes.

⁵²⁰ Submission No. 27 from Office of the Director of Public Prosecutions, July 2007, p16.

⁵²¹ Submission No. 27 from Office of the Director of Public Prosecutions, July 2007, p17.

APPENDIX ONE

WOMEN'S VOICES CALLING FOR CHANGE

Report of the Consultation Forum with Survivors of Sexual Assault and Abuse, Convened by Reclaiming Voices WA

Background

The Consultation Forum with Survivors of Sexual Assault and Abuse was held on the 9th June 2007 at the University Club at the University of WA in Crawley, Western Australia. The forum was convened by *Reclaiming Voices WA*, an independent coalition of self-motivated female victim/survivors of past and recent sexual violence.

Reclaiming Voices WA arose out of a consumer forum run by the Sexual Assault Resource Centre in late 2003 and is affiliated with its sister group formed in Victoria in November 2001. *Reclaiming Voices WA* is funded by a Western Australian Women's Grant from the State Government Office for Women's Policy.

The purposes of the forum included:

- to provide an opportunity for women to talk about how they made their way through the minefield of police, legal and health services;
- to give women the chance to outline what improvements to services they would like to see;
- to gather feedback which could be collated and presented to service providers as well as to the Minister for Health, the Hon Jim McGinty; and
- to support Reclaiming Voices WA's proposal of a model of enhanced service provision for women victim/survivors.

The forum was open to anyone who has:

- ever been the victim of sexual assault as a child, adult or both
- never reported the incident(s) to police
- reported their abuse but their case never went to court
- had their case go to court but the perpetrator got off, or got sentenced.

The forum was attended by 13 women. While no survey or questions were asked of participants, to avoid being intrusive, the following characteristics of members included the following: Mother and daughter; university student; 18 year old; great grand mother; various nationalities; stranger

rape; past childhood sexual abuse; sexual abuse of their child; experiences of services within WA; many married; some happily married; many with children; some without children; professional and non-professional.

The forum was facilitated by *Holly Hammond and Michelle Burgermeister*. The forum received very positive evaluations, demonstrating that Reclaiming Voices had been effective in creating a space in which women felt affirmed, respected and empowered in sharing their experiences and opinions.

Programme

The forum ran from 10am to 1pm and included:

- Welcome and Clarification of Forum Purpose and Format
- Introductory Activity and Round
- Group agreements
- Background and purpose of grant, by Pip Brennan from Reclaiming Voices
- Counselling support for delegates, by SARC
- Literature Review presentation on models for sexual assault services, by Kelli Mitchell, social work student on placement at the Office for Women's Policy
- Small group work shopping on the three consultation questions:
 - As a survivor of sexual assault or sexual abuse what services have been helpful?
 - What services have not been helpful?
 - What would you like to see offered?
- Report back, summary and close.

Summary of consultation responses

The following is a summary of key points made in groups. The groupings of services come from the groups. Comments on services reflect experiences of sexual assault of adult, sexual abuse of child, past childhood sexual abuse of adult now. In the interests of hearing the voices of survivors these comments have not been edited beyond collation into service areas.

CRISIS SERVICES

Helpful	<ul style="list-style-type: none"> SARC forensic exam done with incredible sensitivity SARCS options re: keeping or handing over forensic evidence to police very good
What should be offered in the future	<ul style="list-style-type: none"> Better services in rural and remote areas. Need procedures that allow victims to have medial forensic before making a statement if appropriate.

ADVOCACY SERVICES

Helpful	<ul style="list-style-type: none"> An Advocate service for victim was great to coordinate all the needs of a victim from liaising with police, child protection services, counselling services, medical and support services. Otherwise it is too much for someone already stressed and distressed. (Victorian experience)
Not helpful	<ul style="list-style-type: none"> Lack of services for victims in rural areas.
What should be offered in the future	<ul style="list-style-type: none"> Need one stop shop, which provides, advocacy, police, counselling, medical, housing, victim support, consumer advocacy with hospitals and alternative healing services Oversee quality of services at all levels and stages Provides specialist training and supervision Accreditation of specialized services outside one-stop shop National Standards for all one-stop-shops. Need website to link all services and govt departments together (UK) Particularly aimed at young people. Need an advocate to provide information about the whole process — from police, court, counselling, compensation, victim support etc. Need advocate to help tell victims what will happen in long term on smaller but significant things from not being able to give blood etc. Need to have process and assistance for victim to make complaints about services — need advocate for this. Need an advocate to represent and deal with all the other services Need a strategy for responding to sexual assault in all rural towns and communities More awareness raising of what to do if sexually assaulted and services available. Improve services ability to refer appropriately

- Create a buddy system

POLICE SERVICES

Helpful	<ul style="list-style-type: none"> • Police who understand and specialize in working with children <ul style="list-style-type: none"> • Use of art and teddy's etc • Many officers (male and female), especially if trained and working in a specialized unit, were excellent — did their job but were supportive, helpful and understanding. • Particularly great when officers go out of their way to keep victim informed of what is going on and they can have ready access to the officer should problems arise.
Not helpful	<ul style="list-style-type: none"> • Victim shunted from one police officer and station to another before finding the right person. (Need to know their own procedures and internal referral processes) Often Police Officers were inappropriate. <ul style="list-style-type: none"> • Continual changes in Police officers working with victim • No continuity between states • No National Standards for how police deal with sexual assaults • Responses in rural and remote areas is particularly poor — hours of access, choice of gender • Cross — over of jurisdictions — unnecessary angst; especially when working with children • Re-traumatisation by having to look at file of perpetrators for the identikit — which was not used or necessary. • Being put into a prison cell re-traumatising of victim • Some Police officers ask questions in a way that is very intimidating and non-believing. • Doing Police Statement which took 8 hours before having medical forensic examination, meant victim did not shower for 10 hours. • Difficulty when Police require dates and times of children's assault — unreasonable. • Too quick to “right-off” child's statement if adult perpetrator has an alibi. • Police environment is sterile and hostile for sexual assault. • Not given a choice to see a female officer problematic • Police station environment is very child unfriendly and is in appropriate for interviewing children. • Victim not always offered range of services available — by police. Sometimes Police will take choice away.
What should be offered in the future	<ul style="list-style-type: none"> • Better police training on trauma and issues of survivors — to also take into account the constant turn-over of staff <ul style="list-style-type: none"> • Need training on age development for working with children so expectations are better. • Police need training on trauma awareness • Integrated investigation for services with children — need to have joint interviews with DCD, • Not enough done to minimize incidents of sexual assault/abuse

	<ul style="list-style-type: none"> • Better referral processes — told about all services no matter what stage the victim is at. • Police Commissioner needs to prioritise the issue of sexual assault/abuse • Need a specialized sexual assault unit where they are trained and knowledge and expertise is built up. (WA used to have a Police sexual assault unit but no longer)
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JUSTICE AND COURT PROCESS

Helpful	<ul style="list-style-type: none"> • DPP lawyer was genuine, made plenty of time, kept victim informed with frequent calls.
Not helpful	<ul style="list-style-type: none"> • Discouragement of reporting past child sexual abuse • Victim often has to tell their story many times over because of changes in lawyer. • Legal process dismisses witness as witness only! • No integrated approach to working with children disclosing sexual assault. • Because DPP service was so inappropriate, victim had to keep calling the officer to find out what was happening and pushing for them to ‘fight for the case’. Very stressful and traumatising. • Legal system lacks sensitivity - at all levels. • A private lawyer advised victim not to report case to police! • Judges sometimes make assumptions about victim or state some very inappropriate things. • DPP make agreements with defence without consulting with victim. • Sentencing often inappropriate for crime — difficult for victim to know what to expect. • Adjournments and delays in court means process can be very traumatising for victims. • Court process is re-victimising of victim.
What should be offered in the future	<ul style="list-style-type: none"> • Sentencing should take into consideration of what the victim wants. Not all victims want the perpetrator jailed, but may still want justice though. This can create barrier to reporting. • Should not be limitations on time survivors of past sexual abuse can report on. • DPP lawyers need better training on trauma and how to provide an effective service for victims of sexual assault crimes • Legal system needs to change so victim is no longer the witness, has more power in court, is more likely to win (because convictions very low). • Judiciary need more training and awareness of victims issues to be more sensitive and open • Victims should have more say in sentencing — victim impact statements • Need offender list to promote public safety. • Need state guidelines for sentencing and parole periods

CRIMINAL INJURIES

Not helpful	<ul style="list-style-type: none"> • To get compensation perpetrator must have been sentenced to prison — which is not always what the victim wants (but may still want justice). • Payouts inconsistent
What should be offered in the future	<ul style="list-style-type: none"> • Need to be reviewed for sexual assault and past sexual abuse.

COUNSELLING and SUPPORT SERVICES

Helpful	<ul style="list-style-type: none"> • Professional sees survivor as expert of own life and decisions — very helpful and supportive <ul style="list-style-type: none"> • Being treated in holistic way — i.e. not just looking at assault only but all needs as a person • Let client decide on own journey and guides them through this. • Groups for sexual assault victims very helpful • Women's Health Centres — great places for support — gave victim permission to scream, be themselves, to let go. Was not afraid. Made it a safe place. • Incest Survivors association provided very good counselling service. • H.E.R.O good service. • SARC Prison program really important
Not helpful	<ul style="list-style-type: none"> • Don't allow survivors to tell story in their won words — (especially children) <ul style="list-style-type: none"> • Not enough counselling services specializing in children • Access to timely services delayed, interrupted due to referral process not being completed on paper • Not enough services to meet needs of victims • Not told accurate information about choices for group or counselling services — ending up waiting over 6 months after sexual assault. • Don't offer enough groups for sexual assault victims so not timely • Not right that perpetrator for each court appearance gets to have the same lawyer, but if victim have different lawyers each time! • Too many deals and payouts made with clubs and sporting groups to keep victim quiet — no justice. • Had to drive 2-5 hours for access to counselling in rural town. • Very poor awareness of sexual assault and inaccurate referral process by counselling services that do exist. • Victim support services in different place again to other services. • SARC counselling has long waiting list. • SARC counselling can only receive short term counselling. • Sometimes support people put pressure not to go through court process. But do not give all information to victim. • Not enough funding for SARC to visit all prisons; restricted in visiting private jails which is wrong.
What should be offered in	<ul style="list-style-type: none"> • More and better servicing of relatives and support people of victims. These people often want to know how to better support victim and need counselling

the future	<p>and support themselves.</p> <ul style="list-style-type: none"> • More services or opportunities for survivors to meet and talk with each other — support groups. • Scream Truck — which visits rural areas to raise awareness of the issue, set up support groups, educate professionals etc. • More information for families to know how to help victims and how they can cope. Especially on issues such as suicide, boundaries, communication with victims.
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HOSPITALS — Mental Health

Helpful	<ul style="list-style-type: none"> • Helpful with medication; supportive staff when dealing with sexual assault stuff.
Not helpful	<ul style="list-style-type: none"> • Often inappropriate for survivors of sexual assault • Too medically focused • Emphasis on medication rather than trauma treatment • Lack resources and will to look at sexual assault victims.
What should be offered in the future	<ul style="list-style-type: none"> • More and better training for mental health professionals on sexual abuse — especially past sexual abuse.

CHILD PROTECTION SERVICE

Not helpful	<ul style="list-style-type: none"> • Child victim had to tell their story twice because DCD refused to sit in on police interview of child which took 2.5 hours • DCD were unskilled in working with children — did interview in child care centre for 10 minutes and wondered why the child said nothing
What should be offered in the future	<ul style="list-style-type: none"> • DCD needs to review how they interview child. • Need a collaborative approach with Police • Need higher skilled and trained staff to work with children and sexual abuse.

PUBLIC OPINION — Media, Ministers, education needs

Helpful	<ul style="list-style-type: none"> • Media and public are much more supportive and aware of sexual assault and child sexual abuse issues.
Not helpful	<ul style="list-style-type: none"> • Media — lack awareness still of issues of sexual assault. • Victims lack information about how to deal with media.
What should be offered in the future	<ul style="list-style-type: none"> • Need more education incorporated into school curriculum • Teach protective behaviour in all schools • Teach sexual health for boys and girls with message about rights, responsibility and respect. • Train volunteers who have been victims to go in and education in schools. • More training on “informed” consent and what it really means.

APPENDIX TWO

DEVELOPMENTS IN SERVICES TO VICTIMS - OTHER INITIATIVES SINCE THE KEATING REPORT IN 2001⁵²²

Since 2001, several new bodies have been established or existing ones reformed to improve delivery of services. Referring to the Keating Report, the following are the major developments regarding services and joint initiatives since 2001:

- Integration of the *Child Witness Service* into the *Victim Support Service* to streamline and improve services to children and their families and to expand available services in regional areas including to Kalgoorlie, Port Hedland and Broome and additional funds to facilitate services to remote communities to provide community education and information to Indigenous communities, which initiative is supported by the appointment of an Aboriginal Child Witness Support Worker.
- The *Victim Support Service* Volunteer Programme was expanded to service family violence matters and to support children required to give evidence in court with a full-time coordinator being appointed to assist the programme.
- Establishment of the *Court Support Programme* to help applicants obtain violence restraining orders in the Central Law Courts by assisting applicants with completing paperwork relating to interim violence restraining orders and preparing them to give evidence in court. This initiative aims to help reduce the stress of taking out an application and going to court.
- Establishment of the *Victim Notification Register*, co-located with the Victim Support Service, to provide information to victims of crime about the offender While they are under the supervision of the Department of Corrective Services, thereby ensuring that victims interested in knowing the whereabouts of the offender, including for safety reasons, can be informed of release dates and parole.
- Upgrading of the *Victim Offender Mediation Unit*, providing a mediation service between victims and offenders that offers reparative, protective mediation and therapeutic mediation. Mediation provides a way for victims and offenders to resolve issues relating to an offence through the assistance of a neutral person – a mediator and any agreements reached form part of any parole or release conditions. The Victim-offender Mediation Unit received additional staff and resources to raise the profile of mediation in the Magistrates Court and to explore ways in which the mediation service can be enhanced for both offenders and victims. Consequently, a mediation officer is now permanently present in the Perth Magistrate's Court to facilitate greater use of mediation under the *Sentencing Act 1995*.
- Establishment of a 'one stop shop' contact telephone number (an 1800 number) to enable easy access for victims to all services provided by the Department of Attorney General across the State, with callers able to be transferred directly to services such as the Victim Offender Mediation Unit, the Victim Notification Register and the Criminal Injuries Compensation Tribunal.
- A more collaborative approach between the Victim Support Service, the Victim Notification Register and the Victim Offender Mediation Unit to ensure a better coordinated response to victims.

⁵²²

Submission No. 27 from Office of the Director of Public Prosecutions for Western Australia, July 2007, pp43-46.

- Re-drafting of written information, including pamphlets for victims regarding criminal injuries compensation and Victim Impact Statements, to make it clearer and more comprehensive, in consultation with relevant agencies including the DPP.
- Publication of the comprehensive *Directory of Services for Victims of Crime* (over 100 pages of information), by the then Ministry of Justice, and released in May 2001, detailing a variety of services that could assist victims of sexual assault.
- Publication of the *What do I Do Now? – assistance for families dealing with the unlawful death of a family member Booklet*, a comprehensive information tool, that is provided to secondary victims of homicide to help grieving families cope with the homicide was developed by the then Department of Justice in conjunction with the Homicide Victims' Support Group, WAPOL and the DPP.
- Introduction by the then Ministry of Justice of a new Victims Policy formally requiring staff in the justice system to recognise the interests of victims of crime. Developed in cooperation with the Homicide Victims' Support Group, the policy requires staff to ensure victims are heard and their needs are taken into account in all of their dealings with the justice system, resulting in a range of new programmes and initiatives including victims of crime now having the right to make representations to the Parole Board.
- Development and implementation of an inter-agency model of service delivery for victims of family and domestic violence, based on recommendations from the Joondalup Family Violence Court evaluation report.
- Development of the *Homicide Protocols*, being a joint initiative between Police, Coronial Counselling Service, Victim Support Service and the DPP, plus the Victim Notification Register, Victim Offender Mediation Unit, and Homicide Victims Support Group, setting out each agency's responsibilities to key secondary victims of homicide, assigning tasks to the relevant agency for the various stages in the investigation and court process and after, to ensure that each agency complements the other and that there are no gaps in the delivery of service. The Protocols are summarised in the Appendix 3 of the *Statement of Prosecution Policy and Guidelines* and are part of the DPP's Practice and Procedures Manual. These inter-agency procedures and practices aim to improve services to secondary victims of homicide and to coordinate better services to families of homicide victims so that families now receive timely and accurate information about the progress of police investigations, court proceedings and support services.
- *Child Witness Service Reference Group*, the ongoing brief of which was to deal with and progress issues to facilitate and improve the work of the Child Witness Service of preparing and supporting child witnesses and victims is essential to making the trial process work better and minimising the trauma such children experience in their interface with the criminal justice system. The DPP and CWS liaise regularly in this regard.
- Updating of the *Evidence of Children and Special Witnesses Guidelines for the use of Closed- Circuit Television, Videotapes, and other Means for the Giving of Evidence* by former Hon. Judge Jackson with provision of executive support by the DPP to the former to finalise the Guidelines.
- *Establishment of the Visual Recording Interview Unit*, being a joint Police Department/Department for Community Development initiative whereby alleged victims of abuse or child witnesses are interviewed to minimise the number of times that they must tell their story and thereby reduce the trauma of repeating it and recalling it. This initiative is supported by amendments to the *Evidence Act 1903* and will be extended to mentally impaired victims of sexual assault by the *Criminal Law Evidence Amendment Bill 2006*, when enacted.

- Development of the *Visual Recordings Interview Protocols* by Specialist Child Recordings Working Party, a joint initiative of the Police, Departments for Community Development and Attorney General, Family Court, District Court, and DPP and setting out responsibilities regarding visual recording interviews of child witnesses. The ODPP has played the lead role in the preparation of these significant inter-agency protocols through the Working Party originally convened by Judge Hal Jackson, and now His. Hon. Judge Sleight, to address the procedural changes required by the introduction of the legislation that permits the use of visually recorded interviews as evidence in chief at trial.
- Creation of the Western Australian Aboriginal Justice Agreement, being a partnership between most State Government justice agencies and the Aboriginal and Torres Strait Island Commission.
- *Criminal Law Amendment Act 2005* allowed for an additional member on each of the Parole, Mentally Impaired Accused Review and Supervised Release Review Boards respectively, being a person with an understanding of the interests and concerns of victims of crime, with community based victims groups being able to nominate individuals for this role. The Act required that each of these Boards takes into account submissions from victims of crime when considering an offender's application for early release.
- Establishment of the *Victims of Crime Reference Group* in 2007, chaired by former Attorney General Hon. Cheryl Edwardes with stakeholder and victim representation, and executive support provided by the Department of Attorney General. The Group reports through the Chair directly to the Attorney General in relation to legislative, administrative and practical changes to give victims of crime a stronger voice and help make the court system more victim and witness friendly.
- Various reviews pursuant to Section 6(1) of the *Victims of Crime Act 1994 (WA)* including two reviews in 2002 (untabled) and 2006 (tabled) being *The Review of the Victims of Crime Act 1994 (WA) – A report of the Review of the Act's Operations and Effectiveness* • Ongoing review of the Aboriginal Bench Book whereby the ODPP, in co-operation with the Aboriginal Legal Service, is currently updating the substantive criminal law chapters of the Aboriginal that provides the judiciary with a concise reference to cross-cultural issues that may arise in the course of the conduct of, particularly criminal, trials of Aboriginal persons and with witnesses.
- Establishment of the Visual Recording Unit (Part of the Children First Strategy), occupying central premises and staffed by specialist interviewers. Officers from WAPOL, the Department for Child Protection and the Princess Margaret Hospital Child Protection Unit are co-located to provide a comprehensive service to victims of child abuse in the metropolitan area. The State-wide application of the service ensures that the expertise within the VRU is accessible to officers in rural and remote locations. The VRU has conducted officer training schools to increase the number of prescribed interview officers to work in regional areas.
- Implementation of the Re-entry Programme aimed at providing supports to deal with short term prisoners most at risk of offending on release thereby preventing such re-offending including establishment of re-entry support services in eight regions to assist clients and their families to maintain accommodation, develop and maintain skills requisite for daily living, improve personal and social interaction and increase participation in community life.
- Particularly following the Mahoney Report there has been and is planned significant and major reforms to the corrections area. Many victims have been or will be offenders or are in relationships with offenders. In addition, dealing better with offenders can assist in helping prevent re-offending. The reforms commenced with the splitting of Department of Justice and creation of the Department of Corrective Services (and Attorney General) to assist in planned reforms including:

- Creation of a new corporate governance framework;
- A focus on inter agency cooperation particularly between the Department of Corrective Services and Western Australia Police recognising the separate but linked roles each plays in the criminal justice system;
- Amended legislation to reflect the new approach;
- Development of implementation processes to comply with the *Dangerous Sexual Offenders Act 2006*;
- Development of strategies to deal with Aboriginal imprisonment;
- Improvement of prisoner occupational safety and health;
- Introduction of Community Conferencing in regional areas and remote communities to empower individual communities in the administration of justice issues;
- Improvement of prison security;
- Improve prison accommodation including to accommodate various needs;
- Improvement of community and juvenile justice services including identifying high risk serious and/or repeat offending and dealing with systemic causes of crime and development of a sustainable Re-entry Model of service delivery that will facilitate working more closely together to support young people in the immediate pre and post release period;
- Better workforce management of Community Justice Services;
- Introduction of a comprehensive pre-parole service by community corrections officers to facilitate prisoners successfully re-entering the community; and
- Better offender management and professional development.

APPENDIX THREE

VICTIMS OF CRIME ACT 1995

GUIDELINES AS TO HOW VICTIMS SHOULD BE TREATED Schedule 1

1. A victim should be treated with courtesy and compassion and with respect for the victim's dignity.
2. A victim should be given access to counselling about the availability of welfare, health, medical and legal assistance services and criminal injuries compensation.
3. A victim should be informed about the availability of lawful protection against violence and intimidation by the offender.
4. Inconvenience to a victim should be minimized.
5. The privacy of a victim should be protected.
6. A victim who has so requested should be kept informed about —
 - (a) the progress of the investigation into the offence (except where to do so may jeopardize the investigation);
 - (b) charges laid;
 - (c) any bail application made by the offender; and
 - (d) variations to the charges and the reasons for variations.
7. A victim who is a witness in the trial of the offender and has so requested should be informed about the trial process and the role of the victim as a witness in the prosecution of the offence.
8. A victim who has so requested should be informed about any sentence imposed on the offender, or any other order made in respect of the offender, as a result of the trial and about any appeal and the result of any appeal.
9. A victim's property held by the Crown or the police for the purposes of investigation or evidence should be returned as soon as possible.
10. Arrangements should be made so that a victim's views and concerns can be considered when a decision is being made about whether or not to release the offender from custody (otherwise than at the completion of a term of imprisonment or detention).
11. A victim who has so requested should be informed about the impending release of the offender from custody and, where appropriate, about the proposed residential address of the offender after release.
12. A victim who has so requested should be informed of any escape from custody by the offender.

APPENDIX FOUR

LEGISLATIVE DEVELOPMENTS ADDRESSING VICTIM AND WITNESS ISSUES

General statutory amendments affecting sexual assault victims and witnesses include:

- Amendment of the *Director of Public Prosecutions Act 2004* whereby the DPP can now bring, take over and conduct prosecutions for summary offences, thereby allowing the DPP to oversee all summary prosecution processes. Benefits include being able to develop universal policies and guidelines and providing prosecution services for significant cases. In addition to this, the DPP has appointed a Consultant State Prosecutor to the Magistrates Court and equivalent at the Children's Court, to oversee and advise on Police prosecutions and thereby help ensure that matters are dealt with at the front end and thus more expeditiously, thereby minimising trauma to the victim and witness.
- Criminal Law (Procedure) Amendment Act 2002 being landmark legislation that:
 - o further improved and streamlined court procedures and processes by abolishing preliminary hearings in Magistrate's Courts, thereby relieving all, particularly sexual assault, victims from the distress of having to give their evidence twice;
 - o introduced many reforms to the criminal justice system that gave effect to recommendations of the WA Law Reform Commission for a comprehensive code of criminal practice and procedure by modernising and consolidating criminal proceedings for both summary and indictable matters and aligning procedures in the summary jurisdiction with those in superior courts, thus facilitating the better functioning of the criminal justice system; and
 - o consolidated the earlier amendments that enabled propensity evidence to be admissible in criminal trials and reformed the laws regarding 'joinder' that controlled sexual offences to be joined and tried together.
- *Sentencing Legislation Amendment and Repeal Act 2003* which introduced "truth in sentencing" by abolishing remissions from prison sentences and enabling sentences imposed to be more readily understood in terms of actual punishment on offenders.
- *Criminal Property Confiscation Act 2000* that enables property confiscated under the Act to be converted into money and paid to the Confiscation Proceeds Account which funds may be expended at the direction of the Attorney General on support services and assistance to victims of crime and programmes to prevent or reduce drug related criminal activity and the abuse of prohibited drugs.

- *Criminal Injuries Compensation Act 2003* replaced the 1985 Act in 2003 thereby improving the processes and procedures for victims, particularly of sexual assault, to gain criminal injuries compensation and increased the sum that victims are entitled to, setting a new maximum award of \$75,000 and enabling interim and future payments, as well as allowing those who would eventually have their award granted to have access to instant medical attention and counselling.
- Acts Amendment (Family and Domestic Violence) Act 2004 Acts Amendment (Family and Domestic Violence) Act 2004 amended the Restraining Orders 1997 to improve procedures for victims of family and domestic violence to gain protection from the Courts, strengthening powers to issue and enforce restraining orders, and to extend the grounds for seeking a restraining order to include emotional and other forms of non-physical abuse. Under the legislation, domestic violence in the presence of children and assaults in the domestic arena would be considered more serious and could attract harsher penalties. Importantly, the legislation also provided for the police to have greater powers to investigate and intervene in domestic violence situations. Those powers included the ability to issue “on the spot” short term restraining orders. Procedurally the legislation provides that there will be no direct cross examination by unrepresented respondents, children will no longer be permitted to be called to give oral evidence, except in exceptional circumstances, ex parte applications are to be heard in closed courts and police may assist complainants throughout the process.
- Further review of the *Restraining Orders Act 1997* to ensure that it serves the purpose for which it is intended to prevent domestic violence and abuse including making it easy for victims to obtain help and protection and to facilitate treatment for offenders.

Many legislative initiatives have been implemented specifically aimed at reducing sexual offending and dealing with sex offenders including:

- *Criminal Law Amendment (Simple Offences) Act 2004* that tightened and improved laws dealing with alleged persistent offenders who were particularly threatening to children including making it illegal for a sex offender to consort with a known sex offender or be in or near a school, kindergarten, child care centre or any other public place where children are regularly present, without reasonable excuse; and replaced *Police Act* offences of “loitering”, “evil designs”, “being suspected of having or being about to commit offence” with a “move on” power to enable the police to deal better with loitering and suspicious behaviour such as peeping toms to help prevent commission of a serious criminal act as well as increasing penalties for loitering near schools, kindergartens, and child care centres. This legislation empowered police to seek strict controls on paedophiles and any serious and repeat sex offender who poses a risk to the community or an individual, including prohibiting these offenders from engaging in certain behaviour; associating with or contacting certain people, engaging in certain employment and from being in *certain places*.
- Increased jail terms for those who organise sex tours and introduced lifetime bans on any travel agents who become involved in such offences.
- *Community Protection (Offender Reporting) Act 2004* that created a sex offenders register, obliging such offenders to report regularly to police regarding personal details (including name, date of birth, address, employment details, motor vehicles owned or driven, club memberships and

travel plans) logged on a national Sex Offender Register, and created notification obligations on them as well. It also imposed reporting obligations on offenders from other states and facilitated the capacity of the police to undertake supervision of such offenders upon their release from prison. The increased scrutiny of such offenders will contribute to deterring and preventing the commission of offences and the database will also assist the investigation and prosecution of offences.

- *Working with Children (Criminal Record Checking) Act 2004* that facilitated the creation of the Working with Children Screening Unit and procedures to enable screening of employees and volunteers who may encounter children during their employment or voluntary work. It obliges employers and employees to ensure that comprehensive checks are now conducted prior to people commencing employment in any place where there is a potential for children to be at risk to prohibit such people who have been convicted of or charged with certain offences from carrying out child related work.

- *Dangerous Sexual Offenders Act 2006* that provides for a scheme whereby at or near the end of their sentence, sex offenders can be ordered to be supervised or further preventatively detained if they pose a serious danger and risk to the community if released, to complement existing *Sentencing Act 1995* provisions that allow a court to impose an indefinite sentence on an offender

- *Criminal Code Amendment (Cyber Predators) Act 2006* that amended the *Criminal Code* to prohibit the use of electronic communication, especially the internet, to procure children for sex, allowing police to pose as children on-line in order to catch cyber predators and enabling police to seek a court order to facilitate decryption of evidence on a suspect's computer and ensure that persons who have been convicted of cyber predator offences will be kept from working with children.

- *Censorship Amendment Act 2006* that introduced measures to address the problems identified by the WA Police in relation to forfeiture in the course of investigating child pornography, as well as allowing the use of evidentiary certificates and infringement notices to speed up the process of investigation and enhance the administration of justice. Also those convicted of child pornography offences are now automatically reportable offenders under the *Community Protection (Offender Reporting) Act*.

Other legislative amendments were directed at improving legal processes and procedures as they affect victims and witnesses of sexual assault and the conduct sexual assault trials, including:

- The Criminal Law Amendment (Sexual Assault and other Matters) Act 2004
 - Amended the *Evidence Act 1906* to afford greater protection to victims of sexual assault during the court process by:
 - enabling propensity evidence to be more readily admissible in sexual assault trials;
 - creating a legislative scheme for counselling notes regarding sexual assault complainants to facilitate their recovery by preventing fishing expeditions and thus better protecting counselling records of victims of sexual assault from being accessed by those alleged to have committed the offences;

- creating a process by which child victims of sexual assault could have their statement to investigators visually recorded soon after the complaint was made, so the visual recording of a child's initial interview with police becomes the primary source of evidence from a child complainant in sexual abuse and other court proceedings thereby sparing child victims and witnesses of sexual abuse the trauma of retelling the graphic details of their ordeal in court with the initial interviews being conducted by trained professionals in a purpose built facility with a "child friendly" environment;
 - preventing an unrepresented alleged offender from personally cross examining the complainant;
 - giving courts more powers to control intimidatory and harassing cross examination of witnesses;
 - extending "special witness" status to all complainants of serious sexual assault which enables them to take advantage of pre-recordings, closed circuit television, screens and a support person whilst giving evidence, to minimise the trauma of giving evidence in sexual assault matters; and
 - extending the categories of witnesses and support people who are eligible to receive fees and expenses.
- Amended the laws of joinder under the *Criminal Code* to minimise the number of trials arising out of similar and related circumstances to make it easier for several sexual offences to be joined so that they could be prosecuted in the same trial where the allegations are by several victims against say one alleged offender.

In addition to the above reforms, the Criminal Law and Evidence Amendment Bill 2006, introduced and second read in Parliament on 22 June 2006 seeking to amend the Evidence Act 1906 (WA), the Criminal Code 1913 (WA) and the Criminal Procedure Act 2004 (WA) is a significant Bill for sexual assault victims and witnesses, adding to the other initiatives that have been implemented to facilitate sexual assault prosecutions and reduce the trauma for complainant of sexual offences including. The Bill proposes to:

- introduce a right for the prosecution to appeal against acquittal in respect of matters tried before a judge and jury in limited circumstances;
- enhance offences relating to assaults against public officers and consequent penalties;
- build upon the 2004 sexual assault reforms to enhance sexual assault laws;
- extends provisions already available to child witnesses to mentally impaired persons consistent with the Keating Report that discussed the extraordinary disadvantage that intellectually disabled victims and witnesses face when encountering a system that is so dependant on explanation and when the victim of sexual abuse is usually the only witness.

The Criminal Law and Evidence Amendment Bill 2006 also seeks to amend section 321A of the Criminal Code to make offences of persistent sexual conduct less onerous to prosecute follows by:

- Amending the wording of “sexual relationship” to “persistent sexual conduct with” to reflect the reality of the offending behaviour and remove the connotation, inherent in the previous wording, that an element of consensus exists in the word “relationship”;
- Making more practical the provisions that deal with an alleged offender who is usually known to the child and has sexual dealings with that child on more than one occasion thus reformulating the offence so that the manner in which the offence is proved is consistent with and representative of the gravamen of the offence, and will restore the level of protection against the persistent sexual abuse of children, as was intended when the offence was originally inserted in 1992.
- Including attempts as a prescribed offence; and
- Allowing for interstate offences to be considered in the offence. At least one of the incidents must take place in Western Australia.

The *Criminal Law and Evidence Amendment Bill 2006* seeks to amend the Evidence Act to allow expert evidence in relation to general child developmental information and children’s behaviour and reactions to sexual abuse to be admitted in criminal proceedings against a person charged with sexual offences against a child, because it is well established that the behaviour of a child in response to sexual assault is different from that of an adult and that the capacity for the jury to evaluate that behaviour is impeded by a lack of understanding about child responses and that children rarely respond to sexual assault in a way that an adult may expect. For example one study, in a survey of jurors in the United States found that jurors tended to be unaware of:

- The empirical data that indicates allegations of sexual abuse made by children are rarely proved to be false;
- The absence of physical evidence to substantiate allegations in the majority of cases;
- Retracted, delayed and inconsistent accusations are fairly common;
- Children are generally reluctant to report the incidents of abuse;
- Children are not easily manipulated into giving false reports about sexual abuse
- Children do not typically react to abuse by trying to resist, crying for help or trying to get away.

APPENDIX FIVE

SUBMISSIONS RECEIVED

Number	Name	Position	Organisation
9	Tania Towers	Manager	Dept of Health, Sexual Assault Resource Centre
10	Dr Janine Spencer	Consultant Paediatrician	Child Protection Unit, Princess Margaret Hospital
15	Philippa Brennan		
17	Dr Ron Chalmers	A/Director General	Disability Services Commission
18	Michelle Scott	Public Advocate	Dept of the Attorney General, Office of the Public Advocate
23	Philippa Brennan	Conciliator of Health Complaints	Reclaiming Voices
25	Christabel Chamarette	Clinical Director	SafeCare
27	Robert Cock	Director	Department of Public Prosecutions
30	Dr Zohl de Ishtar	Coordinator	Kapululangu Aboriginal Women's Association

APPENDIX SIX

BRIEFINGS HELD

Date	Name	Position	Organisation
22 June 2007	David Taylor	General Manager	PathWest Laboratory Medicine WA
	Dr Gavin Turbett	Principal Scientist Forensic Biology	PathWest Laboratory Medicine WA
	Dr Neil Kent	Principal Scientist Division of Clinical Pathology	PathWest Laboratory Medicine WA
3 July 2007	Dr Margot Legosz	A/Deputy Director Misconduct and Policing	Crime and Misconduct Commission QLD
	Susan Johnson	Director Research and Prevention	Crime and Misconduct Commission QLD
	Jason Payne	Research Analyst	Australian Institute of Criminology
	Paul Rutledge	Deputy Director (A/Director)	QLD Office of the Director of Public Prosecutions
	Paul Davey	Executive Director	QLD Office of the Director of Public Prosecutions
	Detective Inspector Cameron Harsley	Acting Superintendent Sex Crime Investigation Unit	Queensland Police Service
	Detective Acting Inspector George Marchesini	Sex Crime Investigation Unit	Queensland Police Service
4 July 2007	Claire Giroto	Deputy Solicitor	NSW Office of the Director of Public Prosecutions

	Ian Steventon		iTec Software
5 July 2007	Detective Superintendent Helen Begg	Commander, Child Protection and Sex Crime Squad	New South Wales Police
	Detective Chief Inspector Janice Stirling	Child Protection and Sex Crime Squad	New South Wales Police
17 August 2007	Detective Inspector Shayne Maynes	Sex Crime Division	Western Australia Police

APPENDIX SEVEN

LEGISLATION

Legislation	State (or Country) if not Western Australia
<i>Acts Amendment (Family and Domestic Violence) Act 2004</i>	
<i>Censorship Amendment Act 2006</i>	
<i>Community Protection (Offender Reporting) Act 2004</i>	
<i>The Criminal Code</i>	
<i>Criminal Code Amendment (Cyber Predators) Act 2006</i>	
<i>Criminal Injuries Compensation Act 2003</i>	
<i>Criminal Law Amendment (Simple Offences) Act 2004</i>	
<i>Criminal Law Amendment (Sexual Assault and other Matters) Act 2004</i>	
<i>Criminal Law and Evidence Amendment Bill 2006</i>	
<i>Criminal Procedure Act 2004</i>	
<i>Criminal Property Confiscation Act 2000</i>	
<i>Dangerous Sexual Offenders Act 2006</i>	
<i>Director of Public Prosecutions Act 1991</i>	
<i>Director of Public Prosecutions Amendment Act 2004</i>	
<i>Evidence Act 1904</i>	
<i>Restraining Orders 1997</i>	

<i>Sentencing Legislation Amendment and Repeal Act 2003</i>	
<i>Working with Children (Criminal Record Checking) Act 2004</i>	
<i>Victims of Crime Act 1995</i>	

APPENDIX EIGHT

DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER ADOPTED BY GENERAL ASSEMBLY RESOLUTION 40/34 OF 29 NOVEMBER 1985

A. Victims of Crime

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. Victims of Abuse of Power

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.⁵²³

⁵²³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Adopted by General Assembly resolution 40/34 of 29 November 1985. http://www.unhchr.ch/html/menu3/b/h_comp49.htm, accessed 2/10/07.