

ROYAL COMMISSION

INTO THE

NEW SOUTH WALES POLICE SERVICE

FINAL REPORT

VOLUME V: THE PAEDOPHILE INQUIRY

Commissioner: The Hon Justice JRT Wood

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EXPLANATORY NOTES

The amalgamation of the New South Wales Police Force (operations) and the New South Wales Police Department (policy and administrative support) into a single entity known as the New South Wales Police Service, commenced in June 1987. This was formalised by the *Police Service Act 1990* (NSW) which came into effect on 1 July 1990. Throughout this Report, the organisation is generally referred to as 'the Service' or 'the Police Service'.

The Department of Youth and Community Services (YACS) became the Department of Family and Community Services (FACS) in 1988 and the Department of Community Services (formerly abbreviated to DOCS, but now referred to as DCS) in 1991.

Legislation referred to throughout this Report is NSW legislation unless otherwise indicated.

The letter 'C' following a Royal Commission exhibit number indicates that the exhibit is confidential.

The letter 'B' following a Royal Commission exhibit number indicates that this is the public version of the exhibit, which will have some deletions to preserve necessary confidentiality, and the letters 'AC' indicate that this is the confidential version of the same document.

ABBREVIATIONS USED IN THIS REPORT

ABA	Australian Broadcasting Authority
ABCI	Australian Bureau of Criminal Intelligence
ACID	Australian Criminal Intelligence Database
ADD	Ageing and Disability Department, NSW
ADT	Administrative Decisions Tribunal
AFP	Australian Federal Police
AIDS	Auto Immune Deficiency Syndrome
ALRC	Australian Law Reform Commission
AMA	Australian Medical Association Limited
BBS	Bulletin Board Services, Internet
BCS	NSW Bureau of Crime Statistics and Research
BLACP	Boy Lovers Against Child Pornography
BLAZE	Boy Lovers and Zucchini Eaters
CAPS	Child Abuse Prevention Service
CCP	Centre for Child Protection, Children's Commission
CCTV	closed circuit television
CEO	Chief Executive Officer
CFS	Child and Family Services, Department of Community Services
CIB	Criminal Investigation Branch, NSW Police Service
CIIS	Crime Information and Intelligence System
CIS	Client Information System, Department of Community Services
CIT	Computer Investigation Techniques, National Police Research Unit
CMS	Case Management System, Department of School Education
CMU	Child Mistreatment Unit, NSW Police Service
CMU	Central Management Unit, Department of School Education

CNI	Criminal Names Index
COBAC	Community Based After Care
CPC	NSW Child Protection Council
CPD	Child Protection Directorate, NSW Police Service
CPE program	Child Protection Education program
CPEA	Child Protection Enforcement Agency, NSW Police Service
CPIT	Child Protection Investigation Team, NSW Police Service
CPS	Child Protection Services
CSC	Community Service Centre
CSC	Community Services Commission
CUBIT	Custody Based Intensive Treatment Unit, Department of Corrective Services
CWU	Child Witness Unit, Office of the Director of Public Prosecutions
DCS	Department of Community Services, NSW (present acronym)
DG	Director-General
DJJ	Department of Juvenile Justice
DOI	Duty Operations Inspector
DPP	The Director of Public Prosecutions, NSW
DSE	Department of School Education
DSR	Department of Sport and Recreation
EIC	Employment Information Centre, Children's Commission
EMDR	Eye Movement Desensitisation and Reprocessing
EU	European Union
FACS	Department of Family and Community Services
FAIRS	FACOM Advanced Information Retrieval System - a former NSW Police Service database for sensitive information
FBI	Federal Bureau of Investigation, USA
GREAT	Government and Related Employees Appeals Tribunal, NSW
HCCC	Health Care Complaints Commission, NSW

HCR	Health Conciliation Registry
HIV	human immunovirus
HREOC	Human Rights and Equal Opportunity Commission
ICAC	Independent Commission Against Corruption, NSW
ICARE program	Interviewing Children and Recording Evidence program
IOC	Child Protection Interagency Operational Committee
IPSB	Internal Police Security Branch, NSW Police Service
IRC	Industrial Relations Commission
IROC	Initial Response Officers Course, NSW Police Service
IRU	Investigation and Review Unit
JCS	Juvenile Crime Squad, NSW Police Service
JIT	Joint Investigation Team (comprising police and DOCS personnel)
JSB	Juvenile Services Bureau, NSW Police Service
LRC	Law Reform Commission, NSW
MCEETYA	Ministerial Council of Education, Employment, Training and Youth Affairs Ministers
MLA	Member of the Legislative Assembly, NSW Parliament
MLC	Member of the Legislative Council, NSW Parliament
OCYP	Office of Children and Young People, The Cabinet Office, NSW
ODDP	Office of the Director of Public Prosecutions, NSW
OFLC	Office of Film and Literature Classification
ORC	Operations Review Committee
PANOC	physical abuse and neglect of children
PSG	Paedophile Support Group
PSRG	Professional Standards Resource Group (Catholic Church)
RAHC	Royal Alexandra Hospital for Children, Sydney (now the New Children's Hospital)
RC	Refused Classification
RCPS	Royal Commission into the New South Wales Police Service

RCT	Royal Commission Transcript (Commissioner Wood)
RCT(U)	Royal Commission Transcript (Commissioner Urquhart)
RYC	Rural Youth Centre
SAAP	Supported Accommodation Assistance Program
SANE	Sexual Assault Nurse Examiners
SCAG	Standing Committee of Attorneys-General
SIG	State Intelligence Group, NSW Police Service
SNYPIC	State Network of Young People in Care, NSW
SOAP	Sex Offenders Assessment Program, Cooma
SRA	Satanic ritual abuse
VCB	Victims of Crime Bureau, NSW
ViCLAS	Violent Crime Linkage Analysis System
YACS	Department of Youth and Community Services

CHAPTER 11

THE CHURCHES

11.1 While Churches and religious associations are not 'public authorities' or 'Government departments and agencies' and their leaders and members are not 'public officials' (and therefore do not fall directly within the Commission's terms of reference) very early in its inquiries the Commission uncovered a number of cases where, after preliminary investigations, it appeared that:

- there had been a substantial incidence of sexual abuse involving clergy, members of religious orders, ministers of religion, acolytes, and others involved on a paid or unpaid basis in and around Churches or institutions associated with or conducted by Churches or religious bodies, including schools, residential homes, youth and fellowship groups and the like;
- in very many cases, investigations or prosecutions of these incidences had been suppressed, discontinued, or failed in circumstances suggestive of either protection or failure on the part of the official agencies involved to exercise their powers impartially;
- there was a serious absence of protocols, guidelines, accepted practices or established lines of communication with the Police Service, concerning the way that allegations of this kind should be managed; and that
- there had been a history of ignorance or misunderstanding of the existence of the problem, as well as a pattern of denial and repression of any allegations which happened to be raised.

11.2 Faced with these initial findings, the Commission determined that unless this area of paedophile activity was thoroughly investigated, a substantial part of the problem involving the sexual abuse of children would be left unexamined, and a potential for ongoing abuse and harm, of a significant kind, would remain unchecked. The Commission's inquiry into this area was judged to fall variously within terms of reference (d1), (g) and (j), based on some of the case studies outlined later in this chapter.

11.3 After some initial reticence, the Commission received total support from all Churches and religious organisations with which it dealt. Not only were files and information readily provided, but senior clergy and lay officials appeared keen to assist by fully and frankly admitting past failings, by conscientiously developing protocols for dealing with child sexual abuse, or by the revision of existing protocols and guidelines where, on examination, they were found to be deficient. In a number of cases the Commission was assured that the Churches or organisations concerned were grateful for the spotlight having been shone on this problem, as it created the impetus for immediate reform. For some this had obviously been needed for a long time but had been difficult to achieve because of institutional inertia, or fear of public scandal and civil liability at the hands of the victims of abuse.

11.4 Without this degree of co-operation, the path of the Royal Commission would have been very difficult. In view of that assistance, and the frank admissions received upon a cross denominational basis, this chapter can be kept, within reasonable bounds, to an examination of:

- the problem;
- the reason for the past failure to deal with it effectively;
- the changes achieved; and
- any residual matters requiring attention;

to ensure that, so far as possible, child sexual abuse within Churches or religious associations and their agencies can be minimised or, where it occurs, detected, prosecuted and managed.

11.5 By reason of the wide range of Churches potentially involved, and the wide range of activities encompassed, there will be no attempt to deal with the matter upon a denominational basis. Nor will there be an attempt to suggest that any one Church, religious body or religious order has performed any better or worse than any other. While a good deal of evidence and assistance was provided by the Catholic Church, it is not the case that the Commission finds particular fault with that Church or its constituent bodies. Indeed, its response to the matters disclosed by the Royal Commission is held up as a model for other Churches and religious organisations to follow, as set out in more detail later in this chapter.

11.6 For convenience, when the context requires, the various bodies and associations loosely co-ordinated by religious bonds will be referred to hereafter as 'the Church', or 'the Churches', in recognition of the common problem they face. However, for clarity and before turning to the substance of the Royal Commission investigations, it may be noted that the cases studied, the information received, and the evidence called, related to the abuse of both boys and girls in settings that included:

- religious congregations, that is, those attending Churches for the purpose of regular worship;
- choirs, bible study groups and youth groups;
- schools conducted by religious bodies;
- residential homes, missions, and similar facilities conducted by religious bodies for orphans, wards of the State or neglected children; and
- various forms of care agency.

A. THE EMERGENCE OF ABUSE WITHIN THE CHURCHES

THE ALLEGATIONS EMERGE

11.7 Revelations of sexual and physical abuse (of an aberrant nature) involving the clergy, members of religious orders and those associated with religious associations, began to emerge in the United States in about 1985. This resulted in some well publicised disclosures and court cases. They were followed by similar public disclosures in Canada during 1988, and then in Australia during 1992. Before this time, almost universally, allegations of abuse of this kind had been dealt with in-house, sometimes by quiet transfer of the offender interstate, overseas or to a position away from the public, and in other cases by disbelief, denial or exhortation to forget the incident, for the greater good of the Church. Rarely did allegations of this kind reach the public notice, and little existed by way of protocol or guidelines for their management.

11.8 In 1992, two graphic documentaries were screened on ABC Television, 'The Ultimate Betrayal' and 'The Leaving of Liverpool'. Together they highlighted instances of physical and sexual abuse involving members of various religious orders or associations. Considerable media debate followed.¹ There was soon a rising tide of allegations of sexual abuse, from which prosecutions or civil actions for damages ensued. In some but not all cases, the allegations involved offences allegedly committed against children up to 20 and 30 years earlier. The allegations were not confined to the Catholic Church but began to spread to other denominations and religious groups as well.²

11.9 The initial response on the part of all Churches tended to be defensive, and many members and office holders, including very senior clergy, were unprepared to embrace what they considered to be unthinkable. However, as the allegations grew, and as they extended to other Churches and organisations, there was a change from the earlier approach, which has been described as 'tardy, unwilling and over cautious'.³ The process of confrontation and acknowledgment of the problem was hastened by the evidence led in the Royal Commission hearings, and by media pressure, as much as it was by the mounting number of complaints.⁴

11.10 Sexual abuse of children is now recognised as a major problem for Churches around the world. It is something that:

- poses significant pastoral issues;
- exposes the Church and those responsible for the employment or placement of the offender in jeopardy of civil liability; and
- risks the authority and reputation of all religious organisations.⁵

11.11 A number of reasons have been identified for the tardiness of the Churches in acknowledging the problem, and for their adoption of a response which was quick to minimise its extent⁶ or seriousness, or to offer assurances of good intentions and of a change from the past.⁷ They include:⁸

- ignorance of matters of sexuality, and lack of any ability, particularly by older members of the clergy, to comprehend or accept the fact of sexual indiscretion by their brethren;⁹
- ignorance of the fact that paedophile activity is strongly compulsive and recidivist in nature, and that it is impossible to dismiss an apparent indiscretion as a one-off event;¹⁰
- confusion over loyalty to the Church and its community;
- confusion between forgiveness and trust towards offenders, and the duties of protection owed to the wider community, and ignorance concerning the limits of counselling;

¹ eg. *Sydney Morning Herald*, 18/3/92, p. 18; P. Horsfield, 'An analysis of the media debate following the ABC Compass program, 'The Ultimate Betrayal'', *Australian Journalism Review*, 1993, p. 2.

² P. Parkinson, *Child Sexual Abuse and the Churches*, Hodder & Stoughton, London, 1997, p. 176.

³ J. Craney, *Aftermaths: Conflict between the support constituency and the Catholic church about clergy sexual abuse*, Masters thesis, University of Technology, Sydney, 1996, RCPS Exhibit 3258, p. 81.

⁴ *ibid*, p. 83.

⁵ Australian Broadcasting Commission (ABC), *Compass - Conduct Unbecoming: Sexual Assault in the Church*, (telecast), 27/6/93.

⁶ J. Craney, 1996, *op cit*, p. 79.

⁷ *ibid*, p. 85.

⁸ P. Parkinson, 1997, *op cit*, p. 177.

⁹ J. Craney, 1996, *op cit*, p. 79.

¹⁰ B. Lucas, RCT, 18/4/96, p. 23796.

- concern to avoid or limit legal liability, in order to protect the Church as a viable institution, which has led to an adversarial approach (for example reliance on limitation statutes to defeat otherwise obviously valid claims, or determined defence against plaintiffs of limited means) rather than a response based on pastoral concern;
- confusion in relation to the limits of confidentiality concerning matters disclosed, or learned outside the confessional; and
- uncertainty as to the appropriate response where the complainant does not wish the matter to proceed to police action.

REACTIONS TO THE ALLEGATIONS

11.12 Some of these reactions and the reasons for them which emerged during the hearings, call for further mention.

Denial

11.13 Generally speaking the approach of the Churches has been to reject complaints of sexual abuse by clergy,¹¹ accompanied by failure to notify the appropriate authorities. Offenders have similarly exhibited denial, or have attempted to re-explain events or to expect forgiveness.¹² There has been a closure of ranks and a reluctance to accept that an incident of this kind could happen within a good Christian family, or with a well respected priest.¹³

11.14 Investigating police may also find it difficult to believe the allegations,¹⁴ and even more difficult to penetrate the protective cloak of the Church:

The Churches have a tendency to regard themselves as self-regulatory institutions that are 'just' and 'sacred' and therefore not in need of scrutiny. The reluctance of Church leaders to report sexual abuse allegations to law enforcement authorities stems from their misguided, although fierce, loyalty to their institution whose image must never be tarnished.

11.15 A priest whose name was suppressed described this very situation when X4's allegations against Brother Evans and Father Comensoli were publicised in the press.¹⁵ The initial response was one of outrage to a 'vicious media attack' designed to destroy the Church's credibility. It was only with increasing evidence and then plea of guilty by the priest that the wrongdoing was finally accepted.

11.16 It has not been unknown in some of these cases for the immediate response of the Church or of the member of the clergy involved to be the threat of an action for defamation if the complaint was pursued.¹⁷

¹¹ S. M. Foley, RCT, 8/5/96, p. 24868.

¹² P. Parkinson, 1997, op cit, pp. 178-179.

¹³ P. Parkinson, 1997, op cit, p. 178.

¹⁴ B. Lucas, RCT, 18/4/96, p. 23823. This was demonstrated in the Evans/Comensoli case.

¹⁵ Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, p. 312; evidence of C. Wilding, 19/6/94.

¹⁶ Discussed in more detail later in this chapter.

¹⁷ W. S. Skillicorn, RCT, 8/5/96, p. 24910.

11.17 The inappropriateness of this almost instinctive reaction is now acknowledged. The Uniting Church has stated:

In the past there has been a tendency for the Church to create a cloak of silence. Often victim/survivors have been unwilling to complain because of the myths which have existed and because of an apprehension that they will not be believed.¹⁸

11.17 The Catholic Church has stated in its 1993 pastoral statement:

in the past, lacking the knowledge provided by the modern behavioural sciences, Church authorities sometimes denied or minimized the seriousness of such incidents or accepted too readily the promise by an offender that such behaviour would not be repeated.¹⁹

Minimisation and Avoidance

11.18 Whether the complainant was in fact believed by a Church often depended upon the circumstances in which the complaint came to notice.²⁰

- if the information came second-hand there was a tendency to disbelieve it;²¹ or
- if there was a direct complaint there was a greater likelihood of it being believed although the interpretation of its seriousness was often minimised.²²

11.19 Victims have complained that Church officials often seemed sympathetic and constructive in private discussions, but reneged on the pledges of support when publicly challenged.²³ They were often met with responses such as:

- 'it all happened so long ago - why do you want to stir it all up now?';
- 'what if this causes the man to commit suicide?'; or
- 'he's done a lot of good work for the Church'.²⁴

Sin/Moral Failure

11.20 Sexual abuse has often been regarded by Churches as a problem of 'moral failure'²⁵ rather than a criminal offence, calling for help rather than punishment. Often judged to be an inappropriate reaction to stress, and a temporary aberration,²⁶ the response has been to offer the offender moral and spiritual counselling.²⁷

11.21 Spiritualising the problem is dangerous because it involves the assumption that once confessed and subjected to counselling, the problem has been resolved.²⁸ Brother McDonald, the Provincial²⁹ of the Christian Brothers, acknowledged in his evidence to the Royal Commission that the Christian Brothers' practice was to merely reprimand the person involved, without public disclosure.³⁰

¹⁸ Uniting Church in Australia, Procedures for use when complaints of sexual abuse are made against ministers, 1994, RCPS Exhibit 3226, p. 4.

¹⁹ Catholic Church, Pastoral Statement on Child Protection and Child Sexual Abuse, RCPS Exhibit 1803.

²⁰ B. Lucas, RCT, 18/4/96, p. 23795.

²¹ B. Lucas, RCT, 18/4/96, p. 23795.

²² B. Lucas, RCT, 18/4/96, pp. 23795-96.

²³ J. Lundy, 'Devils in disguise: The Catholic Church is coming to grips with clerical sexual abuse', *The Bulletin*, 10/8/93, p. 27.

²⁴ *ibid.*

²⁵ J. McDonald, RCT, 18/4/96, pp. 23889-90; B. Lucas, RCT, 18/4/96, p. 23795; J. J. Usher, RCT, 16/8/96, p. 30806; R. Wyre, RCT (video link to Birmingham, UK), 26/4/96, p. 24233.

²⁶ P. Parkinson, 1997, *op cit*, p. 30.

²⁷ *ibid.*, p. 196.

²⁸ *ibid.*, p. 198.

²⁹ The head of the Christian Brothers in Australia.

³⁰ J. McDonald, RCT, 18/4/96, p. 23889.

There was an expectation that it would be sufficient if the priest was confronted with his behaviour, shamed and embarrassed by it and provided with a period of psychological and spiritual counselling.³¹

11.22 The typical response in such a case was to move the minister or priest to another parish after counselling, or to send him away for a period of prayer and contemplation. The dangers of this being arranged in secret to avoid scandal,³² and of sending such a person back into an unsuspecting parish, are obvious. Many such priests were not even relocated after a complaint.³³ This response is inappropriate because many such offenders have simply continued to abuse over the years. Sexual abuse is inconsistent with continued ministry. Having offended once, it would only be in the most exceptional circumstances that an offender should be returned to any work in which an opportunity for direct contact with children arose.

Defence of Reputation

11.23 Often Churches reacted with fear, 'for the good name of the diocese or institute, fear of the victim and of the emotional and financial demands that might be made, fear for the financial assets of the diocese or institute, fear of how many other cases might be there to be uncovered.'³⁴ A defensive response of this kind, however, risks doing more damage to the institution than the abuse itself,³⁵ particularly in the light of the public awakening to the problem. It was never appropriate for any Church to place its reputation ahead of its responsibility to the community. It is not appropriate now.

Use of Euphemisms

11.24 The Churches have traditionally used euphemisms when dealing with complaints of sexual abuse and have referred them to bodies such as a 'Professional Standards Committee', or a 'Special Issues Sub-Committee'.³⁶ This is symptomatic of an inability to properly acknowledge the existence of the problem.³⁷ Father Lucas agreed that 'there was a tendency on the part of many people to minimise the description' so that child sexual assault may have been categorised under the vague title of 'improper conduct',³⁸ or a 'matter of conscience'.

Christian Isolationism

11.25 On the whole, Churches have been reluctant to report allegations of sexual abuse to the police, or to refer them into the criminal justice system. The preferred approach has been to deal with the issue within the Church.³⁹

11.26 There are obvious problems with organisations investigating complaints made against their own members. If these matters are investigated and determined by a Church in-house, there is:

- limited accountability;
- a risk of the Church losing credibility in the eyes of the public;⁴⁰
- the possibility of a perception that it is interfering with the police role;⁴¹

³¹ B. Lucas, RCT, 18/4/96, p. 23795.

³² P. Parkinson, 1997, op cit, p. 176.

³³ R. H. Goodhew, RCT, 7/5/96, p. 24797.

³⁴ G. Robinson, 'Abuse and Trust', *Eureka Street*, vol. 6, no. 7, September 1996, pp. 14-16.

³⁵ *ibid.*

³⁶ N. Ormerod, A little breathless and a little late: Catholic policy on sexual abuse, paper presented at 1st Australian and New Zealand Conference on Sexual Exploitation by Health Professionals, Psychotherapists and Clergy, University of Sydney, 12-14 April 1996, RCPS Exhibit 3294C.

³⁷ J. Lundy, 10/8/93, op cit, p. 27.

³⁸ B. Lucas, RCT, 18/4/96, p. 23795.

³⁹ P. Parkinson, 1997, op cit, p. 186.

⁴⁰ G. Robinson, September 1996, op cit, pp. 14-16.

⁴¹ National Committee for Professional Standards, Submission to RCPS, 20/9/96, RCPS Exhibit 2529/165.

- a danger that the inquiry will contaminate the evidence, alert suspects and in other ways jeopardise a police investigation;⁴² and
- invite the suggestion that members of the religious order in question have been placed in a somewhat privileged position compared with the rest of the community.

11.27 Some of the reasons for 'Christian isolationism' can be traced back to aspects of Church history and culture. Historically, Church and State have existed with parallel legal systems and structures.⁴³ Canon law emerged as a distinct body of law, parallel to the State's jurisdiction and the Church had its own ecclesiastical courts, separate from the common law courts.

11.28 The Church therefore dealt with its own people and exercised disciplinary functions over its own clergy.⁴⁴ In Protestant Churches as with the Catholic Church, there has been a strong tradition of 'telling it to the Church' and resolving matters within the Church.⁴⁵

11.29 Often a complainant, out of concern for the institution, would go straight to the Church with a matter of this kind rather than approaching the Police Service. If reassured that their experience will not happen to anyone else,⁴⁶ they may be satisfied to leave the matter in-house. Often, however, as experience shows, the response was inappropriate, and the offender did repeat his behaviour.⁴⁷

Confidentiality

11.29 Difficulties arise when the complainant does not wish police to be notified. If the complainant's wishes are respected, then children/adults could continue to be at risk and the Church could be accused of inaction.⁴⁸ On the other hand, if the Church does not act according to the wishes of the victim, it risks putting that victim through the trauma of a court case.⁴⁹

11.30 The law of NSW in this regard requires mention:

- the common law religious confessional privilege is now recognised and preserved under s. 127 of the *Evidence Act 1995*, unless the communication involved in the confession was made for a criminal purpose;
- otherwise no common law privilege attaches to communications to a person in religious vows; and
- the mandatory reporting provisions arising under ss. 22(2) and (3) of the *Children (Care & Protection) Act 1987* exclude ministers of religion from those requirements, although there is no prohibition on them reporting under the permissive provisions of that Section,⁵⁰ with the protection afforded under s. 22(8) of the Act.

⁴² Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, p. 312.

⁴³ P. Parkinson, 1997, op cit, p. 187.

⁴⁴ ibid.

⁴⁵ ibid, pp. 189-90.

⁴⁶ B. Lucas, RCT, 18/4/96, p. 23798.

⁴⁷ B. Lucas, RCT, 18/4/96, p. 23798.

⁴⁸ National Committee for Professional Standards, Submission to RCPS, 20/9/96, RCPS Exhibit 2529/165.

⁴⁹ G. Robinson, September 1996, op cit, pp. 14-16.

⁵⁰ *Children (Care & Protection) Act 1987*, ss. 22(1) & (1A).

11.31 The dilemma which arises for clergy with reporting complaints, particularly when the informant expressed a desire that the matter not be notified to police, was identified by Brother McDonald,⁵¹ and by Father Lucas,⁵² in their evidence to the Commission. In summary, they noted:

- the general expectation of the community, particularly the Church community that if people confide in a priest or minister, that the confidence will be kept;
- there is a public interest in persons feeling able to discuss freely and in confidence personal matters with a minister of religion or a member of a religious order;
- in the absence of confidentiality, some complainants may prefer not to bring allegations of this kind to light, thereby risking perpetuation of the abuse; and
- similarly, there is an interest in helping a truly penitent offender who wishes to secure assistance with his problem - he may have a real resistance to approaching a superior, or making full disclosure of any past pattern of misbehaviour, again risking an imperfect response and perpetuation of the abuse, if he knows that his disclosure will be reported.

11.32 Balanced against these matters Brother McDonald and Father Lucas noted the existence of a public interest in:⁵³

- the investigation and prosecution of the commission of serious offences of a sexual nature by a member of a religious order; and
- the relevant investigation and prosecutorial authorities receiving any information that would promote the protection of children and the welfare of the community.

11.33 The dilemma which arises will be addressed later in this chapter, but for the meantime it may be noted that Brother McDonald,⁵⁴ took the pragmatic approach of:

- informing the complainant or self-reporting perpetrator of the option of reporting the matter to police;
- respecting the informant's wishes, if that person was an adult and did not want the matter reported, or if it concerned old events; and
- making a report through appropriate channels where the complaint involved a recent complaint concerning a minor.

Celibacy

11.34 Any sexual misconduct by a priest or member of the clergy is a clear violation of his or her commitment to celibacy and chastity.⁵⁵ Father Usher acknowledged that there has been a widely held 'belief' that the vow of celibacy is confined to heterosexual relations involving penetration and did not extend, for example, to acts of indecency, or to encounters with boys or adolescent males.⁵⁶ Clergy might see it as a moral wrong but might not define it as a serious sexual offence,⁵⁷ or as a breach of the vow of celibacy. This has the traditional overtone of paedophile minimisation and distortion in cognitive thinking. Should there be any residual doubt in this respect, then it would be appropriate for those in preparation for the ministry or priesthood to have any such notions clearly dispelled.

⁵¹ J. McDonald, RCT, 18/4/96, pp. 23887-88.

⁵² B. Lucas, RCT, 18/4/96, pp. 23805-09.

⁵³ B. Lucas, RCT, 18/4/96, p. 23804; J. McDonald, RCT, 18/4/96, p. 23887.

⁵⁴ J. McDonald, RCT, 18/4/96, pp. 23887-88.

⁵⁵ The Catholic Church's principles in relation to sexual abuse and professional misconduct (draft), 4/11/93, RCPS Exhibit 1713.

⁵⁶ J. J. Usher, RCT, 16/8/96, p. 30806.

⁵⁷ J. J. Usher, RCT, 16/8/96, p. 30806. See also X11, RCT, 16/8/96, p. 30786.

11.35 Centacare and the Australian Catholic Social Welfare Commission have, in fact, commenced a research project to examine factors such as the vow of celibacy, which may lead to sexual abuse by priests, clergy or other workers within the Catholic Church⁵⁸ and which may form a useful basis both for screening and education in this area.

Pastoral Relationship

11.36 Clergy are in a position of trust and authority within the pastoral environment which is characterised by an inequality of power.⁵⁹ As such there is a need to recognise that:

- any sexualisation of the pastoral relationship involves professional misconduct and an abuse of trust and authority;⁶⁰
- failure of a parishioner to reject sexual approaches does not imply consent on his or her part,⁶¹ particularly where that person is young, impressionable and possibly at a vulnerable stage of life; and
- because the Minister has the greater power and pastoral responsibility, it is his duty to guard the boundary against sexual contact.⁶²

Insurance and Liability Concerns

11.37 The Church's position as a potential defendant in a civil action may limit its ability or even its desire to admit liability for abuse out of concern that an admission may:

- prejudice any claim it may make on its policy of insurance, where it contains a condition precluding admissions; or
- lead to a substantial increase in premium,⁶³ or even refusal of further coverage.

11.38 Additionally, where the insurance is inadequate, or subject to a substantial excess, there may be a fear within the Church of the financial consequences and the possible forced sale of schools, residences or other assets.⁶⁴

11.39 It has been suggested that the stand previously taken by the Churches in denying abuse, now at least publicly abandoned, had been even further perpetuated by the Churches resorting to expensive legal procedures to defend claims and thereby seeking to avoid paying compensation.⁶⁵

11.40 Although it is inappropriate for the Royal Commission to comment on any of the many cases currently before the courts, let alone to express any view whether specific cases have been or are being defended unfairly or other than on their merits, anecdotally some commentators suggest that:

- the approach of some Churches has been unco-operative and dependent on technicalities, for example the defence by one religious group that it cannot be sued as it is not a legal entity;⁶⁶ and that

⁵⁸ National Committee for Professional Standards, Submission to RCPS, 20/9/96, RCPS Exhibit 2529/165.

⁵⁹ Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, National Committee for Professional Standards, *Towards Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse Against Personnel of the Catholic Church in Australia*, Hectorville, 1996, RCPS Exhibit 3051/23.

⁶⁰ *ibid.*

⁶¹ Presbyterian Church in NSW Social Services, *Breaking the Silence: Policy and procedures for protecting against and dealing with sexual abuse within the Church*, November 1995, RCPS Exhibit 1804.

⁶² Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, National Committee for Professional Standards, *Towards Healing: Principles and procedures in responding to complaints of sexual abuse against personnel of the Catholic Church in Australia*, Hectorville, 1996, RCPS Exhibit 3051/23.

⁶³ ABC, *Compass - Conduct Unbecoming: Sexual Assault in the Church*, (telecast), 27/6/93.

⁶⁴ ABC, *Four Corners - Twice Betrayed*, (telecast), 27/5/96.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

- deliberate attempts have been made to delay proceedings or to make them as expensive as possible to deter claimants.

11.41 Other commentators suggest that while individual Church leaders may express regret for the abuse, this is not translated into acceptance of blame by the Church as the result of legal advice given to the Church.⁶⁷ Within the Catholic Church, 'Pastoral Response Teams' have been implemented to provide counselling and mediation for victims, but it is said that people are encouraged to sign a form acknowledging that the Church accepts no responsibility for the abuse, before they are given counselling.⁶⁸

11.42 As observed earlier, it is no part of the role of this Commission to venture into the area of civil claims, or to come to any conclusions where the merits lie in any case, other than to observe that the Church response to the current body of litigation may be important in:

- restoring the faith of those who have been abused that their complaints will in the future be listened to and appropriately answered;
- determining whether the protocols and guidelines have been adopted in good faith, and that the Churches have been truly listening to the lessons of the past and the disclosures of this Royal Commission; and in
- deciding whether for the future there is to be a shift in the balance between the interests of the offenders and the Church as opposed to the needs and rights of victims, in favour of the latter.

11.43 While the Commission supports entirely the current proposal of the Catholic Church to develop a comprehensive plan for the treatment of clergy who offend in this area,⁶⁹ it wonders why equal facilities are not offered to proven victims of abuse, or why their entitlement to assistance with counselling, rehabilitation and the like should have to depend upon them successfully bringing legal proceedings against the Church in question, or upon them waiving any such claim.

B. INCIDENCE OF ABUSE WITHIN THE CHURCHES

AN UNCERTAIN ESTIMATE

11.44 It is virtually impossible to make any firm estimate of the incidence of abuse involving members of Churches and religious organisations, having regard to:

- the significant under-reporting and the past practice of denial which has emerged;
- the fact that most of the recently surfaced allegations are yet to be tested in the courts;
- the past practice of 'solving' many of these cases quietly, privately and in ways that moved the offender away, or hid the problem; and
- the closed climate and the naivety within religious congregations concerning matters sexual, and the fear of the impact that disclosure, or voluntary request for treatment, has had on the ministry or vocation of individual members.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ See below at section C of this chapter.

11.45 The available information is in effect limited to those who are identified and charged as the result of complaints or who seek admission to Church conducted therapy programs. The Professional Standards Research Project Report 'A National Treatment Program for Priests or Religious with Psycho-sexual Disorders' reviewed various estimates by experts in the field.⁷⁰ While concluding that the prevalence of the rate of sexual abuse or violations of sexual boundaries within the religious community is generally unknown, there were 'soft indications' that the figure was approximately 10%. The Report concluded that there was no firm basis to argue that the figure was disproportionately higher than that found in the population of other professional groups.

11.46 The Commission is not in a position to agree or to disagree with this assessment. However, it notes that during the period of its inquiry there have been a large number of priests, ministers, members of religious orders, choir masters, organists and others associated with Churches, charged and convicted of offences involving the sexual abuse of children in NSW and elsewhere in Australia. They have come from a range of different denominations and beliefs.

11.47 An estimate of 10% of the population represents a significant problem, particularly since any one offender is likely, on past experience, to come into contact with many children, and having abused once to reoffend with a degree of regularity. While the reasons for, and the patterns of, abuse do not differ markedly from other categories of offender, it is instructive for further reference to be made to some selected case studies, in that they:

- confirm the heterogeneous nature of the paedophile offender;
- underline that paedophile offenders do include people trusted by the community and who, to all outward appearances, are beyond reproach; and
- illustrate a particular problem for law enforcement, arising out of the circumstance that at least in the past there has been a reluctance by the Churches to bring in the police, and on the part of the latter a degree of deference shown, due to inherent disbelief in allegations against priests or ministers of religion.

11.48 The cases are dealt with very briefly, and without any attempt at attribution of fault, having regard to the limits of the terms of reference and the frank concessions made by the Churches and religious authorities of all denominations, that:

- paedophiles have existed within their ranks;
- their response has in the past been inadequate; and that
- there is a pressing need for proper protocols to ensure that these cases are neither suppressed, nor dealt with inappropriately.

SOME CASE STUDIES

Case Study 1 - AC1

11.49 AC1 was an Anglican minister against whom complaints of an inappropriate sexual relationship involving an adolescent girl, AC2, were made. She informed the Commission that she became involved in a sexual relationship with AC1, the minister of her Church, between 1979 and 1983, commencing when she was 14 years old and a student in a confirmation class.⁷¹ She said that she felt flattered and singled out by the attention.⁷²

⁷⁰ Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, Professional Standards Research Project: A national treatment program for priests or religious with psycho-sexual disorders: Final Report, 1996, RCPS Exhibit 2513C, pp. 26-28.

⁷¹ AC2, RCT, 7/5/96, pp. 24762-75.

⁷² AC2, RCT, 7/5/96, p. 24770.

11.50 She acknowledged that she had a distorted view of the relationship, considering the minister to be her boyfriend and expecting that he would leave his wife and marry her. By January 1983 she realised this would not happen. When she was informed by another girl that AC1 had also 'tried it with her', she terminated the relationship.⁷³

11.51 She sought counselling from AC3, a Presbyterian Minister, in mid-1984, who informed the Commission that he had spoken to AC1, who confirmed the allegations.⁷⁴

11.52 After making a statement to police many years later, AC2 was informed by the Office of the Director of Public Prosecutions (ODPP) in January, 1996 that a prosecution was not viable, because of her age at the time, her consent to the relationship and the delay in reporting.⁷⁵

11.53 AC4, the father of AC2, raised his concerns with a Bishop of the Church in 1985,⁷⁶ and both he and AC2 spoke to an Archdeacon in February 1996. They were informed that he had no power to act on his own behalf and that the facts would need to be put before the Archbishop to take whatever action he saw fit.⁷⁷ There was no response to the allegation on the part of the Church, either by way of investigation or otherwise.

11.54 Archbishop Goodhew agreed in evidence that, irrespective of the truth of the matter, it was unacceptable that AC1 had been able to continue in the parish for 10 years after the complaint was made, without any investigation having been conducted.⁷⁸

11.55 An associated matter of concern in this matter was the apparent reluctance of the Anglican Church to pay for the counselling which AC2 sought in response to the alleged abuse.

Case Study 2 - X11

11.56 X11, a Christian Brother and teacher at a number of schools, was, on his own admission involved in sexual assaults on numerous (up to 20) pre-pubescent boys over many years.⁷⁹

11.57 Initially he had been confronted by a school principal in 1984 with allegations of molesting a boy, which he admitted. He sought therapy after disclosing an assault on another boy X17 to the then Provincial, in August 1987.⁸⁰ He was threatened with dismissal but a decision was made that treatment would be more appropriate and this prompted him to begin therapy.⁸¹

11.58 In disclosing his 'difficulties' to Brother McDonald in late 1987, he minimised the extent of the assaults.⁸² Brother McDonald said that he understood that the complaints had been reported to the police and that there had been an investigation but that no charges had been laid.⁸³ X11 was interviewed by detectives in 1988 but had no further contact with police following this.⁸⁴

⁷³ AC2, RCT, 7/5/96, p. 24773.

⁷⁴ AC3, RCT, 7/5/96, p. 24786.

⁷⁵ AC2, RCT, 7/5/96, p. 24778; Letter from ODPP to NSW Police Service, 29/1/96, RCPS Exhibit 1809C.

⁷⁶ R. H. Goodhew, RCT, 7/5/96, p. 24796.

⁷⁷ AC2, RCT, 7/5/96, p. 24783.

⁷⁸ R. H. Goodhew, RCT, 7/5/96, p. 24796.

⁷⁹ X11, RCT, 16/8/96, pp. 30778-80.

⁸⁰ X11, RCT, 16/8/96, p. 30781.

⁸¹ X11, RCT, 16/8/96, p. 30782.

⁸² X11, RCT, 16/8/96, p. 30780.

⁸³ J. McDonald, RCT, 18/4/96, p. 23875.

⁸⁴ X11, RCT, 16/8/96, p. 30787.

11.59 When Brother McDonald became the Provincial in 1991, he believed that X11 had received counselling but was not convinced that the matter had been dealt with sufficiently. He took it upon himself to make regular checks on X11, ensured that he was in a position where his access to children was minimised, and recommended that he undergo assessment for treatment whilst overseas on a study course, as there was no appropriate treatment in Australia.⁸⁵ X11 was assessed and commenced immediate residential treatment at the Saint Luke Institute, a mental health hospital in Maryland in the United States, in September 1994. He has since returned to Australia where he is receiving therapy in another State, including sessions with a psychiatrist, a psychotherapist, and a spiritual director, along with group work, all of which is funded by the Order. As part of his therapy he admitted to his sexual offences and gave permission for Brother McDonald to be informed of this.⁸⁶

11.60 X11 informed the Royal Commission that it was not until he was threatened with dismissal that he realised his actions were criminal; rather, he had interpreted them as 'positive relationships' with the boys.⁸⁷ He said that he saw the vow of chastity as 'applying primarily to heterosexual relationships' and that sexual conduct had not been the subject of discussion within the Order.⁸⁸ His offending had commenced when he was aged 17, and his victims had included children from various families whom he had befriended (the offences occurring in their homes), as well as boys in a children's home.

11.61 A police investigation is under way as a result of X11's admissions, and evidence to the Commission.

Case Study 3 - Father Peter Comensoli/Brother Michael Evans

11.62 Allegations were made by several boys of sexual assaults by Brother Evans (deceased), an ex member of the Christian Brothers, and by Father Comensoli.

11.63 The first allegations against Brother Michael Evans relate to when he was attached to St Patrick's College, Strathfield in the late 1970s.⁸⁹ He then was appointed Principal of Edmund Rice College in Wollongong where he became a prominent community figure. He wrote a column in the *Illawarra Mercury*, had a radio show, and worked in various charity organisations.⁹⁰

11.64 Father Comensoli was a well known and popular parish priest in Wollongong at the time. The principal complainant, X4, gave evidence that Father Comensoli provided him with alcohol, showed him pornographic movies, and indecently assaulted him at the presbytery.⁹¹

11.65 On one occasion in 1984, when X4 was staying at the parish presbytery, Brother Evans had gone up to his room and indecently assaulted him.⁹² About a month later X4 informed Bishop Murray of the incident.⁹³ Although he was assured that his complaint would be treated seriously and the matter looked into, he heard no more about it.

11.66 Bishop Murray acknowledged speaking to X4 concerning Brother Evans and Father Comensoli in 1984, but said that no action was taken at that stage as he had not understood X4 to be making a formal complaint and had not wanted to disturb Brother Evan's planned preparation for the seminary.⁹⁴

⁸⁵ J. McDonald, RCT, 18/4/96, pp. 23878-79; X11, RCT, 16/8/96, p. 30788.

⁸⁶ J. McDonald, RCT, 18/4/96, pp. 23880-81.

⁸⁷ X11, RCT, 16/8/96, p. 30784.

⁸⁸ X11, RCT, 16/8/96, p. 30786.

⁸⁹ The witness gave evidence of an encounter with Brother Evans when he was on a football camp at St Patrick's College Strathfield; Witness name suppressed, RCT, 17/4/96, pp. 23690-95.

⁹⁰ J. McDonald, RCT, 18/4/96, pp. 23842 & 23858; J. F. Dooley, RCT, 22/4/96, p. 23928.

⁹¹ X4, RCT, 17/4/96, pp. 23717-18.

⁹² X4, RCT, 17/4/96, pp. 23718-20.

⁹³ X4, RCT, 17/4/96, p. 23720.

⁹⁴ W. E. Murray, RCT, 24/4/96, pp. 24123-24 & 24129-30.

11.67 In 1989, concerned at the inaction, and having heard that two other boys, X5 and X6, had suffered similar experiences with Brother Evans, X4 made a complaint to a priest whose name is suppressed.⁹⁵

11.68 The priest whose name is suppressed encouraged X4 to report the complaint to Wollongong Police, after which he and two other victims provided statements.

11.69 Following investigations a decision was made by the Police Service not to charge Brother Evans.⁹⁶

11.70 On taking office as Provincial in July 1991, Brother McDonald was briefed by his predecessor as to the allegations against Brother Evans. He was told that Brother Needham had dealt with the matter and that the police and the ODPP had determined that the matter would go no further.⁹⁷

11.71 In 1991 the mother of X4 contacted Brother McDonald, as a result of which he concluded that the allegations should be investigated further.⁹⁸ Having first gained the approval of Bishop Murray he informed Centacare, sought advice from the police chaplain, spoke to the school counsellor at Edmund Rice College, and indicated to police that he would like the matter re-investigated.⁹⁹

11.72 Brother McDonald questioned both Brother Evans and another priest, Brother Hocking, concerning allegations of sexual abuse of boys at 'Eddy's Place', a youth refuge in Wollongong in which they were both involved.¹⁰⁰ They both denied the allegations, although Brother Hocking later confessed to sexual abuse of a boy at the premises and was subsequently convicted of indecent assault.¹⁰¹

11.73 Brother McDonald was sufficiently concerned about Brother Evans to withdraw him from the principalship of Edmund Rice College¹⁰² and advised him that he would have difficulty recommending him for any further teaching positions.¹⁰³ He informed the Commission that he had hoped at the time that any person contacting him as a referee for Brother Evans would 'read between the lines'.¹⁰⁴ Thereafter, Brother McDonald sought to supervise Brother Evans by requiring regular meetings and contact with his psychologist.¹⁰⁵

11.74 Brother Evans went on leave and was subsequently offered a position with the Department of Juvenile Justice, and later with a college of Technical and Further Education (TAFE) in an administrative position. Brother McDonald was not asked for any reference for these positions.¹⁰⁶ In a personal letter to Brother McDonald dated 19 October 1993, Brother Evans revealed directly for the first time that he had sexual problems.¹⁰⁷

⁹⁵ X4, RCT, 17/4/96, pp. 23722-23; Witness name suppressed, RCT, 16/4/96, pp. 23669-70.

⁹⁶ D. J. Ainsworth, RCT, 23/4/96, p. 24043; J. McDonald, RCT, 18/4/96, p. 23874.

⁹⁷ J. McDonald, RCT, 18/4/96, pp. 23837-38.

⁹⁸ J. McDonald, RCT, 18/4/96, p. 23839.

⁹⁹ J. McDonald, RCT, 18/4/96, p. 23851.

¹⁰⁰ J. McDonald, RCT, 18/4/96, pp. 23851-52.

¹⁰¹ J. McDonald, RCT, 18/4/96, pp. 23854-56; *Illawarra Mercury*, 1/9/92, p. 1, RCPS Exhibit 1819C/122.

¹⁰² J. McDonald, RCT, 18/4/96, p. 23858.

¹⁰³ J. McDonald, RCT, 18/4/96, p. 23863.

¹⁰⁴ J. McDonald, RCT, 18/4/96, pp. 23863-64.

¹⁰⁵ J. McDonald, RCT, 18/4/96, p. 23870.

¹⁰⁶ J. McDonald, RCT, 18/4/96, p. 23875.

¹⁰⁷ J. McDonald, RCT, 18/4/96, p. 23875.

11.75 In August 1992 Operation Paradox¹⁰⁸ received an anonymous call that Father Comensoli and Brother Evans were suspected of interfering with young children. A report was subsequently sent to Wollongong detectives.¹⁰⁹ Inexplicably, the Patrol Commander at Wollongong was provided with a report to the effect that nothing adverse was known about either man.¹¹⁰

11.76 The author of this report admitted in evidence that no check had been made of any intelligence reports, nor had the file on the earlier matter been obtained.¹¹¹

11.77 The matter became public when the priest whose name is suppressed informed a reporter of the complaints and a number of boys, including X4, X5 and X6 related their stories to the *Illawarra Mercury*.¹¹² An article appeared on 27 October 1993.¹¹³

11.78 Later that day police interviewed Brother Evans about the allegations. He declined to take part in a recorded interview but denied the allegations.

11.79 Following the publication of the article in the *Illawarra Mercury*, additional allegations were made to the police, this time by X9 and X14, which led to Father Comensoli being interviewed and charged.

11.80 Father Lucas acknowledged that he and Brother McDonald met with the complainants shortly after the *Illawarra Mercury* article appeared. He agreed that he told them that he would have preferred them not to have gone to the media. He said he had believed at the time that they wanted the Church to deal with the complaints.¹¹⁴ He denied that he had sought to dissuade the boys from going to the police. Father Lucas said in evidence that there was some closing of ranks in this situation because many of the priests, particularly the older ones, could not countenance the possibility of such behaviour by Father Comensoli and they were distressed by what they considered to be inflammatory reporting by the *Illawarra Mercury*.¹¹⁵

11.81 Bishop Murray told the Commission that he offered counselling to the complainants and asked for Father Comensoli's resignation.¹¹⁶ In June 1994 Father Comensoli pleaded guilty to two charges of indecent assault.¹¹⁷

11.82 Further inquiries in relation to Brother Evans led to a decision to charge him, but before that could occur he committed suicide.¹¹⁸ He had earlier applied for and been granted dispensation from his vows.¹¹⁹

¹⁰⁸ Operation Paradox is referred to in Chapter 18 of Volume.

¹⁰⁹ B. Lawson, RCT, 22/4/96, pp. 23977-82; Report by State Intelligence Group re Operation Paradox-1992, 1/9/92, RCPS Exhibit 1747C, at Doc. 1090637-40.

¹¹⁰ Report from J. H. McGrath to Patrol Commander, Wollongong, 13/10/92, RCPS Exhibit 1747C, at Doc. 1090636.

¹¹¹ J. H. McGrath, RCT, 23/4/96, p. 24094.

¹¹² Witness name suppressed, RCT, 16/4/96, pp. 23677-78.

¹¹³ B. Martin, 'Brother, parish priest molested us', *Illawarra Mercury*, 27/10/93, pp. 1-4, RCPS Exhibit 1720/1.

¹¹⁴ B. Lucas, RCT, 18/4/96, pp. 23812-15.

¹¹⁵ B. Lucas, RCT, 18/4/96, pp. 23822-23; Witness name suppressed, RCT, 16/4/96, pp. 23678-79 & 23684-85.

¹¹⁶ W. E. Murray, RCT, 24/4/96, pp. 24138-39.

¹¹⁷ Certificate of Committal on Plea of Guilty, 2/6/97, RCPS Exhibit 3260; B. Martin, 'Sex charges: priest pleads guilty' and 'Guilty plea vindicated going public', *Illawarra Mercury*, 3/6/94, RCPS Exhibit 3261, pp. 1 & 5.

¹¹⁸ A. Beck, RCT, 23/4/96, pp. 24111-12.

¹¹⁹ A. Beck, RCT, 23/4/96, pp. 24111-12.

C. CHURCH PROTOCOLS FOR DEALING WITH ALLEGATIONS OF SEXUAL ABUSE

CATHOLIC CHURCH

Development of Protocol

11.83 It has been acknowledged by the Catholic Church that it did not begin to address the problem of sexual abuse until about 1988. In November/December 1988 the Australian Catholic Bishops Conference established a Special Issues Committee, including people with relevant experience in dealing with child sexual abuse,¹²⁰ to consider the implications of allegations of criminal behaviour, especially relating to children, made against members of the clergy. The Committee was required to develop a protocol to be observed if an accusation was made, and to advise on its implementation.

11.84 A draft of the 'Protocol for dealing with allegations of criminal behaviour' was completed in April 1991, and was revised the following year. The Protocol was circulated to all bishops,¹²¹ and to diocesan priests in late 1991 early 1992.¹²² In his evidence Father Lucas said that he was unsure whether it was implemented in all dioceses and acknowledged that it was not binding in an enforceable way.¹²³ Each of the dioceses and religious orders was free to determine its own response to official protocol of this kind.

11.85 In January 1993, the Australian Bishops Conference issued the 'Pastoral Statement on Child Protection and Child Sexual Abuse'.¹²⁴ The Statement acknowledged that some clergy had been offenders and that the Church may not have treated these incidents as seriously as they deserved. A statement of principles for dealing with sexual abuse was released by the Church in April 1994.¹²⁵

11.86 In December 1996, the Catholic Church released a new protocol 'Towards Healing',¹²⁶ which sets out the basic principles for the Church's response to complaints of sexual abuse and the procedures for dealing with such complaints. They became operational on 31 March 1997. The guidelines were developed by the National Committee for Professional Standards, a Committee jointly established by the Australian Catholic Bishops Conference and by the Australian Conference of Leaders of Religious Institutes.¹²⁷ The Committee continues as the national body overseeing the implementation of policies and procedures across Australia.

Key Developments

11.87 The Church has established a Professional Standards Resource Group (PSRG) in each of the five provinces, consisting of at least one priest and one 'religious', and up to 10 other suitable persons with experience in child protection, social sciences, civil and Church law and/or industrial relations. Such groups are to act as advisers to Church bodies within their province, and are to provide Contact Persons, Assessors, Victims' Support Persons, Accused's Support Persons, Facilitators and Reviewers.¹²⁸

¹²⁰ 'Statement on abuse of children', *The Catholic Weekly*, 30/6/93.

¹²¹ B. Lucas, RCT, 18/4/96, pp. 23801-02.

¹²² B. Lucas, RCT, 18/4/96, p. 23802.

¹²³ B. Lucas, RCT, 18/4/96, p. 23802.

¹²⁴ Catholic Church, Pastoral Statement on Child Protection and Child Sexual Abuse, RCPS Exhibit 1803.

¹²⁵ The Catholic Church's principles in relation to sexual abuse and professional misconduct within the Church (draft), 4/11/93, RCPS Exhibit 1713.

¹²⁶ Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, National Committee for Professional Standards, *Towards Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse Against Personnel of the Catholic Church of Australia*, Hectorville, 1996, RCPS Exhibit 3051/23. See also Volume VI, Appendix P15.

¹²⁷ *ibid.*, p. 7.

¹²⁸ *ibid.*, p. 9.

11.88 Although initially formed with a mandate confined to matters concerning sexual abuse by people working for the Church, this has been widened to incorporate allegations of physical, emotional and psychological abuse, as well as other failures to meet accepted professional standards.¹²⁹

11.89 The Professional Standards Office is the operating arm of PSRG, and has a role similar to that of an internal ombudsman, to monitor the process and ensure that mechanisms are in place so that allegations of abuse are:

- recorded promptly;
- notified to the relevant Church authority;
- pursued sensitively and effectively; and
- notified to the relevant civil authority, where the allegation relates to a criminal act.

11.90 One of the main functions is to ensure open liaison with police and other relevant authorities. For this purpose liaison arrangements have been made and a memorandum of understanding between the PSRG and the Police Service is in preparation, which will deal with the procedures for communications between the two bodies.

11.91 A report prepared for the Royal Commission by the Professional Standards Office outlines further developments under way, including:

- advice to Church officials and personnel of their obligations under the law and of the procedures required of them in receiving and handling allegations of abuse, whether from a victim, third party or self confessed perpetrator;
- the appointment of contact persons to cover all key areas in the States;
- the development of a system for services to support victims, including harm assessment and financial assistance for counselling;
- the establishment of Encompass Australia by the Church in association with the University of New South Wales to provide treatment facilities for offenders - a program discussed later in this chapter;
- the development of a comprehensive computerised reporting and data collection system, to enable monitoring of case progress, the development of reports and the analysis of trends, with suitable security;
- a review of the protocol document Towards Healing, for possible improvement and extension to other areas of alleged criminal activity; and
- the development by the NSW Catholic Education Commission, working on behalf of the 600 systemic and independent Catholic schools in the State, of policies and procedures to be implemented by school authorities in cases of allegations of sexual abuse of children by school personnel, in harmony with but probably extending beyond 'Towards Healing'.¹³⁰

¹²⁹ Bishops and Leaders of Religious Institutes for the Catholic Church in NSW and ACT, Professional Standards Office, Report for the Wood Royal Commission, Fax to RCPS on 16/7/97, RCPS Exhibit 3229, p. 1.

¹³⁰ Bishops and Leaders of Religious Institutes for the Catholic Church in NSW and ACT, Professional Standards Office, Report for the Wood Royal Commission, Fax to RCPS on 16/7/97, RCPS Exhibit 3229.

11.92 The Report closes with the following observation:

The Church in New South Wales is now much more aware of its past deficiencies and failures in dealing with allegations of sexual abuse brought against its members. The Church offers no excuse for this and is indebted to the Royal Commission for drawing its attention to those deficiencies in its processes that were thought to be addressing whatever problems there were. The Church has been faced with a crisis; it is now seeking to address the matters constructively by establishing appropriate policies and procedures that demand openness and transparency throughout.

The Church in New South Wales is committed to act justly and with compassion in respect to its pastoral, moral and legal responsibilities to all parties wronged by any criminal activity involving its members. The Church will also pursue the responsibilities defined in its own law to assess and determine the present and future status of, and sanctions against offenders within the Church, irrespective of the outcomes of any criminal proceedings.¹³¹

11.93 The Commission commends these developments. For the assistance of other Churches or religious organisations which have not yet progressed as far, the key points of the 'Towards Healing' protocol are outlined below.

Principles for dealing with Allegations of Sexual Abuse

11.94 The relevant principles are defined as follows:

- the clergy are in a position of trust and authority within the pastoral environment and any sexualisation of the pastoral relationship is professional misconduct and an abuse of trust and authority;
- a failure to reject such approaches does not imply consent and clergy should at all times take responsibility to guard against sexual contact (even if initiated by a parishioner);
- any sexual behaviour with a minor is immoral and criminal and sexual approaches to adults may also be subject to provisions of civil or criminal law;¹³²
- the Church makes a firm commitment to principles of truth, humility, healing for the victims, assistance to other persons affected, an effective response to those who are accused and those who are guilty of abuse, and prevention of abuse;
- the procedures apply to all Church personnel (clerics, religious personnel, lay employees and volunteers); and
- the Church will not interfere with or jeopardise a police or other investigation.

Procedures for dealing with Allegations of Sexual Abuse

11.95 These provide for the following:

Complaints

- complaints received are to be referred to the PSRG Contact Person within 24 hours in accordance with the reporting procedures circulated through the Church community;
- Church personnel are to comply fully with mandatory reporting requirements;
- the person receiving a complaint is to make a written note of the information provided which is to be signed by the complainant and forwarded to the Contact Person who is to forward a report to the appropriate Church authority;

¹³¹ ibid, pp. 5-6.

¹³² Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, National Committee for Professional Standards, *Towards Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse Against Personnel of the Catholic Church of Australia*, December 1996, RCPS Exhibit 3051/23, p. 2.

Assessment

- the Contact Person is to make a recommendation as to whether the case warrants a full formal assessment;
- where a criminal act is involved, the Contact Person should encourage a report to the police and assist the complainant to do so if necessary;
- any decision not to inform the police must be noted and confirmed by the complainant;
- any State law concerning reporting must be observed;
- the PSRG is to liaise with authorities;
- if a matter is later revealed to be criminal, the Church assessment procedures are to cease and the complainant is to be informed of the right to take the matter to the police;

Assessment Procedures

- the Church authority is to appoint two independent assessors to conduct an assessment within 24 hours of the receipt of the Contact Person's report during which time the person accused can be asked to stand aside;
- this must be done if there is a risk of further sexual assault;
- the assessors are to liaise with the Contact Person before interviewing the victim, who is to be invited to have a support person present during the interview;
- the assessors, who must be qualified child interviewers, are not to interview the child if this would interfere with legal interview/investigation, or if the parent or guardian has not given consent;
- the accused who is to be informed of the complaint and interviewed by both assessors, is to be afforded rights as follows:
 - assumption of innocence;
 - opportunity to make admission;
 - a right to independent legal advice; and
 - a right to have another person present at interview;
- a written record is to be made of any interviews;
- Support Persons should have access to the assessors and keep both parties informed of developments;
- the assessors are to produce a report, with any recommendations, at the conclusion of assessment and supply a copy to the Church Authority, PSRG and Support Persons;
- the Church Authority must act on the recommendations as soon as possible and consult with PSRG as to their implementation;
- the process of assessment is to be as quick and efficient as possible and transparent to all;
- during the process no comment is to be made on the issue of guilt, innocence or liability;

Outcomes

- post-assessment, one convenor is to meet with the complainant to discuss the findings;
- if the finding is one of guilt, the victim and Church Authority are to agree on a facilitator who will then organise and moderate a meeting between the Church Authority and victim to discuss the ongoing needs of the victim and his or her family, to identify and confront any outstanding issues, and to draw up a record of agreement between the parties (explaining reasons for any disagreement) which is to be provided to the PSRG;
- the victim may call for a review of the process if he or she is dissatisfied with the Church's actions;

Review of Process

- this may be requested in writing by the complainant or by the accused;
- if the request for a review is accepted, the convenor is to name a reviewer from Resource Group (who can be objected to by complainant) who is to undertake an independent evaluation as to whether the procedures and general principles set out have been adhered to;
- the reviewer may interview all Church personnel concerned and have access to all relevant documentation;
- the reviewer is to complete the review within three months, and provide the convenor with a written report and recommendations;
- copies are to be provided to those involved and to the Church Authority;

Outcomes re Accused

- if there is a risk of further abuse or 'scandal' the accused is to be suspended on full pay (clerics and religious personnel will be put on administrative leave) and not allowed to take part in public ministry until the matter is resolved;
- if there is a finding of guilt the accused can be dismissed, banned from Church involvement, removed from public ministry, requested to return to lay status or the canonical penal process can be commenced;
- if an admission is made, a Church representative will meet with the offender and discuss future options;
- if found not guilty, the Church will take necessary steps to vindicate the accused, informing of the steps taken;

Preventative Strategies

- all Church personnel are to be made aware of the seriousness of sexual abuse, inappropriate behaviour and inappropriate conduct;
- if a member of the clergy requests a transfer they will be asked for a signed statement that they know of no circumstance which may lead to a complaint of sexual abuse;
- local Church Authority will also be asked for such a statement;
- candidates for religious institutions must make a similar statement prior to acceptance;
- it is to be made generally known that any proven incident of sexual abuse is to result in dismissal or removal;
- Church bodies are to have procedures in place for obtaining police checks and references and for verifying the suitability of applicants;

- Church authorities must be honest and frank in any references given; and
- In-Service programs should be run by Church authorities to inform them of the principles and procedures contained in Towards Healing.

11.96 The protocol has undergone considerable improvement since the 1992 version. It attempts to balance the rights of the victim and the accused fairly and it has lost the damage control element of previous protocols where the emphasis was on protecting the reputation of the Church. Commendably it deals with prevention and screening of potential clergy. Generally it appears that Church policies are becoming more constructive.¹³³

11.97 The development of this protocol and the other steps outlined earlier indicate that the Catholic Church is now aware of its past deficiencies in dealing with allegations of sexual abuse and is making a concerted effort to overcome them. As with all policies and plans, the proof will lie in their implementation.

ANGLICAN CHURCH

Development of Protocol

11.98 A Sexual Abuse Committee was established following a resolution of the Standing Committee in 1993, to develop a set of guidelines, policies and procedures for detecting and investigating sexual misconduct.¹³⁴ The Committee instituted a Working Party which reported in May 1994,¹³⁵ after a lengthy examination of protocols in use elsewhere, and consultation with clergy, social workers, counsellors and lawyers.

11.99 The system proposed a structure that would provide information and support to complainants, and establish a series of committees to deal with complaints, research, education and prevention processes, and protect the rights and interests of both the victim and accused.

11.100 One member of the Working Party, Justice Peter Young, put forward a dissenting report arguing that the Working Party's Report was too victim oriented, that there were limited resources to be devoted to the care of victims, that police should be informed of allegations rather than the Church dealing with them alone, and that a system dealing with the rights of the victim and accused alike may lead to conflict to the detriment of the accused.¹³⁶

11.101 The Working Party's Report led, in June 1996, to the creation of a Protocol for dealing with sexual misconduct by Church workers in the Diocese of Sydney.¹³⁷

11.102 The stated purpose of the protocol is to assist the Church to confront the problem (of sexual misconduct by Church workers whether lay or ordained) by setting down procedures for the making of complaints and for dealing with those complaints:

¹³³ N. Ormerod, A little breathless and a little late: Catholic policy on sexual abuse, paper presented at 1st Australian and New Zealand Conference on Sexual Exploitation by Health Professionals, Psychotherapists and Clergy, University of Sydney, 12-14 April 1996, RCPS Exhibit 3294C.

¹³⁴ The terms of reference of the Committee were: 'To report to the Archbishop as soon as possible on the prevention, detection and investigation of complaints of sexual misconduct by clergy, employees of parishes and diocesan organisations and persons who hold appointments in parishes and diocesan organisations, and to consider subsequent counselling procedures for all persons involved'.

¹³⁵ R. H. Goodhew, RCT, 7/5/96, p. 24798; Report to the Archbishop of Sydney on the prevention, detection & investigation of sexual abuse within the Church, May 1994, RCPS Exhibit 1811/1.

¹³⁶ P. Young, Diocese of Sydney, Sexual Abuse Report, March 1994, RCPS Exhibit 1811/2.

¹³⁷ Anglican Church Diocese of Sydney, Protocol for Dealing with Sexual Misconduct by Church Workers in the Anglican Church Diocese of Sydney, June 1996, RCPS Exhibit 3230.

Complaints

- The protocol stipulates that:
 - a complaint is to be investigated expeditiously and fairly (to the parties concerned);
 - the aggrieved person is to be informed of the outcome of the complaint; and that
 - the parties concerned are to be treated appropriately and with respect.¹³⁸
- Five contact persons have been appointed to receive complaints from the aggrieved person themselves or from any person who suspects or becomes aware of sexual misconduct.¹³⁹ Their role is specified as follows:
 - where there is reasonable evidence of sexual misconduct involving a minor, they are to report it to the police and relevant government agencies 'if required to do so by applicable law';
 - they are to provide the aggrieved person with information about support services, legal advice and advice concerning the possible need to report the complaint to appropriate authorities;
 - they are to record the complaint in writing if so required by the complainant, and to provide a copy to the Archbishop, and to his confidential advisers who may include 'persons with expertise in dealing with sexual misconduct matters and persons with expertise in the law';¹⁴⁰ and
 - they may provide a copy of the written complaint to the alleged offender, after consultation with the complainant.

If the complainant commences legal proceedings, the complaint may cease to be dealt with under the Protocol.¹⁴¹

Assessment

- The Archbishop is to determine, with the help of his advisers, how the complaint should be dealt with, including the scope of any investigation. Factors to be considered include:
 - the nature of the alleged sexual misconduct;
 - the confidentiality required by the complainant;
 - whether the alleged offender is currently working in the Diocese; and
 - other relevant circumstances, such as the existence of other persons who may be affected by the complaint.¹⁴²

Outcomes

- Possible outcomes include one or more of the following:
 - complaint reported to police or other authorities;
 - written response or apology to the aggrieved person;
 - aggrieved person referred to further resources and/or counselling;
 - Church worker warned or employment terminated;

¹³⁸ *ibid.*, p. 2.

¹³⁹ *ibid.*, p. 4.

¹⁴⁰ *ibid.*, p. 5.

¹⁴¹ *ibid.*, pp. 4-5.

¹⁴² *ibid.*, p. 6.

- if the offender is a member of the clergy, formal disciplinary proceedings commenced;
- any licence or authority from the Archbishop that the Church worker holds revoked.¹⁴³

Church Disciplinary Procedures

- If a charge laid against a member of the clergy is not admitted, the charge is investigated by a Board of Enquiry. If it is found that a prima facie case exists, the matter is referred to the Diocesan Tribunal for hearing and determination. If found guilty the member of the clergy may be admonished, suspended or expelled from office, deprived of the rights and emoluments of office, or deposed from Holy Orders.¹⁴⁴

Draft Code of Conduct

11.103 In July 1997 the Church provided the Commission with a Draft Code of Conduct for Clergy.¹⁴⁵ The stated purpose is 'to map out the boundaries of acceptable behaviour' and to 'set the standards of behaviour required by Clergy'.¹⁴⁶

11.104 The Code outlines:

- the Christian view of sexual activity and the avenues for its proper expression;¹⁴⁷
- the manner in which the clergy should conduct themselves with children and with others, so as to eliminate the possibility of harassment,¹⁴⁸ recognising the position of power which clergy occupy, and warning of the abuse of this power;
- the importance of confidentiality in the pastoral relationship,¹⁴⁹ recognising that where there is a legal or other obligation for disclosure, compliance with it is permissible;
- definitions of unwanted sexual behaviour, including sexual harassment, sexual assault and child sexual abuse;¹⁵⁰
- guidelines regarding the personal and organisational life of members of the clergy, including the need for an awareness of appropriate leadership styles;¹⁵¹
- procedures for conducting personal interviews;¹⁵²
- guidelines regarding the conduct of Leaders (Clergy and lay) ministering to children and young people, for example, not being with a child or young person unaccompanied, and respecting privacy; and
- the requirement for leaders to complete an application form in order to undertake child/youth work which includes questions about previous criminal charges and investigations by police and the Department of Community Services (DCS).¹⁵³

¹⁴³ ibid.

¹⁴⁴ ibid, p. 7.

¹⁴⁵ Anglican Church Diocese of Sydney, Code of conduct for clergy (draft), RCPS Exhibit 3231.

¹⁴⁶ ibid, p. 5.

¹⁴⁷ ibid, p. 6.

¹⁴⁸ ibid.

¹⁴⁹ ibid, p. 8.

¹⁵⁰ ibid, pp. 9-10.

¹⁵¹ ibid, pp. 14-15.

¹⁵² ibid, p. 16.

¹⁵³ ibid, pp. 17-18.

UNITING CHURCH

Development of Protocol

11.105 The Uniting Church's 'Procedures for use when complaints of sexual abuse are made against Ministers' was published in 1994.¹⁵⁴ The Procedures were prepared by the Commission on Women and Men, in consultation with the Assembly Legal Reference Committee, Assembly Standing Committee, Synod General Secretaries, the Anti-Discrimination Board of NSW and other interested parties.

11.106 At its 8th National Assembly in July, 1997 the Church took further steps to improve its response to allegations of sexual misconduct including approval of:¹⁵⁵

- significant amendments to the Discipline Regulations,¹⁵⁶ to be presented to the Assembly Standing Committee in late August 1997 for final endorsement;
- the development of guidelines to implement the Regulations;
- immediate implementation of an Interim Code of Ethics,¹⁵⁷ followed by continuing consultation with ministers as to the final content of the Code;
- continued development by the Assembly Standing Committee of policy statements for the prevention of sexual misconduct (currently in draft form);¹⁵⁸ and
- a requirement that all Ministers of the Word, Deacons, Deaconesses, Youth Workers, Community Ministers and Lay Pastors in active service complete basic education in the implementation of the discipline processes, (particularly that part concerning sexual misconduct) and the Code of Ethics.

Amendments to Disciplinary Regulations¹⁵⁹

11.107 The amendments to the Discipline Regulations provide, in broad summary, for:

Complaints

- the appointment of a Synod Sexual Misconduct Complaints Committee¹⁶⁰ consisting of a panel of members including one with expertise in sexual abuse issues, one with legal expertise, and other members skilled in mediation and conciliation, with general knowledge of sexual abuse issues, knowledge and understanding of pastoral ethics and appropriate behaviours for Ministers;¹⁶¹

¹⁵⁴ Uniting Church in Australia, Procedures for use when complaints of sexual abuse are made against ministers, 1994, RCPS Exhibit 3226, p. 1.

¹⁵⁵ Uniting Church in Australia, Letter to RCPS, 28/7/97, RCPS Exhibit 3233; Uniting Church in Australia, Letter to RCPS, 29/7/97, RCPS Exhibit 3232/1.

¹⁵⁶ Uniting Church in Australia, Discipline Regulations as agreed at 8th Assembly, Amendment to the constitution and amendments to regulations - Discipline, July 1997, RCPS Exhibit 3232/2.

¹⁵⁷ Uniting Church in Australia, Interim code of ethics for community ministers, deacons, deaconesses, and lay pastors, ministers of the word and youth workers in the Uniting Church in Australia, 29/7/97, RCPS Exhibit 3232/3. The full Code is to be presented at the 9th National Assembly.

¹⁵⁸ Uniting Church in Australia, Policy and Procedures for dealing with a complaints of sexual misconduct by members, adherents or volunteers of the Uniting Church in Australia and for providing a safe faith community (draft), 22/7/97, RCPS Exhibit 3232/4; Uniting Church in Australia, Policy and procedures for dealing with a complaint of sexual misconduct against lay staff employed by the Uniting Church in Australia and its agencies (draft), 22/7/97, RCPS Exhibit 3232/5.

¹⁵⁹ Uniting Church in Australia, Discipline Regulations as agreed at 8th Assembly, Amendment to the constitution and amendments to regulations - Discipline, July 1997, RCPS Exhibit 3232/2.

¹⁶⁰ *ibid*, p. 4.

¹⁶¹ *ibid*, p. 5.

- the Committee to appoint a panel of contact persons and advisers;
- allocation of a panel member to be an adviser to a complainant or a Minister;
- appointment of a contact person to provide assistance including listening to a complainant, discussing the nature of the conduct, informing the complainant of the rights and responsibilities that arise, providing information about the Church's complaints and disciplinary processes and of other options available, and assisting the complainant to choose the appropriate option, including making a formal complaint (in writing);
- referral of the complaint to the chairperson of the Committee who is to notify the Minister and convenor of the panel of advisers.

Assessment

- the investigation of complaints of sexual misconduct by the Committee 'with a view to facilitating a response that takes into account the interest of the complainant, the Minister, and the values by which the Church lives',¹⁶²
- appointment by the chairperson of a person or person to investigate complaints and to report to the Committee - such investigation to be inquisitorial not adversarial, in nature.

Outcome

- determination by the Committee that the complaint:
 - warrants no further action;
 - should be referred for conciliation;
 - should be referred to the Synod Committee for Discipline;
 - should be referred to the Presbytery Pastoral Relations Committee or to the Moderator, with recommendations for counselling, supervision, or training;
- suspension of further action until criminal or civil legal proceedings commenced against the Minister are concluded.¹⁶³

Interim Code of Ethics

11.108 The Interim Code of Ethics covers issues such as:

- the Pastoral relationship;
- professional conduct, including:
 - relationships with colleagues;
 - teaching;
 - relationships with Church Councils;
 - competence;
 - professionalism; and

¹⁶² ibid, p. 7.

¹⁶³ ibid, p. 10.

- confidentiality (relevantly for present purposes, providing that information received in the context of a pastoral relationship is to remain confidential unless that would result in significant physical, emotional or sexual harm to another person or persons; or unless disclosure is required by law);
- guidelines for the conduct of ‘particular relationships’, (a ‘particular’ relationship’ being a close personal relationship between the Minister and another person, only possible where the Minister is not in a pastoral relationship with the other person);
- acceptance of gifts;
- declaration of legal action; and
- working with another institution.

Policies and Procedures for Members and for Lay Staff

11.109 As referred to above, the Church has developed draft policies and procedures for dealing with complaints of sexual misconduct by ‘members, adherents or volunteers’¹⁶⁴ and against ‘lay staff’,¹⁶⁵ which deal with:

- prevention issues such as the display of information concerning the complaint, and education for Church leaders in providing safe worship and community and boundary setting within the pastoral relationship;
- the responsibility of the Church to ensure that it does not interfere with due legal process;
- operational guidelines for:
 - responding to a complainant;
 - supporting the complainant;
 - supporting the respondent; and
- privacy principles.

PRESBYTERIAN CHURCH

11.110 In 1995 the Presbyterian Church appointed a Committee to promote the implementation of policies and procedures to be adopted when dealing with sexual misconduct within the Church, and to further develop its policies and procedures document *Breaking the Silence - policies and procedures for protecting against and dealing with sexual abuse within the Church*.¹⁶⁶ In 1997, as part of the implementation process the Committee developed:¹⁶⁷

- a policy to Prevent or Report Sexual Abuse of Minors, and
- a suggested Voluntary Code of Conduct for Church Workers.

¹⁶⁴ Uniting Church in Australia, Policy and procedures for dealing with a complaint of sexual misconduct by members, adherents or volunteers of the Uniting Church in Australia and for providing a safe faith community (draft), 22/7/97, RCPS Exhibit 3232/4.

¹⁶⁵ Uniting Church in Australia, Policy and procedures for dealing with a complaint of sexual misconduct against lay staff employed by the Uniting Church in Australia and its agencies (draft), 29/7/97, RCPS Exhibit 3232/5.

¹⁶⁶ Presbyterian Church in NSW Social Services, Paper presented to the 1997 General Assembly, 1997, RCPS Exhibit 3234; Presbyterian Church in NSW Social Services, *Breaking the Silence: policies and procedures for protecting against and dealing with sexual abuse within the Church*, November 1995, RCPS Exhibit 1804.

¹⁶⁷ Presbyterian Church in NSW Social Services, Paper presented to the 1997 General Assembly, 1997, RCPS Exhibit 3234.

11.111 At the 1997 General Assembly, approval was given for the Committee to:¹⁶⁸

- prepare policies and procedures for ministers and elders as to the appropriate response to a complaint, particularly in those instances where the police are not involved;
- prepare an information and training package to present to Presbyteries.

Voluntary Code of Conduct

11.112 The draft voluntary code¹⁶⁹ notes that:

- Churches need to recognise the problem of child abuse openly and the fact that ministers and other Church workers may sin in this way;
- Churches need to have a clear and specific child protection policy in place including screening of all Church workers;
- all members should be made aware of the policies and all Church workers should agree to abide by them;
- all employees and volunteers of the Church should be required to sign a statement declaring that they have no criminal convictions 'or done anything to endanger the safety of a child';¹⁷⁰
- information confided to a Leader by a child or youth that he or she is the victim of abuse is to be reported to the Minister;
- all credible allegations of child sex abuse should be reported to DCS and the Police Service as are any cases where a Church worker became aware of the sexual abuse of a minor;
- Churches must treat complaints seriously, ensure they are properly investigated and that the approach is 'victim friendly';
- Church workers should not be on their own with youths/children or drive them home from Church functions unaccompanied;
- the child's right to privacy and personal space should be respected; and that
- in relation to the investigation of complaints about child sexual abuse:
 - Churches should not investigate complaints on their own but co-operate fully with the Police Service and other civil authorities;
 - independent investigation and action are required to ensure that justice is done and is seen to be done;
 - the alleged offender should either be suspended from duties or placed on restricted duties during the investigation, and if convicted they should be disqualified from pastoral ministry; and
 - the complainant is to be kept informed of the investigative process.

¹⁶⁸ Presbyterian Church in NSW Social Services, 1997 General Assembly 'Breaking the Silence', Resolutions, RCPS Exhibit 3234.

¹⁶⁹ Presbyterian Church in NSW Social Services, Voluntary Code of Conduct, 1997, RCPS Exhibit 3234.

¹⁷⁰ *ibid*, p. 4.

Breaking the Silence

11.113 In this document comprehensive procedures are outlined for:

- the notification of disclosure of child sexual assault,¹⁷¹ including:
 - immediate contact with the Minister and DCS,
 - the preparation of a written report of the disclosure;
 - the assignment of a contact person for the child; and
 - practical instructions as to the steps to be taken, and matters to be avoided, so as not to interfere with an official investigation;
- protective advice,¹⁷² including the need to:
 - maintain a level of professional behaviour;
 - avoid situations that may be open to misinterpretation, and to
 - remain open with supervisors concerning any difficult situations;
- the procedures applicable¹⁷³ following an allegation of assault, including:
 - suspension from duties pending investigation, or hearing where a charge has been laid by Police;
 - internal investigation where there is insufficient evidence for a criminal prosecution, but where DCS considers that the child should be separated from the worker, followed by appropriate disciplinary proceedings in keeping with industrial legislation and unfair dismissal laws.
- recommended policy practices for adoption by local Churches,¹⁷⁴ including:
 - respect by youth leaders of privacy, and avoidance of situations where they might be alone in the company of a child;
 - the preparation of a statement of duties for those who hold positions of responsibility;
 - the selection of appropriate camp parents; and
 - segregation and supervision of dormitories on camps and the like;
- screening of all office holders and applicants,¹⁷⁵ including:
 - completion of an appropriate declaration;
 - check of identity; and
 - contact with referees and previous Churches where the applicant has performed youth work.

11.114 These documents go a long way towards managing complaints of sexual abuse of children and establishing a protective regime.

¹⁷¹ Presbyterian Church in NSW Social Services, *Breaking the Silence: policies and procedures for protecting against and dealing with sexual abuse within the Church*, November 1995, RCPS Exhibit 1804, pp. 6-7.

¹⁷² *ibid.*, p. 8.

¹⁷³ *ibid.*, pp. 8-9.

¹⁷⁴ *ibid.*, p. 10.

¹⁷⁵ *ibid.*, p. 13.

11.115 The Church acknowledges that in relation to its response to sexual misconduct it still has much to achieve, particularly in the way of education. It has advised the Commission of its intention to pursue these issues over coming months.¹⁷⁶

SALVATION ARMY

11.116 The Salvation Army's 'Procedures for Complaints of Sexual and Other Abuse Against Salvationists and Workers'¹⁷⁷ outlines the procedures to be followed in making a complaint and in dealing with it.

Making a Complaint

11.117 Relevantly this document provides for:

- an independent contact person (from an approved list) to be contacted;
- the independent contact person to notify authorities of sexual misconduct involving a minor as required;
- the independent contact person to inform the complainant of his or her rights, and of the Salvation Army's procedures and support service, and also to advise the complainant that a copy of the statement will be provided to the Chief Secretary, and to the alleged offender with the complainant's approval; and
- the contact person (on request from the Chief Secretary) to contact and offer to meet with the alleged offender, and to deal with him or her as with the complainant.

Dealing with the Complaint

11.118 The procedures:

- specify that the Chief Secretary or his representative will determine with the assistance of his confidential advisors how the complaint is to be dealt with, including the scope of any investigation; and
- permit the delivery of a copy of the statement, with the complainant's consent, to the alleged offender.

Outcomes

11.119 The procedures contemplate that:

- if appropriate, the complaint will be reported to the Police Service or other authorities in accordance with applicable law;
- the complainant and/or the alleged offender may be directed to counselling or further resources for help;
- mediation (although not at the expense of the Salvation Army in the absence of special arrangement) and reconciliation may be sought through the independent contact person; and that
- the alleged offender, if an employee, may be warned, suspended or dismissed.

¹⁷⁶ C. Llewellyn, Presbyterian Church in NSW Social Services, Letter to RCPS, 31/7/97, RCPS Exhibit 3234.

¹⁷⁷ The Salvation Army, *Procedures for Complaints of Sexual and Other Abuse Against Salvationists and Workers*, supplied to the Commission on 5/8/97, RCPS Exhibit 3235.

In the case of an officer, local officer or soldier, formal disciplinary proceedings may be commenced under the Orders and Regulations of the Salvation Army.

CONCLUSION

11.120 The development of the various protocols by the Churches mentioned, and the revision of past inappropriate procedures, is highly encouraging. It will, however, remain important for the Churches to recognise the serious criminality involved in child sexual abuse, and to ensure that prompt police intervention is made possible. It is simply impermissible for the Churches to deal with offending priests or members of the clergy privately, or in a way that may allow them to continue to offend.

D. TREATMENT FOR OFFENDERS

11.121 For a number of years, overseas institutions have been offering therapeutic treatment for member of the clergy, including Southdown in Toronto, Canada and Saint Luke's Institute in Maryland, to which X11 was sent.

11.122 The latter is a 'mental health facility for the treatment of alcohol and drug addiction and psychological and psychiatric problems such as depression, anxiety and sexual problems.'¹⁷⁸ It began operations in 1981 to treat clergy of all faiths, and has a three-fold mission - to treat, research and educate. It is a 32 bed hospital providing in-patient as well as out-patient treatment. Treatment programs are followed by a continuing care program for 2-5 years which includes monitoring of progress, local psychological supervision and regularly scheduled maintenance visits to Saint Luke.

11.123 In April 1996 the National Committee for Professional Standards, a joint committee of the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes, released a report: 'A National Treatment Program for Priests or Religious with Psycho-sexual Disorders'.¹⁷⁹ It proposed the formation of a 'National Therapy Program Unit'. In November 1996 this treatment program was approved by the Australian Council of Bishops. A decision was made to fund the unit and a Board of Management has been appointed. This is said to be the first such specific and comprehensive treatment program for sex offenders within Australia, outside the limited programs established within the Corrections systems.¹⁸⁰

11.124 As established it is independent of, but accountable to the Catholic Church, in its management of offenders.¹⁸¹ The Commission has been informally advised that the treatment program will be available to ministers from other denominations as well as Catholic clergy and in due course will be offered to groups other than clergy.¹⁸² Treatment will be offered for psychosexual disorders, boundary violation disorders, compulsive behaviour, paedophile behaviour and the full range of psychosexual disorders. Its first patient was accepted in July 1997.

¹⁷⁸ Saint Luke Institute: A Mental Health Hospital (brochure), RCPS Exhibit 2414.

¹⁷⁹ Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, Professional Standards Research Project: A national treatment program for priests or religious with psycho-sexual disorders: Final Report, 1996, RCPS Exhibit 2513C.

¹⁸⁰ *ibid*, p. 8.

¹⁸¹ *ibid*, p. 101.

¹⁸² Information provided to the Commission by Professor Blaszczyński, Director of the National Therapy Program Unit, on 5/2/97, RCPS Exhibit 3279.

11.125 In a very broad compass, the Program provides for four therapy options,¹⁸³ the selection of which is the most appropriate is to be made by the National Program Unit Director in collaboration with the PSRG which has had contact with the member involved. These options comprise:

- therapy under supervision of the PSRG, applicable where:
 - the nature of the disorder is such that it can be dealt with using the resources of the PSRG's network of clinical practitioners; or
 - the continued presence of the individual in the community is not problematic.

In this case the individual would continue to reside in the local community, and the National Program Unit would be kept informed of his progress.

- therapy under supervision of the National Program Unit - community residence, applicable where:
 - the nature of the disorder is such that it cannot be dealt with using the resources available to the PSRG; or
 - the continued presence of the individual in the community is problematic.

In this case the individual would reside in the local community within the vicinity of the National Program Unit, which would provide 'out-patient' therapy and report to the PSRG on progress. The individual would be given a clinical therapist to act as a case manager;

- therapy provided by the National Program Unit - residential setting (for example, religious community) - applicable where:
 - the individual requests to live in such a setting;
 - the individual requests a level of support not available if living independently in the community;
 - this option is in the best interests of the individual, or
 - it is a condition of the individual's involvement in the therapy program;
- therapy under supervision of the National Program Unit - institutional setting, applicable where:
 - there is a risk that the individual may do some harm to himself;
 - there is a grave risk of the individual committing further offences if he remains in the community;
 - the individual displays some other neurosis; or
 - the nature of the disorder requires some medical intervention to stabilise the individual.

¹⁸³

Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, Professional Standards Research Project: A national treatment program for priests or religious with psycho-sexual disorders: Final Report, 1996, RCPS Exhibit 2513C, pp. 61-64.

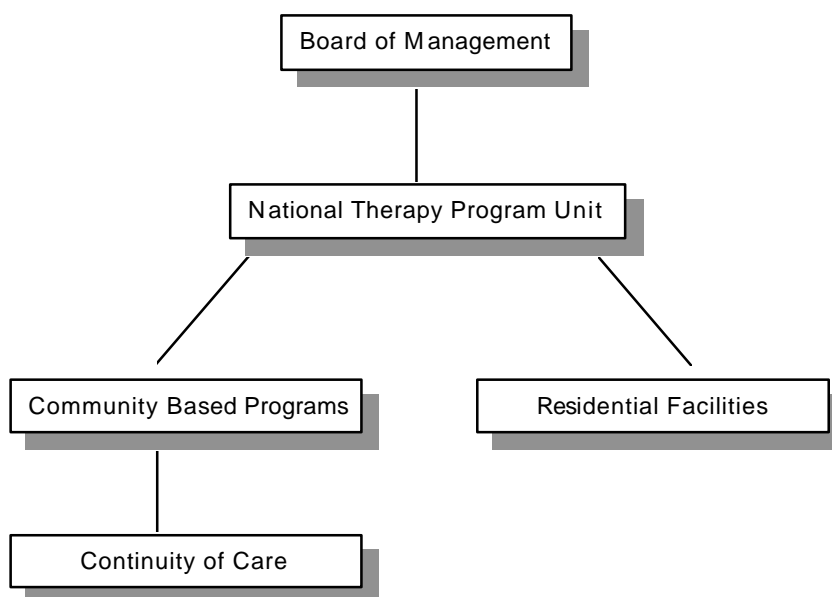
11.126 With each option, once an individual is accepted into a therapy program, all subsequent contact with the relevant Church authority is to be conducted through the contact person designated by the PSRG. At the end of the treatment a Discharge Report and Program are to be provided which will address re-entry to the original Church community, or where clinical intervention is unsuccessful, the offender will not be re-admitted to the ministry and canonical penal process to reduce the individual to lay state will be implemented.¹⁸⁴

11.127 The Report emphasises that therapeutic intervention is not to be used as a means of avoiding or minimising any criminal action against the offender. Rather it encourages deferment of treatment and risk assessment until all court matters are finalised, otherwise offenders will deny/minimise the offence, report excellent progress for any intervention, and deny risk for further offences with the hope of influencing the courts to impose more lenient penalties.¹⁸⁵ An exception was noted where there was a high risk of reoffending.

11.128 The structure created has, effectively, three tiers:

- the first of which involves a small residential facility;
- the second of which revolves around the delivery of community-based counselling and care services;¹⁸⁶ and
- the third of which comprise a Board of Management to oversight the research and education activities of the Unit.¹⁸⁷

Diagrammatically it is represented as follows:



¹⁸⁴ Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, Professional Standards Research Project: A national treatment program for priests or religious with psycho-sexual disorders: Final Report, 1996, RCPS Exhibit 2513C, p. 65.

¹⁸⁵ *ibid*, p. 68.

¹⁸⁶ *ibid*, p. 87.

¹⁸⁷ *ibid*, p. 88.

11.129 The Board of Management is to include representatives of some or all of the existing Professional Standards Resource Groups, independent clinicians and legal representatives. It is to be responsible for overseeing, supervising and monitoring all aspects of the operation of the program.¹⁸⁸ An independent but accountable Resource/Research Unit is to be appointed by the Board to monitor individual programs, to carry out research and provide information to assist the Board in policy decision making.¹⁸⁹ The recommendation of the Report that there be an affiliation with a university or teaching hospital has been implemented, the University of New South Wales having been selected for the purpose. Professor Alex Blaszczyński has been appointed National Director of the Unit.

11.130 The primary goals of the Unit in treating offenders are to:

- stop any further continuation of abusive behaviour and to ensure that no child remains in a position of risk by removing the offender from any environment that allows contact with children;
- motivate offenders to admit to the full extent of their sexual proclivities;
- secure offenders' recognition of the child as a victim traumatised by the behaviour rather than a willing consenting partner;
- correct errors in cognition, for example the belief that sexual molestation is an expression of intimacy or care; and to
- teach techniques that will modify the intensity of aberrant urges, and control behaviours, so that the probability of acting on urges is reduced.¹⁹⁰

11.131 The program recognises that no regime can claim to 'cure' paedophilia but assumes that a reduction in behaviour, following increased control over urges is possible. The treatment for religious persons is designed to separate the sexual component from any religious or spiritual aspect. The former is to remain the province of properly qualified mental health professionals,¹⁹¹ while the latter will also be addressed, but by a suitably qualified Spiritual Director.

11.132 Treatment is to focus on cognitive behavioural and relapse prevention strategies combined with anger and stress management procedures, sexual education and external supervision.¹⁹²

11.133 In relation to screening, the Report concluded that there is no instrument that can reliably detect paedophilia, nor is voluntary frank disclosure on the part of a candidate for religious vows likely. Additionally, it identifies the dangers and unfairness of false labelling.¹⁹³ The approach favoured, by way of a preventative strategy, was accordingly the encouragement of open and comprehensive sex education on sexual paraphilic disorders for such candidates. This would include information which highlights the need for people to recognise the existence of any aberrant urges, and to understand the way in which they can respond to these urges by seeking appropriate help.¹⁹⁴

¹⁸⁸ *ibid.*, p. 102.

¹⁸⁹ *ibid.*, p. 89.

¹⁹⁰ *ibid.*, p. 34.

¹⁹¹ *ibid.*, p. 68.

¹⁹² *ibid.*, p. 94.

¹⁹³ *ibid.*, pp. 51-52.

¹⁹⁴ *ibid.*, p. 52.

11.134 The program also recognises the need for caution in relation to re-admission to the ministry which is only to occur:

- after a long period of successful non-offending;
- in a situation absolutely removed from children and young people; and
- with a clear awareness, acceptance and supervision by a welcoming community.¹⁹⁵

11.135 The model developed is, on any view, comprehensive, impressive and innovative. It would be highly desirable if other Churches could establish similar programs, or alternatively join up with this program through suitable funding arrangements.

E. SUPPORT FOR VICTIMS

11.136 This is an area where the Churches have provided a response which at best has been patchy, and at worse uncaring. In part the absence of any consistent policy to repair the harm done to victims of sexual abuse has been a product of the climate of denial and cover up. For the remainder, it has been due to fear of the consequences of civil litigation, and in particular the possibility that an offer of assistance might be regarded as an admission of liability.

11.137 The limitations upon the availability of benefits or services for the victims of abuse are noted later in this Report.¹⁹⁶ In summary, without any particular scheme for counselling or support provided by an individual Church, a victim who needs counselling, medical assistance or other support is confined to:

- access to the limited services available in the community for much of which bulk billing or financial recoupment is unavailable;
- a claim for compensation under the scheme for criminal compensation;
- an action for civil damages which in the light of the limited legal aid available, may be an unacceptably expensive option; or
- an *ex gratia* payment without admission of any liability.

11.138 The Commission has been informed that in some cases assistance was offered only on condition of the victim waiving any claim to damages.

11.139 Some of the problems which arise in this respect were illustrated by AC2 (Case Study 1 above) who faced very great difficulty in procuring counselling through the Anglican Counselling Centre. When the circumstances in this case were brought to the notice of Archbishop Goodhew, he acknowledged that it had been poorly dealt with.¹⁹⁷

¹⁹⁵ *ibid*, p. 36.

¹⁹⁶ See Volume V, Chapter 17 of this Report.

¹⁹⁷ R. H. Goodhew, RCT, 7/5/96, pp. 24795-97.

AVAILABLE SERVICES

11.140 On paper some of the Churches have a program for assistance which, if properly funded and committed to the objective of caring for the victim, could fill the gap mentioned. They may be briefly mentioned:

- **The Catholic Church**

- the Pastoral Response office is tasked, *inter alia*, with providing therapeutic counselling and crisis care generally, although not specifically for the victims of child sexual assault;
- Centacare Catholic Community Services - the Catholic family welfare agency, which deals with all matters concerning child and family welfare, has a capacity to provide professional counselling facilities, but, at least in the past, seems to have lacked any specific program or focus applicable to this area;
- 'Towards Healing'¹⁹⁸ acknowledges the need to 'enter into dialogue with victims concerning their needs and ensure that they are given such assistance as is demanded by justice and compassion', wherever it is established 'either by admission or by proof, that sexual abuse did in fact take place'. This is to be achieved through the services of the Facilitator.¹⁹⁹ The document is, however, silent as to the means by which the needs of the victim are to be met, or the extent of the assistance provided;

- **The Anglican Church**

- in the protocol developed by the Standing Committee of Synod²⁰⁰ it recommends that Synod should 'consider making funds available to enable payment, in appropriate circumstances, of certain (undefined) 'crisis' costs in dealing with misconduct' - such costs may include the costs of counselling for a person aggrieved. The legal ramifications were foreshadowed in the caution 'consideration must also be given to how such payments can be made without prejudicing the Church's legal position';
- Care Force, the Welfare division of the Anglican Home Mission Society, should be well placed to provide assistance of this kind.²⁰¹

- **The Presbyterian Church**

- in the protocol document 'Breaking the Silence',²⁰² the Minister or Person in Authority is to liaise with DCS concerning referral of a victim to counselling at a Sexual Assault Unit. The impression given by this provision is that any such assistance is to be provided at community expense rather than by the Church.

11.141 It is beyond the role of the Commission, in this area, to do any more than to identify the circumstance that, without prompt and genuine assistance for the victims of child sexual abuse at the hands of ministers, priests and other members of the clergy, the Churches will have only addressed part of a very serious problem that has been of their own making.

¹⁹⁸ Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, National Committee for Professional Standards, *Towards Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse Against Personnel of the Catholic Church of Australia*, Hectorville, 1996, RCPS Exhibit 3051/23, paras. 14-17.

¹⁹⁹ *ibid*, para. 7.

²⁰⁰ Anglican Church Diocese of Sydney, Protocol for Dealing with Sexual Misconduct by Church Workers in the Anglican Church Diocese of Sydney, June 1996, RCPS Exhibit 3230.

²⁰¹ S. M. Foley, RCT, 7/5/96, p. 24819 and 8/5/96, p. 24875.

²⁰² Presbyterian Church in NSW Social Services, *Breaking the Silence: policies and procedures for protecting against and dealing with sexual abuse within the Church*, November 1995, RCPS Exhibit 1804, p. 6.

11.142 This needs to be taken into account in the way that they approach civil litigation brought by victims of abuse, and in the way that they respond to requests for counselling and assistance and to cases where, after investigation, they find it necessary to discipline one of their own. Their task is incomplete if they leave it to victims to find their own way back from abuse.

F. CONCLUSION

11.143 There can be little doubt that the Churches have owed and continue to owe a duty of care, ethical if not legal, to ensure that all appropriate steps are taken to reduce the risk of harm to children within their communities, using their schools, living in their homes, and otherwise falling within their sphere of responsibility. It is equally beyond question that expelling members from a congregation or order, quietly removing them from office, transferring them to other localities, ignoring or minimising the complaints of victims, placing moral pressure on victims to allow the matter to be dealt with comfortably for the Church or the member, denying victims the support and assistance they need, or placing unreasonable impediments in the way of any police investigation or civil claims for compensation, do not meet the requirements for that duty of care.

11.144 No Church can today responsibly exist without a protocol that suitably addresses, at least:

- a procedure for receiving and dealing with allegations of sexual abuse, whether raised by the victim, a third party or self confessed perpetrator, to ensure that matters involving criminality are referred to the police for investigation, and that the remainder are suitably investigated and resolved internally;
- the provision of support for and assistance of victims of such abuse at the hands of clergy and others holding official office within the Church, either as employees or volunteers;
- the provision of treatment, where assessed worthwhile and consented to by the offending member;
- the delivery of education and counselling concerning the risks of sexual abuse and the procedures/facilities earlier outlined, to all members of the Church, and particularly to those who are having difficulties with their own sexual urges, before they fall prey to them;
- the removal of those members for whom an unreasonable risk of harm to children is assessed to exist, from any positions placing them into contact with children and young people; and that
- independent and effective oversight and monitoring of the operation of the protocols, guidelines and programs developed in this area.

11.145 Their work in this area does not stop with the development of a protocol. Such a document is of no value unless carried into practical application, and applied bona fide.

11.146 As this chapter notes, there has been a dramatic change in the attitude of the Churches, and a shift of focus from damage control towards assumption of responsibility, in discouraging child sexual abuse and making its perpetrators accountable to justice.

11.147 The developments so far have been directed more towards the management of complaints, than towards rehabilitation and assistance of the victim or the development of preventative strategies. Within a broad compass, it is important that the Churches look towards the development of:

- education of those involved in the ministry and delivery of pastoral and allied services, as well as members of congregations, schools and the like who receive those services, in areas of responsibility, sexuality, sexual abuse, and child protection;

- screening (so far as practicable) of those received into the ministry or religious orders, or otherwise providing services bringing them into contact with children; and of
- work practices, which reduce the opportunity for offending, or provide greater security for children.

11.148 Beyond noting these matters, and encouraging the Churches to adopt procedures which promote reporting and facilitate police investigation of child sexual abuse, it is inappropriate for any formal recommendations to accompany this chapter.

11.149 The issues which arise concerning the notification of suspected or reported child sexual abuse, and the proposals for establishing a system under which a certificate may be issued stating that a particular person poses an unacceptable risk to be allowed to occupy any position involving the care or supervision of children, and for pre-appointment inquiry to the Children's Commission, are further considered later in this Report.²⁰³ The past record of serious sexual abuse of children by the clergy, youth workers and those associated with church schools, homes and other religious institutions is such that, notwithstanding the protocols outlined, they should be subject to the regime proposed in Volume V, Chapter 20; no relevant distinction in this regard exists between them and other members of the community having the care or supervision of children.

²⁰³ See Chapter 20 of this Volume.

CHAPTER 12

DEPARTMENT OF JUVENILE JUSTICE

12.1 The Department of Juvenile Justice (DJJ) has responsibility for the detention and supervision of juvenile offenders.²⁰⁴ Relevantly for the Royal Commission it has a role to:

... recognise and notify suspected child abuse and neglect and to ensure the protection of young people under its supervision from all forms of abuse or neglect.²⁰⁵

12.2 This is of some importance since the juveniles within its sphere of responsibility generally come from broken homes, are likely to have suffered abuse of some description,²⁰⁶ and often join a cycle of offending.

12.3 In these circumstances the DJJ must be in a position to recognise and address abuse and, through its close relationship with the Department of Community Services (DCS) and the justice system, to assist in the detection of offenders external to the department. Similarly it needs to be vigilant in the protection of those under its care from abuse occurring during detention, at the hands of its own staff.

12.4 Like the other departments and agencies reviewed, there have been problems, and some patchy performance, in the discharge of its responsibilities. However, some significant developments have occurred during the term of the Royal Commission which have the potential for the DJJ to make a more effective contribution in relation to the children and adolescents within its care.

A. THE DEPARTMENT OF JUVENILE JUSTICE

12.5 The DJJ is a relatively new department having been established on 1 November 1991 as the Office of Juvenile Justice.²⁰⁷ Its residential and community-based responsibilities were transferred from the DCS in July 1991 to the Attorney General's Department and then to Corrective Services.²⁰⁸ It was established as a separate department on 10 September 1993,²⁰⁹ and currently reports to the Minister for Community Services, Aged Services and Disability Services.²¹⁰

12.6 As at March 1997 the DJJ was operating nine full-time detention centres,²¹¹ supplying field services for juveniles and catering for approximately 430 juveniles daily.²¹²

12.7 The creation of the Office of Juvenile Justice in 1991 was declared to be an initiative in recognition of:

... the fundamental differences that exist between welfare and justice issues and the administration of juvenile justice as opposed to adult justice.²¹³

²⁰⁴ *Children (Detention Centres) Act 1987*.

²⁰⁵ NSW Child Protection Council, *Interagency Guidelines for Child Protection Intervention*, 2nd edn, Sydney, 1997, RCPS Exhibit 3204, p. 17.

²⁰⁶ Department of Juvenile Justice, *Corporate Plan: Juvenile Justice Towards 2001*, 1996, RCPS Exhibit 5951, p. 6.

²⁰⁷ Pursuant to Schedule 2 of the *Public Sector Management Act 1988*; Office of Juvenile Justice, *Annual Report 1991/92*, p. 2.

²⁰⁸ K. J. Buttrum, RCT, 28/5/96, pp. 26049-50.

²⁰⁹ Pursuant to Schedule 1 of the *Public Sector Management Act 1988*; DJJ, *Breaking the Crime Cycle: New Directions: Annual Report 1993/94*, p. 4.

²¹⁰ Ministerial responsibility for the DJJ has resided with The Honourable Ron Dyer, MLC since 2/3/95.

²¹¹ The detention centres are Mt Penang at Kariang; Cobham at St Marys; Worimi at Broadmeadow; Riverina at Wagga Wagga; Keelong at Unanderra; Minda at Lidcombe; Yasmar at Haberfield; Reiby at Campbelltown; Kariang at Kariang; and Broken Hill at Broken Hill on a part-time basis; see K. J. Buttrum, RCT, 3/3/97, p. 36527.

²¹² K. J. Buttrum, RCT, 3/3/97, p. 36526.

²¹³ DJJ, *Focusing on Effective Intervention: Annual Report, 1994/95*, p. 6.

12.8 The Juvenile Justice Advisory Council was established as an independent body, on 18 September 1991 to provide advice to the Government on juvenile justice policy. It has presented two papers to the Government concerning the directions that juvenile justice should be taking.²¹⁴ The Royal Commission does not suggest any change in this regard. It is appropriate for the Government to continue to receive assistance from a specialist Advisory Council in this area.

12.9 The juvenile justice system has been the focus of several reviews over the past 10 years.²¹⁵ One of the repeated criticisms of that system has been a lack of co-ordination between the various departments involved.²¹⁶

12.10 The current Director-General of the DJJ, Mr Kenneth Buttrum, was appointed in late 1995.²¹⁷ He was frank and informative in his evidence to the Commission, and provided a valuable insight into the system for handling child sexual assault and protection issues, and in particular into the response to accusations of sexual abuse against staff of the agencies and departments involved.

B. THE OPERATIONS OF THE DEPARTMENT OF JUVENILE JUSTICE

STATED OBJECTIVES AND ROLE

12.11 The operations of the DJJ are governed by its legislative obligations under three principal Acts:

- the *Children (Detention Centres) Act 1987*;
- the *Children (Community Service Order) Act 1987*; and
- the *Children (Criminal Proceedings) Act 1987*.

12.12 Its principal roles, as described by Mr Buttrum are the:

- provision of pre-sentence advice to the courts;
- supervision of juvenile offenders placed under supervision orders by the court;
- supervision of offenders placed on Community Service Orders to ensure completion of the order;
- return of offenders to court or detention if they breach their orders; and the
- accommodation of offenders committed to detention.²¹⁸

12.13 The published objectives of the Department of Juvenile Justice are:

- To provide quality advice to courts sentencing juvenile offenders and through effective supervision and support, to assist juvenile offenders to comply with court orders and minimise reoffending ...
- To provide secure, supportive juvenile justice centre environments which respect the rights of juvenile offenders and which encourage positive behaviours to minimise reoffending ...

²¹⁴ The Juvenile Justice Advisory Council presented its Green Paper on Future Directions in Juvenile Justice to the Minister for Justice in February 1993. Its White Paper was prepared from discussions and submissions on the Green Paper and submitted to government in 1994. See NSW Office of Juvenile Justice, *Annual Report 1992/93*, p. 3; and DJJ, *Focusing on Effective Intervention: Annual Report, 1994/95*, p. 30.

²¹⁵ Reviews have been conducted by the Youth Justice Coalition (1990), the NSW Legislative Council Standing Committee on Social Issues (1992), Juvenile Justice Advisory Council (1993 & 1994). See NSW Attorney General's Department, *Report of the New South Wales Working Party on Family Group Conferencing and The Juvenile Justice System*, Discussion Paper, September 1996, p. 3.

²¹⁶ NSW Attorney General's Department, *Report of the New South Wales Working Party on Family Group Conferencing and the Juvenile Justice System*, Discussion Paper, September 1996, p. 4.

²¹⁷ K. J. Buttrum, RCT, 28/5/96, p. 26047.

- To co-operate with government and community agencies in delivering effective services to juvenile offenders and young people at risk of offending ...
- To strategically plan and effectively manage the department's resources to produce quality results through a working environment which is safe, equitable and focussed on achievement and best practice.²¹⁹

Under the legislation the 'welfare and interests' of juveniles under control or on remand are to be 'given paramount consideration'.²²⁰

CARER OR KEEPER ?

12.14 Despite the statutory emphasis on the welfare of juveniles for whom it is responsible, Mr Buttrum acknowledged that there has been a 'keeper/kept' mentality within some quarters of the department.²²¹

12.15 This attitude can only serve to undermine the developmental objective of the DJJ and any attempt it makes to address child protection issues.

12.16 Mr Buttrum said that in his experience many children who end up on the street or enter DJJ detention, are trying to escape problems of neglect and abuse at home. Without other avenues for care and support, many juveniles in this situation 'replace' their family with other juveniles and/or come into contact with adults who may manipulate them into sexual relationships through the provision of basic needs such as accommodation, food, and clothing.²²²

12.17 This dilemma emphasises the need for the DJJ to adopt more than a custodial role and to:

- educate juveniles in its care about protective behaviours; and to
- devise a protective plan for those juveniles who do not have families to which they can return.

JUVENILE JUSTICE SEX OFFENDER PROGRAM

12.18 The Juvenile Justice Sex Offender Program²²³ began in 1991/92 and was reviewed in 1993.²²⁴ The program was set up as an attempt to prevent young sex offenders pursuing paedophile activities as adults.²²⁵ It caters for juveniles who have assaulted other children or who have assaulted adults and is modified to meet the individual needs of each juvenile.²²⁶ As at June 1996 the program was catering for 110 males.²²⁷

12.19 As mentioned earlier in this Report²²⁸ many paedophiles begin to offend as adolescents which makes the existence and success of the Juvenile Justice Sex Offender Program vitally important.

²¹⁸ K. J. Buttrum, RCT, 28/5/96, p. 26050.

²¹⁹ DJJ, *Annual Report 1995/96*, p. 10; NSW Department of Juvenile Justice, *Focusing on Effective Intervention: Annual Report 1994/95*, p. 4. See also K. J. Buttrum, RCT, 28/5/96, p. 26050.

²²⁰ *Children (Detention Centres) Act 1987*, s. 4(2)(a).

²²¹ K. J. Buttrum, RCT, 29/5/96, p. 26110.

²²² K. J. Buttrum, RCT, 29/5/96, pp. 26107-08.

²²³ Originally called the Personal Development Unit. See specifically the evidence of S. Goodman, RCT, 9/7/96, pp. 28455-78. Between 1987 and 1995 the number of sexual offences by juveniles accounted for between 0.7% and 1.0% of offences before the Children's Court; see Letter from Department of Juvenile Justice, Table 1.2 Offences before the Children's Court in NSW (1987/88 to 1994/95), RCPS Exhibit 2248.

²²⁴ See S. Goodman, *The Role of Research in the Management of Adolescent Sexual Offenders within the NSW Department of Juvenile Justice*, RCPS Exhibit 3051/17, pp. 1-2.

²²⁵ Mr Buttrum said that although it is not always the case, children who have been abused often become offenders themselves. K. J. Buttrum, RCT, 28/5/96, p. 26099.

²²⁶ K. J. Buttrum, RCT, 29/5/96, pp. 26102-03.

²²⁷ Letter from NSW Department of Juvenile Justice to the Royal Commission, 3/6/96, RCPS Exhibit 2248, p. 1.

²²⁸ See Volume IV, Chapter 3 of this Report.

12.20 The Commission supports the program but is concerned that the DJJ is apparently the only department actively addressing the needs of child sex offenders²²⁹ with any form of organised program, and that its reach is limited to those who have been convicted of such offences.

12.21 There has been no comprehensive evaluation of the success of this program so far, and a number of problems have been identified with respect to its implementation. Juvenile offenders are not segregated from other residents and so pose a potential danger, particularly to those clients who have previously suffered abuse. This problem is exacerbated by the lack of adequate numbers of trained staff who can provide the level of supervision and security that these juvenile sex offenders require.²³⁰

12.22 There has been a tendency, even within the criminal justice system, to ignore or downplay the seriousness of juvenile sexual offending.²³¹ In addition, there is often a long delay between disclosure of the offence and the sentencing of the juvenile offender. The DJJ has no mandate to treat the offender during this period and there is a danger that the problems of denial and minimisation will become more entrenched the longer treatment is delayed.²³²

12.23 One of the more serious problems identified has been the absence of any provision for continuity of care once the offender has been released from the juvenile justice system. Although DJJ has paid for additional staffing in contracted agencies to assist the juveniles once they leave the detention centres there is a dearth of post-release programs available in the community.

12.24 This is a matter of some significance given the suggestion in the evidence,²³³ that many paedophiles become fixated at this stage of their lives. A possible opportunity for remedial intervention can be lost if either victim or abuser is lost in the system, and denied support or counselling at a critical stage of their lives.

REVISED PROTOCOLS

12.24 The DJJ recently revised its client protection policy and produced a document 'Provision of a Protective Abuse-Free Environment in the Department of Juvenile Justice'.²³⁴ Its protocols are in line with the CPC's Interagency Guidelines released in February 1997. The document was produced in consultation with DCS, DSE, Health and the Police Service.²³⁵

12.25 Significant changes include:

- an added emphasis on the responsibilities and duties of DJJ staff to protect juveniles from abuse;
- a greater emphasis on the prevention of abuse requiring staff to be more attentive to signs of abuse; and
- clearer notification procedures, especially in relation to different forms of abuse, recognising the different needs and action required.

²²⁹ C. K. Riley, RCT, 30/10/96, p. 33728.

²³⁰ S. Goodman, RCT, 9/7/96, pp. 28465-67; Confidential Submission to RCPS, 12/8/96, RCPS Exhibit 2529C/122.

²³¹ S. Goodman, RCT, 9/7/96, pp. 28461-62; Sydney Rape Crisis Centre, Submission to RCPS, 17/7/96, RCPS Exhibit 2529/132, p. 7; G. Green, Submission to RCPS, 30/7/96, RCPS Exhibit 2529/48, p. 8.

²³² DCS, ADD & DJJ, Joint submission to RCPS, August 1996, RCPS Exhibit 2540, p. 50.

²³³ A. Blaszczyński, RCT, 30/10/96, pp. 33694-95; K. V. Lanning, RCT, 5/9/96, pp. 31599-600.

²³⁴ This document establishes the DJJ's policy and procedures for the management of clients who are victims of abuse and/or neglect. It outlines staff responsibilities for reporting all forms of abuse and neglect, RCPS Exhibits 5951 & 3051/28.

²³⁵ K. J. Buttrum, RCT, 3/3/97, p. 36525.

12.26 Although not currently mandatory notifiers under Statute, DJJ staff are administratively required to notify DCS if they suspect a child is in danger of being abused.²³⁶ The requirement is to 'immediately report all allegations of abuse or neglect to their manager whose responsibility it is to notify [DCS]'.²³⁷ It would be desirable to elevate the reporting requirement to a statutory requirement.

12.27 Once a matter is reported to DCS it becomes its responsibility to refer the matter to the police if it is thought that a criminal offence has occurred. If there is immediate evidence of a criminal offence, the DJJ manager is required to report the matter directly to the police. The manager is also required to arrange independent legal advocacy for the child.²³⁸

PROGRAMS

12.28 Prior to 1991, when DJJ was established as a separate entity, specialist support services for young offenders exhibiting emotional problems, often resulting from sexual abuse, were provided by DCS via psychologists in detention centres and at Community Youth Centres.

12.29 The DJJ does not have any current program that deals specifically with the problems of young offenders who have suffered sexual abuse. However, it does offer a number of programs which deal generally with the problems of juvenile offenders, including those which are likely to arise from sexual abuse. They include:

- Intensive Program Units (IPUs) which provide intensive counselling and support to emotionally disturbed and vulnerable clients, and facilitate their entry into community-based therapy;
- Alcohol and Other Drugs Program;
- Psychological Services (Juvenile Justice Centres) Program;
- Young Women in Custody;
- Robinson Program, which provides specialist assessment and intervention for young boys with emotional and behavioural disturbance;
- Crisis Support Program, which provides immediate response to critical incidents involving residents of Juvenile Justice Centres.

A program designed to deal specifically with the problems arising from child sexual abuse would be a useful adjunct to these programs, in order to head off a cycle of next generation abuse, along with a protective behaviours program.

12.30 Specialist support programs including the Violent Offenders Program and Post Release Support Programs have been developed.²³⁹ The latter is designed in a way that would see DJJ contract with other agencies for specific services to assist adolescent offenders post release. This is again a welcome initiative but its implementation will need to be assessed. It is important that specialist support is also provided under this program for adolescent sex offenders of the kind contemplated by the COBAC program for adult offenders.²⁴⁰

²³⁶ CPC, *Interagency guidelines for Child Protection Intervention*, 2nd edn, Sydney, 1997, RCPS Exhibit 3204, p. 50.

²³⁷ *Ibid.*, p. 53.

²³⁸ DJJ, *Provision of a Protective Abuse-Free Environment in the Department of Juvenile Justice*, November 1996, RCPS Exhibits 5951 & 3051/28, pp. 6-7.

²³⁹ DCS, ADD & DJJ, Department of Juvenile Justice Specialist Programs, Appendix J in Joint submission to RCPS, August 1996, RCPS Exhibit 2540, at Doc. 2390877-81.

²⁴⁰ See Chapter 19 of this Volume.

C. RELATIONSHIP WITH OTHER DEPARTMENTS

12.31 Mr Buttrum acknowledged that:

- the lack of interdepartmental liaison has in the past protected paedophiles and put children at risk;²⁴¹ and that
- the proceedings of the Commission had raised an awareness of the need to adopt an interdepartmental approach.²⁴²

12.32 He identified the existence of separate budgets and the tendency to 'turf protection' as the most significant barriers to interagency co-operation.²⁴³ It was his suggestion that each Director-General's performance agreement should include the achievement of interagency co-operation as a matter for review.²⁴⁴

12.33 He explained that national competencies for staff in relation to child protection issues had only been established in May 1996, and that departments were only just realising their responsibility to train staff in this area.²⁴⁵ Mr Buttrum added:

I look back in horror to be quite truthful that we haven't done these things, particularly in Juvenile Justice. For instance we have been working with Health to provide protective behaviour group work with young women ... after last week's course, four young women disclosed sexual abuse.²⁴⁶

NSW POLICE SERVICE

12.34 It appears that there has been little in the way of liaison between the DJJ and the Police Service.

12.35 Inspector John Heslop gave evidence, in May 1996, that he was not aware of any lines of communication having been opened between police and the DJJ at the time of the DJJ's establishment.²⁴⁷ Such communication had in fact begun only 'over the last six or seven weeks'. This occurred in the context of establishing a protocol between the DJJ and the newly formed CPEA, particularly in relation to any allegations of abuse against employees of the department.²⁴⁸

12.36 Mr Buttrum confirmed that he had participated in discussions with the CPEA in relation to:

- establishing a quick response by police to any notification; and
- establishing ways of sharing information.²⁴⁹

²⁴¹ K. J. Buttrum, RCT, 29/5/96, pp. 26112-13 & 26131-32.

²⁴² K. J. Buttrum, RCT, 29/5/96, p. 26131.

²⁴³ K. J. Buttrum, RCT, 29/5/96, p. 26137.

²⁴⁴ K. J. Buttrum, RCT, 29/5/96, p. 26137.

²⁴⁵ K. J. Buttrum, RCT, 29/5/96, p. 26130.

²⁴⁶ K. J. Buttrum, RCT, 29/5/96, pp. 26130-31.

²⁴⁷ J. R. Heslop, RCT, 28/5/96, pp. 26004-05.

²⁴⁸ J. R. Heslop, RCT, 28/5/96, p. 26005.

²⁴⁹ K. J. Buttrum, RCT, 29/5/96, p. 26112.

DCS

12.37 Many juvenile detainees and offenders are, or have been State wards, and most have major welfare issues. In those circumstances, it might have been expected that a close working relationship between the DJJ and the DCS would have been established. It seems, however, that it was not.

Welfare Drift

12.38 Mr Buttrum indicated a need for interaction between DCS and DJJ on a proactive basis, as opposed to the more customary reactive basis. This was particularly important in relation to the problem of 'welfare drift' - the experience of State wards who run into trouble (often for minor matters) and end up in a DJJ detention centre, simply because there is no other place for them.²⁵⁰ Both Mr Semple²⁵¹ and Mr Buttrum agreed that in the past there had been a lack of follow up or true assistance for 'street kids'.

12.39 No community with any real concern for the safety and well-being of its children can tolerate a system under which there is an inevitable, or even substantial, drift of State wards to juvenile detention, with its increased risk of progression to adult imprisonment. Mr Buttrum explained the dangers thus:

When you put a whole lot of kids that I'd regard at drift, at emotional drift, and focus on crime together in detention centres, what you do is you reinforce the criminal behaviour, because that's the thing that the kids have in common - that's what they sit and talk about. Often times they talk about that rather than the other hurtful things.²⁵²

12.40 Another significant factor contributing to the high rate of State wards within the DJJ system, was the propensity of those working with children in residential care to use police to deal with behavioural problems.²⁵³ This is the easy way out, but it does not help the children or the community, in the long term.

12.41 The DJJ has contracts with homes, and other services, to which they can refer children at the completion of detention.²⁵⁴ There are two main types of refuges of this kind:

- those set up and licensed by DCS under the SAAP;²⁵⁵ and
- private refuges run by charitable organisations, licensed by DCS under the Children (Care and Protection) Act if taking children under 16 years of age.²⁵⁶

12.42 Most refuges are only adequate for short-term placements or emergency accommodation yet many children require longer term placement,²⁵⁷ which has been seriously lacking. Moreover, as previously mentioned, some of the licensed refuges turn away children who have prior records, particularly a history of sexual offences. The experience of so many juveniles returning to the streets, either because of lack of accommodation or refusal of refuges to accommodate them, is unacceptable. The repercussions are predictable.

²⁵⁰ K. J. Buttrum, RCT, 3/3/97, p. 36528.

²⁵¹ D. L. Semple, RCT, 28/5/96, pp. 26062-63.

²⁵² K. J. Buttrum, RCT, 3/3/97, p. 36531.

²⁵³ The Youth Justice Coalition, Submission to the RCPS, July 1996, RCPS Exhibit 2529/26.

²⁵⁴ K. J. Buttrum, RCT, 29/5/96, p. 26122.

²⁵⁵ The Supported Accommodation Assistance Program is a joint State/Commonwealth funded program.

²⁵⁶ K. J. Buttrum, RCT, 28/5/96, pp. 26051-52.

²⁵⁷ K. J. Buttrum, RCT, 3/3/97, p. 36529.

12.43 The evidence received in this area points to the desirability of closer liaison between DJJ, DCS and Housing for the effective post-release supervision of juvenile offenders. As previously mentioned the newly developed Post Release Support Program provides a basis for this kind of intervention. Additionally it would be appropriate for this program to provide specific monitoring and support along COBAC lines²⁵⁸ for juvenile sex offenders post release.

Placements of State Wards

12.44 In the course of the Commission inquiries, it became apparent that the system for assessment and placement of State wards has been less than perfect. Mr Buttrum informed it that:

- DCS staff taking notifications are placed under great pressure to make quick decisions²⁵⁹ and in many cases only a cursory examination of the child's family circumstances occurs; and
- sometimes an abused child has been handed on to an unsuitable support person which has only compounded the abuse.²⁶⁰

12.45 It is clear that of all the children at risk, State wards are the most vulnerable. They have often been brutalised, they lack trust in authority, and they have no-one to speak for them. It is critical that care is taken to ensure that such a child is not placed into the hands of someone who will take advantage of them or abuse them,²⁶¹ and for that reason careful assessment is required before the court is advised that a placement is appropriate.

SCHOOL EDUCATION

12.46 Detainees under the age of 15 are required to attend school. The Department of School Education operates schools in all juvenile justice centres.²⁶² As with teachers in the main stream schooling system, those teaching in DJJ facilities should have equivalent training and responsibilities to recognise, report and deal with child sexual abuse.

CORRECTIVE SERVICES

12.47 As mentioned later²⁶³ the record of the Department of Corrective Services in providing treatment programs for sex offenders has been patchy. Hopefully that can be overcome by implementation of the CUBIT and COBAC programs. Research and monitoring the effectiveness of these programs is essential.

Additionally there is a need for an extension of that work to monitor the effectiveness of the Juvenile Sex Offender Program and the incidence of recidivism.²⁶⁴ Whether organised as part of COBAC, or as a separate program, it is important that there be a significant effort to develop best practice for post-release support and monitoring of juvenile sex offenders.

²⁵⁸ See Chapter 19 of this Volume.

²⁵⁹ K. J. Buttrum, RCT, 29/5/96, p. 26129.

²⁶⁰ K. J. Buttrum, RCT, 3/3/97, p. 36533.

²⁶¹ K. J. Buttrum, RCT, 3/3/97, p. 36538.

²⁶² DJJ, *Focusing on Effective Intervention: Annual Report*, 1994/95, p. 7.

²⁶³ See Chapter 19 of this Volume.

²⁶⁴ A. Blaszczyński, RCT, 30/10/96, p. 33722.

D. SCREENING AND DISCIPLINE OF EMPLOYEES

SCREENING

12.48 The Community Services Commission Review of Employment Procedures found that it was not uncommon for staff to be appointed without screening. Although the DJJ's practice has been to check all applicants from outside the public service who will have direct contact with children, there was no documented policy to that effect. According to the Review, the practice as at September 1996 allowed people with criminal records to be employed in administrative positions within the DJJ where they may have access to personal records of children.²⁶⁵

12.49 Mr Buttrum informed the Commission that the DJJ policy was to make a criminal records check, but did not require applicants to respond to questions about their criminal antecedents. The current procedures ran into a problem through the inability to access interstate convictions, or to check aliases.²⁶⁶ This is a concern shared by other departments.²⁶⁷ The Community Services Commission (CSC) review similarly concluded that the criminal records check procedure was of limited use,²⁶⁸ and expressed concern that an individual could be employed in a 'non-sensitive' position, but later transferred into a position with direct contact with children, without having been screened.

12.50 By reason of these concerns the Commission sees merit in the careful screening of all DJJ employees prior to employment and subjecting them to the system outlined in Chapter 20 in relation to the Children's Commission, concerning both pre-employment screening and the issue of unacceptable risk certificates.

COMPLAINTS

12.51 If an allegation of assault is made against a staff member, a preliminary internal assessment is made. If appropriate, the matter is referred to the police, DCS is informed and the staff member is suspended on pay until a full investigation is carried out.²⁶⁹ Where there is evidence of criminality it is standard practice for the incident to be reported to the police.²⁷⁰

12.52 Mr Buttrum informed the Commission that it can be very difficult for DJJ staff to believe that a co-worker is responsible for abusing a child.²⁷¹ Indeed he had experienced a reaction of disbelief, in relation to a current serious matter when it was notified to him. That matter is now subject to CPEA investigation, and it is one where the Commission gathered some evidence.²⁷² Mr Buttrum accepted that some department managers would simply not want to know about allegations against their staff.²⁷³ However, as managers are responsible, under the new interagency guidelines, for receiving complaints from DJJ employees and passing those complaints to DCS or the Police, this reluctance must be addressed.

²⁶⁵ Community Services Commission, *Who Cares? Protecting People in Residential Care*, September 1996, RCPS Exhibit 3194, p. 58.

²⁶⁶ K. J. Buttrum, RCT, 29/5/96, p. 26134.

²⁶⁷ See Volume IV, Chapters 8, 9, & 10 of this Report.

²⁶⁸ Community Services Commission, *Who Cares? Protecting People in Residential Care*, September 1996, RCPS Exhibit 3194, p. 14.

²⁶⁹ K. J. Buttrum, RCT, 3/3/97, pp. 36534 & 36552.

²⁷⁰ K. J. Buttrum, RCT, 29/5/96, p. 26117.

²⁷¹ K. J. Buttrum, RCT, 3/3/97, p. 36540.

²⁷² K. J. Buttrum, RCT, 3/3/97, pp. 36541-42.

²⁷³ K. J. Buttrum, RCT, 3/3/97, p. 36551.

12.53 The problem in this area is accentuated by the circumstances that:

- it is often assumed, by reference to the dysfunctional background of the child who makes the allegation, that the complaint is unreliable or vindictive;
- the child in question is being detained against his will, and cannot extract himself or herself from the environment, and, as a result, may be very fearful of disbelief or retribution from authority;
- other children, in a similar position to the complainant, may be very reluctant to provide corroboration; and that
- children in these situations have a reluctance to speak about sexual abuse to police, with whom they often have an antagonistic relationship.²⁷⁴

12.54 Of some concern is the appropriateness of the 'preliminary assessment'. It would appear that often, in the absence of any corroboration, a denial from the alleged offender brings an end to the complaint.

12.55 The Youth Justice Coalition submission proposed a scheme under which Official Visitors might become an alternative avenue of complaint for juveniles in detention, and assume an advocacy role, in order to help overcome any resistance in reporting abuse to an officer who is a co-worker of the subject of the complaint.²⁷⁵

12.56 There is no reason why they should not perform this role, as part of their duties, but the Commission does not see any advantage in formalising such an arrangement.

12.57 Mr Buttrum recognised that there was a good argument for the establishment of a separate entity to receive complaints about professional misconduct, including sexual assault, by staff.²⁷⁶ He said that it would be a better system if children could make complaints to a body other than the body who is looking after them.²⁷⁷ He suggested there was room for powers similar to that of the HCCC to be extended to the Community Services Commission.²⁷⁸

12.58 There is obvious merit in investigative independence. The Commission considers that the complaint investigation mechanism proposed in relation to DCS staff should be extended to DJJ staff.²⁷⁹

12.59 Mr Buttrum advised that some DJJ officers had been prosecuted in the past, but that where this has occurred the DJJ had not always been formally notified of the outcome.²⁸⁰ This situation emphasises the need for close interagency co-operation and information sharing, as an acquittal may not establish innocence, foreclose disciplinary action, or preclude transfer to other duties if an unacceptable risk is perceived to exist.

12.60 Mr Buttrum informed the Commission of his department's legal dilemma in sharing information,²⁸¹ and of a recent personal experience of this kind which may lead to litigation.²⁸² He would like a clearly stated legislative basis and protection for the disclosure of information concerning an employee or carer, with other carers of children.²⁸³

²⁷⁴ K. J. Buttrum, RCT, 29/5/96, pp. 26111-12.

²⁷⁵ The Youth Justice Coalition, Submission to the RCPS, July 1996, RCPS Exhibit 2529/26.

²⁷⁶ K. J. Buttrum, RCT, 3/3/97, p. 36555.

²⁷⁷ K. J. Buttrum, RCT, 3/3/97, p. 36554.

²⁷⁸ K. J. Buttrum, RCT, 3/3/97, p. 36577.

²⁷⁹ See Volume IV, Chapter 8 of this Report.

²⁸⁰ K. J. Buttrum, RCT, 29/5/96, p. 26117.

²⁸¹ K. J. Buttrum, RCT, 29/5/96, p. 26126.

²⁸² K. J. Buttrum, RCT, 29/5/96, pp. 26123-27.

²⁸³ K. J. Buttrum, RCT, 29/5/96, p. 26127.

12.61 Any residual concern in relation to defamation, or the protection of privacy interests, could be covered by legislation of the kind later proposed in this Report.²⁸⁴

DISCIPLINARY PROCEEDINGS

12.61 As Director-General, Mr Buttrum has the power under the Public Sector Management Act²⁸⁵ to commence disciplinary proceedings against an employee, and can institute punishment if there is adequate evidence based on a balance of probabilities test.²⁸⁶ Disciplinary proceedings may also be instituted where a complainant does not want the matter dealt with criminally.²⁸⁷ Employees have a right of appeal to GREAT under the Act.²⁸⁸

12.62 Another problem under the current system, shared with DCS, is that under Public Sector Management Regulations, if an officer is found not guilty of a disciplinary charge, the alleged breach is not recorded in any official record and all information concerning the matter must be removed from official files and destroyed. Again the proposals developed in relation to DCS staff would overcome this problem.²⁸⁹

E. THE FUTURE

12.63 The DJJ has been working on several initiatives including:

- the introduction of a complaints procedure to ensure consistent management;²⁹⁰
- the development of protocols in conjunction with the CPEA;²⁹¹
- the development of an induction package for staff to ensure that they understand their legislative requirements and responsibilities;²⁹²
- a revision of its code of conduct of service;²⁹³ and
- the introduction of a new management approach which would promote an educational and developmental role in place of a narrow custodial role.²⁹⁴

12.64 The DJJ has also produced a Corporate Plan for the period 1996 to 2001. It outlines planned initiatives and expected outcomes of relevance to child protection including:

- the introduction of a 'consistent case management system';
- the implementation of a 'client protection policy';
- the implementation of a 'consistent complaints management system';
- the development of more specialist services for young sex offenders;
- the development of a 'mentor scheme' to increase and improve client support;

²⁸⁴ See Chapter 20 of this Volume.

²⁸⁵ See Part 5 of the *Public Sector Management Act 1988* for procedures relating to breaches of discipline.

²⁸⁶ K. J. Buttrum, RCT, 29/5/96, p. 26117.

²⁸⁷ K. J. Buttrum, RCT, 29/5/96, p. 26118.

²⁸⁸ K. J. Buttrum, RCT, 29/5/96, p. 26120; see *Public Sector Management Act 1988*, s. 75.

²⁸⁹ See Volume IV, Chapter 8 of this Report.

²⁹⁰ K. J. Buttrum, RCT, 28/5/96, p. 26135.

²⁹¹ K. J. Buttrum, RCT, 28/5/96, p. 26135.

²⁹² K. J. Buttrum, RCT, 28/5/96, p. 26136.

²⁹³ K. J. Buttrum, RCT, 28/5/96, p. 26136.

²⁹⁴ K. J. Buttrum, RCT, 3/3/97, pp. 36535-36.

- the introduction of new recruiting methods including probity checks;
- the implementation of consistent staff induction and training procedures; and
- the introduction of competency based training.²⁹⁵

12.65 These are welcome initiatives, however, as has been observed elsewhere, more than the development of a new Corporate Plan is required. It is necessary that it be put into practice and that close co-operation with DCS and the other relevant agencies, pursuant to the interagency guidelines, be achieved. Continuing education of DJJ staff, preferably in a multi-disciplinary environment, in relation to child protection and sexual abuse issues, would assist in this regard.

RECOMMENDATIONS

The Commission recommends the following:

- ◆ Extension of the Juvenile Justice Sex Offenders Program to provide post-release support and monitoring of juvenile offenders (paras. 12.30 & 12.43).
- ◆ Establishment of close interagency co-operation to provide for more effective support and housing of juvenile offenders as part of the Post Release Support Program, to discourage welfare drift and resort to prostitution (paras. 12.30 & 12.43).
- ◆ Inclusion of Department of Juvenile Justice staff, and of teachers working in Department of Juvenile Justice facilities, as mandatory notifiers under the *Children (Care and Protection) Act 1987* (para. 12.26).
- ◆ Application of the various procedures outlined in Volume IV, Chapter 8 and Volume V, Chapter 20 respectively of this Report, concerning complaints management and disciplinary proceedings, to all Department of Juvenile Justice employees (para. 12.57).
- ◆ The development of appropriate screening procedures for all DJJ employees (para. 12.50).
- ◆ Application of the system outlined in Volume V, Chapter 20, to Department of Juvenile Justice employees, concerning pre-employment notification to the Children's Commission, and concerning the issue of unacceptable risk certificates (para. 12.50).
- ◆ Repeal of so much of the Regulations under the *Public Sector Management Act 1988* as requires the removal and destruction of information concerning allegations of child sexual assault made against Department of Juvenile Justice staff, in the event of dismissal of any disciplinary charge (para. 12.62).
- ◆ Introduction of continuing education of DJJ staff in child protection issues, in conjunction with other agencies on a multi-disciplinary basis (para. 12.65).
- ◆ Introduction of counselling and treatment programs for juvenile offenders who have themselves been the subject of sexual abuse (para. 12.29).
- ◆ Extension of statutory immunity from liability in relation to information provided bona fide by DJJ staff, to relevant authorities concerning those suspected of child sexual abuse (para. 12.60).

²⁹⁵ DJJ, *Corporate Plan: Juvenile Justice Towards 2001*, 1996, pp. 10-11.

CHAPTER 13

DEPARTMENT OF SPORT AND RECREATION AND OTHER COMMUNITY GROUPS AND CARERS

13.1 Previous chapters have dealt with those departments and agencies with primary legislative child protection responsibilities. In each case similar problems have been uncovered in relation to the lack of recognition, notification and investigation of child abuse, and the screening of employees.

13.2 This chapter is directed towards one other government department, and some non-government organisations which, although not legislatively responsible for the welfare or health of children, conduct activities placing their employees or members in close contact with children.

13.3 Given the extent of the past ignorance and inactivity of those departments and agencies with direct legislative responsibility for children, there is no reason to assume that these additional bodies are any more aware of, or organised in their approach to dealing with, child sexual abuse.

A. THE DEPARTMENT OF SPORT AND RECREATION (DSR)

THE OPERATIONS OF THE DEPARTMENT OF SPORT AND RECREATION

13.4 The DSR was first established as a Department in its own right in 1976, its functions having been performed previously by the Department of Education, the Chief Secretary's Department, the Department of Culture, Sport and Recreation and by the National Fitness Council of NSW.²⁹⁶

13.5 Over the past 20 years it has had various incarnations, and has at times been responsible for tourism²⁹⁷ and racing and gaming.²⁹⁸ The last restructure occurred in April 1995 when its responsibilities for racing and gaming were transferred to the newly formed Department of Racing and Gaming.²⁹⁹ The focus of DSR is:

The promotion and development of facilities, programs and services that encourage safe participation and excellence in sport and recreation.³⁰⁰

13.6 Not all DSR operations are directed exclusively at children. The Department provides programs for women, Aboriginal people, the elderly, the disabled and those from non-English-speaking backgrounds.³⁰¹

²⁹⁶ Department of Sport and Recreation (DSR), *Annual Report 1985-1986*, pp. 6-7.

²⁹⁷ The Department of Leisure, Sport & Tourism was created in 1982, before reverting back to Sport and Recreation in 1985 with the creation of the Tourism Commission of NSW. See DSR, *Annual Report 1985-1986*, p. 7.

²⁹⁸ The Department of Sport, Recreation and Racing was created in 1986. See DSR, *Annual Report 1995-1996*, p. 7.

²⁹⁹ DSR, *Annual Report 1995-1996*, p. 7.

³⁰⁰ *ibid.*

³⁰¹ *ibid.*, p. 6.

13.7 It has a system of funding to which sporting and recreational bodies and councils can apply to upgrade or install facilities. Those who have received funds from the DSR include:

- scouting groups;
- schools;
- local sporting groups across all sports;
- parents and citizens associations;
- surf life saving clubs;
- local improvement and progress groups;
- pony clubs;
- disabled and handicapped centres;
- youth centres; and
- Lions Clubs.

13.8 There are approximately 360 full-time staff³⁰² employed by the DSR at its head office and in 10 regional offices. Many of these staff are involved in purely administrative positions and do not have direct contact with children. In fact by far the greater involvement with children is by the volunteers or part time officials who belong to the various clubs and groups mentioned in the preceding paragraph and those employed to conduct specific DSR programs and/or residential facilities.

13.9 Although the DSR does not have a formal role in the welfare or custody of children, or any investigative responsibilities, it is important that:

- its employees be vigilant in the recognition and notification of child abuse;
- it be diligent in screening its potential employees and disciplining those against whom well founded allegations of abuse are made; and that
- it develop guidelines for the organisations funded by it, and participate in a system whereby its employees, and those working for funded organisations (including volunteers and casual staff), can be effectively screened, monitored and removed from office, if found to be involved in the sexual abuse of children.

13.10 The need for a comprehensive system of this kind arises from the fact that employees or volunteers within the umbrella of agencies or groups funded by the DSR come into contact with more children than any other department outside the Department of School Education (DSE). For example:

- in the last 25 years, 1.7 million children have been taught to swim by DSR casual staff under the Swimsafe Program;³⁰³
- DSR operates 12 residential Sport and Recreation Centres, including the newly created NSW Academy of Sport and Winter Academy of Sport,³⁰⁴ for which the overall occupancy rate in 1995/96 represented 76,000 participant days³⁰⁵ in residential programs;³⁰⁶ and

³⁰² In 1995/96 this figure totalled 367 staff, 348 full-time staff and 19 other full-time equivalent part-time staff. *ibid*, p. 111.

³⁰³ *ibid*, p. 16.

³⁰⁴ *ibid*, p. 13.

³⁰⁵ This is the measure used by DSR for analysing participant levels. The figure records the number of participant 'days' rather than the actual number of participants.

³⁰⁶ DSR, *Annual Report 1995-1996*, p. 13.

- the vast majority of children resident in NSW have contact at some time with one or other of the sporting or recreational groups which receive funds from the DSR.

13.11 The DSR is heavily reliant on volunteers. It estimates that 1.5 million volunteers contribute an average of 110 hours each per annum to its facilities and programs.³⁰⁷ A non-compulsory Volunteer Involvement Program is available for these helpers.³⁰⁸

13.12 Of the employees against whom child sexual assault allegations have been made, the majority were temporary employees whose offences are alleged to have occurred at residential camps.³⁰⁹ This emphasises the need for:

- systematic screening procedures for all staff attached to the DSR and funded agencies, not just permanent employees; and for
- training of all staff including volunteers and temporary employees in child protection and risk prevention issues.

RELATIONSHIP WITH OTHER AGENCIES

13.13 Somewhat surprisingly the DSR was not included in the past attempts to establish interagency co-operation and standard guidelines.³¹⁰ Prudently, it has been included in the latest Interagency Guidelines. Under those Guidelines, it has a responsibility to:

... ensure all staff whether paid, voluntary, permanent or casual, are aware of the indicators of child abuse and neglect, their obligations to notify suspected child abuse and neglect, and procedures for notification.³¹¹

13.14 Pursuant to the notification procedures:

- staff members are to report suspected child abuse to the 'program director' or 'centre manager';
- the program director or centre manager is to notify DCS if he or she, on reasonable grounds, suspects that a child has been abused or is in danger of being abused;
- if a decision is made not to notify DCS, the staff member is to be informed that he or she may make a notification as a private citizen;
- if there are not reasonable grounds for a notification to DCS, the program director or centre manager is nevertheless to notify the child's school principal about the matter; and
- the program director or centre manager is required in every case to notify the Director, Operations Division.³¹²

13.15 The DSR developed a child abuse and child sexual assault policy document³¹³ in October 1995, which applies to all permanent and casual staff, and is consistent with these guidelines. Prior to this time it did not have any formal protocol.

³⁰⁷ *ibid.*, p. 17.

³⁰⁸ *ibid.*, p. 17.

³⁰⁹ DSR, Statement of Information, 16/7/97, Annexure 5, RCPS Exhibit 3171.

³¹⁰ The DSR had no formal responsibilities under the Child Protection Council's 1991 interagency guidelines and was subsequently not one of the departments reviewed by Quinn in the 1994 review of the interagency guidelines which found that not only were the interagency guidelines not used, but very many staff did not know of their existence. See C. Quinn, Training and consultancy, review of interagency guidelines in child protection, Project Report, 28/9/94, RCPS Exhibit 2131.

³¹¹ Child Protection Council (CPC), *Interagency Guidelines for Child Protection Intervention*, 2nd edn, Sydney, 1997, RCPS Exhibit 3204, p. 19.

³¹² *ibid.*, pp. 53-54.

³¹³ *ibid.*, p. 54.

13.16 The Minister for Sport and Recreation has issued a ministerial direction for mandatory notification by DSR staff, whether volunteers or paid employees.³¹⁴ This was an appropriate direction, but would benefit by translation into a legislative requirement, in accordance with the recommendation made later in this Report.³¹⁵

SCREENING OF EMPLOYEES

13.17 The DSR informed the Commission that as a matter of practice all employees undergo criminal record checks prior to employment.³¹⁶ Its recruitment and employment guidelines³¹⁷ do not, however, go so far, as they stipulate that criminal record checks 'should be obtained', and then only for those applicants for 'sensitive' positions.

13.18 A circular dated 6 February 1996 lists the following as positions that require records checks:

- all positions where there is contact with children;
- all positions in DSR centres and academies;
- casual regional and vacation swimming staff; and
- all positions involving the handling of money or financial transactions.³¹⁸

13.19 While this circular clearly identifies the areas of most concern, it would be desirable to amend the guidelines to make them applicable to all staff, including permanent, part-time and casual staff, in order to remove any uncertainty. It would also be desirable to provide for further screening, where an officer already holding an administrative position transfers into a more 'sensitive' position. Similarly it would be desirable for DSR to develop guidelines for screening capable of use by funded agencies.

13.20 The DSR informed the Commission that it had some difficulty in the past with criminal records checks as a result of the slow response by the Police Service to its inquiries.³¹⁹ It would be undesirable if, in such a situation, an appointment proceeded without the necessary check, a matter emphasising the need for significant interagency co-operation.

13.21 Another problem identified relates to the limits of that check, since:

- there is a five year limit on the criminal records searched;
- the criminal records of school leaver applicants are not checked; and
- juvenile offences (except indictable offences) are not disclosed.³²⁰

³¹⁴ DSR, Child Protection and Intervention, Policy Procedures For All Staff Employed Through Regional Offices, March 1997, Attachment 2, Statement of Information, 16/7/97, RCPS Exhibit 3171.

³¹⁵ See Chapter 18 of this Volume.

³¹⁶ DSR, Statement of Information, 16/7/97, RCPS Exhibit 3171.

³¹⁷ DSR, Guidelines and Procedures (Recruitment and Employment), Attachment 5, Statement of Information, 16/7/97, RCPS Exhibit 3171.

³¹⁸ DSR, Personnel Circular No. 96/5, 6/2/96, RCPS Exhibit 3171, at Doc. 2739385-86.

³¹⁹ DSR, Statement of Information, 16/7/97, RCPS Exhibit 3171, p. 3.

³²⁰ DSR, Guidelines and Procedures (Recruitment and Employment), Attachment 5, Statement of Information, 16/7/97, RCPS Exhibit 3171.

13.22 Given the knowledge that paedophile offenders:

- tend to begin offending during adolescence;
- are involved in behaviour which is compulsive and repeated; and that
- only a small number of offences are actually detected;

these restrictions risk rendering what is already a limited method of screening largely ineffective. For these reasons, the Commission considers that the procedures outlined in the final chapter of this Report³²¹ should be extended to all DSR employees, be they permanent, part-time, casual or voluntary, before appointment or engagement.

DISCIPLINE OF EMPLOYEES

13.23 The DSR disciplines its employees in accordance with the *Public Sector Management Act 1988*. It informed the Commission that when an allegation is referred to the DCS or to the Police Service, it is dealt with by those departments, but the results are not referred back to it.³²² However, unless it receives a clearance from the Police Service after such a notification, the employee against whom the allegations were made is not re-employed.³²³ The system outlined in the final chapter of this Report should overcome this problem.

B. OTHER COMMUNITY GROUPS AND CARERS

13.24 Within the community there are many organisations and activities which place individuals in positions of trust or influence in respect of children. These include:

- providers of residential care to wards of the State, homeless children and the like;
- the Scouting and Cub movement (and similar organisations such as Girl Guides and Brownies);
- sporting organisations, for example local cricket, soccer, football, netball and softball teams, and Little Athletics groups;
- surf life saving clubs and Little Nippers;
- babysitters and nannies, some provided through commercial agencies;
- music teachers, sporting coaches and similar instructors;
- bands and musical/theatrical groups;
- the operators of fairgrounds and travelling shows;
- school bus drivers;
- managers and staff working with sporting facilities, such as swimming pools and gymnasiums;
- operators and staff employed at cinemas and entertainment centres, including pinball parlours and video games outlets;
- independent child carers and youth workers; and
- day care centres.

³²¹ See Chapter 20 of this Volume.

³²² DSR, Statement of Information, 16/7/97, RCPS Exhibit 3171, p. 3.

³²³ DSR, Guidelines and Procedures (Recruitment and Employment), Attachment 5, Statement of Information, 16/7/97, RCPS Exhibit 3171.

Some are funded by DSR. Other are self-funded, often through public donations, or fund-raising activities.

13.25 Although the Commission has not conducted any specific investigations into these organisations or occupations, there are documented cases (that is, cases prosecuted to conviction) involving offenders associated with most of them. Moreover, the Commission received a number of individual complaints concerning persons who have been involved in these activities, which it has passed on to the Child Protection Enforcement Agency (CPEA) where appropriate.

RISK FACTORS

13.26 The importance of looking at these groups stems from an understanding of the nature and behaviour of child sexual abusers, which has been dealt with elsewhere.³²⁴ In brief:

- child sexual abusers are most likely to be known to the child and/or to hold a position of influence or authority in relation to them;
- offenders with a preference for children are attracted to activities in which children participate, and to positions which give them some control over children, particularly where opportunities exist for them to be with children while they are away from their homes;³²⁵
- their behaviour is compulsive, and they are capable of grooming and manipulating children in ways for which the latter are unguarded and unprepared, particularly where the opportunity of a 'legitimate cover' exists for their activities; and
- they are capable of providing pressure, both subtle and otherwise, through reward, team selection, threat, and otherwise to secure silence.

13.27 There is accordingly a need for parents and community organisations to be aware of:

- the indicators of abuse and of the risk factors that exist;
- the fact that many volunteers or others involved in the activities outlined have never been subject to any form of screening or vetting process; and that
- the organisations concerned may well respond very defensively to allegations of abuse, to protect their reputations.

13.28 The list of organisations and positions provided above is not meant to be exhaustive, nor is it meant to dissuade parents from involving children in activities or associations, which for the most part are perfectly safe and highly beneficial. Paranoia should not be a product of this Report. However, it needs to be stated that a risk of abuse does exist, and needs to be sensibly taken into account where children are left in the care of adults from outside the family, on any regular or residential basis.

13.29 Often those who are found to have offended in this area have acquired a reputation for community service in relation to the interests of children, extending across several organisations. It is commonly the case that they are able to provide character references speaking favourably of their work, as well as references from parents of other children under their care who have not been abused, and for whom the offender has made a valuable contribution.

13.30 These factors underline the reluctance with which allegations made against people who are ostensibly doing good works are received. In part it is a product of the dangerous myth that portrays child sexual abusers as 'monsters' or 'dirty old men in raincoats'.

³²⁴ See Volume IV, Chapter 3 of this Report.

³²⁵ See Volume IV, Chapter 3 of this Report.

13.31 This myth in fact contributes to the ability of offenders to select victims who are vulnerable to manipulation and who are unlikely, for a variety of reasons, to complain. A child who is unhappy at home, lacks a role model, is unloved or has behavioural problems is a prime target for the paedophile.³²⁶ Such an offender working in community recreational activities can both satisfy his sexual desires and build an otherwise convincing reputation of community service, thereby avoiding suspicion, and/or providing a basis for denial and a way of discrediting any accusation levelled against him.

13.32 It is impracticable that all of those who fit into the categories mentioned earlier be made the subject of external positive vetting, and it would be something of an overreaction to propose such a scheme. However, there are a number of precautionary measures that can be used, including:

- education of the relevant organisations, the public and parents of the indicators and risks of abuse;
- attention by the organisations involved to ensure that their employees are appropriately screened and reference checked;
- the extension of mandatory reporting to those working in organisations having close and continuing relationships with children, as discussed later in this Report;³²⁷
- adoption by the organisations involved of a firm policy concerning the suspension and/or dismissal of persons reasonably suspected of the sexual abuse of children; and
- the adoption of procedures permitting the Police Service and the Children's Commission to provide information to the relevant organisations concerning prospective and existing employees or volunteers, without risk of legal liability, again in accordance with the proposals developed later in this Report.³²⁸

RELATIONSHIP WITH OTHER AGENCIES

13.33 The Interagency Guidelines state that the role of non-government organisations and local government authorities is to:

... identify and notify suspected child abuse and neglect [and to] develop and implement educational and preventative programs aimed to protect children.³²⁹

13.34 They are expected, *inter alia*, to ensure that those working in the area are aware of the indicators of abuse and procedures for notification, and to work with other agencies to establish suitable safeguards to protect children. The guidelines are silent as to the manner in which the diverse groups involved should achieve those objectives, or as to any procedure by which their activities might be co-ordinated under a single umbrella.

13.35 The Community Services Commission has similarly drawn attention to the need for non-government, local government and other community agencies and services which have contact with children to probity check employees in residential care facilities.³³⁰

³²⁶ D. H. Jones, RCT, 3/7/96, p. 28100.

³²⁷ See Chapter 18 of this Volume.

³²⁸ See Chapter 18 of this Volume.

³²⁹ CPC, *Interagency Guidelines for Child Protection Intervention*, 2nd edn, Sydney, 1997, RCPS Exhibit 3204, p. 21.

³³⁰ Community Services Commission, *Who Cares? protecting people in residential care: report on the recruitment, screening and appointment practices of the Department of Community Services, the Department of Juvenile Justice and Non-Government Services funded or approved through the Department of Community Services, the Department of Juvenile Justice and the Ageing and Disability Department, Surry Hills, 1996*, RCPS Exhibit 3194, p. 91.

13.36 In the absence of a co-ordinating body, which is able to provide assistance, some community organisations may experience difficulties in addressing the responsibilities required of them under the Interagency Guidelines. The proposed Children's Commission could readily fulfil this role, in conjunction with the DSR which is likely to have more immediate contact with them. In this capacity, it could assist in the development of guidelines for screening and training staff in child abuse prevention strategies and notification requirements.

13.37 Additionally, problems may arise in monitoring the adoption and enforcement of appropriate procedures. For organisations with high profiles and reasonable financial strength it may be relatively easy for them to establish a structured complaints and disciplinary mechanism (if they do not already have one), and to provide some form of induction or training program for employees and volunteers, including advice as to the individual responsibility and procedures for notifying child abuse. For other smaller organisations this may be impracticable, and alternative but less complex measures may be sufficient.

13.38 Within all these agencies or associations, concern may arise as to any legal repercussions which may arise where suspected abuse is reported, or where information is sought, or provided, in relation to the vetting of potential employees or volunteers. As previously noted, this needs to be addressed by the provision of:

- a clear line for reporting and for management of the information supplied, to ensure appropriate and prompt notification to the DCS and to the Police Service where evidence of criminality exists; and of
- a means of access to information concerning suspect paedophiles, in good faith, on the part of those organisations or agencies having legitimate claim to it.

13.39 For those organisations which are in receipt of government funding, it would be possible for continued funding to be made conditional upon proof that the organisation has, so far as applicable to it, adopted procedures consistent with the Interagency requirements and compliance with the system outlined in the final chapter of this Report.

SCREENING AND DISCIPLINE OF EMPLOYEES

13.40 The voluntary basis on which many positions are filled within organisations such as the scouting movement and sporting bodies and the transient nature of their membership makes it difficult to establish any external or positive system for screening these officials and workers.³³¹ Additionally many smaller community organisations have difficulty obtaining assistance and are grateful to any individual who volunteers his or her time. It would be inappropriate if an overreaction to the problems identified by the Commission were to make that form of voluntary work unattractive or too burdensome.

13.41 The Scout Association has arranged access to criminal histories via a Police Liaison Officer, in accordance with conditions approved by the Privacy Committee.³³² While this procedure provides some protection, in light of the fact that many offenders have never been charged or convicted of any offence or may move from State to State, it needs to be supplemented.

³³¹ L. C. Mathews, RCT, 3/7/96, p. 28177.

³³² NSW Police Service, Freedom of Information Unit, Submission to RCPS, 22/7/96, RCPS Exhibit 2529C/44.

13.42 D1, a convicted paedophile and former scout leader, informed the Commission that when he joined the Association he did not recall any specific questions which may have exposed his problem, but added that he had no criminal record at the time. Even had he been asked any questions in this area he would not have disclosed his attraction for boys.³³³ This indicates the problem in relying upon criminal record checks alone to screen potential employees.

13.43 The Commission sees the answer in:

- permitting approved organisations to approach the Children's Commission for information required on a bona fide basis in relation to prospective employees or volunteers;
- permitting the Police Service to provide information in relation to any person working for, or involved with, such an association, where continuation of that activity would give rise to a serious risk that a child or children would be sexually abused; and in
- extending the categories of mandatory notifiers;

in each case as developed later in this Report.

13.44 The Commission does not consider it either practicable or appropriate for any formal or external disciplinary system to be created in relation to these organisations. In each case they should be subject to self regulation so long as they:

- ensure that matters of criminality are reported to the Police Service; and that
- they do not deal with allegations by 'quiet resignation', concealment or transfer of the suspect offender to some other location or work, in order to protect their own reputation, or that of the offender.

As has been shown, this simply exposes other children to risk and inevitably does more damage to the organisation than the abuse itself.

13.45 It is important that allegations of this kind are dealt with in a systematic manner, and that during any investigation, the alleged offender is removed from any position of contact with children.

13.46 For those activities which are subject to a central controlling body, such as the major sports, it may be possible for the individual clubs to pass any investigative (that is, non-police investigation) or disciplinary responsibility to them. It may even be possible to vest any vetting procedure in them, as a means of protecting privacy interests. As the Commission favours self regulation in this area, it would be appropriate for this to be worked out in conjunction with the Children's Commission.

CONCLUSIONS

13.47 All individuals and organisations which have regular contact with children, including families, have a responsibility for the welfare of those children. The responsibility cannot be confined to those organisations with specific legislative obligations for their care and protection. However, the wide variety of the organisations involved in children's activities, the disparate nature of their organisational and financial structures, and the numbers involved, makes it impossible for any single structure to be provided. While self regulation is the approach favoured by the Commission, it is of the view that with the aid of the Children's Commission, guidelines and procedures should be adopted to facilitate:

- education and training as to the risks of child abuse and prevention strategies for those involved in these activities;

³³³ D1, RCT, 18/3/96, pp. 22010-11.

- the exchange of information bona fide between the Children's Commission and those organisations which have substantial contact with children and are established on a permanent and organised basis; and
- identification and prescription by regulation of the organisations and activities/positions to which the procedures outlined in Volume V, Chapter 20 of this Report should apply.

RECOMMENDATIONS

The Commission recommends the following:

- ◆ Pre-employment screening in relation to DSR employees and volunteers.
- ◆ Ongoing training for DSR staff in child sexual abuse prevention strategies and notification requirements (paras. 13.12 & 13.36).
- ◆ Application of the system proposed in Volume V, Chapter 20 of this Report concerning pre-employment notification to the Children's Commission, and the issue of unacceptable risk certificates, to DSR staff, as well as to those who work for community organisations or activities to be prescribed by regulation (para. 13.9).
- ◆ Development of guidelines in conjunction with the Children's Commission, for screening and monitoring of employees and volunteers of agencies funded by the DSR and for protective and preventative training of their staff in relation to child sexual abuse issues and notification requirements (paras. 13.9, 13.12 & 13.36).
- ◆ Statutory immunity from liability where information is provided bona fide in relation to the suspected sexual abuse of children by persons engaged in sporting and recreational activities (paras. 13.43 & 13.47).

CHAPTER 14

ADEQUACY OF PROTECTION LAWS

14.1 The laws relating to the protection of children from sexual abuse, particularly the criminal laws, have been the subject of considerable change over the years, and are not free of anomaly.

A. CRIMINAL LAWS

LEGISLATION - AN OVERVIEW

14.2 The relevant offences involving the sexual abuse of children are principally contained in the *Crimes Act 1900*. In summary, the Act provides for a series of offences as follows:

OFFENCE	SECTION	MAXIMUM PENALTY PENAL SERVITUDE
Sexual intercourse³³⁴ without consent and with knowledge of the absence of consent	61 I	14 years
– if the victim is aged under 16 years	61 J	20 years
– if the victim is under the authority of the offender	61 J	20 years
Assault with intent to have sexual intercourse	61 K	20 years
Indecent assault	61 L	5 years
– if the victim is aged under 10 years	61 M	10 years
– if the victim is aged under 16 years	61 M	7 years
– if the victim is under the authority of the offender	61 M	7 years
Indecent act (or incitement)	61 N(2)	18 months
– if the victim is aged under 16 years	61 N(1)	2 years
– if the victim is aged under 16 years and is under the authority of the offender	61 O(1)	5 years
– if the victim is aged under 10 years	61 O(2)	7 years
– if the victim is aged 16 years or above and under the authority of the offender	61 O(1A)	3 years

³³⁴

Sexual intercourse is defined in the *Crimes Act 1900*, s. 61H to mean:

- (a) sexual connection occasioned by the penetration of any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
 - (i) any part of the body of another person; or
 - (ii) any object manipulated by another person;
 except where the penetration is carried out for proper medical purposes; or
- (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person; or
- (c) cunnilingus; or
- (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

OFFENCE	SECTION	MAXIMUM PENALTY PENAL SERVITUDE
Sexual intercourse with a person under 10 years – attempt or assault with intent	66 A 66 B	20 years same as for principal offence
Sexual intercourse with a person of or above age 10 and under 16 years – if the child is also under the authority of the offender – attempt or assault with intent	66 C(1) 66 C(2) 66 D	8 years 10 years same as for principal offence
Carnal knowledge by a schoolmaster or other teacher, or father, or stepfather of a girl aged of or above 16 years and under 17 years, being his pupil, daughter or stepdaughter – attempt or assault with intent	73 74	8 years 7 years
Incest Carnal knowledge by a male of a female aged of or above the age of 16 years who is his sister, daughter or granddaughter, or female who permits same – attempt	 78 A 78 B	 7 years 2 years

OFFENCE	SECTION	MAXIMUM PENALTY PENAL SERVITUDE
Homosexual intercourse³³⁵ by a male person – with a male under 10 years – attempt or assault with intent with a male under 10 years – with a male of or above the age of 10 years and under 18 years – attempt or assault with intent with a male of or above the age of 10 years and under 18 years	78 H 78 I 78 K 78 L	25 years 14 years 10 years 5 years
Homosexual intercourse by a male person, being a schoolmaster or other teacher, or father or stepfather with a male aged of or above 10 years and under 18, being his pupil, son or stepson – attempt	78 N 78 O	14 years 7 years
Act of gross indecency by a male with or towards a male under 18 years of age	78 Q(1)	2 years
Soliciting, procuring or inciting or advising any male person under 18 years to commit or be party to an act of gross indecency towards a male	78 Q(2)	2 years

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Homosexual intercourse is defined in the *Crimes Act 1900*, s. 78G to mean:

(a) sexual connection occasioned by the penetration of the anus of any male person by the penis of any person;
 (b) sexual connection occasioned by the introduction of any part of the penis into the mouth of another male person; or
 (c) the continuation of homosexual intercourse as defined in paragraph (a) or (b).

OFFENCE	SECTION	MAXIMUM PENALTY PENAL SERVITUDE
Promoting or engaging in acts of child prostitution – if child is under the age of 14 years	91 D(1) 91 D(1)	10 years 14 years
Obtaining benefit from child prostitution	91 E	10 years
Using premises for child prostitution	91 F	7 years
Employing or causing or consenting to a child being employed for pornographic purposes – if child is aged under 14 years	91 G 91 G	5 years 7 years
Possession of child pornography	578 B(2)	100 penalty units (\$10,000) or imprisonment for 12 months or both

14.3 A number of other offences arise under State and Commonwealth legislation. They include:

OFFENCE	SECTION	MAXIMUM PENALTY
<i>Children (Care and Protection) Act 1987</i> Child abuse (which includes sexual assault and exposure to psychologically harming behaviour)	25 120	Fine not exceeding \$1,000 or imprisonment not exceeding 12 months or both
<i>Classification (Publications, Films and Computer Games) Enforcement Act 1995</i> A series of offences exist relating to: – the sale and public exhibition of certain films to minors – the private exhibition of certain films to minors – the sale and showing of certain publications to minors – the sale and demonstration of certain computer games to minors	9, 12, 13 14 24 30, 32, 33	
<i>Crimes Act 1914(Cth)</i> A series of offences exist concerning conduct by an Australian citizen or resident while overseas, relating to: – sexual intercourse with a person who is under the age of 16 years – inducing a person aged under 16 years to engage in sexual intercourse with a third person in the presence of the first person – committing or submitting to an act of indecency with a person under the age of 16 years or in the presence of such a person – inducing a person under the age of 16 years to commit or submit to, or to be present during an act of indecency involving a third person – benefiting from the foregoing offences – encouraging the foregoing offences	50 BA 50 BB 50 BC 50 BD 50 DA 50 DB	17 years 17 years 12 years 12 years 17 years 17 years

ANOMALIES

14.4 The Royal Commission received a number of submissions concerning apparent anomalies or discrimination in the application of existing legislation. In summary, they concern:

Age of Consent

14.5 Foremost in this regard were the submissions relating to the difference between the ways in which the law treats consensual heterosexual and male homosexual intercourse with children aged 16 years or 17 years. In summary:

- if a male person places his penis in the anus or mouth of another male who is 16 years or 17 years he commits an offence;³³⁶ yet
 - the same conduct by a male in relation to a female aged 16 years or 17 years does not constitute any offence;
 - similarly a female who engages in sexual intercourse with a male aged 16 years or 17 years commits no offence, nor does a female who engages in sexual intercourse with a female aged 16 years or 17 years;
- if a male schoolmaster or other teacher or father or stepfather engages in similar conduct with a male aged 17 years, being his pupil, son or stepson, then he commits an offence;³³⁷ yet
 - similar conduct by a male schoolteacher, other teacher, father or stepfather towards a female aged 17 years, who is a pupil, daughter or stepdaughter does not constitute an offence; and
 - a female schoolmistress or other teacher, or mother or stepmother similarly commits no offence in engaging in sexual intercourse with a male pupil, son or stepson aged 16 years or over. Nor does such a person commit any offence when engaging in sexual intercourse with a female 16 years or over.

Defences

14.6 Similarly there are significant differences in the available defences depending on the gender of the child:

- if a male has sexual intercourse³³⁸ with a girl aged of or above 14 years and under 16 years, then a defence is available to him if the girl consents, and he had reasonable grounds to believe, and did believe that she was aged 16 years or older;³³⁹
- if a male attempts to have intercourse with a girl aged of or above 14 years and under 16 years or assaults a girl with such intent, the same defence is available;³⁴⁰
- if a male commits an act of indecency, or an aggravated act of indecency, or an indecent assault or aggravated indecent assault on a girl aged of or above 14 years and under 16 years, the same defence is available;³⁴¹ and

³³⁶ *Crimes Act 1900*, s. 78K.

³³⁷ *Crimes Act 1900*, s. 78N.

³³⁸ *Crimes Act 1900*, s. 61H.

³³⁹ *Crimes Act 1900*, s. 77(2).

³⁴⁰ *Crimes Act 1900*, s. 72(2).

³⁴¹ *Crimes Act 1900*, s. 77(2).

- a similar defence is available where the offender is female, and the child is either a male or female; yet
 - no such defence is available in any such case when the offender is a male and the child is also male.³⁴²

Penalties

14.7 A number of differences also relate to the available penalties, depending on whether the conduct is heterosexual in nature, or involves homosexual intercourse on the part of a male. For example:

- sexual intercourse with a girl under the age of 10 years carries a maximum penalty of 20 years,³⁴³ yet homosexual intercourse with a boy under that age attracts a maximum penalty of 25 years;³⁴⁴
- an attempt to have sexual intercourse with a girl under the age of 10 years carries a maximum penalty of 20 years,³⁴⁵ yet an attempt to have homosexual intercourse with a boy under that age attracts a maximum penalty of 14 years;³⁴⁶
- sexual intercourse with a girl aged 10 years or above and under 16 years carries a maximum penalty of eight years³⁴⁷ (10 years if under the authority of the offender),³⁴⁸ while homosexual intercourse with a boy aged 10 years or above and under 18 years attracts a maximum penalty of 10 years;³⁴⁹
- an attempt to have sexual intercourse or an assault with intent to have sexual intercourse with a girl aged 10 years or above and under the age of 16 years carries a maximum penalty of eight years (10 years if under the authority of the offender),³⁵⁰ yet an attempt to have homosexual intercourse with a boy aged 10 years or above and under 18 years attracts a maximum penalty of five years;³⁵¹ and
- carnal knowledge by a schoolmaster, other teacher, father or stepfather of a girl being a pupil, daughter or stepdaughter aged 16 years carries a maximum penalty of eight years,³⁵² yet homosexual intercourse by such a person with a boy being a pupil, son or stepson attracts a maximum penalty of 14 years.³⁵³

Child Prostitution

14.8 Differences also occur in relation to activities constituting prostitution depending on the gender of the child involved:

- where a male involves himself in an act of child prostitution with a girl aged 14 years or over and under 18 years, then he has a defence if the girl consents, and he had reasonable cause to believe and did believe that she was above the age of 18 years;³⁵⁴

³⁴² *Crimes Act 1900*, s. 78R.

³⁴³ *Crimes Act 1900*, s. 66A.

³⁴⁴ *Crimes Act 1900*, s. 78H.

³⁴⁵ *Crimes Act 1900*, s. 66B.

³⁴⁶ *Crimes Act 1900*, s. 78I.

³⁴⁷ *Crimes Act 1900*, s. 66(C)(1).

³⁴⁸ *Crimes Act 1900*, s. 66C(2).

³⁴⁹ *Crimes Act 1900*, s. 78K.

³⁵⁰ *Crimes Act 1900*, s. 66D.

³⁵¹ *Crimes Act 1900*, s. 78L.

³⁵² *Crimes Act 1900*, ss. 73 & 74.

³⁵³ *Crimes Act 1900*, s. 78N.

³⁵⁴ *Crimes Act 1900*, s. 91D(2).

- the same defence applies where the person charged is a female and the act of prostitution is engaged in with a boy or a girl; yet
 - a male has no comparable defence where he engages in such an act of prostitution with a boy.

Other Anomalies

14.9 Several other anomalies are apparent:

- no apparent reason exists for the creation of a separate offence of gross indecency in relation to male upon male behaviour,³⁵⁵ with an equivalent maximum sentence to the offence of indecent act otherwise available,³⁵⁶ but without any provision for the increase in penalty which exists for that latter offence where the victim is under the age of 10 years,³⁵⁷ or is under the authority of the offender;³⁵⁸
- some definitional difficulty arises in drawing a distinction between an act of 'indecency', and an act of 'gross indecency';
- in the case of the offences dealing with homosexual intercourse between males, the formula otherwise adopted, creating a circumstance of aggravation where the boy is under the authority of the offender, has not been used;
- a male who commits an act of gross indecency towards another male aged 16 years or above and under 18 years, or who solicits, procures, incites or advises such a male to commit an act of homosexual intercourse, or an act of gross indecency with another male, commits an offence;³⁵⁹ yet
 - no equivalent offence applies in relation to comparable conduct by a male towards a female, or by a female towards a male or another female; nor is there any alternative verdict available where the act is considered by the jury to amount to an act of 'indecency' but not a 'gross indecency';
- where the accused is male, aged under 18 years, and is charged with any of the offences relating to homosexual intercourse, or acts of gross indecency, the consent of the Attorney General is required for commencement of a prosecution.³⁶⁰ No such requirement relates to any other offence of the kind under review, nor does the Act set out the criteria for determining whether consent should be given; and
- contrary to the usual practice of providing the same maximum penalty for an attempt as for the principal offence, substantially lesser penalties have been provided for attempts in relation to homosexual offences.

³⁵⁵ *Crimes Act 1900*, s. 78Q.

³⁵⁶ *Crimes Act 1900*, s. 61N(1).

³⁵⁷ *Crimes Act 1900*, s. 61O(2).

³⁵⁸ *Crimes Act 1900*, ss. 61O(1) & 61O(1A).

³⁵⁹ *Crimes Act 1900*, s. 78Q.

³⁶⁰ *Crimes Act 1900*, s. 78T.

SUMMARY

14.10 In the result, on their face the various provisions of the Crimes Act:

- place less value on the protection of young females compared with young males;
- operate in a way that is discriminatory against male homosexuals;
- are inconsistent as to the availability of a defence;
- are unnecessarily complex, particularly in relation to areas of overlap, consent and circumstances of aggravation; and
- result in significant, and at times inexplicable, differences in maximum penalty for similar conduct.

14.11 While it is difficult and possibly unproductive to detect a reason for this state of affairs, it does seem largely to be the product of piecemeal amendment of the legislation and of compromise associated with attempts at homosexual law reform.

14.12 By way of brief overview, there were a number of attempts to achieve legislative change in relation to homosexual acts between 1981 and 1984, in the form of:

- the Crimes (Sexual Offences) Amendment Bill, introduced by the Honourable George Peterson MLA in the Legislative Assembly in November 1981;³⁶¹
- the Crimes (Adult Sexual Behaviour) Amendment Bill, introduced by the Honourable Michael Egan MLA in the Legislative Assembly in December 1981;³⁶²
- the Crimes (Homosexual Behaviour) Amendment Bill, introduced by the Honourable Barry Unsworth MLC in the Legislative Council in February 1982;³⁶³ and
- the Crimes (Amendment) Bill, introduced by the Honourable Neville Wran QC³⁶⁴ in the Legislative Assembly in May 1984.

Only the last of the Bills was passed.

14.13 Since 1984, there have been several unsuccessful attempts to secure a re-examination of this legislation and removal of the discrimination which it introduced.

B. THE DRAFT MODEL CRIMINAL CODE

14.14 In November 1996, a discussion paper was issued by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.

³⁶¹ NSW Parliament, *Hansard*, Legislative Assembly, 11/11/81, p. 439.

³⁶² NSW Parliament, *Hansard*, Legislative Assembly, 2/12/81, p. 1375.

³⁶³ NSW Parliament, *Hansard*, Legislative Council, 18/2/82, p. 2080.

³⁶⁴ NSW Parliament, *Hansard*, Legislative Assembly, 10/5/84, p. 573.

DEFINITION

14.15 In summary the discussion paper proposes a Code for sexual offences against the person with the following relevant definitions:

- a definition of sexual penetration to mean:
 - the penetration (to any extent) of the genitalia or anus of a person by any part of the body of a person or by an object manipulated by a person;
 - the penetration (to any extent) of the mouth of a person by the penis of a person;³⁶⁵
- a definition of consent to mean 'consent freely and voluntarily given', and a series of examples of circumstances in which consent is not taken to be given including those where:
 - the person submits to the act because of force or the fear of force, or because the person is unlawfully detained;
 - the person is asleep or unconscious, or so affected by alcohol or another drug as to be incapable of consenting;
 - the person is incapable of understanding the sexual nature of the act;
 - the person is mistaken about the sexual nature of the act, or about the identity of the person committing the act;³⁶⁶
- a definition of 'indecent' to mean 'indecent according to the standards of ordinary people and known by the defendant to be indecent according to the standards of ordinary people'.³⁶⁷

OFFENCES

14.16 The offences proposed under the Code are as follows:

OFFENCE	PARAGRAPH	MAXIMUM PENALTY PENAL SERVITUDE
Sexual penetration without consent and knowing or being reckless as to lack of consent	33.1	15 years
Sexual penetration without consent and being negligent about the lack of consent	33.2	7 years
Indecent touching without consent and knowing or being reckless as to lack of consent	33.3	5 years
Compelling sexual penetration	34.4(1)	15 years
Compelling indecent touching	33.4(3)	5 years
Sexual penetration of or by a child under 10 years	34.2	25 years
Sexual penetration of or by a child 10 years and above and under 16	34.3	12 years
Indecent act with or in the presence of a child under 10 years	34.4	12 years
Indecent act with or in the presence of a child 10 years and above and under 16 years	34.5	7 years

³⁶⁵ Model Criminal Code Officers Committee of the Standing Committee of Attorneys General (MCCOC), *Model Criminal Code Chapter 5: Sexual Offences Against the Person. Discussion Paper*, November 1996, para. 32.1. The paper contains proposed Code provisions (Model Criminal Code) and commentary explaining the Committee's reasoning and intentions.

³⁶⁶ Model Criminal Code, para. 32.2.

³⁶⁷ Model Criminal Code, para. 32.3.

Persistent sexual abuse of a child - that is, engaging, during any period, in conduct in relation to a particular child that constitutes offences under this part on three or more separate occasions, each occurring on separate days in that period	34.6(1)	25 years
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INCREASE IN PENALTY

14.17 The Code provides for increased penalties (but not so as to increase the maximum penalty beyond 25 years) in various circumstances of aggravation that include:

	ADDITIONAL PENALTY
Offence committed during torture	10 years
Offence committed in the abuse of a position of trust	10 years
Offence committed involving the use or threatened use of an offensive weapon	10 years
Offence committed in company	10 years
Offence committed in circumstances that involved the victim being caused serious physical harm or being threatened with serious physical harm or death	10 years
Offence committed against a child under 10 years (except 34.2 or 34.4)	10 years
Offence committed against a child aged of or above 10 years and under 16 years (except 34.3 or 34.5)	5 years

DEFENCES

14.18 The Code further provides for a defence of consent if:

- the child concerned was 10 years or above, consented to the act, and the accused was married to the child, or was not more than two years older or younger than the child;³⁶⁸ or
- if the child was 10 years or above, consented and the accused held a mistaken but reasonable belief that the child was aged 16 years or above.³⁶⁹

14.19 The Code additionally provides that a person who is sexually penetrated by a child is not guilty of an offence (under clauses 34.2 or 34.3) if he or she did not consent to that act.³⁷⁰

C. REFORM

THE AGE OF CONSENT

14.20 As outlined earlier, subject to certain exceptions, the general age for consent in NSW is 16 years, although for homosexual intercourse between males it is 18 years. By reason of the statutory defence earlier mentioned,³⁷¹ the age of consent can be 'lowered' to 14 years, although not in cases involving carnal knowledge by a schoolmaster, teacher, father or stepfather, or homosexual activity between males.

³⁶⁸ Model Criminal Code, para. 34.7(2).

³⁶⁹ Model Criminal Code, para. 34.9 in conjunction with 6.1 & 9.2.

³⁷⁰ Model Criminal Code, para. 34.7(3).

³⁷¹ *Crimes Act 1900*, s. 77.

Other Jurisdictions

14.21 There is a considerable lack of uniformity between the States and Territories, some of which maintain a distinction in respect of homosexual activities in respect of boys. The position is demonstrated by the comparative table contained as an appendix to this Report.³⁷²

14.22 Only the Northern Territory and Western Australia share the NSW approach of creating a higher age of consent for male homosexual relationships.³⁷³ In the ACT and Victoria the age of consent is 16 years for both heterosexual and homosexual relations.³⁷⁴ In South Australia and in Tasmania (from May 1997)³⁷⁵ there is a common age of consent of 17 years.

14.23 Internationally, the position varies significantly from one jurisdiction to another. In some countries homosexuality is illegal, irrespective of the age of the parties. In other countries, an age differential for consent exists between heterosexual and homosexual activity, while in yet other countries the age of consent for homosexual and heterosexual activity is equivalent but less than 18 years. A table showing some of the differences is contained in an appendix to this Report.³⁷⁶

14.24 In some jurisdictions, for example, the ACT, Victoria and Tasmania,³⁷⁷ the age differential between the parties to the conduct is taken into account, either in determining whether there is any offence, or whether a defence of consent is available to the accused.

14.25 The Royal Commission received very many submissions on this topic,³⁷⁸ from individual members of the community, churches and religious associations, academics, medical practitioners, and various councils, boards, associations and agencies representing a wide cross-spectrum of views and interests. There was no consensus of opinion among those who contacted the Commission, some arguing for retention of the existing position, others arguing for a reduction and others arguing for an increase in the age of consent. The submissions were, however, very helpful in exposing the range of community and expert views, and in extracting the arguments for and against any change.

The Arguments for Change

14.26 The submissions in favour of a change were principally directed towards achieving a common age of consent of 16 years.³⁷⁹

14.27 The arguments relied upon included the following:

- the existing legislation is discriminatory, out of line with legislation in other communities of a similar make-up to NSW, including other Australian States and Territories, and lacks any rational basis;

³⁷² See Volume VI, Appendix P17, Child Sexual Assault Offences in the Crimes Act of Each State/Territory.

³⁷³ In NSW and NT the age is 16 years for heterosexual and 18 years for homosexual sex, while in WA sexual penetration is prohibited under 16 and the age of consent for homosexual sex is 21 years.

³⁷⁴ In Queensland anal intercourse with any person under the age of 18 years is forbidden, while vaginal sex is banned under 16 years of age.

³⁷⁵ *Criminal Code Act 1924* (Tas) as amended by Act No. 12 of 1997.

³⁷⁶ See Volume VI, Appendix P16, Overseas Ages of Consent.

³⁷⁷ *Crimes Act 1900* (ACT), s. 92E(3); *Crimes Act 1958* (Vic), s. 46(2)(b); *Criminal Code Act 1924* (Tas), s. 124(3)(a) & (b).

³⁷⁸ 45 submissions dealt directly with the issue and it was referred to in many others.

³⁷⁹ eg. AIDS Council of NSW (ACON), Submission to RCPS, July 1996, RCPS Exhibit 2529/177; Anti-Discrimination Board of NSW, Submission to RCPS, 3/7/96, RCPS Exhibit 2529/7; Gay and Lesbian Rights Lobby, Submission to RCPS, 21/3/97, RCPS Exhibit 2529/181; Report to the Minister for Health by the NSW Ministerial Review HIV/AIDS Legal Working Party, *The courage of our convictions: HIV/AIDS: The national strategy and the laws of New South Wales*, November 1993 in C. Puplick, Submission to RCPS, 3/7/96, RCPS Exhibit 2529/8.

- the 1984 Bill³⁸⁰ which led to the legalisation of homosexual activity between consenting adults, was the fourth major attempt to bring about that reform since November 1981. As such it was put forward as a 'rather conservative' reform, with the clear expectation that it would be reviewed at a later time, in the light of contemporary community standards;³⁸¹
- it is unrealistic to expect that, by reason of legislation, adolescents will defer sexual activity until some arbitrary age of consent, and similarly unrealistic to ignore the circumstance that very many, if not most adolescents, in contemporary society, are sexually active by the age of 16 years, whether they are male or female;
- sexual identity and preference is determined early,³⁸² and is not determined by youthful encounters;³⁸³
- homosexuality *per se* is no longer regarded as unlawful or as a deviance, or psychological disorder which should be treated or modified;³⁸⁴ rather it is recognised as an acceptable and natural choice of sexuality practised by a section of humankind since time immemorial;
- a discriminatory age of consent is inconsistent with the underlying principles and philosophy of anti-discrimination legislation in NSW, and reform of the law to bring about a uniform age of consent of 16 years for both heterosexual and homosexual activity has had the support of the Anti-Discrimination Board since at least 1982;³⁸⁵
- a discriminatory age of consent has potentially adverse effects on public health and education policies, by driving underground those who should be receiving advice on safe sex, permitted to obtain condoms, or provided with relevant health and education services;
- two provisions of the Crimes Act, namely:
 - section 78Q(2)³⁸⁶ which makes it an offence for any person to advise a male under the age of 18 years to commit or be a party to the commission of an act of homosexual intercourse or an act of gross indecency with or towards a male; and
 - section 316(1) which makes it an offence for someone who knows or believes that another person has committed a serious offence, and has information which might be of material assistance in securing the apprehension, prosecution or conviction of the offender, to fail to bring the information to the attention of a member of the Police Service or other appropriate authority;

are said to cause particular difficulty for HIV counsellors, educators, doctors, social workers and others who should be able to provide advice on safe sex practices, HIV testing, medical care, counselling and the like to persons aged 18 years and under, without the risk of prosecution;³⁸⁷

- the preservation of a criminal constraint upon a form of activity by adolescent males which is not uncommon, lends itself to extortion and corrupt practices on the part of police;

³⁸⁰ Introduced on 10/5/84.

³⁸¹ NSW Parliament, *Hansard*, Legislative Assembly, 10/5/84, p. 576.

³⁸² The Wolfenden Report noted that its medical witnesses were unanimously of the view that the main sexual pattern is laid down in the early years of life, and the majority of them held that it was usually fixed in main outline by the age of 16 years. *Report of the Committee on Homosexual Offences and Prostitution*, (Sir J. Wolfenden, Chairman) Cmd 247, London, HMSO, 1957, p. 26.

³⁸³ See Criminal Justice Commission Queensland, *Reforms in laws relating to homosexuality: an information paper*, May 1990, RCPS Exhibit 3242, p. 9.

³⁸⁴ *Report of the Committee on Homosexual Offences and Prostitution*, (Sir J. Wolfenden, Chairman) Cmd 247, London, HMSO, 1957, pp. 11 & 115. *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines*, World Health Organisation, Geneva, 1992, RCPS Exhibit 1419, p. 221.

³⁸⁵ See an analysis of the Peterson Bill in: Anti-Discrimination Board of NSW, *Discrimination and Homosexuality*, 1982, pp. 336-43 in Submission to RCPS, RCPS Exhibit 2529/7. See also Report to the Minister for Health by the NSW Ministerial Review HIV/AIDS Legal Working Party, *The courage of our convictions: HIV/AIDS: The national strategy and the laws of New South Wales*, November 1993 in C. Puplick, Submission to RCPS, 3/7/96, RCPS Exhibit 2529/8.

³⁸⁶ Commonly referred to as the 'Yeoman's Amendment'.

³⁸⁷ AIDS Council of NSW (ACON), Submission to RCPS, July 1996, RCPS Exhibits 2529/177.

- the preservation of the existing laws risks stigmatising sexually active adolescent male homosexuals, making it more difficult for them to come to terms with their sexuality, increasing the incidence of depression, emotional disturbance and suicide, and inappropriately bringing them into contact with the criminal law when their female or heterosexual counterparts are free of such risks;
- the appearance of discriminatory treatment risks reinforcing homophobic bias and creating a false stereotype that homosexual males are likely to behave in a predatory fashion towards adolescents, and/or that males who have homosexual relations with boys aged between 16 and 18 years fall within the clinical definition of paedophile;
- lowering the age of consent might encourage some younger homosexual men to remain at home rather than to leave, because of the present difficulty in being honest with their families, who see them as being involved in criminal conduct; and
- the existing law tends to legitimise the sexual harassment and assault within schools of older gay pupils, leading some to take their lives, and others to opt out of further schooling.

14.28 Some submissions went very much further than arguing for a common age of consent of 16 years. Principally they focused on the notion that an arbitrary age of consent was inappropriate, and should be replaced by more general tests turning, for example, upon whether the relationship was exploitative and abusive, or upon whether the child was sufficiently mature, physically and emotionally, to engage in a mutually satisfying relationship and consented to it. There is a good deal of material from paedophile advocacy groups which espouses a similar view, based on the self-serving propositions that the principal aim of paedophiles is to help children, to save them from constricting nuclear family relationships, and to educate them into social and sexual freedom, so that they can better enjoy their lives; and on the equally unconvincing proposition that more often than not the paedophile is seduced by a knowing and sexually aware child, and that the relationship is as pleasurable and beneficial to the child as it is to the adult.

14.29 Other submissions³⁸⁸ focused on establishing a regime which would permit sexual relations to occur at an age below 18 years or 16 years, so long as there was an age differential no greater than say, two years between the participants, to overcome the current anomaly that an adolescent engaging in prohibited behaviour with a person under age is theoretically in the same position as a mature adult engaging in a relationship with that person.

The Arguments against Change

14.30 The arguments against change turned upon the propositions that:

- physical and emotional development was said to occur about two years later in boys than girls, so that extra time should be allowed for boys to determine their sexual identity and preference;
- amendment of the law would be seen as an encouragement of paedophiles, and would mark the beginning of a progressive relaxation or erosion of child sexual abuse laws;
- lowering the age of consent would increase the opportunities for paedophile networks to expand; and
- homosexuals were suggested to be more likely to seduce boys if the age of consent was lowered, a proposition which assumes that laws can modify sexual behaviour, and that adolescent males are less capable of resisting sexual advances than their female counterparts.

³⁸⁸ eg. Twenty-Ten Association, Submission to RCPS, 15/7/96, RCPS Exhibit 2529/14; Council for Civil Liberties, Submission to RCPS, 27/8/96, RCPS Exhibit 2529C/147; H. Collier, Submission to RCPS, 7/8/96, RCPS Exhibit 2529/75.

14.31 Several submissions opposing any reduction in the age of consent for male homosexual activity were based upon the proposition, that if there was to be any change then in order to improve moral standards, the only change should be an increase in that age to 18 years for females, to achieve a common age for heterosexual and homosexual relations. Other submissions were opposed to the continuing legalisation of homosexuality, and as a result, to the existence of any age of consent.

Conclusion

14.32 The question whether there should be any change in the age of consent is uniquely a matter for the community, rather than for this Commission to determine. However, upon the material available, the Commission is able to state that it sees no reason:

- to perpetuate a distinction between consensual homosexual and heterosexual activity; or
- to suppose that legislative change to achieve uniformity in this area would bring about any behavioural shift, or that it would, in real terms, expose any more children to the risk of paedophile activity than are presently exposed to that risk (that is, so long as the age of consent does not go below 16 years).

Accordingly it considers it appropriate for the relevant legislation to be the subject of further review in the light of community opinion, and in light of matters identified in this Report.

14.33 In coming to this view the Commission has had regard to:

- the circumstance that the present legislation is, on any view, discriminatory and anomalous in its application;
- the need for the law to recognise current social mores and practices, and the circumstance that most adolescents are today sexually active by the age of 16 years; and are very much better informed about sexual matters through education, films, magazines, television, radio and otherwise than past generations;
- the fact that legislative proscription of consensual conduct moves into shaky territory when it is based upon purely moral or religious grounds, particularly where they are the subject of genuinely divergent opinions. In such circumstances, the Commission agrees that:

... the legislature should interfere only to the extent necessary to protect the community, or any individuals with special needs. Generally speaking, those who take part voluntarily in activities some consider morally repugnant should not be the concern of the legislature, unless they are so young or defenceless that their involvement is not truly voluntary³⁸⁹.
- the desirability of ensuring that the needs of young persons for advice on safe sex, support and education are not denied to them because of the illegality attaching to their conduct;
- the interest of removing an opportunity which is ripe for selective policing, extortion and corruption; and that
- irrespective of legislative provision, freedom remains for parents and religious bodies to teach their children according to their own religious and moral values, as it does for those children to accept or reject them.

³⁸⁹ *Report of a Commission of Inquiry Pursuant to Orders in Council*, (G. E. Fitzgerald, Commissioner), Brisbane, June 1989, p. 186.

14.34 In examining this aspect of the law the Commission has also given particular attention to the 'threshold' age:

- below which any form of sexual activity should be treated as a circumstance of aggravation; and
- above which the consent defences might attach.

14.35 In relation to the available defences, the Commission takes the view that any statutory age of consent should be one at which both parties are capable of a reasoned decision, and are sufficiently mature to form that decision. Moreover, the relationship in which the activity takes place should be one where the younger party is not at risk of being coerced into otherwise unwelcome sexual activity by a partner who is able to use his or her superior age, authority, emotional or intellectual maturity, to achieve that end.

14.36 It is recognised that children are not a homogenous group, and that, irrespective of gender, they do not all mature at the same rate, or receive the same exposure to life. As a consequence, a degree of arbitrariness attaches to the selection of a fixed age, below which all sexual activity should be forbidden, or above which certain activities should be permissible with consent or subject to a qualified defence based upon mistaken but reasonable belief as to consent. Nevertheless, any other approach leaves too much uncertainty to be acceptable within the criminal law.

14.37 It is the Commission's firm view that a 'threshold' age of 10 years, as proposed in the Model Code, as a point at which a defence based on mistaken but reasonable belief of consent might become available is too low. It is in the area of pre-pubescent and pubescent children that the greatest risk of sexual abuse has been identified, both from adult paedophiles, and from those children who abuse other children and go on to become adult offenders. The Commission does not believe that there are any circumstances where sexual activity involving pre-pubescent or pubescent children should be permissible, or should attract a defence of mistaken but reasonable belief as to consent.³⁹⁰

14.38 The preservation of the defence does raise some issues of principle. If it is appropriate to set a minimum age for sexual activity, then on one view it makes little sense to 'lower' that by reference to consent whether mistaken but reasonable or otherwise. On the other hand, there is good reason to recognise the reality of adolescent sexual exploration, and the possibility of genuine mistake as to the age of a child during late adolescence. No occasion for such mistake should arise during the pre-pubertal or pubertal years, and the Commission considers the Model Code to be unacceptable in offering a qualified defence of consent from an age as low as 10 years.

14.39 Balancing the opinions expressed on this topic, and its own assessment of the risk posed by clinical paedophiles and youthful child abusers, the Commission is of the view that a defence should be available in relation to consensual activity where the child has attained the age of 14 years, if there is not more than a two year age differential between the parties, or if they are married.

14.40 Additionally, the Commission considers that it is appropriate for the defence of mistaken but reasonable belief as to consent to be available, irrespective of the gender of the parties involved, where the child is aged 14 years or above, but not in relation to persons standing in a 'position of trust'. It would define such persons to include parents, step-parents, foster parents, guardians, custodians, schoolteachers, religious advisers, health professionals, or any other person providing instruction or services to, or having the care or supervision of or authority over the child, and not being married to that child. No occasion arises in the view of the Commission to repeal the offence of incest.

14.41 These conclusions differ from the draft Model Code so far as it applies absolute liability up to age 10 years, and strict liability from 10 years.³⁹¹ A somewhat stricter regime is proposed in this Report based upon the Commission's understanding of the behavioural characteristics of child sexual abusers, and the harm to young children occasioned by their activities. The recognition of a two year differential would however bring the practice of policing, in which it is now rare for young persons engaging in consensual sexual relations together to be charged, into line with the law.

14.42 In summary, the Commission recommends that there be a review of the relevant portions of the *Crimes Act 1900* summarised earlier, in consultation with the community.

14.43 This might conveniently consider:

- a repeal of those sections which are directed specifically to male homosexual activity, and extension (where necessary) of the remaining provisions so as to make them also applicable to male homosexual activity - this would result in a common age of consent, a common defence of honest and reasonable mistake as to consent, and common maximum penalties;
- creating an offence in relation to an extended group of persons standing in special relationships (cf ss. 73 and 78A) as specified in paragraph 14.40, for which the relevant age would increase (17 years under s. 73) to 18 years (as is currently the case with s. 78N), to which the defence of consent but honest and reasonable mistake would not apply; and
- introduction of a defence of consent for sexual activity where a child has attained the age of 14 years, if there is not more than a two year differential between the parties, or if they are married.

OTHER RECOMMENDATIONS

Persistent Sexual Abuse

14.44 In order to overcome the very serious practical difficulties caused by the decision of the High Court in *S v The Queen*,³⁹² the Commission considers it essential for NSW to introduce an offence of persistent sexual abuse, along the lines of the Model Code. This would allow an accused to be charged where during a nominated period, he or she is shown to have committed sexual offences in relation to the one child on more than three occasions, on separate days, without the necessity of establishing the incidents with the specificity required by *S v The Queen*.

14.45 Similar legislative provision is already in place in the other States and Territories.³⁹³

³⁹⁰ While several States apart from NSW have adopted the age of 10 years as the age below which a separate offence with heavier penalties attach, in South Australia and Western Australia the relevant age of demarcation is extended to 12 and 13 years respectively. In the Northern Territory a heavier penalty applies in the case of children under 14 years.

³⁹¹ At which age the defence of consent and mistaken but reasonable belief applies. Model Criminal Code, paras. 6.1 & 9.2.

³⁹² *S v The Queen* (1989) 168 CLR 266.

³⁹³ *Crimes Act 1900* (ACT), s. 92EA; *Criminal Code Act 1983* (NT), s. 131A; *Criminal Code 1899* (Qld), s. 230; *Criminal Law Consolidation Act 1935* (SA), s. 74; *Crimes Act 1958* (Vic), s. 47A; *Criminal Code Act 1913* (WA), s. 321A; *Criminal Code Act 1924* (Tas), s. 125A.

14.46 Such a provision would recognise the reality of continuing or prolonged child sexual abuse, namely that:

- it is impossible for the victim to recollect the detail of many events when they tend to blur one into the other, or to fix any with complete certainty as to time and place; and
- on most occasions a sexual encounter of this kind encompasses a number of separate acts, rather than a single act, so that again it is difficult, particularly for a young child, to pinpoint exactly what occurred or to provide a consistent account of it, a circumstance that can be used to unfair advantage by defence counsel.

14.47 In *S v The Queen* the prosecution failed because of the latent ambiguity in the indictment, which was not removed by particulars, or by an election on the part of the prosecutor to nominate the particular act which was charged in each count. It was noted that this:

- might lead the accused to being convicted even though the jury were not unanimous as to the occurrence of any one (that is, the same) act;
- might occasion the accused difficulty for a plea of *autrefois acquit* if he or she was subsequently charged with a further act during the period covered by the indictment;
- might prejudice the ability of the accused to test the Crown case through alibi or other evidence which might have been available had the act charged been nominated with some precision; and
- allowed an impermissible use of similar fact or tendency evidence.

14.48 The Commission considers that each of these matters is more theoretical than real, and pays insufficient recognition to the reality of child sexual abuse. The provision proposed in the Model Code in this respect, which this Commission supports, has been in force in most other States and Territories, and seems not to have been the occasion of difficulty in its application. The introduction of an offence in these terms is accordingly supported.

Exception to Yeoman's Amendment

14.49 Whatever the outcome in relation to the age of consent, the Commission is of the view that there should be an exception to s. 78Q(2) (or any equivalent provision) of the *Crimes Act 1900*, or any aiding and abetting provision, to spare health professionals and HIV or sexual counsellors from the risk of prosecution for providing, in the proper course of their professional duties, counselling or medical assistance to children under the age of consent.

14.50 Whatever the age of consent, no rational basis exists for the preservation of a distinction between those engaged in male homosexual activity and other forms of sexual activity in this regard. Moreover, the risks of unwanted pregnancies, sexually transmitted diseases, HIV, AIDS, hepatitis and the like are substantial, and the delivery of advice or assistance which might minimise such risks should not be a crime.

14.51 As later explained,³⁹⁴ the Commission would not support any exception to the mandatory reporting conditions in relation to child sexual assault,³⁹⁵ but it does recommend an exception to s. 316(1) of the *Crimes Act* in relation to mandatory reporters, concerning information derived in the course of their professional duties.

³⁹⁴ See Chapter 18 of this Volume.

³⁹⁵ *Children (Care and Protection Act) 1987*, s. 22.

Loitering for Sexual Gratification

14.52 It is a common behavioural practice for paedophiles to loiter in areas where children gather, and to watch, photograph or film them, or to engage in discussion with them. Particularly does this occur in the vicinity of schools, public toilets and places such as beaches, swimming pools, sporting arenas, parks and the like where children gather. As was shown graphically by video film tendered in the Royal Commission,³⁹⁶ this conduct is a form of voyeurism. Sexual gratification or excitement of the paedophile, is obtained from their near presence to, or observation of children, particularly when they are partially or wholly undressed. It can also lead to a personal physical contact, or indecent exposure.

14.53 There is no clear basis for a criminal charge or other remedy for such conduct in NSW. In South Australia,³⁹⁷ a 'paedophile restraining order' can be made where a defendant has been found loitering near children, and:

- has been found guilty of a child sexual offence within the previous five years;
- having been sentenced to imprisonment for a child sexual offence, has been released from prison within the previous five years; or
- has been found loitering near children on at least one prior occasion and there is reason to think that unless restrained he will again loiter near children.

14.54 In Victoria it is an offence for convicted offenders to be found loitering without reasonable excuse in or near a school, kindergarten, child care centre or public place regularly frequented by children and in which children are present at the time of loitering.³⁹⁸

14.55 The Royal Commission favours the introduction of similar legislation in NSW. Not only would each provision provide a protection against the risk posed by the recidivist offender, but the nature of the proceedings is likely to have a personal deterrent value.

Group Sexual Activity

14.56 One of the behavioural characteristics identified in relation to clinical paedophiles is their capacity to collect a group of children, and to encourage or permit members of that group to engage in sexual contact with each other in the presence of the paedophile. On some occasions it may be possible to prove that the paedophile actively encouraged or 'incited'³⁹⁹ the activity, but sometimes out of learned experience or custom, it might occur without any direct encouragement of the adult, although that person will derive sexual gratification as an observer. Under laws which provide a defence so far as the children are concerned, (that is, where the conduct is consensual, and they are of similar age) it may be that no offence is committed by the adult.

14.57 In the Commission's view, this form of conduct should be the subject of a specific provision whereby a person who permits or suffers a child under the age of 16 years, to engage in an act of indecency or sexual intercourse in his or her presence, or exposes a child to such conduct, with the intention of deriving sexual gratification from the presence of the child during that activity, commits an offence.

³⁹⁶ Video film of young boys, RCPS Exhibits 1556/1 & 1556/2.

³⁹⁷ *Summary Procedure Act 1921* (SA), s. 99A, introduced by the *Statute Amendment (Paedophiles) Act 1995* (SA).

³⁹⁸ *Crimes Act 1958* (Vic), s. 60B.

³⁹⁹ *Crimes Act 1900*, ss. 61N, 61O & 78Q. Incite means to cause, stimulate, urge, spur on, stir up or animate; *Young v Cassells* (1914) 33 NZLR 852.

14.58 A precedent for this exists in the *Crimes Act 1914* (Cth)⁴⁰⁰ which creates offences where a person:

- commits an act of indecency;
- submits to an act of indecency; or
- engages in sexual intercourse;

in the presence of a person under the age of 16 years, and intends to derive sexual gratification from the presence of the child during such activity.

14.59 A further precedent exists in the Queensland *Criminal Code*⁴⁰¹ which makes it an offence for a person to:

- wilfully and unlawfully expose a child under the age of 16 years to an indecent act by him or herself or any other person;
- without legitimate reason, wilfully expose a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter.

This section does not require proof of intention to obtain sexual gratification.

14.60 This offence should be in addition to any offence of soliciting, procuring or inciting a child or children under the age of 16 years to engage in sexual behaviour⁴⁰² which may not encompass the conduct of an adult who allows or causes a child to be simply present during sexual activity between others, or who simply observes such activity between a child and others without soliciting or inciting its occurrence.

14.61 It would be appropriate for the defence of consent previously outlined, to be available from the age of 14 years.

Act of Indecency

14.62 Brief mention is appropriate in relation to some residual concern in this area concerning the:

- definition of an act of indecency; and
- the utility of the retention of an offence of gross indecency in the event of there not being a revision of the law to bring male homosexual activity in line with other forms of sexual activity.⁴⁰³

14.63 The expression 'act of indecency', has been given a meaning in the case law as 'an act which right-minded persons would consider to be contrary to community standards of decency'. Where it has unequivocal sexual connotations it is unnecessary for the prosecution to prove the purpose of providing sexual gratification; otherwise it must be shown to have been accompanied by some intention to obtain sexual gratification.⁴⁰⁴

⁴⁰⁰ *Crimes Act 1914* (Cth), s. 50BC.

⁴⁰¹ *Criminal Code 1899* (Qld), s. 210.

⁴⁰² See also *Criminal Code Act 1913* (WA), ss. 320(3) & 321(3).

⁴⁰³ *Crimes Act 1900*, s. 78Q(1).

⁴⁰⁴ *R v Harkin* (1989) 38 A Crim R 296; and *R v Mansa* CCA (NSW) 17/2/93, unreported.

14.64 This appears to the Commission to be a perfectly workable test. However, it notes that the draft Model Code proposes a definition of indecency which calls for proof that the defendant knew the act to be indecent according to the standards of ordinary people. Proof of a subjective belief of this kind by inference (that is, in the absence of an admission) could prove difficult in the extreme, and even more difficult than has been the case with proof of the mental element required in relation to drug offences.⁴⁰⁵ The Commission sees no merit in the proposal.

14.65 Additionally, the Commission queries the wisdom of creating or preserving an offence of 'gross indecency' in relation to male homosexual activity. The boundary between 'indecency' and 'gross indecency' is problematic to say the least, and little would appear to be achieved by maintaining a distinction which, by the emotive wording of the offence, tends only to stigmatise the offender.

Cyber Sex and Child Pornography

14.66 The Royal Commission has identified several problems in the current laws, in relation to the use of on-line services by paedophiles.

14.67 The creation, collection and distribution of child pornography, particularly where it involves the filming by fixated paedophiles of their own activities, is of great importance to them. Not only does it involve an exercise of power over the child, but it assists in the establishment of networks of paedophiles among whom pornographic material is exchanged. The opportunities for the abuse of children, and for the expansion of such groups are significantly increased by current technology, and by the difficult to detect, but easy to effect, international and interstate transmission on-line of pornographic materials.

14.68 The Commission regards this problem as of such potential importance that it is separately dealt with in this Report.⁴⁰⁶

⁴⁰⁵ *He Kaw Te v The Queen* (1985) 157 CLR 523; and *Kural v The Queen* (1987) 162 CLR 502.

⁴⁰⁶ See Chapter 16 of this Volume.

RECOMMENDATIONS

The Commission recommends the following:

Removal of Gender Discrimination in Existing Laws

- ◆ Consideration be given, with appropriate community consultation, to the introduction of legislation under which:
 - a gender neutral approach is taken, and in which the existing distinctions between heterosexual and male homosexual activity involving children, including the defences and maximum penalties available, is removed (para. 14.32);
 - the common age of consent is set at 16 years, subject to exceptions in relation to child prostitution and to adults standing in special relationships, in each of which cases it is set at 18 years (paras. 14.33 & 14.43);
 - the defence of mistaken but reasonable belief of consent is made equally applicable to heterosexual and male homosexual activity involving children aged 14 years or upwards (para. 14.40); and under which
 - an additional defence of consent is created applicable where the child is 14 years of age or above and the age differential with the other person involved is not more than two years, or they are married (para. 14.39).

Additional Offences

- ◆ Creation of additional offences concerning:
 - persistent sexual abuse in relation to children under the age of 16 years, in accordance with the draft Model Code (clause 34.6) (paras. 14.44 - 14.48);
 - permitting or suffering a child under the age of 16 years to engage in an act of indecency, or sexual intercourse, in the presence of the person charged, or exposing a child to such conduct on the part of another, in either case with the intention of deriving sexual satisfaction from the presence of the child during that activity (para. 14.57).
 - loitering by a convicted child sexual offender, without reasonable excuse, in or near defined premises regularly frequented by children and in which children are present at the time of loitering (paras. 14.52 - 14.55).
- ◆ Additionally:
 - if s. 78Q of the *Crimes Act 1900* is retained, an exception to the Yeoman's Amendment to exempt counselling and medical advice provided to children under the age of consent bona fide by qualified health professionals in the course of their profession (para. 14.49);
 - provision for the making of a paedophile restraining order along the lines of the provision contained in the *Summary Procedure Act 1921* (SA), s. 99A (paras. 14.53 - 14.55).

CHAPTER 15

THE JUSTICE SYSTEM

15.1 On 23 October 1996, the terms of reference of this Commission were expanded to include, among other things, an inquiry into whether the criminal trial process is sufficient to adequately deal with allegations of paedophilia and pederasty.⁴⁰⁷ This involved some overlap with work which the Commission had already undertaken, as part of its investigation of term of reference (d2), which invited consideration of the procedures used by the Police Service and other public authorities in connection with the prosecution of paedophiles and pederasts.⁴⁰⁸

15.2 Submissions had earlier been sought on a range of topics, including proposals as to any changes to the prosecution process for child sexual abuse cases to achieve a modern, efficient and fair system.⁴⁰⁹ In this regard, attention was specifically directed to:

- videotaping interviews with children;
- the use of the videotapes as evidence in chief;
- the cross-examination of victims;
- jury trials/judge only trials;
- the retention of wigs and robes in such cases; and
- the training of the professionals, the magistracy and the judiciary in relation to child sexual abuse cases.

15.3 A number of submissions were received touching on this aspect of the inquiry, and evidence was taken from a range of individuals involved in the criminal trial process.⁴¹⁰ Additionally, the Commission has been assisted by consultation with the Supreme and District Court concerning matters relating to the listing of child sexual assault cases, and the problems of delay. Evidence was also taken by video link from individuals associated with the prosecution of these cases in San Diego, California, Tennessee and Alabama.⁴¹¹

15.4 Until reforms were achieved in recent years, the criminal trial process in child sexual assault cases seemed peculiarly weighted against the child witness:

- the evidence of young children in some cases was not received at all, and in other instances where a child was thought to be too young to give evidence on oath his/her unsworn evidence was not capable of providing a foundation for a conviction without corroboration;⁴¹²
- judges were required to warn juries of the dangers associated with convicting on the uncorroborated account of children who gave sworn evidence;⁴¹³ and

⁴⁰⁷ Letters Patent, 23/10/96, RCPS Exhibits 2724 & 2725, para. (j). See also Volume VI, Appendix P1 of this Report for a copy of the consolidated Letters Patent.

⁴⁰⁸ Letters Patent, 21/12/94, RCPS Exhibits 69 & U69, para. (d2).

⁴⁰⁹ RCPS, Advertisement calling for submissions in relation to the paedophile term of reference, RCPS Exhibit 2100; and see Volume VI, Appendix P3 of this Report.

⁴¹⁰ J. Heslop, RCT, 27/5/96, pp. 25958-96, 28/5/96, pp. 25998-6047; N. Cowdery, RCT, 1/7/96, pp. 27916-64; P. Dart, RCT, 24/2/97, pp. 36139-87; P. Conlon, RCT, 24/4/96, pp. 24145-81; B. Holborrow, RCT, 3/9/96, pp. 31443-58; NSW Legal Aid Commission, Submission to RCPS, August 1996, RCPS Exhibit 2529/88; P. Parkinson, Submission to RCPS, August 1996, RCPS Exhibit 2529/117; S. Booth and the Child Protection Unit Team, The New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521; National Association for Prevention of Child Abuse and Neglect, Submission to RCPS, 26/7/96, RCPS Exhibit 2529C/141.

⁴¹¹ D. Pence, C. Wilson & K. Pearce, RCT (video link to Alabama, USA), 2/7/96; D. Jones & C. A. Stephenson, RCT (video link to San Diego, USA), 3/7/96.

- the child witness was required to give evidence from the witness box in the same way as adult witnesses even though the presence of the accused, often a near relative, was likely to be particularly intimidating.

15.5 Prior to 1987 child witnesses in sexual assault cases were required to give evidence both at the committal hearing and at trial. Amendments designed to ease the lot of complainants in sexual assault cases led to the practical elimination of oral evidence from the complainant at the committal hearing.⁴¹⁴ More recently, legislation has come into operation providing for 'paper committals' in all cases.⁴¹⁵

15.6 Since 1985 there have been a number of legislative amendments designed to improve the position of child witnesses in child sexual assault cases. These are conveniently summarised in a report on Child Sexual Assault published by the Judicial Commission.⁴¹⁶ During the life of this Commission further far reaching procedural changes have been enacted in an effort to ameliorate the position of child witnesses in these cases.⁴¹⁷ These changes are noted in this chapter, which goes on to consider remaining areas where problems persist, and where reform might be considered.

A. EVIDENCE AT TRIAL - CLOSED CIRCUIT TELEVISION (CCTV)

15.7 As noted above, child complainants, like other witnesses, are no longer required to give evidence at the committal (preliminary) hearing.

15.8 At trial a child is still required to attend and give oral evidence. Generally the trial proceeds before a judge and jury.⁴¹⁸ The child's evidence in chief is led by the Crown prosecutor. He or she is next cross-examined by the legal representative of the accused and may be re-examined by the Crown prosecutor. The judge may also question the child but under our adversarial system this is not encouraged.

15.9 In relation to all children under the age of 16 years, at the date of the hearing, there is a presumption that their evidence will be given by means of closed circuit television.⁴¹⁹ Generally the child gives his/her evidence from a separate room while the accused, judge, jury and counsel watch it on screens in the courtroom. This spares the child the stress of seeing the accused. From the limited research available to date, it appears that judicial officers and counsel tend to communicate with the child witness, in a manner designed to be more sensitive to the child's needs, when the evidence is taken in this way.⁴²⁰

15.10 A child may choose not to give evidence by closed circuit television.⁴²¹ This recognises the importance of giving weight to the child's wishes about the manner of giving evidence. It is felt that some children may feel empowered by giving evidence in the courtroom,⁴²² and confronting the person they regard as their abuser.

⁴¹² *Crimes Act 1900*, s. 418 (repealed).

⁴¹³ *Kilby v the Queen* (1973) 129 CLR 460.

⁴¹⁴ *Justices (Paper Committals) Amendment Act 1987*.

⁴¹⁵ *Justices Amendment (Committals) Act 1996*.

⁴¹⁶ P. Gallagher, J. Hickey & D. Ash, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*, Judicial Commission of NSW, Sydney, 1997, RCPS Exhibit 3227, Appendix 1.

⁴¹⁷ *Crimes Amendment (Children's Evidence) Act 1996*.

⁴¹⁸ *Criminal Procedure Act 1986*, s. 31. Note that pursuant to s. 32 provision is made for trial by judge alone in cases where the accused so elects and the Crown consents to that course.

⁴¹⁹ *Crimes Amendment (Children's Evidence) Act 1996*, s. 405D(1). This provision applies to child witnesses in proceedings where it is alleged that a person has committed a personal assault offence (which includes child sexual assault offences) together with certain other types of proceedings including apprehended violence order matters.

⁴²⁰ Australian Law Reform Commission (ALRC), *Children's Evidence: Closed Circuit TV*, Report No. 63, 1992, p. 3.

⁴²¹ *Crimes Amendment (Children's Evidence) Act 1996*, s. 405D(3).

⁴²² ALRC, *Children's Evidence: Closed Circuit TV*, Report No. 63, 1992, pp. 7-8; J. Cashmore & R. Cahill, 'Closed circuit television and child witnesses: achieving its objective?', *Law Society Journal*, vol. 69, no. 1, February 1991, p. 59.

15.11 A court officer is present with the child at the remote location from which his/her evidence is taken. A person may be present with the child, either:

- as an interpreter;
- for the purpose of assisting the child with any difficulty in giving evidence associated with a disability; or
- for the purpose of giving the child other support.⁴²³

15.12 Where, for any reason, the child's evidence is not taken by means of closed circuit television the court must make alternative arrangements in order to restrict the contact (including visual contact) between the child and any other person. Those arrangements may include:

- the use of screens; or of
- alternative seating arrangements within the court (the latter may have regard to the child's line of vision).⁴²⁴

15.13 Again, a child may choose not to use such altered arrangements. In these cases the court must allow the child to give evidence in the ordinary way.⁴²⁵

15.14 In cases where an accused is unrepresented the court may appoint a person to conduct the cross-examination of the child.⁴²⁶ The appointee must act on the instructions of the accused. The court has a discretion not to make such an appointment if it considers that it is not in the interests of justice to do so.⁴²⁷

15.15 Although the mechanism for taking evidence by closed circuit television has been available, in NSW, since 1991 it was not widely used prior to the recent amendments. This was because it was necessary to satisfy the court that it would cause mental or emotional harm to the child to give evidence in the ordinary way.⁴²⁸ An order could only be made on the application of the prosecutor and it appears that some prosecutors were reluctant to make such an application as they feared the child's account may have less impact on the jury.⁴²⁹

15.16 The measures introduced by the *Crimes Amendment (Children's Evidence) Act 1996* represent a significant improvement in the approach taken by the criminal justice system to dealing with child witnesses in sexual assault cases.

15.17 The amendments only came into operation on 28 March 1997.⁴³⁰ There is little material available to date on the impact of the use of closed circuit television both in terms of its capacity to ease the strain of giving evidence for children and on its impact on the other participants in the criminal trial process. The experience in other jurisdictions speaks strongly in favour of its adoption, as does the experience of this Royal Commission, which called evidence from a large number of children utilising closed circuit relay from a facility located nearby. That facility also permitted electronic masking of the child's face and voice, an option that would not normally be needed or desirable in a conventional trial, save where a protected witness was called. The images were displayed to those present in the hearing room via personal computers and a large overhead monitor.

⁴²³ *Crimes Act 1900*, s. 405DB. Note the child may have more than one support person if the court thinks it in the interests of justice: *Crimes Act 1900*, s. 405CA.

⁴²⁴ *Crimes Amendment (Children's Evidence) Act 1996*, s. 405F.

⁴²⁵ *Crimes Amendment (Children's Evidence) Act 1996*, s. 405F(4).

⁴²⁶ *Crimes Amendment (Children's Evidence) Act 1996*, s. 405F(2).

⁴²⁷ *Crimes Amendment (Children's Evidence) Act 1996*, s. 405F(4).

⁴²⁸ *Crimes Act 1900*, s. 405D(2) inserted by the *Crimes (Child Victim Evidence) Amendment Act 1990* and since repealed by *Crimes Amendment (Children's Evidence) Act 1996*.

⁴²⁹ NSW Attorney General's Department, *Report of the Children's Evidence Task Force*, August 1995-96, RCPS Exhibit 2507, para. 2.2.9; P. Dart, RCT, 24/2/97, pp. 36162-63; S. Ryan, Submission to RCPS, August 1996, RCPS Exhibit 2529/91, pp. 1-3.

⁴³⁰ *NSW Government Gazette*, No. 31, 27/3/97, p. 1663.

Using these facilities there was no loss of impact resulting from the fact that the witness did not give evidence in the immediate presence of those in the hearing room.

15.18 Much of the assembled knowledge is canvassed in the Attorney General's Children's Evidence Task Force Report upon which the 1996 amendments appear to have been based.⁴³¹ Having regard to the passing of the legislation, which this Commission strongly supports, no point is achieved by any further examination of this issue. The Commission does, however, emphasise the need for the use of technology which permits high resolution display on large screens within close proximity of the jury. Poor resolution, defective audio, or reduced images can have an adverse impact on the process and occasion injustice to the prosecution case.

B. VIDEOTAPED INTERVIEWS WITH CHILD WITNESSES

15.19 One area not addressed by the 1996 amendments relates to the audio or videotaping of the child's statement pre-trial and its subsequent admission into evidence at trial.

15.20 A pilot project involving videotaped interviews in child sexual assault cases was undertaken in NSW in 1991. This project appears to have been prompted by interest in a scheme developed in Queensland. In 1981, the Queensland Co-ordinating Committee on Child Abuse established a working party to investigate the feasibility of admitting videotaped interviews with child complainants in court. The working party recommended the setting up of a joint training program, for police and family services officers, to enable them to conduct appropriate interviews with child complainants in cases where it was likely that criminal proceedings would follow. This led to the Interviewing Children and Recording Evidence Program (ICARE) in Queensland.⁴³²

15.21 In NSW a Steering Committee, comprising the NSW Police Service, Attorney General's Department, Department of Family and Community Services and the Office of the Director of Public Prosecutions was established to examine the process of video recording interviews with child sexual assault victims. The Steering Committee identified its potential use:

- to rebut claims of contamination of evidence in child sexual assault cases;
- to elicit sufficient information from the child to document the alleged abuse; and
- to minimise further trauma to the child during the interview process.⁴³³

15.22 The NSW ICARE Pilot Program commenced on 4 March 1991 in the areas serviced by the Gosford and Newcastle Child Mistreatment Units (although following a restructure in the Department of Community Services (DCS) in October 1991 the participating locations were reduced).⁴³⁴ The project was not successful. The ICARE Evaluation Report released in March 1993 records a litany of failures. Noteworthy is the fact that submissions by the Newcastle Child Mistreatment Unit and the DPP indicated that the number of times the children were interviewed increased because of the poor quality of police video interview skills.⁴³⁵

⁴³¹ NSW Attorney General's Department, *Report of the Children's Evidence Task Force*, August 1995-96, RCPS Exhibit 2507.

⁴³² Letter from Chairperson, Queensland Co-ordinating Committee on Child Abuse to NSW Child Protection Council (CPC), 9/4/92, RCPS Exhibit 3166.

⁴³³ ICARE: Interviewing Children and Recording Evidence Pilot Program, evaluation report to the ICARE working party, March 1993, RCPS Exhibit 3165, p. 3.

⁴³⁴ *ibid.*, p. 4.

⁴³⁵ *ibid.*, p. 9.

15.23 It appeared that police and DCS officers received little training as part of the NSW ICARE program and the trial was conducted at a time when many police were yet to become familiar with the ERISP process.⁴³⁶ A four day training program was conducted prior to the commencement of the pilot scheme.⁴³⁷ A number of the DCS staff who attended the training did not go on to participate in the pilot.⁴³⁸ The Evaluation Report recorded the wish of most police and DCS staff, who attended the training course, to have more time and attention devoted to practical sessions for interviewing and observing interview role models.⁴³⁹ The Queensland model provided for four weeks training.⁴⁴⁰

15.24 The Evaluation Report noted:

Generally, police indicated a lack of confidence in their skills and thus reluctance to implement the video interviewing technique

15.25 An examination of the Evaluation Report, together with the submissions attached to it, reveals a concern on the part of the various participants that the only likely use of the videotape would be by the defence, that is, if there was some inconsistency between the initial interview and later evidence. In this sense, those concerned with the interests of the child, saw the videotaped interview as potentially another weapon to be used against the child.

15.26 The Commission considers that the unhappy experience with the ICARE pilot should not stand in the way of the introduction of videotaped interviews with child complainants in sexual assault cases. The ICARE pilot failed largely because of a lack of proper training, and interviewing skills.

15.27 The Commission considers that videotaped interviews with child complainants in these cases are desirable for the following reasons:

- they provide a record of the child's presentation at a time which, inevitably, will be closer to the events complained of than the date of trial;
- the interview is conclusive evidence of the manner in which the child was questioned;
- when properly conducted such interviews should be shorter (and more accurate) than interviews in which both questions and answers are recorded manually;
- the strain of giving evidence in court about intimate matters may be reduced by the admission of the interview as the child's evidence in chief; and
- the risk of later reinforcement, or enhancement through repetition or suggestion can be reduced.

15.28 It has been suggested that video recording of interviews will do away with allegations of contamination. The Commission does not consider that this will necessarily be the case. Children, particularly young children, will not always disclose any or all details of abuse at the initial interview. Even with appropriately qualified interviewers there will be cases when incomplete details are disclosed on the first occasion, because of:

- initial embarrassment;
- the need for a relationship of trust and confidence in the interviewer before the most graphic or intimate incidents are revealed; and
- the ordinary processes of recollection in which details may not be immediately present.

⁴³⁶ ERISP is the Police Service acronym for 'electronically recorded interview between a suspect and police'.

⁴³⁷ ICARE: Interviewing Children and Recording Evidence Pilot Program, evaluation report to the ICARE working party, March 1993, RCPS Exhibit 3165, p. 4.

⁴³⁸ *ibid.*

⁴³⁹ *ibid.*, p. 16.

⁴⁴⁰ *ibid.*, p. 16.

15.29 Subsequent interviews will often need to be conducted and dates checked against independent records, to correct natural and understandable errors in the recollection of fine detail. In this regard, somewhat unreal expectations are often advanced by defence counsel when criticising the credibility of complainants on matters of detail, which are contrary to ordinary human experience. Cues and references to diaries, known dates and the like are the way people ordinarily bring matters back when a past event is recounted.

15.30 It is important that all interviews are recorded so that the court has before it a complete record of the questioning of the child and of the way detail may be filled in.⁴⁴¹ This will not stop suggestions of coaching of the child between interviews. However, the Commission considers that over time, and with improved training on the part of those conducting interviews, the practice of video recording will tend to reduce the amount of court time taken up with issues of alleged contamination.

15.31 In this regard it is impressed with the practice seen in several overseas jurisdictions, permitting the interview to take place in a room designed to make children feel comfortable, and in circumstances where:

- the interview is video/audio recorded and conducted by a suitably trained interviewer; and
- it is observed through a one way screen from outside the room, by investigating police, social workers and others involved in the case, who can follow the proceedings, and at appropriate intervals, without the knowledge of the child, suggest supplementary questions.

15.32 This approach permits a more comprehensive interview, utilising the skills and knowledge of others involved in the case, without adding to the burden of the child.

15.33 The Commission is sensitive to the stress placed on children when they are required to speak of intimate sexual matters in court. There seems much to commend the approach of admitting the video recorded interview into evidence as the child's evidence in chief. This does not mean that the child will not be subject to questioning at court. Proper regard for the rights of accused persons means that the child's account must be subject to testing. The introduction of the video recording does operate to reduce the number of times the child is required to particularise the nature of the abuse, and is likely to shorten the period that the child will be needed in the witness box.

15.34 Fair and responsible cross-examiners often tend to focus their examination on issues such as motive and opportunity rather than having the child repeat details of the sexual activity,⁴⁴² in the hope of finding some minor inconsistency upon which criticism of the witness's reliability can be based. Experienced judges are not persuaded by the latter technique, but inexperienced lay jurors may be. The introduction of the video recording might serve to spare the child the need to speak of these things in court at all.

15.35 In these circumstances the Commission sees no good reason why a video recording of the child's interview, by an appropriately qualified professional(s), should not be admissible in evidence, subject to the discretion of the trial judge to reject it in whole or part, if it is in the interests of justice to do so. Provisions enabling the tender of video recorded interviews in the prosecution case exist in a number of jurisdictions both within Australia and overseas, and a simple legislative amendment would permit their use in this State.⁴⁴³

⁴⁴¹ In the ICARE pilot it appears that the initial video recorded interview was, on occasions, supplemented by a later typewritten statement. See ICARE: Interviewing Children and Recording Evidence Pilot Program, evaluation report to the ICARE working party, March 1993, RCPS Exhibit 3165, p. 9. The undesirability of this approach does not require further comment.

⁴⁴² See eg. the observations concerning the subject matter of cross-examinations of complainants in G. Davies, C. Wilson, R. Mitchell & J. Milsom, Videotaping children's evidence: an evaluation, a report on the effectiveness of the provisions in the *Criminal Justice Act 1991* (UK) for dealing with child witnesses, RCPS Exhibit 3167, pp. 32-33.

⁴⁴³ *Evidence Act 1906* (WA), s. 106H; *Evidence Act 1977* (Qld), s. 21A(2)(e); *Evidence Act 1958* (Vic), s. 37B(2); *Criminal Justice Act 1991* (UK), s. 32A; *Evidence Act 1908* (NZ), s. 23D; and the Canadian Criminal Code.

15.36 The Commission notes the findings of the evaluation carried out in England and Wales as to the impact of the introduction of videotaped statements by child witnesses into evidence.⁴⁴⁴ In terms of trial outcomes it is of interest that there appears to have been no difference between the rates of acquittal for the videotape trials compared to the trials where the child witnesses gave the whole of their evidence orally.⁴⁴⁵

15.37 Consideration is currently being given in NSW to the issues surrounding videotaped interviews with child witnesses. The Attorney General requested the Children's Evidence Task Force to report on the use of videotapes of out of court statements made by children and on legislative amendments which might be introduced in this respect.⁴⁴⁶

15.38 The Task Force (comprising representatives from various agencies and government departments including the Office of the Director of Public Prosecutions (ODPP), the Legal Aid Commission, the Police Service, the Child Protection Council (CPC), the Department of Health, DCS and the Attorney General's Department) examined the relevant schemes adopted in Victoria, Queensland, Western Australia and New Zealand.

15.39 The Task Force has recommended the introduction of mandatory audio or videotape recording of all interviews with child witnesses, and the introduction of the same into evidence as part or all of the child's evidence in chief. These recommendations are in line with recommendations made by the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) in their Draft Recommendations Paper on Children and the Legal Process.⁴⁴⁷

15.40 The Commission supports the recommendations contained in the Children's Evidence Task Force Report insofar as they relate to the mandatory audio or videotaping of interviews with child witnesses, and the admission of the same into evidence as part or all of the child's evidence in chief. In this regard it has taken into account the substantial concerns expressed to it through submissions and complaints, concerning the ordeal children experience in giving evidence in these cases.

C. DELAY

CURRENT STATE OF THE LISTS

15.41 Delays in the justice system were a common cause of complaint by the parents of child complainants in Dr Cashmore's study of this group,⁴⁴⁸ and similarly were the subject of many complaints to the Commission. The CPC commissioned a report on 'Systems Abuse' which was published in February 1994. It sought and received submissions from the public and conducted consultation meetings around the State. Every submission received touching on the legal process made reference to delays as a problem.⁴⁴⁹ The stress placed on the child and family by the legal system's delays was similarly a feature of the complaints made to the Commission.

⁴⁴⁴ G. Davies, C. Wilson, R. Mitchell & J. Milsom, op cit.

⁴⁴⁵ ibid, p. 34.

⁴⁴⁶ Report of the Children's Evidence Task Force, Audio and videotaping of children's out of court statements (draft), June 1997, RCPS Exhibit 3168C, p. 1.

⁴⁴⁷ ALRC & Human Rights and Equal Opportunity Commission (HREOC), *A Matter of Priority: Children and the Legal Process*, Draft recommendations paper no. 3, May 1997, RCPS Exhibit 3284, draft recommendation 5.3, p. 37.

⁴⁴⁸ J. Cashmore, *The Evidence of Children*, Judicial Commission of NSW, Sydney, June 1995, RCPS Exhibit 1544, p. 38.

⁴⁴⁹ J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, Sydney, 1994, RCPS Exhibit 2356/2.

15.42 Estimates as to the average delays currently being experienced in finalising sexual assault trials where the complainant is a child were varied. It was difficult to ascertain a precise figure. Figures are available to show delays in finalising trial matters in the District Court generally but these do not separately identify matters involving child complainants,⁴⁵⁰ and are complicated by the priority given to these cases immediately behind those involving persons in custody. Moreover, the expression 'delay' is itself misleading, since for the prosecution and defence alike, some time is required to prepare for committal and trial which cannot be reduced. A more reliable calculation is to record the time between the significant events of arrest, committal and trial.

15.43 In recent times the ODPP has been keeping statistics on 'delays' in disposing of child sexual assault trials.⁴⁵¹ There is insufficient data yet to allow definite conclusions to be drawn, but it is important to monitor the position. If these statistics show that the median period between arrest and trial for these cases is unacceptable, or increasing, urgent action will be required to bring the period elapsed back to an acceptable period.

15.44 The Director of Public Prosecutions noted that there has been some reduction effected in the time taken for disposal of these cases over the past three or four years.⁴⁵² This was borne out by reference to studies of child sexual assault prosecutions. In June 1995 the Judicial Commission published Dr Cashmore's monograph 'The Evidence of Children'. This included the results of a survey she had earlier conducted of solicitors employed by the DPP. The survey looked at all child sexual assault cases handled by solicitors attached to that office for the period April 1991 to April 1992. Dr Cashmore found an average period of six months between charge and committal hearing and a further 48 weeks between committal and trial. The total period from charge to trial was 74 weeks.

15.45 The Judicial Commission Report on Child Sexual Assault 1997 was a study of child sexual assault matters which were prosecuted in the District Court of NSW in 1994. At that time the median time between arrest and finalisation for matters listed for trial was 62 weeks. The median time between committal and finalisation for listed trial cases was 18 weeks.⁴⁵³

15.46 In the financial year ended June 1995, at the Sydney District Court, only three child sexual assault trials appear to have been finalised within six months of the date of committal for trial. Eight trials were finalised within nine months of committal. Nine trials took in excess of nine months from the date of committal to trial. Indeed, three of those were finalised after more than 18 months from the date of committal. The average time was 329 days from committal to trial.⁴⁵⁴

15.47 In the same period the figures for the District Court at Gosford showed five matters finalised within six months of committal, and a further 13 matters finalised within nine months. Four trials had taken more than nine months to be heard from the date of committal. The average time was 253 days from committal to trial.⁴⁵⁵

15.48 Of concern, however, is the circumstance that the figures for the financial year ended June 1996, showed an increase in the average time between committal and trial in child sexual assault matters, at the Sydney District Court. It was 436 days. By comparison the figures for Gosford had improved on the previous year. The average time elapsed at that court was 236 days between committal and trial.⁴⁵⁶

⁴⁵⁰ District Court of NSW, *Annual Report 1996*.

⁴⁵¹ Period from Committal to Trial - CSA Matters Listed for Trial 01-JUL-1994 - 30-JUN-95 in N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, Annexure P.

⁴⁵² N. Cowdery QC, RCT, 1/7/97, p. 27950.

⁴⁵³ P. Gallagher, J. Hickey & D. Ash, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*, Judicial Commission of NSW, Sydney, 1997, RCPS Exhibit 3227, p. 31.

⁴⁵⁴ N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, Annexure P.

⁴⁵⁵ N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, Annexure P.

⁴⁵⁶ N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, Annexure P.

15.49 The increase in these figures at the Sydney District Court was attributed to a scheme, operating during the subject period, designed to reduce the court's backlog of long trials.⁴⁵⁷

15.50 Figures for the Western District Court and other country sittings are not available. However, the 1996 District Court Annual report shows that the time compliance schedules set by the court for the disposal of trial matters are generally not being met.⁴⁵⁸

15.51 The Director of Public Prosecutions and Mr Dart, the solicitor responsible for overseeing sexual assault prosecutions within the ODPP, both gave the Commission estimates of the times expected for disposal of child sexual assault matters which exceed 12 months from charge to finalisation. Mr Dart suggested the figure ranged from two to three years in cases where the accused was not in custody. This figure would be reduced to between 12 to 18 months with paper committals.⁴⁵⁹

15.52 Delay becomes a critical factor in cases where the complainant is still a young child at the time of complaint. The Director of Public Prosecutions put it this way:

[F]or a 6-year-old victim, a delay of 18 months, which is, despite those figures, not uncommon, is about one-quarter of the child's life. For an adult, of course, it's a very much smaller proportion and not only is it one-quarter of the child's life, but it's a time during which the child is growing, maturing, changing his or her attitudes, putting the unpleasantness of the past behind and seeking to get on with life and, ... indeed, to blot out painful and unpleasant memories. All of that impacts on the attainment of justice in the particular case.⁴⁶⁰

15.53 The Commission endorses those observations. It is plainly unsatisfactory for a young child to have the prospect of a court attendance hanging over his or her head for a period as much as 12 to 18 months after the suspected offender is charged. It is understandable that health professionals should have identified the criminal justice system as itself a contributor to the abuse of children in these cases, since it is important that they be allowed to resume their lives, and try to get over the event, as quickly as possible.⁴⁶¹

15.54 Moreover, there is a real risk that justice will not be done to the child, where there is a substantial delay between complaint and trial, because:

- of the risk of distortion or loss of memory over the intervening period, which may lead to an apparent inconsistency between the earlier disclosures and the evidence;
- the child giving evidence will have developed, become more knowledgeable and may have a totally different appearance and manner to that at the time of the abuse;
- gathering stress and anger over the intervening period may cause the child to give a most unfavourable impression in the witness box, particularly if there has been an acrimonious family break up and loss of support; and
- accumulating pressure from other members of the family, associated with the matter last mentioned, may bring about a retraction of the complaint, even though it is true.

⁴⁵⁷ N. Cowdery, RCT, 1/7/96, p. 27951.

⁴⁵⁸ District Court of NSW, *Annual Review 1996*, pp. 36-37.

⁴⁵⁹ P. Dart, RCT, 24/2/97, p. 36175.

⁴⁶⁰ N. Cowdery QC, RCT, 1/7/97, p. 27951.

⁴⁶¹ J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, Sydney, 1994, RCPS Exhibit 2356/2.

THE LISTING ARRANGEMENTS FOR CHILD SEXUAL ASSAULT TRIALS

15.55 The listing of criminal trials is the responsibility of the Criminal Listing Directorate. Trials are designated as category 'A' or 'B'. All child sexual assault cases are given a category 'A' listing. They take precedence over all matters save for cases where the accused is in custody.⁴⁶² Notwithstanding this priority the fact is that the time between arrest and trial remains unacceptable. There are insufficient judges to handle the volume of work assigned to the District Court. Despite moves to reduce the workload of that court by increasing the jurisdiction of the Local Courts in a range of less serious criminal cases, the court reports that it has reached its maximum capacity for the disposal of criminal trials. It has not been able to come close to achieving compliance with its time standards for the disposal of matters.⁴⁶³

15.56 The Commission's prime concern in this area relates to the prompt hearing of trials where the complainant is still a young child. There is a need to do so because:

- as already noted, any lengthy interval between charging and trial inevitably means the judge and jury are deprived of the opportunity to make an assessment of the child as he or she presented at the time of the relevant events;
- the child's life is disrupted by the uncertainty of the uncompleted criminal proceedings; and
- therapeutic counselling may be delayed in an effort not to contaminate the child's evidence.

15.57 Child sexual assault trials represent a significant component of the total allocation of criminal trial work in the District Court. Figures supplied by the ODPP as at 5 June 1997, show that they currently constitute 17.4% of all criminal trials heard in that Court.

15.58 That figure includes cases in which the complainant is an adult at the time of charging. There are an increasingly large number of matters being prosecuted involving allegations of abuse in childhood which are not brought to light until years later. Mr Dart gave evidence that some 50-70% of all child sexual assault prosecutions at the present time involve adult complainants.⁴⁶⁴ The precise figure is difficult to ascertain since such statistical material, as is maintained in respect of child sexual assault matters at best identifies the age of the complainant at the date of the incident, not at the time of charge.⁴⁶⁵

15.59 Statistical material supplied to the Commission by the ODPP shows a marked increase in the number of child sexual assault prosecution briefs received by that Office over the past five years. In 1992/3 there were 81 cases. In 1996/7 the figure was 713.⁴⁶⁶ The rate of increase was most dramatic in the period 1994/96. This corresponds with the life of this Commission, and the increase may, to some degree, be attributed to the publicity given to this topic and to greater awareness of child sexual assault arising out of public hearings. Nonetheless, there has been a steady increase in the number of such prosecutions for at least the last 15 years.⁴⁶⁷ The impact of this on the resources of the District Court needs to be recognised.

⁴⁶² N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2.

⁴⁶³ District Court of NSW, *Annual Review 1996*, pp. 3 & 35-41.

⁴⁶⁴ P. Dart, RCT, 24/2/97, pp. 36143 & 36170.

⁴⁶⁵ NSW Bureau of Crime Statistics and Research (BCS), *The Criminal Justice Response to Sexual Assault Victims*, Sydney, 1996.

⁴⁶⁶ Letter from the Office of the Director of Public Prosecutions (ODPP) to RCPS, 20/6/97, RCPS Exhibit 3169.

⁴⁶⁷ P. Gallagher, J. Hickey & D. Ash, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*, Judicial Commission of NSW, Sydney, 1997, RCPS Exhibit 3227, p. ix.

15.60 The District Court's ideal time standard for the commencement of criminal trials is 112 days (that is, four months) from the date of committal, in 90% of cases, or within one year in 100% of cases. In 1996, only 47.5% of trials where the accused was in custody were commenced within 112 days. The figure dropped to 19.3% in cases where the accused was not in custody. Commonly, the accused facing child sexual assault charges will not be in custody.

15.61 The Commission considers that it is imperative that the time taken for bringing on trials involving children under 16 years at the time of arrest are reduced. For children in this group it is not appropriate that trials should be brought on for hearing any more than six months from the time of charge. It considers this to be imperative in relation to children under 12 years, and highly desirable for children aged between 12 and 16 years because adolescence is a time of some turbulence, and children in their critical developmental years do not need the risk of secondary abuse.⁴⁶⁸

15.62 The interval between charging and committal in the past was of the order of six months. The introduction of the *Justices Amendment (Committals) Act 1996* should operate to reduce delays between committals and trials generally. A 28 day period is provided under the Justices Act for the service of the prosecution brief on the defendant. There seems no good reason why the interval between charge and committal in cases involving child complainants should be more than six weeks.

15.63 Applying the District Court's ideal time standard, it would seem reasonable to work to a time frame which would see sexual assault trials, involving child complainants, brought on for hearing within six months of the date of charge. If that cannot be achieved with existing resources, then consideration needs to be given to providing additional judges, or setting a court timetable that allocates more of the existing judges to these cases. Although this would have undesirable consequences for the remaining cases, the Commission considers that to be a necessary price for ensuring justice and avoiding system abuse for victims of child abuse.

D. PRE-TRIAL HEARINGS

15.64 It remains the case that the ideal time standards may not be achieved in all cases even where the complainant is a young child. It is for this reason that the Commission has given consideration to the introduction of videotaped pre-trial hearings at which the whole of the evidence of young children may be taken.

15.65 In December 1989, the report of the Home Office Advisory Group on Video Evidence was published in England. The Group, chaired by his Honour Judge Pigot QC, was appointed in June 1988, with a brief to consider and report on the use of video recordings, as a means of taking the evidence of children and other vulnerable witnesses in criminal trials.⁴⁶⁹ The Group looked at a number of issues including the admission into evidence of a videotape of the child complainant's interview. It concluded that in principle such a recording should be admissible.⁴⁷⁰ This recommendation was acted upon in the *Criminal Justice Act 1991*.

15.66 The Pigot Report went on to recommend the adoption of a system of pre-trial hearings in child sexual assault cases. The features of the Pigot Report model are outlined below:

- the prosecutor in a child sexual assault case should be able to apply as of right to have the child witness examined and cross-examined at an out-of-court hearing;
- the pre-trial hearing would be videotaped;

⁴⁶⁸ N. Cowdery, RCT, 1/7/96, p. 27951; P. Conlon, RCT, 24/4/95, pp. 24151-52.

⁴⁶⁹ *Report of the Advisory Group on Video Evidence*, Home Office, HMSO, London, December 1989.

⁴⁷⁰ *ibid*, p. 21.

- the pre-trial hearing would take place before the trial judge and would be subject to the rules of evidence;
- the examination and cross-examination of the child witness would take place in informal surroundings;
- wigs and gowns would not be worn;
- the judge would control cross-examination with special care;
- in the case of small children the pre-trial hearing might be conducted in a purpose built interview suite at a hospital or similar place;
- no-one should be present in the room at which the pre-trial hearing takes place save for the child, the judge, the advocates, and a parent or support person for the child. The accused should be in a separate room but able to communicate with his or her legal representative by audio link;
- the videotape of the pre-trial hearing would be shown to the jury at the later trial without the child witness being called; and
- in the event that it was necessary to further examine, or cross-examine, the child a further informal hearing should be conducted and videotaped.

The above scheme was not adopted in England although, as noted, other recommendations were acted upon.

15.67 In Western Australia, wide ranging reforms relating to the conduct of child sexual assault trials were introduced in the *Acts Amendment (Evidence of Children and Others) Act 1992*. The changes introduced by that Act were substantially derived from the *Report on the Evidence of Children and Other Vulnerable Witnesses* published by the Law Reform Commission of Western Australia. Among other proposals the Law Reform Commission supported the introduction of the Pigot Report pre-trial hearing.

15.68 Under s. 1061(1)(b) of the *Evidence Act 1906* (WA) the prosecutor may apply for the whole of the child's evidence (examination and cross-examination) to be taken at a videotaped pre-trial hearing.⁴⁷¹ Provision is also made for the admission of a videotaped recording of an interview with the child complainant,⁴⁷² and for the presentation of the whole, or part, of the child's evidence in chief by video recording.⁴⁷³

15.69 The West Australian amendments came into operation on 16 November 1992. In practice, the provision permitting the introduction of an audio or videotaped out of court statement into evidence has not been used.⁴⁷⁴ Investigators in that State tend not to electronically record their interviews with child witnesses.

⁴⁷¹ *Evidence Act 1906* (WA), s. 106 I(1)(b).

⁴⁷² *Evidence Act 1906* (WA), s. 106H.

⁴⁷³ *Evidence Act 1906* (WA), s. 106 I(1)(a).

⁴⁷⁴ M. Dixon, "Out of the Mouths of Babes..." - A Review of the Operation of the Acts Amendment (Evidence of Children Act) 1992', *Western Australian Law Review*, vol. 25, December 1995, p. 310 - Annexure W in RCPS Exhibit 2101/2.

15.70 However, as at November 1995, there had been seven trials, at which the complainant's evidence was presented to the jury in the form of a video of the pre-trial hearing. In these trials there had been five convictions, one acquittal and one discharge where the jury were unable to agree.⁴⁷⁵ More recent figures supplied to the Commission by the Child Victim Support Service of Western Australia show an increase in the use of pre-trial hearings. In the first six months of 1997, 14 hearings had been conducted.⁴⁷⁶ The Commission understands that the increase in the use of these pre-trial hearings arises from the need to preserve the evidence of young children, when it is apparent that there will be lengthy delays listing the case for trial. Pre-trial 'Pigot Report' style hearings are only held in respect of young children.

15.71 When the pre-trial hearings first commenced in Western Australia, the facilities for the conduct of the hearings in informal surroundings were not available. The pre-trial hearings were held in the courtroom and, reversing the procedure contemplated by the Pigot Report, the child witness gave his or her evidence from a separate room by closed circuit television. It was considered that this was an improvement on the Pigot model since it avoided subjecting the child witness to the stress of being in the same room as the defence lawyer,⁴⁷⁷ who the child might well relate to the accused.

15.72 The West Australian experience suggests that pre-trial hearings, if adopted in NSW, might operate best under conditions which, from the child's point of view, are similar to the experience of giving evidence at a trial by closed circuit television. The child is separated from the judge, advocates and the accused in a room with a support person and court officer.

15.73 Marion Dixon, a consultant to the WA Law Reform Commission in the preparation of its Report on the Evidence of Children and Other Vulnerable Witnesses, and a person closely associated with the implementation of the West Australian scheme, has summarised the advantages of pre-trial hearings thus:

- it enables the recording of the child's evidence while it is still relatively fresh;
- the child can, at an early stage, put the events behind him/her and get on with life;
- counselling, which may have to be postponed in order to avoid tainting the child's evidence can begin at an earlier stage;
- where a re-trial is ordered, the child's evidence may be presented in the form of the same videotape, avoiding the enormous emotional strain presently occasioned to children where a new trial is ordered on appeal, or because the jury fails to agree, or is discharged as the result of other misadventure during the first trial; and
- inadmissible evidence may be excluded ahead of time by judicially approved editing of a videotape - *Evidence Act 1906* (WA), s. 106M, is said to imply or authorise this.⁴⁷⁸

The Commission considers there is force to each of these considerations.

⁴⁷⁵ M. Dixon, "Out of the Mouths of Babes..." - A Review of the Operation of the Acts Amendment (Evidence of Children Act) 1992', *Western Australian Law Review*, vol. 25, December 1995, p. 310 - Annexure W in RCPS Exhibit 2101/2.

⁴⁷⁶ Western Australia Child Victim Witness Service, Information concerning the number of pre-recorded hearings held in the first half of 1997, RCPS Exhibit 3170C.

⁴⁷⁷ M. Dixon, "Out of the Mouths of Babes..." - A Review of the Operation of the Acts Amendment (Evidence of Children Act) 1992', *Western Australian Law Review*, vol. 25, December 1995, p. 310 - Annexure W in RCPS Exhibit 2101/2.

⁴⁷⁸ M. Dixon, "Out of the Mouths of Babes..." - A Review of the Operation of the Acts Amendment (Evidence of Children Act) 1992', *Western Australian Law Review*, vol. 25, December 1995, p. 310 - Annexure W in RCPS Exhibit 2101/2.

15.74 The Attorney General's Children's Evidence Task Force also looked at the pre-trial hearing model. It concluded that such a scheme should not be adopted. The Task Force's reasons for coming to this view were as follows:

- pre-trial hearings would not facilitate one of the main objectives of the Task Force, namely, the audiotaping and videotaping of children's out of court statements during the investigative phase;
- the pre-trial hearing would not reduce the trauma on the child to any greater degree than giving evidence at trial by closed circuit television; and
- there may be practical difficulties in arranging for the same prosecutor, defence counsel and judge to be available for both pre-trial hearing and trial.⁴⁷⁹

15.75 This Commission disagrees with each of these reasons:

- recording of out of court statements is not excluded by the existence of a pre-trial hearing;
- the context in which the evidence is taken is not unimportant - if the child is aware that a trial is under way and that there are observers watching and listening, there is likely to be more stress than in a setting which is known to be a preliminary event; and
- the need for the same personnel at the trial although desirable, is not critical; any difficulty in this regard might be offset by the increased prospect of an early plea of guilty if an assessment is made by the defence that the child came across as a persuasive witness, or by leave to further examine the child, if satisfactory cause is shown.

15.76 The ideal is to have the trial finalised within a short interval from the date of charge. In this respect, pre-trial hearings do not fully meet the concerns voiced by children and families about the stress caused by delay. Any scheme for the taking of the child witness's evidence pre-trial must be subject to the discretion to grant leave to recall the child, whether at another pre-trial hearing or at trial, in order to deal with some matter which, for good reason, was not dealt with at the original hearing. The West Australian scheme contemplates such a course.⁴⁸⁰ In this sense the pre-trial procedure does not ensure absolute finality for the child witness. However, it should be noted that the incidence of successful applications for the recall of child witnesses at trial (following a pre-trial hearing) in Western Australia has been low.

15.77 It is recognised that many child sexual assault trials are short; occupying one to three days of court sitting time. Such is one inference to be drawn from materials produced to the Commission by the Director of Public Prosecutions.⁴⁸¹ It is common for child sexual assault matters to proceed where there is little, if any, evidence available to corroborate the child complainant. The child is the central witness in the prosecution case. Upon that basis it might be suggested that little would be achieved by a pre-trial hearing, and that it would be better to use the time for the trial proper.

15.78 It is also recognised that listing of the pre-trial hearing and of the trial would be subject to an added complication in finding suitable dates for the same judge, prosecutor and defence counsel. Additionally, in some instances scheduling a pre-trial hearing may serve to delay the listing of the trial.

15.79 For these reasons the Commission does not favour the mandatory use of pre-trial hearings for young witnesses. The goal should at all times be the timely finalisation of the trial and any associated sentence proceedings.

⁴⁷⁹ Children's Evidence Task Force, Audio and videotaping of children's out of court statements, draft report, June 1997, RCPS Exhibit 3168C, pp. 23-24.

⁴⁸⁰ *Evidence Act 1906* (WA), s. 106K(5).

⁴⁸¹ Matters involving District Court Hung Juries 1994/95 Financial Year in N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, Annexure EE.

15.80 However, in cases where it is apparent that the suggested time frame (six months from date of charging to trial) will not be met or where the nature of the case suggests that a child under the age of 12 years would be at particular risk of trauma or prejudice through delay, the Commission considers that a mechanism should be available to take his or her evidence in advance of the trial.

15.81 The Commission recommends that the Crimes Act be amended to provide for maximum flexibility in the manner in which a child witness's evidence may be taken in proceedings involving personal sexual assault offences. Additional to the presumption in favour of the taking of evidence by CCTV, the court should have the power to direct (upon application by the prosecutor) that:

- the whole or part of the child's evidence in chief be taken by way of the admission of an audio or videotaped out of court statement; and/or that
- the evidence of the child be taken at a pre-trial hearing.

15.82 Any such amendments need to include appropriate safeguards as to the rights of the accused. Thus the court should not make such an order if it is not in the interests of justice to do so. Where evidence is given in either of the additional ways suggested above, a warning similar to that currently provided under s. 405H of the Crimes Act should be given.

15.83 The court should also be empowered to direct that an audio or videotape out of court statement, or videotape of a pre-trial hearing, be edited to omit material that is prejudicial or not relevant. The child witness should be subject to recall, either at a further pre-trial hearing or at trial, where the trial judge grants leave to do so.

E. THE ROLE OF THE ODPP

15.84 The ODPP is responsible for the conduct of sexual assault prosecutions in both summary and indictable matters. In recent years that Office has introduced a number of initiatives designed to address the needs of complainants in sexual assault matters.⁴⁸² Thus:

- in March 1990 a Sexual Assault Review Committee was established, which comprises representatives from the ODPP and other agencies associated with the prosecution process. The Committee has a number of functions including the identification of improvements which might minimise the trauma for victims of sexual assault, and the development of training for ODPP prosecutors. The Committee may review individual sexual assault prosecutions;
- designated sexual assault co-ordinators and senior solicitors have been located in each of the ODPP offices throughout the State. They are responsible for screening child sexual assault briefs of evidence, and ensuring that they are allocated to appropriate lawyers;
- a Witness Assistance Service was established in November 1994 following a successful pilot program commenced a year earlier⁴⁸³ (this is discussed in more detail below);
- the ODPP supports court preparation programs for complainants in child sexual assault cases and was involved in the development of the 'Nothing But the Truth' package;⁴⁸⁴ and
- a child witness interview room has been set up in the Sydney office of the ODPP.

⁴⁸² N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, pp. 5-10.

⁴⁸³ P. A. Dart, Assistant Solicitor ODPP, Letter to RCPS, 17/7/97, RCPS Exhibit 3179.

⁴⁸⁴ NSW Health Department Women's Health and Sexual Assault Unit, Nothing but the truth - court preparation for adult and child witnesses in sexual assault proceedings, RCPS Exhibit 2101/2, Annexure I.

15.85 In April 1996, the NSW Bureau of Crime Statistics and Research (BCS) published a report on the criminal justice system's response to victims of sexual assault. This included surveys of complainants as to the number of meetings they had attended with the ODPP solicitor handling their case and the crown prosecutor. The Report revealed that satisfaction with the ODPP was less evident than with the police and health services. In particular there were instances where complainants had not met the ODPP solicitor in advance of the court hearing.⁴⁸⁵

15.86 Complaints made to the Commission have mirrored those findings. Considerable resentment was expressed at the perceived disinterest of ODPP staff, and the lack of apparent preparation or familiarity with the case, where the first meeting occurred on the day of the hearing. Often that assessment was incorrect, but impression is very important in cases of the kind here considered, particularly where the child later experiences a rigorous cross-examination.

15.87 The contents of the BCS Report, together with the DPP's own inquiries, led to the adoption of new measures to ensure that complainants were kept informed of the progress of their cases and that they attended conferences in advance of the hearing.⁴⁸⁶ The Witness Assistance Service now identifies all complainants in sexual assault cases, makes contact with them and ensures contact between solicitor and complainant.⁴⁸⁷ These are positive moves which the Commission recommends. It is important that they be universally applied.

15.88 The prosecution of child sexual assault matters within the ODPP is not treated as a speciality. This is in conformity with the Director's view that the prosecution of criminal cases is itself a speciality, and that any further refinement might lead to lack of work satisfaction among staff.⁴⁸⁸ There is not a specialist group of Crown prosecutors handling sexual assault cases. This, again, is for the reason that the Director does not favour such a limited field of specialisation.⁴⁸⁹

15.89 The Commission sees the force of the Director's concerns about the potential for burn-out, should specialist groups of lawyers be assigned exclusively to the prosecution of child sexual assault matters. It is important, however, that all lawyers who are engaged in the prosecution of child sexual assault matters receive specialist training relating in the cognitive development of children, phenomena such as the abuse accommodation syndrome, and age appropriate communication. It is noted that the ODPP already undertakes training on sexual assault issues with both solicitors and Crown Prosecutors and that in 1996 a training needs analysis was undertaken with respect to child sexual assault matters.⁴⁹⁰

15.90 The ODPP aims to ensure that the same solicitor has carriage of child sexual assault prosecutions throughout the progress of the matter. The desirability of this was recognised by Mr Dart, who has overall responsibility for sexual assault prosecutions.⁴⁹¹ It is not always achieved, particularly on country circuits. This is unfortunate since the greatest number of sexual assault trials are in fact listed in country courts. The Commission is strongly supportive of the ODPP's efforts to ensure continuity of staff in these cases. It is clear that children and their families are likely to take some comfort in knowing the identity of, having contact with and confidence in, the person who is prosecuting the trial. It is appropriate for the Criminal Listing Directorate to accord weight to the consideration of continuity in prosecuting staff in listing these matters, and for the ODPP to make every effort to secure that continuity.

⁴⁸⁵ *The Criminal Justice Response to Sexual Assault Victims*, NSW Bureau of Crime Statistics and Research (BCS), Sydney, 1996, p. 51.

⁴⁸⁶ N. Cowdery QC, Letter to RCPS, 12/12/96, RCPS Exhibit 5896; ODPP, Memorandum to all Crown Prosecutors, 16/12/96, RCPS Exhibit 5897.

⁴⁸⁷ N. Cowdery QC, Letter to RCPS, 12/12/96, RCPS Exhibit 5896.

⁴⁸⁸ N. Cowdery QC, RCT, 1/7/96, p. 27920.

⁴⁸⁹ N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, p. 9.

⁴⁹⁰ N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, pp. 9-10.

⁴⁹¹ P. Dart, RCT, 24/2/97, p. 36149.

15.91 The Commission is aware of the anxiety on the part of child witnesses, and their families, to know the outcome of the criminal trial and, in cases where the accused is convicted, to know the sentence imposed by the court. This is particularly understandable in the large number of cases where the accused is either a family member or a trusted friend. Complaints about delay do not stop with the trial. The Judicial Commission's report, *The Evidence of Children* draws attention to complaints about the delay in sentencing offenders convicted at trial.⁴⁹² The Judiciary and Officers of the ODPF particularly need to be aware of this concern, and to redress it so far as possible.

F. CROSS-EXAMINATION OF CHILD COMPLAINANTS

15.92 One of the principal complaints voiced by child witnesses and their families relates to the conduct of cross-examination,⁴⁹³ and the manner in which they are treated when called as witnesses. Very many submissions were received complaining of harassing and belittling cross-examination, the use of age inappropriate questions, and of questions which were expressed in terms which were long-winded or imprecise.

15.93 This is an area where the interests of the child are in conflict with the demands of a system of criminal justice which is designed to ensure fairness to the accused. There is no doubt that cross-examination is upsetting to children, places them in an environment with which they are totally unfamiliar, and calls on them to communicate in a way which is not natural for them. However, the accused must have the right, through his or her representative, to test the child's evidence.

15.94 Our adversary system has not encouraged judges to intervene in the conduct of the examination of witnesses unless objection is taken, or the advocate has plainly exceeded the bounds of proper questioning. Some judges fear that undue intervention, even if justified, will excite concern as to prejudice, or cause the jury to be sympathetic to the accused. There is a class of counsel that in fact seeks to incite judicial intervention and rejection of questions, for this purpose, as a standard forensic technique. Judges need to be aware of techniques of this kind, and of the risk that witnesses, particularly children, may be persuaded or misled into giving evidence that does not reflect their true understanding of the facts. Sometimes this occurs out of the child's respect for a person of apparent authority, and a reluctance to disagree with a proposition advanced in a leading form which seems to invite concurrence. On other occasions it is simply a product of a misunderstanding of a complex or confusing question, and the child's lack of confidence in asking for it to be clarified.

15.95 The Commission accepts that in a significant proportion of sexual assault trials, children are examined in a way which, having regard to their level of cognitive and emotional development, is inappropriate.⁴⁹⁴ This may be the result of a deliberate attempt to mislead the witness, or it may arise from the advocate's lack of knowledge of child development. Whatever the explanation, evidence extracted from children which may be affected by a lack of understanding of the question, or is a matter of concession derived not out of truth but as a result of bullying or coercion, is of little value to the trier of fact.

⁴⁹² J. Cashmore, *The Evidence of Children*, Judicial Commission of NSW, Sydney, June 1995, RCPS Exhibit 1544, p. 38.

⁴⁹³ *ibid*, p. 32.

⁴⁹⁴ Brennan & Brennan, *Strange Language - child victims under cross-examination*, Riverina Murray Institute of Higher Education, 1988; J. Cashmore, *The reliability and credibility of children's evidence*, Paper presented to the seminar 'The Child as a Witness', Dubbo, June 1991; R. K. Oates, 'Children as witnesses', *ALJ*, vol. 64, March 1990, p. 133.

15.96 The *Evidence Act 1995* empowers the trial judge or magistrate to intervene to disallow cross-examination which is misleading, unduly annoying, harassing, intimidating, offensive or repetitive.⁴⁹⁵ The court is specifically invited to have regard, among other matters, to the age of the witness in exercising its powers in this respect.⁴⁹⁶ The trial judge also has the power to disallow leading questions put in cross-examination in cases where he or she is satisfied that the facts concerned would be better ascertained if leading questions were not used.⁴⁹⁷ The court has a general discretion to disallow evidence if its probative value is substantially outweighed by the danger that it might be misleading or confusing or might cause or result in undue waste of time.⁴⁹⁸

15.97 It is considered that adequate mechanisms exist under the Evidence Act to enable the trial judge to ensure cross-examination of child witnesses is conducted responsibly. However, for these powers to be properly exercised, judicial officers need to be on their guard, and to be suitably experienced and trained both in deciding when to intervene, and in the manner that intervention can best occur without prejudicing the fairness of the trial.

15.98 In several submissions received by the Commission, the suggestion was made that a child complainant giving evidence be granted legal representation, or have available, a 'child advocate' whose function it would be to intervene at any time that it was seen that the child was confused, tired, or being inappropriately treated. The Commission does not regard such a concept with any favour:

- it would be more likely to promote friction and an appearance of a party/party dispute, which may rebound to the disadvantage of the complainant;
- there could be a tendency in the child advocates to adopt a partisan approach and contaminate the witness; and
- in any event, the intervention would usurp the proper role and function of the judge to control the trial, and ensure fairness to the Crown and accused alike.

G. TRAINING FOR JUDICIAL OFFICERS AND LAWYERS

15.99 Newly appointed judges, particularly those inexperienced in the criminal law, would be assisted in exercising the powers conferred on them, under the Evidence Act provisions referred to above (particularly s. 41(2) of the Evidence Act which invites consideration of the witness's age in determining whether questions asked in cross-examination are misleading, intimidating and so forth) by specialist training in child development and in the management of young witnesses. The Commission has been supplied with a deal of research and other material which emphasises the importance of questioning children in a way that is appropriate.⁴⁹⁹ There are various avenues for such training that can be utilised. They include:

- the judicial orientation program conducted by the Judicial Commission of NSW in conjunction with the Australian Institute of Judicial Administration;
- annual court conferences; and/or
- specific programs conducted by the Judicial Commission.

⁴⁹⁵ *Evidence Act 1995*, s. 41(1).

⁴⁹⁶ *Evidence Act 1995*, s. 41(2).

⁴⁹⁷ *Evidence Act 1995*, s. 42(1) & (3).

⁴⁹⁸ *Evidence Act 1995*, s. 135.

⁴⁹⁹ Brennan & Brennan, *Strange Language - child victims under cross-examination*, Riverina Murray Institute of Higher Education, 1988; J. Cashmore, *The reliability and credibility of children's evidence*, Paper presented to the seminar 'The Child as a Witness', Dubbo, June 1991; R. K. Oates, 'Children As Witnesses', *ALJ*, vol. 64, March 1990, p. 133.

15.100 In addition to taking effective control so as to eliminate, or at least clarify, otherwise inappropriate questions, judges should also be informed as to the problems children may have in maintaining concentration, or sitting in the same position, for any length of time, so that they can either curtail prolonged questioning, or provide for suitable breaks.

15.101 As noted above, the ODPP has developed a training program for solicitors and Crown Prosecutors engaged in child sexual assault cases. It is to be hoped that the Bar Council and Law Society might undertake similar training programs for their members, to ensure that those engaged in defence work in these cases, are equipped to handle child witnesses in an appropriate, fair and responsible way. The duty to represent a client to the best of the ability of a legal practitioner does not include a right to act unethically, or to occasion inappropriate secondary abuse to a witness/complainant in cases of the kind here under consideration.

H. ROBING AND FORMALITY

15.102 Courts are almost always an unfamiliar and intimidating environment for child witnesses. To add to the child's sense of bemusement is the fact that the judge and barristers wear wigs and gowns (robes). The wearing of robes in the higher courts is justified on a number of grounds apart from tradition. These have to do with reinforcing the solemnity of the proceedings and the authority of the court. Such considerations are not appropriate when it comes to dealing with child witnesses.

15.103 Several strategies have been adopted to make the court experience less stressful to child witnesses: court familiarisation visits, CCTV, special seating arrangements and so forth. In this context it is also appropriate that in trials to which s. 405C of the Crimes Act applies, neither the judge nor counsel should wear robes, at least during the taking of evidence from any child witness. As a matter of practical convenience, there is good reason to dispense with robes entirely in such cases, and with all other unnecessary formalities.

15.104 Additionally, it is appropriate for the courts to provide appropriate facilities, or otherwise to ensure that suitable procedures are in place to ensure privacy for child witnesses in waiting, and their separation from the public, and accused and his representatives, during the trial.

I. COURT PREPARATION COUNSELLING

15.105 The need for appropriate counselling to prepare the witnesses in sexual assault cases for the experience of giving evidence, and to support them during the period when proceedings are pending, has been recognised in this State and in other jurisdictions.⁵⁰⁰

15.106 At present the ODPP has a Witness Assistance Service. This Service was established in 1994 after the previous Director of Public Prosecutions observed the operation of a similar service in Canada.⁵⁰¹ It has seven qualified counsellors.⁵⁰² This is insufficient to cover all of the ODPP's regional offices. It is understood that funds have recently been made available to increase the staffing of this unit and that, in the near future, there will be an officer from the Service attached to each regional office.⁵⁰³

15.107 As noted above, the Witness Assistance Service:

⁵⁰⁰ N. Cowdery QC, RCT, 1/7/96, p. 27943.

⁵⁰¹ N. Cowdery QC, RCT, 1/7/96, p. 27942.

⁵⁰² P. Dart, RCT, 24/2/97, p. 36144.

⁵⁰³ An additional \$600,000 per annum was allocated in the 1997-98 NSW Budget for the employment of nine extra staff to expand the Witness Assistance Service to all ODPP regional offices. See NSW Parliament, *Social Justice Budget Statement 1997-98*, NSW Government Printer, Sydney, 1997, RCPS Exhibit 3077, p. 8.

- seeks out complainants in sexual assault matters, and ensures timely contact with the solicitor assigned to the case;⁵⁰⁴
- provides crisis counselling and referrals; and
- in cases where the complainant is not already receiving counselling from one of the Department of Health's Sexual Assault Centres, provides court preparation counselling⁵⁰⁵ and may accompany the witness to court.

The Commission supports this initiative and the continued provision of funds to enable the Service to cover all child sexual assault cases across the State. This is of course subject to the need for care to be exercised not to contaminate any evidence.

J. TRIAL BY JURY

15.108 Some sexual offences against children may be dealt with summarily before magistrates.⁵⁰⁶ The more serious cases are dealt with on indictment in the District Court,⁵⁰⁷ unless there is some special circumstance justifying trial in the Supreme Court. It is possible for trials in either court to be heard by a judge sitting alone, provided the accused elects to be tried in this way, and the prosecution consents to that course.⁵⁰⁸

15.109 The Royal Commission did receive some submissions inviting consideration to the introduction of:

- a requirement that all trials involving the sexual assault of children be conducted by judge alone or by a panel of three judges; or alternatively
- the introduction of majority verdicts for such trials.

15.110 The supposed advantages of judge alone (or judge panel) trials were identified as follows:

- lay jurors are likely to be uncomfortable with these cases and through ignorance or otherwise, may be incapable of confronting the facts, accepting the actuality of sexual abuse, or understanding the issues;
- greater experience is brought to bear by judges in the fact finding exercise;
- there is a likelihood that trials would be shorter, and judges would be more prepared to intervene to stop inappropriate cross-examination;
- there might be a reduction in the stress imposed on children, since they would not need to recount painful and embarrassing events to 12 strangers;
- there might be an elimination of possible bias, in that it cannot be known with any certainty whether some members of the jury panel were themselves abusers of children, or the victims of abuse, or had strong preconceptions or feelings in this area; and
- the occasion for hung juries would be eliminated absolutely in the case of a judge alone trial.

⁵⁰⁴ P. A. Dart, RCT, 24/2/97, pp. 36149-50.

⁵⁰⁵ NSW Health Department Women's Health and Sexual Assault Unit, Nothing but the truth - court preparation for adult and child witnesses in sexual assault proceedings, RCPS Exhibit 2101/2, Annexure I.

⁵⁰⁶ See *Crimes Act 1900*, ss. 61L, 61N, 61O(1) or (1A), 476 & 495.

⁵⁰⁷ Such offences are triable in both the District and Supreme Court - by direction of the Attorney General all sexual assault offences are prosecuted in the District Court. See letter from Attorney General to Director of Public Prosecutions, 29/6/92, RCPS Exhibit 2106.

⁵⁰⁸ *Criminal Procedure Act 1986*, s. 32.

15.111 The submissions supporting majority verdicts related to the assumption (held with some justification) that child sexual abuse cases are the cases where the presence of an intransigent juror, committed to a single viewpoint out of personal bias, is most likely to be experienced.

15.112 There are some superficial attractions in these arguments, but it is by no means clear that they attract empirical support.

15.113 Since the introduction of the option for trial by judge alone it appears that in relatively few cases has the election been made to proceed in this way.⁵⁰⁹ The Director of Public Prosecutions supplied the Commission with figures relating to judge alone trials over a six month period from 1 October 1995.⁵¹⁰ These did not include a breakdown of child sexual assault trials. Although the figures did show a higher conviction rate in judge alone trials they were too small to enable meaningful conclusions to be drawn. It needs to be remembered that trials before judge alone only take place if the accused so elects. While the reasons which lead to an election being made are, no doubt, varied it is likely that it is only in cases with some unusual feature that an accused receives advice to make the election.

15.114 One significant and obvious distinction between the two forms of trial is that all judge alone trials proceed to a verdict, whereas jury disagreements and retrials are not uncommon. This is an advantage so far as it avoids delay and duplication of court resources. On the other hand it does not necessarily guarantee a fair outcome for the trial. Often a hung jury indicates the existence of a serious doubt concerning the evidence, and results in the proceedings being no-billed.

15.115 The success rate of appeals does not seem to differ significantly depending on the form of trial although the exposure of reasons for the verdict required of a judge, potentially creates a greater opportunity for appellate intervention.

15.116 Three countervailing arguments arise:

- judge alone trial does present an opportunity for forum shopping referable to the reputation individual judicial officers acquire for leniency/sternness either generally, or in relation to a particular category of cases, which might become particularly noticeable in this area;
- the use of panels at trial level would stretch judicial resources very thinly;
- these cases quintessentially depend on a simple ultimate issue of fact, and on the credibility of two key witnesses - the complainant and the accused (assuming, as is now more likely to be the case after abolition of the unsworn statement,⁵¹¹ that the accused gives evidence) which are best left to the representatives of the community to determine; and
- these cases are particularly worrying and demanding, invariably attract high emotions on the part of those involved and are sometimes attended with public controversy, such that it is better for the accountability to be shared.

15.117 The Commission is not persuaded, in the absence of any change in the adversary system of justice, or the introduction of special juries, that any exceptions to the usual practice should be made for child sexual assault cases.

⁵⁰⁹ N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, Annexures CC & DD.

⁵¹⁰ N. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2, Annexures CC & DD.

⁵¹¹ *Crimes Act 1900*, s. 404A introduced by the *Crimes Legislation (Unsworn Evidence) Amendment Act 1994*.

15.118 Trial by jury is an important right accorded to all accused and there is no justification in depriving those accused of sexual offences against children of it. Nor is there any reason to think that were all child sexual assault trials conducted before judges sitting alone or in a panel, that the pattern of verdicts would differ. The fact is that juries do convict on the uncorroborated evidence of children in a significant number of cases, even though the burden of proof placed on the Crown in criminal cases is a heavy one.

15.119 In very many child sexual assault cases there is no evidence available to corroborate the complainant. In prosecutions for offences other than sexual assault the Crown may be reluctant to proceed where the issue will come down to one word against another. The relatively low conviction rate is not of itself a reason to change the mode of trial. Nor should it cause the police or the Crown to prosecute in a lesser number of cases.

15.120 If however, majority verdicts are introduced generally, this report should not be seen as advancing a special case for reserving unanimous verdicts in child sexual assault trials. Subject to the special procedural aspects identified in this Report, the mode of trial should be similar for all cases.

K. EXPERT EVIDENCE IN CHILD SEXUAL ASSAULT TRIALS

15.121 It has been suggested that juries in child sexual assault trials would benefit from hearing expert evidence about the behavioural characteristics of sexually abused children.⁵¹² It is said that in the absence of such evidence jurors may find behaviour such as:

- the failure to report abuse; or
- the continued association with the abuser as inconsistent with the child witness's account.

Such behaviours have been found to be typical of children subjected to repeated abuse by trusted adult figures.⁵¹³

15.122 To date, the admission of expert evidence from psychiatrists or psychologists as to the behavioural characteristics of sexually abused children has tended not to find favour with Australian courts.⁵¹⁴ Were expert evidence available to show that sexually abused children demonstrate a pattern of distinctive characteristics which can be said to be the concomitants of sexual abuse, such evidence might be admitted in the same way that evidence of signs of physical trauma is admissible to prove the fact of assault.⁵¹⁵ Generally, the behaviours described by experts lack the degree of specificity necessary to be admissible on this footing.

15.123 An alternative basis at common law for the admission of expert evidence, from psychiatrists or psychologists, as to the behaviour of sexually abused children is that it may rehabilitate the credit of the complainant in a case in which a challenge has been mounted (or, perhaps, anticipated) as to a matter such as the failure to report the abuse.⁵¹⁶ Expert evidence concerning the abuse accommodation syndrome, and the repressed memory syndrome, potentially fall into this category.

⁵¹² P. Dart, RCT, 24/2/97, p. 36166; P. Budai, 'Rehabilitation of Children's' Evidence in CSA cases', *Current Issues in Criminal Justice*, vol. 7, no. 2, November 1995, pp. 223-24.

⁵¹³ K. Bussey, 'Allegations of Child Sexual Abuse: Accurate and Truthful Disclosures, False Allegations, and False Denials', *Current Issues in Criminal Justice*, vol. 7, no. 2, November 1995, p. 176; R. K. Oates, March 1990, op cit, p. 129; R. Summit, 'The Child Sexual Abuse Accommodation Syndrome', *Child Abuse & Neglect*, vol. 7, 1983, pp. 177-93.

⁵¹⁴ *Ingles v The Queen*, Unrep., TasCCA, 4/5/93; *R v C* (1993) 60 SASR 467; *F v R* (1995) 83 A Crim R 502.

⁵¹⁵ *R v Johnson*, Unrep., VicCCA, 8/12/94.

⁵¹⁶ *R v Johnson*, Unrep., VicCCA, 8/12/94; *Cross on Evidence*, 5th Aust edn. paras 19170 & 19175; *R v C* (1993) 60 SASR 467.

15.124 The *Evidence Act 1995* now governs the position. This Act introduced significant changes into the law of evidence in NSW and its impact is still being determined. Significantly the Act has adopted a liberal test for the admission of expert opinion evidence.⁵¹⁷ A person with 'specialist knowledge' based on training, study or experience may be able to give opinion evidence based on that knowledge. The 'common knowledge' rule has been abolished.⁵¹⁸ This was the rule which prevented the admission of expert evidence about a subject considered to be within the realm of 'common knowledge'. It was by reference to this rule that expert evidence relating to the behaviour of sexually abused children was rejected by the South Australian Supreme Court.⁵¹⁹

15.125 While the common knowledge hurdle has been removed, it is not clear that evidence led to show the behavioural characteristics of sexually abused children generally would be admissible. The Commission is not aware of any case where evidence of this kind has been led in NSW, since the introduction of the *Evidence Act 1995*. Evidence that is relevant only to a witness's credibility is not admissible.⁵²⁰ The exceptions to the operation of that principle, relating to the rehabilitation of credit, would not let in evidence of this description.⁵²¹

15.126 It may be that expert evidence tendered to dispel common misconceptions about the behaviour, which might be expected of sexual assault victims, meets the broad test of admissibility pursuant to s. 56 of the Act. It is relevant within the meaning of s. 55(1) and it does not fall foul of the credibility rule.⁵²² The position is uncertain and if it is intended that expert evidence of matters such as the Child Sexual Assault Accommodation Syndrome be admissible in child sexual assault cases then it is appropriate to make specific legislative provision for it.

15.127 The ALRC and the HREOC, in their Draft Recommendations Paper on Children and the Legal Process, recommend that judges should have the discretion to admit expert evidence concerning the reliability of child witnesses. In particular it is suggested that evidence which would assist the judge and or jury to understand the Child Sexual Abuse Accommodation Syndrome or other patterns of children's disclosure in abuse cases should be admissible, and/or the effects of child abuse on children's behaviour and demeanour in court.⁵²³

15.128 The New Zealand Evidence Act makes specific provision for the reception of expert evidence in child sexual assault cases.⁵²⁴ Evidence may be led as to:

- the intellectual attainment, mental capability, and emotional maturity of the complainant (it being contemplated that such evidence may be based on an examination of the complainant conducted prior to trial);

⁵¹⁷ *Evidence Act 1995*, s. 79.

⁵¹⁸ *Evidence Act 1995*, s. 80(b).

⁵¹⁹ R v C (1993) 60 SASR 467.

⁵²⁰ *Evidence Act 1995*, s. 102.

⁵²¹ *Evidence Act 1995*, s. 108(3).

⁵²² Freckleton describes this evidence as 'counter intuitive' in 'Contemporary comment: when plight makes right - the forensic abuse syndrome', *Criminal Law Journal*, vol. 18, February 1994.

⁵²³ ALRC & HREOC, *A Matter of Priority: Children and the Legal Process*, Draft recommendations paper no. 3, May 1997, RCPS Exhibit 3284, draft recommendation 5.12, p. 40.

⁵²⁴ *Evidence Act 1908*, s. 23G is in these terms:

- (1) For the purposes of this section, a person is an expert witness if that person is -
 - (a) A medical practitioner registered as a psychiatric specialist under regulations made pursuant to section 39 of the Medical Practitioners Act 1968, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or
 - (b) A psychologist registered under the Psychologists Act 1981, practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children.
- (2) In any case to which this section applies, an expert may give evidence on the following matters:
 - (a) The intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on -
 - (i) Examination of the complainant before the complainant gives evidence; or
 - (ii) Observation of the complainant giving evidence, whether directly or on videotape;
 - (b) The general development level of children of the same age group as the complainant;

- the general development level of children of the same age group as the complainant; and
- whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

15.129 The Commission considers that it is appropriate that expert evidence be admitted in sexual assault trials along the lines of the New Zealand model. Such evidence may place in context behaviour which is otherwise perplexing, such as the absence of complaint, or the continued association with the alleged offender. Its purpose would be to establish a neutral playing ground, in which misconceptions held by jurors arising out of their ignorance concerning the behaviour of children generally, might be removed.

15.130 In one respect the Commission favours a more restrictive approach than the New Zealand scheme. The expert called by the Crown should be independent in the sense of not having been involved in the investigation. This serves to reduce the number of interviews to which the child is subject and avoids any suggestion of unfairness arising from the fact that the defence expert does not have access to the complainant.⁵²⁵

15.131 The *Evidence Act 1995* is designed to be uniform with the Commonwealth Act. It is hoped that the two will provide the basis for uniform laws throughout Australia. If the draft recommendation made by the ALRC and HREOC is adopted, both the Commonwealth and NSW might jointly amend their respective Evidence Acts to allow for the admission of expert evidence in these cases. In the meantime provision for the admission of expert evidence in trials for child sexual assault offences might be included in the Crimes Act, in that part dealing with the evidence of child witnesses.

L. DIRECTIONS TO JURIES IN CHILD SEXUAL ASSAULT CASES

WARNING AS TO THE RELIABILITY OF THE EVIDENCE OF CHILDREN

15.132 It was a rule of practice for a warning to be given to juries that it was dangerous to convict on the uncorroborated evidence of a complainant, in a trial for a sexual assault, although the jury may act upon the testimony if after scrutinising it with care they were satisfied as to both its truth and accuracy.⁵²⁶

15.133 That requirement was abolished by the *Crimes (Sexual Assault) Amendment Act 1981*.

15.134 A separate rule of practice required a warning as to the danger of convicting in any criminal matter on the uncorroborated evidence of a child witness.⁵²⁷ This was abolished by the *Crimes (Child Assault) Amendment Act 1985*, and the *Evidence (Children) Amendment Act 1985*. Following the introduction of these amendments it was neither necessary or appropriate for a judge to warn a jury of the danger of convicting on the evidence of a child, unless the facts of the particular case called for a warning.⁵²⁸ Judges were, however, left with some difficulty in determining whether any particular case fell into the category where a warning should still be given.

(c) The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

⁵²⁵ It is to be noted that in New Zealand the complainant is not made available for examination by any expert nominated by the defence.

⁵²⁶ *Kelleher v The Queen* (1974) 131 CLR 534 at 553 per Gibbs J.

⁵²⁷ *B v the Queen* (1992) 63 A Crim R 225 at 237 per Dawson and Gaudron JJ.

⁵²⁸ *Longman v the Queen* (1989) 168 CLR 79; see also *Murray v R* (1987) 11 NSWLR 12, *R v E* (1996) 39 NSWLR 450.

15.135 Those reforms were contained in the former s. 405C of the Crimes Act. That section was repealed on the commencement of the *Evidence Act 1995*. The latter Act provides that it is unnecessary that evidence be corroborated.⁵²⁹ Despite any rule of law or practice to the contrary, but subject to other provisions of the Act, it is not necessary in a jury trial for the judge to warn the jury that it would be dangerous to convict on uncorroborated evidence.⁵³⁰

15.136 The Evidence Act does refer to categories of evidence which 'may be unreliable'.⁵³¹ In respect of such evidence, at a jury trial, a party may request and a judge shall, on application to do, so warn the jury that the evidence may be unreliable, identify the matters that may cause it to be unreliable and warn the jury of the need for caution in determining whether to accept the evidence and the weight to give to it.⁵³²

15.137 One of the types of evidence which the Act provides may be unreliable is evidence 'the reliability of which may be affected by age'.⁵³³

15.138 It should be noted that the judge has a discretion to refuse to give the warning if there are good reasons for not doing so.⁵³⁴

15.139 The operation of s. 165 of the Evidence Act may see a return to the practice of warnings being given as a matter of course in cases where the complainant is a young child.⁵³⁵

15.140 This would be an unfortunate development since, no matter how carefully it is given, such a warning is easily mistaken by a jury as an instruction to acquit. The common law rule of practice as to the giving of warnings, in cases involving children, seems to have grown from notions that children were inherently fanciful and unreliable historians.⁵³⁶ It was associated with an equally dubious practice requiring a similar warning in respect of female (adult) victims of sexual assault, whose evidence was not corroborated.⁵³⁷ Research has been undertaken in this area which tends to suggest that child witnesses are as a class no more likely to be unreliable than adult witnesses.⁵³⁸ Equally no longer is it seriously suggested that females are prone to lie about sexual assault, or are inherently less reliable witnesses. Nor is it likely that many would today agree with the view once held, which supported the former direction, that an allegation of sexual abuse is easy to make and hard to disprove. Any person with practical experience in this field would appreciate that the opposite is in fact the case.

15.141 It is clear from the decision in *Longman* that in any case where there are potential dangers in acting on evidence, which may not be appreciated by a jury, the trial judge is under a duty to give an appropriate warning. No doubt in some cases involving child witnesses, trial judges will consider it necessary to give a warning. The vice is with any practice that makes the giving of the warning routine having regard to the age of the witness. The incongruity of so doing in cases of sexual assault within a family setting was emphasised by Deane J, in *Longman*.⁵³⁹

⁵²⁹ *Evidence Act 1995*, s. 164.

⁵³⁰ *Evidence Act 1995*, s. 164(3).

⁵³¹ *Evidence Act 1995*, s. 165.

⁵³² *Evidence Act 1995*, s. 165(2).

⁵³³ *Evidence Act 1995*, s. 165(1)(c).

⁵³⁴ *Evidence Act 1995*, s. 165(3).

⁵³⁵ See the observations of the Court in *Lane v R* (1996) 66 FCR 144.

⁵³⁶ *R v Dossi* (1918) 13 Cr. App. R. 158 at 161.

⁵³⁷ See *R v Henry & Manning* (1968) 53 Cr. App. R. 150 per Salmon LJ at 153; *R v Lillyman* (1896) 2 QB 167 at 178; *Kilby v the Queen* (1973) 129 CLR 460; and see the discussion of the history of this practice in the judgment of Gaudron J in *M v the Queen* (1994) 181 CLR 487 at 513-5.

⁵³⁸ R. K. Oates, 'Children As Witnesses', *Australian Law Journal*, vol. 64, March 1990, p. 129 at p. 131.

⁵³⁹ *Longman v the Queen* (1989) 168 CLR 79 at 93.

15.142 The ALRC and the HREOC in their Draft Recommendations Paper have recommended amendment to the *Evidence Act 1995* to ensure that warnings are not given which might suggest that children constitute an unreliable class of witness, or on the basis of general assumptions about the abilities of children as witnesses.⁵⁴⁰ The Commission supports amendment of the Act along the lines proposed in the Draft Recommendations Paper.

COMPLAINT

15.143 Two matters arise for consideration:

- the admissibility of evidence as to the making of a complaint; and
- the direction given where there has been an absence of complaint or a delay in making a complaint.

15.144 Previously evidence of complaint was admissible only as a matter going to the credibility of the witness.⁵⁴¹ It did not stand as evidence of the truth of what was said, and was admissible only where the complainant was called as a witness.⁵⁴²

ABSENCE OF COMPLAINT OR DELAY IN COMPLAINT

15.145 The law concerning the admissibility of evidence of complaint in a sexual assault case has now become somewhat more complex since the enactment of the *Evidence Act 1995*. Upon the current state of authority,⁵⁴³ it would seem that:

- a complaint made in a situation where it might be expected that such a complaint would be made by a truthful person who has been sexually assaulted is capable of affecting an assessment of the probability of the fact in issue (the sexual assault charged) and accordingly being relevant in accordance with s. 55 of the Act is admissible under s. 66, as first hand hearsay, unless excluded pursuant to discretion reserved in the Act,⁵⁴⁴
- where admitted, there may be circumstances where pursuant to s. 136 of the legislation, its use should be limited to the issue of credit; and
- additionally it might be admitted by leave, or in re-examination, where the accused asserts that the evidence given by the complainant as to the sexual assault was fabricated or reconstructed or was the result of suggestion.⁵⁴⁵

15.146 These developments would seem to accord with the intention of the legislature, and with the common expectation of lay persons as to the manner in which they would approach a complaint of sexual assault by a child. Notwithstanding, it is entirely possible that a different interpretation will be adopted in other jurisdictions, or an appeal to the High Court. The development of the law in this area, which seems to this Commission to be appropriately enunciated on current authority, should be monitored.

⁵⁴⁰ ALRC & HREOC, *A Matter of Priority: Children and the Legal Process*, Draft recommendations paper no. 3, May 1997, RCPS Exhibit 3284, draft recommendation 5.8, p. 40.

⁵⁴¹ *Rex v Osborne* (1905) 1 KB557 at 558-561, and *Kilby v The Queen* (1973) 129 CLR 460.

⁵⁴² *Ugle v The Queen* (1989) 167 CLR 647 at 649.

⁵⁴³ See recently *R v BD*, CCA (NSW) 28/7/97; *R v Hall* CCA (NSW), Unrep. 19/12/96.

⁵⁴⁴ *Evidence Act 1995*, ss. 135 & 137.

⁵⁴⁵ *Evidence Act 1995*, s. 108(1) & (3).

15.147 The Commission considers that the standard jury directions concerning an absence of complaint, or a delay in the making of a complaint, are in need of review. In the past, in the trial of an accused for a sexual offence, where the complainant had failed to complain at the earliest reasonable opportunity, it was the practice of trial judges to give a *Kilby* direction to the jury.⁵⁴⁶ This was to the effect that, in determining whether to believe the complainant, the jury might take into account his or her failure to complain at the earliest reasonable opportunity. The direction assumed that a prompt complaint was consistent with an assault having taken place, while delay or absence of a complaint was contrary to normal expectation and hence a matter properly taken into account in determining the witnesses' credibility.

15.148 In relation to child complainants the courts adopted a more flexible approach to the concept of what constitutes earliest reasonable opportunity, to take into account their limited comprehension of the wrongfulness of the act.⁵⁴⁷

15.149 Section 405B(2) was introduced into the Crimes Act following concerns that the traditional warning failed to take account of the situation of many victims of sexual assault. It provided that, in trials for prescribed sexual offences, if a question was asked tending to suggest an absence or delay in making a complaint the trial judge was to explain to the jury that:

- the absence of complaint or delay in complaint does not necessarily indicate that the allegation is false; and
- that there may be good reasons why a victim of a sexual assault hesitates or refrains from making a complaint.

15.150 Following the introduction of s. 405B(2), it was held that, apart from the warnings set out in that section, in cases where there had been no complaint, or a delay in making complaint it still remained appropriate to direct the jury in terms of *Kilby*.⁵⁴⁸

15.151 It appears that the underlying assumption that the absence of complaint, or a delay in complaint, affects the complainant's credibility. It is not clear that this is an entirely appropriate assumption in cases involving children, especially young children, who may have been abused by family members or trusted figures. To expect a seven year-old child sexually assaulted by her father (and who may have no understanding of the nature of the sexual activity), to make a complaint is quite out of keeping with an understanding of the phenomenon of child sexual abuse.⁵⁴⁹ Yet in such cases the trial judge, in drawing to the jury's attention the commonsense observation that there may be good reasons why she did not promptly complain, is obliged to underline the impact that delayed or absent complaint may have on her credibility and in the course of so doing, to observe that the lack of complaint does not *necessarily* mean that her allegation is false.

15.152 The Commission suggests that a preferable approach in many child sexual assault cases, where an issue is raised as to delayed or absent complaint, would be for the trial judge to direct the jury in terms such as:

- the experience of the courts is that children who are sexually abused frequently do not complain;
- there are many reasons why children may hesitate before making a complaint; these include embarrassment, fear of getting into trouble, misplaced shame or guilt (and /or such other matters as the particular facts of the case give rise to);

⁵⁴⁶ *Kilby v the Queen* (1973) 129 CLR 460.

⁵⁴⁷ *R v Keevers* CCA (NSW), Unrep. 26/7/94, per Hunt CJ at CL at 5-6: special leave to appeal to the High Court refused 11/5/95; and *R v Hall* CCA (NSW), Unrep. 19/12/96, per Hunt CJ at CL at 3.

⁵⁴⁸ *R v Davies* (1985) 3 NSWLR 276; and see *Crofts v the Queen* (1996) 139 ALR 455.

⁵⁴⁹ *R v Keevers* CCA (NSW), Unrep. 26/7/94.

- you have been invited to regard the delay in complaining in this case as affecting the complainant's credibility; and
- it is open for you to do so if you wish, but you should also bear in mind the matters I have just mentioned.

M. MULTIPLE PROCEEDINGS

15.152 There has been considerable reluctance to permit the joinder of charges involving more than one victim, in child sexual abuse cases.⁵⁵⁰ Where that has occurred, it has often been as the result of the accused wishing to argue that the children put their heads together, and manufactured a false story.⁵⁵¹

15.153 A number of submissions were received expressing concern as to this practice, in particular for the reason that:

- it may require a child who gives evidence as a victim in one trial, to be called afresh to give corroborative evidence in another case or vice versa, thereby increasing the stress occasioned by the judicial process; and
- it may leave the jury with an incomplete picture of the accused, and occasion them to wonder about the complainant's credibility when, within a family, the siblings have been spared abuse, or where within an extrafamilial setting, such as a school class, choir, scout group and so on, only one child has, so far as they are informed, been singled out.

15.154 The law governing the joinder of charges in sexual cases in NSW at present is as summarised below:

- an indictment may contain several charges alleging the commission of offences against the one complainant. Such an approach is in fact common. Generally the joint trial of a number of charges, all related to the same complainant, does not cause prejudice to the accused. If there is a risk of prejudice the trial judge may direct separate trials,⁵⁵²
- an indictment may contain counts alleging the commission of offences against a number of different complainants.⁵⁵³ Again, the trial judge has a discretion to direct that there be separate trials. Unless the evidence in respect of the allegations made by one complainant is admissible, in respect of the trial of the counts relating to the other complainant(s), a trial judge should direct that there be separate trials;⁵⁵⁴
- evidence relating to one complainant is admissible in the trial of a charge relating to another complainant, if it has significant probative value within the 'tendency and coincidence' rules contained in Part 3.6 of the Evidence Act⁵⁵⁵ (formerly if it amounted to 'similar fact evidence'). Where two or more persons make allegations of a sexual kind against the same person, the probative value is said to depend upon the improbability of several persons giving similar accounts unless the incidents occurred. The probative value is weakened in cases where the complainants are known to one another and there exists the possibility of concoction.⁵⁵⁶

⁵⁵⁰ *De Jesus v The Queen* (1986) 61 ALJR 1.

⁵⁵¹ See eg. *Regina v Mitchell*, Unrep., NSWCCA, 5/4/95; and *Regina v Harvey*, Unrep., NSWCCA, 11/12/96.

⁵⁵² *Crimes Act 1900*, s. 365(2).

⁵⁵³ *Castro v the Queen* (1881) 6 App. Cas. 229.

⁵⁵⁴ *De Jesus v the Queen* (1986) 61 ALJR 1; *Sutton v the Queen* (1984) 152 CLR 528.

⁵⁵⁵ *Evidence Act 1995*, Part 3.6.

⁵⁵⁶ *Hoch v the Queen* (1988) 165 CLR 292.

15.155 The possibility of concoction, such as to render it inappropriate to allow a joint trial having regard to the principles set out above, will commonly exist where two or more complainants are related or attend the same school or club. This can cause hardship, particularly in familial abuse cases. As noted earlier the same child may have to give evidence at several trials. Further, the ordeal of the criminal trial process, from the family's perspective, is prolonged over a series of trials.

15.156 The ALRC and the HREOC, in their draft recommendations paper, suggest that in cases where there is more than one complainant the counts should be joined to avoid the necessity of children giving evidence in several proceedings.⁵⁵⁷ They go on to propose that Federal Attorney-General recommend to the Standing Committee of Attorneys General (SCAG), that a working group be convened to conduct a review of:

- the rules relating to joinder; and of
- the Evidence Act 'tendency and coincidence' rules with a view to modifying the operation of the principles contained in *De Jesus*.

15.157 The proposal as set out in paragraph 5.13 of the ALRC and HREOC draft recommendations paper is very broad. The principles governing the circumstances in which separate trials will be directed are designed to ensure a fair trial for the accused. In many instances the joint trial of multiple charges involving different complainants may work real prejudice to the accused.⁵⁵⁸

15.158 The Commission, however, does have sympathy with the view that in some cases, particularly those involving allegations of familial abuse, there may be good reason for joinder. In determining whether to direct separate trials, or to allow the Crown to proceed on a joint indictment, it may be appropriate to have regard among other considerations to the impact of severance on the crown witnesses. This approach has found favour in the United Kingdom.⁵⁵⁹ To this end the Commission is supportive of the proposal that the issues surrounding joinder in sexual cases be taken up by SCAG for review.

⁵⁵⁷ ALRC & HREOC, *A Matter of Priority: Children and the Legal Process*, Draft recommendations paper no. 3, May 1997, RCPS Exhibit 3284, draft recommendation 5. 13, pp. 40-41.

⁵⁵⁸ *Sutton v the Queen* (1984) 152 CLR 528.

⁵⁵⁹ *R v Christou* [1996] 2 Cr. App. R. Part 2 360; *R v Cannan* (1991) 92 Cr. App. R. 16; *DPP v P* [1991] 2 A.C. 447; and see discussion of *DPP v P* in *Pfennig v The Queen* (1994) 127 ALR 99.

RECOMMENDATIONS

The Commission recommends:

- ◆ Amendment of the *Crimes Act 1900* to introduce into that part dealing with the evidence of children provision for the evidence of child witnesses in personal assault cases to be taken in the following ways additionally to those provided by ss. 405D to 405FA, namely:
 - by the admission of an audio or videotape out-of-court statement as part or whole of the witness's evidence in chief (para. 15.40); or
 - by the admission of the videotape of the evidence, examination, cross-examination and evidence in chief, of the child recorded at a pre-trial hearing (para. 15.81).
- ◆ Adoption of a time standard for sexual assault trials involving young children (aged under 12 years at the date of hearing) to be finalised within six months of the date of charge. In cases where it appears that this limit will not be met consideration be given to taking the evidence of the child at a pre-trial hearing (paras. 15.61 - 15.64).
- ◆ Specialised training for judicial officers and lawyers involved in both the prosecution and defence of child sexual assault cases relating to the cognitive and emotional development of children to enable them to deal with child witnesses more effectively, and in particular to exclude inappropriate questioning of such witnesses (paras. 15.99 - 15.101).
- ◆ Removal of the requirement for robes by judges and barristers during the examination of child witnesses in sexual assault trials, and adoption of measures to otherwise reduce unnecessary formality in such proceedings (para. 15.103).
- ◆ Availability of the Witness Assistance Service of the ODPP in all child sexual assault cases (para. 15.107).
- ◆ Amendment of the Crimes Act to allow expert evidence to be admitted in child sexual assault cases as to matters of child development and the behavioural characteristics of sexually abused children (paras. 15.129 - 15.131).
- ◆ Consideration be given to an amendment to the *Evidence Act 1995* consistent with draft recommendation 5.8 of the report of the ALRC and the HREOC relating to the warnings to be given by judges in jury trials involving the evidence of child witnesses (para. 15.142).
- ◆ Amendment to s. 405B(2) Crimes Act in relation to the directions to be given in sexual assault trials where the complainant is a child within the meaning of s. 405C of that Act (paras. 15.150 - 15.151).
- ◆ Consideration be given to permitting judges to take into account, as a relevant circumstance, in any application to sever counts in a trial, involving more than one complainant, any adverse impact that may have on complainants aged under the age of 16 years (para. 15.158).

CHAPTER 16

THE INTERNET AND PAEDOPHILE ACTIVITY

16.1 The Internet comprises a worldwide network of computers capable of communicating with each other through a variety of automatically selected pathways, facilitated by service providers and hubs located in different parts of the world. Communication between the inquirer and actual information holder may occur via any one of those pathways, so that neither a technical hitch nor a nuclear holocaust is likely to cause interruption. The very technology which was designed to preserve the communication link and its burgeoning growth do, however, present insurmountable problems in its regulation, and in its use for unlawful purposes.

16.2 Recent estimates suggest that:

- the penetration of personal computers within the US market, in homes with children, is in the order of 50%, a pattern likely to emerge in Australia, if it does not already exist;⁵⁶⁰
- the worldwide user population of the Internet is in the order of 45 million;⁵⁶¹
- there are approximately 1.5 million Internet users in Australia, and that market is growing at around 12% per month;⁵⁶² and
- within the World Wide Web (www), the graphical face of the Internet, the major 'search engines' provide a search base of over 30 million pages.⁵⁶³

16.3 Moreover, the Internet grows and changes by the day, with information sites emerging, disappearing and reappearing elsewhere, and new technology being developed which takes it into entirely new dimensions. With the introduction of windows and graphics based software, it now provides a communication and information exchange mechanism of a complexity and size that was previously unimaginable,⁵⁶⁴ and which in the hands of the experienced, is capable of quickly searching out matters of narrow interest from within a vast store of information held anywhere in the world.

16.4 Technology under development which will permit the dissemination of high-quality video material, may transfer it into the single most comprehensive search and broadcast medium in the world. Moreover, the Internet is unique in that it is a medium both for private communication between individuals and for worldwide publicity, and any individual user may be both a consumer/reader, and a publisher.

⁵⁶⁰ Telstra, Letter to RCPS, 23/7/97, RCPS Exhibit 3210C.

⁵⁶¹ Telstra, Letter to RCPS, 23/7/97, RCPS Exhibit 3210C.

⁵⁶² Telstra, Letter to RCPS, 23/7/97, RCPS Exhibit 3210C.

⁵⁶³ Telstra advised the Commission that Alta Vista, probably the most extensive search engine on the Internet, reports that it gives access to over 31 million World Wide Web pages, Telstra, Letter to RCPS, 23/7/97, RCPS Exhibit 3210C.

⁵⁶⁴ Telstra advised RCPS that 'The Internet became very widespread following the introduction of the world wide web which was brought about through the development of browser technologies. Browsers have interfaces which are similar in nature to windows (graphical user interfaces) used in most PCs of today, hence as a paradigm users have found the concept of the world wide web easy to assimilate and use', Telstra, Letter to RCPS, 23/7/97, RCPS Exhibit 3210C.

16.5 The purpose of this chapter is to examine, in a non-technical way:

- the way the Internet can be used by the paedophile;
- the problems it presents for law enforcement; and
- some recommendations for reform.

16.6 This chapter is necessarily confined to one aspect of computer crime, which is likely to develop on several fronts. It is essential that :

- government be kept up-to-date with developing patterns of criminality in this area; and that
- law enforcement agencies be provided with the means (both software and hardware), training and a legislative framework (with appropriate offences and powers) to protect the community.

A. USE OF THE INTERNET FOR CRIMINAL CONDUCT

16.6 It must be remembered that the Internet is simply a form of communication between individuals and groups occurring by computer. Those people who wish to communicate by telephone to plan criminal activity can do so equally well, and perhaps more efficiently or securely, by the use of the Internet. It is inexpensive, does not depend on co-location in time or place, is less vulnerable to surveillance, and if appropriate measures are taken, difficult to intercept or trace. Moreover, information stored can be moved to other computers or erased and although sometimes recoverable from seized hard drives, with the application of expertise, this, too, can be made difficult.

16.7 Passwords can be used to prevent unwanted access to an individual's mailbox. A more sophisticated form of security involving encryption enables users to ensure that their messages or communications are not read by people other than those to whom they are sent. Software packages are available to convert the format of messages into an encrypted form.⁵⁶⁵ They can then only be read by those with a decryption key.

16.8 The most common form of encryption currently on the Internet is known as Pretty Good Privacy (PGP).⁵⁶⁶ The encryption processes are developing in ever more sophisticated ways to counter new technology designed to defeat them. This development is not necessarily tied to criminal activity; it has a legitimate place in commercial and defence applications.

16.9 Privacy can also be achieved by anonymous remailers, who provide a conduit through which a message may be passed on its way to its ultimate destination. The conduit removes the actual details of senders and replaces them with a non-identifiable label. The message may be responded to but it is impossible, without the help of the anonymous remailer service provider, to identify the originator of the message, or to reconstruct an audit trail for its passage through the system.

16.10 Computer literate children browsing the Internet can be expected to access information which catches their interest. This can lead to contact with other computer users of like interests, and the development of relationships over the Internet between people who have never met. This can include relationships between children and adults. A child can, from home and without parental knowledge, be communicating with a person who purports to be interested in their welfare, but who is in fact pursuing a relationship for the sole purpose of involving that child in sexual activity.

⁵⁶⁵ McGregor-Lowndes & Davidson, 1997, op cit, p. 42.

⁵⁶⁶ Ebbs & Horey, 1995, op cit, p. 275.

CASE STUDIES

16.11 It is important not to overreact to concerns about paedophiles invading the Internet, or establishing worldwide links. Criminality of this kind has yet to emerge on any large scale or organised way, but the potential is there, and needs to be confronted.

16.12 The cases considered by the Royal Commission, where relationships with adolescents were developed via computers, showed parallels to the 'real time' cases mentioned earlier in this Report, in which paedophiles groomed children for a sexual relationship by a variety of means, including the provision of gifts, special outings and being willing to listen to complaints by children about the restrictions imposed on them in the family setting. Three case studies illustrate the way this can occur.

Case Study 1

16.13 The Royal Commission was assisted by an informant whose teenage son accessed the website for a group called 'Boy Lovers Against Child Pornography' (BLACP). The BLACP pages included the following information:

Who is a Boy Lover? The answer? Simply put, anyone who loves boys with all their hearts. A Boy Lover does not think of a boy as a possession or just another child. To the Boy Lover (or BL for short) the boy is his whole world. It is a misconception that Boy Lovers are child predators. Many have no sexual interest in children and of those who do, most never act on it.⁵⁶⁷

16.14 At its most favourable, this was disingenuous. As the experiences of the teenager, and any critical examination of the material available on this website shows, this group is no less a paedophile front than 'Blaze', or similar groups promoting adult/child love.

16.15 After accessing the BLACP website, this teenager established friendships with a number of 'boy lovers' on the Internet. His mother became aware of this when they started telephoning him (from overseas as well as from within Australia), and sending correspondence and money to enable him to leave home. The mother felt that her son was being brainwashed and recruited to the boy lover movement by a grooming process, which took advantage of his vulnerabilities. She believed that the logical progression of the cyber relationships established on the Internet between her son and the other boy lovers, would be sexual contact in real life, followed by molestation by her son of other under-age males.⁵⁶⁸

16.16 The mother supplied the Royal Commission with copies of e-mails and other correspondence he had received, which evidenced, in the most explicit way, the attempts by the other boy lovers to induce him to leave home. It left no doubt about the sexual motivation behind the correspondence. A 'Boy chat poster list' listed approximately 300 members of the group, under their Net names ('nicks'), to which the boys had, in some instances, added their occupations, interests and sexual relationships. The teenager's mother obtained details from her son about some of the men and made contact with them. She described them as extremely plausible and at least 10 years older than her son.⁵⁶⁹

16.17 The teenager informed his mother that one of the men was a convicted paedophile. When she telephoned that man and suggested to him that he was doing a lot of damage, he replied 'Yes I know that, but I can't help it'.⁵⁷⁰ The mother became so concerned that she disconnected the telephone line to her son's computer. That night he left home. For some time he was missing.

⁵⁶⁷ Extract from BLACP homepage, contained in Teenager's mother, Submission to RCPS, 5/2/97, RCPS Exhibit 5934C, at Doc. 2552313.

⁵⁶⁸ Teenager's mother, Submission to RCPS, 5/2/97, RCPS Exhibit 5934C.

⁵⁶⁹ *ibid.*, at Doc. 2552302.

⁵⁷⁰ RCPS, Record of Interview with teenager's mother, 21/2/97, RCPS Exhibit 3188C.

Although his mother now knows his whereabouts she does not know what further contact he has had with the boy lovers.

Case Study 2

16.18 A case in California, which developed along similar lines, demonstrates the danger of the Internet.⁵⁷¹ It culminated in the sexual assault of a teenage boy in the home of a paedophile who had befriended him through a Bulletin Board Service (BBS), which the teenager had accessed from his home computer.

16.19 The mother of that teenager knew that he was using local BBS to communicate with other computer users, and that he had begun meeting them in real life. Although at first cautious to check anyone her son met this way, she became more trusting and complacent as time went on, thinking that it was a good way for him to meet other teenagers who shared his interests. She was unaware that he had questions about sex and sexuality which he was uncomfortable discussing at his home and that, as a result, he had begun communicating with the operator of a BBS with whom he had developed a relationship of trust.⁵⁷²

16.20 Eventually, the teenager informed his mother that he was going to visit the BBS operator to exchange programs. He indicated that the man was not a student but the owner of a business. Afterwards he informed her that the man did not have anything he wanted and he would not be going back. Six months later he revealed that he had been raped while at his house.⁵⁷³

16.21 The teenager became delusional and suicidal. He was too unwell to press charges. However, two years later, when the same man was shown on television, following his arrest as a result of a successful police investigation into other complaints about him, the teenager contacted the police.⁵⁷⁴

16.22 From information obtained by the Commission, it would appear that the case against the BBS operator changed from one of distributing harmful material with the intent of seducing a minor to one of forcible sodomy and in June 1993 he was sentenced to six years in prison for the sodomy offence and to four months for transmitting pornographic pictures.

Case Study 3

16.23 The absence of any international boundaries on the Internet was amply demonstrated by a case, investigated by United States Customs and the Federal Bureau of Investigation (FBI) in 1996, which resulted in the indictment of 16 men, 13 from the USA and one each from Finland, Australia and Canada, for production and distribution of child pornography.⁵⁷⁵

16.24 The men were members of an invitation-only, password-restricted chat group called the Orchid Club through which they produced and traded homemade child pornography involving children as young as five years old.⁵⁷⁶ Admission to the group depended on the production of an account of personal sexual interaction with a child of a kind sufficient to meet the 'standards' of the other members.

⁵⁷¹ A. O. Olsen, Warwick Township Police Department, Pennsylvania, 'Investigations of Criminal Activity on Computer Bulletin Boards', December 1992, annexed to NSW Police Service, Submission to NCA, Information Technology issues relating to Organised Paedophile Activity, 11/12/95, RCPS Exhibit 2543C/1, at Doc. 1643176-206.

⁵⁷² Letter from teenager's mother to Fresno Police Department, 21/3/92, annexed A. O. Olsen, Warwick Township Police Department, Pennsylvania, 'Investigations of Criminal Activity on Computer Bulletin Boards', annexed to NSW Police Service, Submission to NCA, Information Technology issues relating to Organised Paedophile Activity, 11/12/95, RCPS Exhibit 2543C/1, at Doc. 1643201-02.

⁵⁷³ *ibid.*

⁵⁷⁴ *ibid.*

⁵⁷⁵ USA Embassy, Indictment documents re the Orchid Club investigation conducted by FBI and US Customs Service, 1996, RCPS Exhibit 2543C/3, at Doc. 2239073.

⁵⁷⁶ *ibid.*, at Doc. 2239074.

16.25 Some of the members in the United States videotaped themselves molesting little girls, or videotaped the girls engaged in sexual activity with each other, and transferred the videos into digital format for transmission on the Internet.⁵⁷⁷ On one occasion a 'live' chat session, or 'slumber party', was held, in the course of which one of the members molested a 10 year-old girl (a friend of his daughter) in his home. The activity was recorded with a digital camera connected to the molester's computer, and the images were instantly downloaded and transmitted to the other members of the group who were on-line at the time. Those members were able to 'participate' in the molestation by transmitting requests for particular actions or poses by the child, which would be complied with, photographed and transmitted back to those in the chat room.⁵⁷⁸

16.26 The Australian member of the group, identified in the chat sessions only as 'Smirk', was not in the chat room during any of the live activity. He, along with the other members of the group, has been indicted under a US Federal law for receiving and distributing visual depictions of a minor engaged in sexually explicit conduct.⁵⁷⁹ His identity was established by the Australian Federal Police (AFP), after their assistance was sought by the US Customs Department. A search warrant executed by the AFP on his work computer in August 1996, led to charges of possession of child pornography and the use of a telecommunications service in an offensive manner, to which he pleaded guilty in January 1997.⁵⁸⁰ He was convicted of both offences, fined \$1,600, and placed on a recognisance to be of good behaviour for 12 months.

CONCLUSION

16.27 The Commission entertains concern in relation to the potential use of the Internet for activities such as those described in these case studies. Sometimes the conduct of those involved may be caught up in general soliciting offences, or if it develops into a physical relationship, become chargeable as a specific offence, for example, sexual assault. However, the Commission considers it appropriate that there be a specific offence created to deal with the use of an on-line service to incite sexual behaviour by a child, or to solicit sexual contact with a child, with a suitably substantial penalty, which would meet the facts of an Orchid Club case.

B. PORNOGRAPHY ON THE INTERNET

AVAILABILITY AND DEMAND

16.28 Paedophiles typically share an appetite for child pornography.⁵⁸¹ They tend to:

- subscribe to services offering material featuring anonymous children, from babies through to adolescents, in varying forms, ranging from a simple but explicit display of their sexual or excretory organs, to sex with single adults, to group sex and bizarre or sado/masochistic practices;
- record their own activities, by still photographs or videotapes; and to
- display materials of this kind in the course of seducing their victims.

⁵⁷⁷ *ibid.*, at Doc. 2239085-86.

⁵⁷⁸ *ibid.*, at Doc. 2239083-84.

⁵⁷⁹ *ibid.*, at Doc. 2239076-95; Title 18, United States Code, s. 2252.

⁵⁸⁰ AFP, Submission to RCPS, 27/2/97, RCPS Exhibit 3054C/54, at Doc. 2663017-26.

⁵⁸¹ See recent reports of the arrest of a large number of persons (said to be more than 600) and the seizure of a quantity of videotapes in France following investigation into a child pornography video publishing house, *The Times*, 19/6/97, p. 16 & 21/6/97, p. 16.

16.29 On any view, the volume of material of this kind available, whether in the form of magazines, books, videos, photographs, exchange services and the like, is prodigious. Despite reasonably rigid classification systems,⁵⁸² and specific offences for the possession of child pornography,⁵⁸³ there is no lack of private or commercial suppliers, and the earning potential for this form of pornography is substantial. The Internet provides a new and extremely undesirable outlet for this material, by reason of:

- its wide reach;
- the anonymity and the ease with which it can be provided and accessed;
- the basis it provides for establishing networks of paedophiles, locally and internationally, who are able to hone in on their own deviant interests and fetishes, and link up with like-minded offenders; and
- the dangers it poses in attracting curious and uninformed children and adolescents to this material, and in facilitating their introduction to paedophiles.

16.30 Many of the subjects in this material are children from third world countries, whose co-operation is easily purchased by the so-called tourists who visit those destinations for the purpose of gathering fresh pornography. In the case of most of this material, it is an hypocrisy to suggest that:

- there is any love or affection involved;
- it was obtained with the consent of the child;
- it is of artistic value; or that
- those who purvey, purchase and possess it are merely admirers of the human form.

16.31 It is degrading, offensive and absolutely unnecessary to invade the privacy of children by photographing or filming them in the way depicted, and by then placing their images on the Internet, or BBS, for others to access. The Commission considers that a specific offence for this form of conduct, with a substantial penalty, should be created in order to deter its proliferation. Where there truly is some literary, scientific, or artistic merit, or bona fide medical purpose attached to material of this kind, this can be accommodated by a suitable defence.

16.32 Absent clear legislative proscription, there are practical difficulties in providing any comprehensive barrier to child pornography or other Refused Classification (RC) material⁵⁸⁴ on the Internet. To present a child with a warning that material is unsuitable, and to provide an option to click depending on whether that user is under or over a certain age, is likely, in real life, to be little more than an invitation to access the 'forbidden' material. While it is possible for parents or institutions to purchase software to filter or block this material, or for providers to institute a system dependent upon a PIN number (the issue of which depends on proof of age) or upon approved subscription, it is somewhat naive to suppose that a child with any initiative, or one who has come into contact with a paedophile, will not be able to find and access this material. It is equally naive to suggest that it is beyond the capacity of the paedophile to bypass any of the security systems, or to comply with any form of regulatory code.

⁵⁸² *Classification (Publication, Films and Computer Games) Act 1995* (NSW) which is part of the uniform scheme and picks up the National Classification Code which is set out in the Schedule to the *Classification (Publication, Films and Computer Games) Act 1995* (Cth).

⁵⁸³ *Crimes Act 1900*, s. 578B.

⁵⁸⁴ Material that is Refused Classification (RC) under the National Classification Code schedule to the *Classification (Publications, Films, and Computer Games) Act 1995* (Cth) is set out in the National Classification Code which is attached as a Schedule to the Act.

16.33 The danger is that, once child pornography gets onto the Net, its volume, and variety, and the form in which it can be reproduced, far exceeds anything available in print or conventional form. The fact is that child pornography is readily available to anyone who has access to BBS and other on-line services, particularly within News Groups. A Royal Commission officer, browsing the World Wide Web, was able to view and download explicit material of this kind.⁵⁸⁵

16.34 It is clear that even more objectionable material is being distributed on those parts of the Internet used to exchange files, for example, Usenet newsgroups, chat groups or e-mail, which are free of the warnings often used by commercial content providers.

16.35 Currently in NSW it is an offence to possess child pornography in the form of a film, publication or computer game,⁵⁸⁶ with a maximum penalty of imprisonment for 12 months and or a fine of \$10,000. Although the *Crimes Act 1900* does not make express provision for offences committed with the use of on-line services, it is arguable that a person who downloads child pornography is in possession of it contrary to s. 578B *Crimes Act*,⁵⁸⁷ and that its transmission by placing it on a web page or by sending it to an individual or group electronically amounts to the publication of an indecent article.⁵⁸⁸ The Commission considers that any doubt in this regard should be removed by express provision making it an offence to advertise the availability of this material, to transmit it, or to download it, using an on-line service. This is examined in more depth later in this chapter, but could be achieved either by amendment of the existing section, or by the creation of a separate provision.

16.36 There is also no provision in NSW against using children in the production of child pornography, other than in circumstances where money or some other material thing is paid or provided (whether or not to the child).⁵⁸⁹ In a situation like the one described in Case Study 3, where two little girls were videoed engaging in sexual activity, but were not 'employed' for that purpose, the NSW provision would not apply. In such a case the person orchestrating the activity may be guilty of inciting a person under 16 years to an act of indecency with or towards another person.⁵⁹⁰ However, again to remove any residual doubt, it would be appropriate to amend the *Crimes Act 1900* to remove the requirement under s. 91G of 'employment' of the child as ingredient of the offence and to criminalise the use or the suffering of the use of a child for pornographic purposes.⁵⁹¹

OVERSEAS DEVELOPMENTS

16.36 In Holland, service providers have opened a website which serves a similar function to a hotline, where Internet users can anonymously report child pornography which they find on the Internet. Following a report, the hotline approaches the content provider and asks it to remove the material, or else cautions that the matter will be referred to the police. In most cases the content provider has removed the illegal material after the first warning, making subsequent police action unnecessary.⁵⁹²

⁵⁸⁵ Bundle of photographs downloaded from Internet by RCPS, RCPS Exhibit 1941C.

⁵⁸⁶ *Crimes Act 1900*, s. 578B.

⁵⁸⁷ *Crimes Act 1900*, s. 578B(2).

⁵⁸⁸ *Crimes Act 1900*, s. 578C(2).

⁵⁸⁹ *Crimes Act 1900*, s. 91G.

⁵⁹⁰ *Crimes Act 1900*, s. 61N(1).

⁵⁹¹ *Crimes Act 1900*, s. 91G.

⁵⁹² ABA, *Draft Overview of International Developments in Respect of the Internet*, February 1997, RCPS Exhibit 5935C, at Doc. 2673007.

16.37 In the United Kingdom an Internet Watch Foundation was established in September 1996. It is an independent organisation formed to implement the proposals jointly agreed by government, the police, two major UK service providers and trade organisations. It similarly invites Internet users to report any material believed to be illegal, that is, any images of children apparently under 16 years old, naked and involved in sexual activity or posed to be sexually provocative.⁵⁹³ Once the Internet Watch Foundation has rated the material as illegal, it traces its origins and forwards the material to the relevant law enforcement agency.⁵⁹⁴ The Foundation is also working with UK service providers to develop ratings for web pages and for newsgroups. Rated material, used with compatible software, will help users control what they and their families view.⁵⁹⁵

16.38 The Commission endorses these website hotlines developed in Holland and England and supports the development of a similar hotline in NSW. Additionally, legislation has been passed in the UK to deal with computer generated child pornography and its transmission through on-line services:

- the *Obscene Publications Act 1959* and the *Criminal Justice and Public Order Act 1994* have been amended to include computer transmission within the definition of 'publication';
- the *Criminal Justice Act 1988* now makes it an offence for a person to have an indecent photograph or pseudo-photograph of a child in his or her possession - a pseudo-photograph being defined to include an image made by computer-graphics to appear to be a photograph, as well as data stored on a computer disc capable of conversion into a photograph.⁵⁹⁶

16.39 The United States has attempted the legislative regulatory approach. In 1996, the *Communications Decency Act* was passed by Congress, as an amendment to the *Telecommunication Act 1995*. Although extending generally to communications which are obscene or indecent, or 'patently offensive' as measured by contemporary community standards, in relation to children it specifically creates offences where a person:

- by means of a telecommunications device knowingly makes, creates or solicits any comment, request, suggestion, proposal, image or other communication which is obscene or indecent knowing the recipient to be under 18 years of age;
- knowingly uses an interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs;
- knowingly permits any telecommunication facility under his control to be used for any such activity with the intent that it be used for such activity.

16.40 The legislation has been challenged, and held to violate the First Amendment.⁵⁹⁷ Other legislation has however been passed in the US Congress and in some States, making it an offence to:

- use computer networks and on-line services to transmit images depicting child pornography; and to
- solicit a minor for sexual purposes, utilising such services.

⁵⁹³ ABA, Information downloaded from the Internet from 'Internet Watch Foundation Hotline', February 1997, RCPS Exhibit 5935C, at Doc. 2673025.

⁵⁹⁴ *ibid*, at Doc. 2673029.

⁵⁹⁵ *ibid*, at Doc. 2673030.

⁵⁹⁶ *Criminal Justice Act 1988* (UK), s. 160(7); *The Protection of Children Act 1978* (UK) (both amended February 1995); both in West Midlands Police Press Office, News Release, 'Vice officers smash international child porn internet chain', 26/7/95, RCPS Exhibit 2542/2, at Doc. 580992-6.

⁵⁹⁷ *Reno et al v American Civil Liberties Union et al*, No. 96-511, USA Supreme Court, 26/6/97, RCPS Exhibit 3254.

16.41 In New York State, legislation has been passed, but is under challenge, which would make it an offence to use a chat room or to post material on the Net, where the person concerned has 'reason to believe' that the message may reach a child, in breach of the provision.⁵⁹⁸

16.42 There have been some other important developments internationally:

- at the first World Congress Against Commercial Sexual Exploitation of Children held in Stockholm, Sweden from 27 to 29 August 1996, a Declaration and Agenda for Action was adopted by all 140 government delegations involved, providing a set of guidelines for action at national and international levels regarding issues such as child prostitution; child sex tourism; and the exploitation of children in pornography, particularly via new technologies such as the Internet;⁵⁹⁹
- the European Commission's Working Party on Illegal and Harmful material on the Internet issued a report in early 1997 recommending that a self-regulatory framework for on-line services be developed for European Commission (EC) member States with representatives of industry and users. The Working Party suggested that its proposals, which included a standard approach to content rating and labelling, be used not only within the European Union (EU) but internationally, with police and judicial co-operation;⁶⁰⁰ and
- in July 1997 a Global Informational Networks Ministerial Conference in Bonn, attended by members of the EU as well as guests from USA, Canada, Japan and Russia, released a ministerial declaration supporting the establishment of content rating systems and international networks of hotlines.⁶⁰¹

16.43 Other developments are canvassed in the recent reports of the Senate Select Committee discussed in more detail below.⁶⁰²

AUSTRALIAN BROADCASTING AUTHORITY

16.44 In July 1995, the Minister for Communication and the Arts directed the Australian Broadcasting Authority (ABA) to conduct a review of on-line information and entertainment services. Prior to this, the Government had released a consultation paper which proposed a self-regulatory scheme for the on-line industry, reinforced by education and legislative sanctions.⁶⁰³

16.45 The ABA report following that review, released in July 1996, recommended as its central platform the implementation of a self-regulatory framework based on codes of practice developed by service providers. The codes of practice, developed after a process of community consultation, would then be registered by the ABA. The codes would provide appropriate community safeguards, including a complaints handling regime.⁶⁰⁴

⁵⁹⁸ A. L. Shapiro, 'Cyber Seduction', *New York*, 21/4/97, p. 22.

⁵⁹⁹ Declaration and Agenda for Action, World Congress Against Commercial Sexual Exploitation of Children, Stockholm, August 1996, RCPS Exhibit 3212.

⁶⁰⁰ ABA, Draft Overview of International Developments in Respect of the Internet, RCPS Exhibit 5935C, pp. 2-3.

⁶⁰¹ Ministerial Declaration, Global Information Networks Ministerial Conference, Bonn, 6/7/97 - 8/7/97, RCPS Exhibit 3253.

⁶⁰² Australia Parliament, Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Regulation of Computer On-Line Services*, Part 3, June 1997, Chapter 4, RCPS Exhibit 3211.

⁶⁰³ Attorney General's Department and Department of Communication and the Arts, *Consultation Paper On Regulation of On-Line Information Services*, 1995.

⁶⁰⁴ ABA, *Investigation into Content of On-line Services*, 30/6/96, RCPS Exhibit 3051/45, p. 10.

16.46 The ABA found that 'objectionable' material was available on-line, but that the chance of being involuntarily exposed to it was low. Material considered 'unsuitable for children' was more easily found, but was often accompanied by warnings and/or the requirement for credit card or other details.⁶⁰⁵ The Royal Commission is not so sanguine as to the current situation in relation to the casual discovery of such material, or as to the assumed incapacity of children to bypass obstacles such as those mentioned. Moreover, once one child gains access and downloads the material, it very quickly becomes accessible and available to others, for example, through e-mail.

16.47 Individual responsibility was emphasised by the ABA - it was recognised that the practical difficulty, if not impossibility, of controlling the availability of on-line material created a need for adult supervision and close monitoring of children's use of on-line services. It recommended that:

- there be a co-operative approach to community education by government, industry and consumer groups;⁶⁰⁶ and that
- essentially private communications, such as e-mail, should be exempt from any regulatory regime.⁶⁰⁷

16.48 The report referred to a labelling protocol, Platform for Internet Content Selection (PICS), which provides a technical infrastructure for the labelling of on-line material for the World Wide Web. It recommended that Australia:

- participate in the PICS development process in the international arena; and that it
- collaborate with relevant bodies to maximise Australian labelling consistency with overseas rating schemes.

The Commission endorses these recommendations.

16.49 The report noted that:

- State and Territory ministers had already considered the introduction of criminal provisions creating offences for the transmission of 'objectionable' material and the making available to minors of material regarded as 'unsuitable'; and that
- the model offence provisions which had been drafted provided a number of defences to a service provider in a prosecution, including compliance with an applicable industry code of practice.

16.50 The ABA:

- recommended that any codes of practice, referred to in the draft model offence provisions, should be the same codes as those registered by the ABA; and
- suggested that it not register a code unless that code clearly detailed the conduct required which could constitute a defence to offences of the kind proposed by the draft model.⁶⁰⁸

16.51 The Internet Industry Association of Australia, which supports the approach proposed by the ABA, has drafted a code of practice for those involved in the industry including Internet Service Providers (ISPs). It is currently in its third draft, following a lengthy consultation process including industry, government, consumer groups, the Office of Film and Literature Classification (OFLC) and the Office of the Federal Privacy Commissioner.

⁶⁰⁵ ibid, pp. 11 & 62-63.

⁶⁰⁶ ibid, p. 12.

⁶⁰⁷ ibid, p. 10.

⁶⁰⁸ ibid, pp. 11 & 53-54.

16.52 The principles of this Code include:

- 13.3 Code Subscriber ISPs will take reasonable steps to prevent users of their service from placing on the Internet, obtaining through the Internet or transmitting using the Internet, material which would be classified "RC" by the National Classification Code.
- 13.4 A Code Subscriber ISP shall have complied with 13.3 if:
 - a. it has informed its users that they will not place on the Internet, obtain or transmit material which would be classified "RC" by the National Classification Code.
 - b. when it becomes aware that a user has placed on the Internet, obtained through the Internet or transmitted using the Internet such material which remains at a Web Site or other content database within its control it:
 - promptly removes any offending material from the Web Site or database;
 - informs the user that the user's conduct is a breach of the user's service conditions and, if applicable, a criminal offence; and
 - cancels the account of any user that repeats offending conduct after being informed that the user's conduct is a breach of the user's service conditions and, if applicable, a criminal offence.⁶⁰⁹

SENATE SELECT COMMITTEE

16.53 The Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, has now released three reports.⁶¹⁰

- September 1995 - Report on Regulation of Computer On-Line Services Part 1, describing the proceedings of a public seminar, convened in response to industry concerns about proposals for regulation, in the wake of the BBS Task Force Report to the Standing Committee of Censorship Ministers;
- November 1995 - Report on Regulation of Computer On-Line Services Part 2, in which it made a number of recommendations relating to:
 - the transmitting of certain types of material, including objectionable material and material Refused Classification (RC) through computer on-line services;
 - the need for age-verification procedures to be put in place by on-line service providers; and
 - the introduction of a system of self-regulation based on codes of practice to be developed by the on-line industry; and
- June 1997 - Report on Regulation of Computer On-Line Services Part 3, dealing with the matters outlined below.

16.54 While the Select Committee has been carrying out its inquiry, other developments have occurred, including:

- the release of the ABA report;
- the enactment of legislation in Victoria, Western Australia and the Northern Territory creating a specific offence for the transmission, obtaining possession of, advertising or requesting the transmission of 'objectionable material' as defined in that legislation;⁶¹¹

⁶⁰⁹ Internet Industry Association of Australia, Internet Industry Code of Practice (draft), 30/6/97, RCPS Exhibit 3251, at Doc. 2685258-59.

⁶¹⁰ Australia Parliament, Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Regulation of Computer On-line Services*, AGPS, Canberra, 1995-1997, set in 3 Parts; Part 1, September 1995, RCPS Exhibit 3293; Part 2 November 1995, RCPS Exhibit 3294; Part 3, June 1997, RCPS Exhibit 3211.

- the formation of the On-Line Government Council, including representatives of all State and Territory Governments, whose stated aim is one of co-operation to promote consistency in respect of on-line issues; and
- the release of the National Police Research Unit Report (NPRU) 'Strategies to improve co-ordination by Australasian law enforcement agencies in the investigation of the use of computers for criminal paedophile activity'.⁶¹²

16.55 The Senate Committee, in its third report, stood by its earlier recommendation for industry self-regulation, but additionally concluded that legislative measures should be introduced to complement any codes of practice developed by the industry. These include:

- legislation at Commonwealth, State and Territory level, that would make it an offence to use a computer service to transmit, obtain possession of, demonstrate, advertise or request the transmission of material which is or is likely to be classified as Refused Classification (RC) or to be in a restricted category because it is likely to cause offence to a reasonable adult as described in the National Classification Code;⁶¹³
- legislation, at Commonwealth level, modelled on the *Broadcasting Services Act 1992*, to:
 - require participants in the on-line industry to develop and register codes of practice;
 - create financial penalties for non-compliance with those codes;⁶¹⁴
 - protect from prosecution those Internet Service Providers who choose, in good faith, to restrict access to material that whilst not illegal, could cause offence;⁶¹⁵
 - make it mandatory for those who make available restricted material to require a PIN number (available only on proof of age) before granting the potential user access to such material;⁶¹⁶ and to
 - require retailers and service providers to provide information to customers on blocking and filtering devices, and any other methods available to manage children's access;⁶¹⁷
- amendment, at State and Territory level, of classification and/or censorship legislation to make it an offence to transmit objectionable material including the transmission of material unsuitable for minors, through computer on-line services, so that they would have legislation that is uniform according to an agreement to be reached by the On-Line Government Council, and adopt a standard definition of the expression 'objectionable material'.⁶¹⁸

16.56 Other recommendations included:

- the establishment of an independent complaints handling body under the purview of the ABA or other appropriate government body, based on the model provided by the Telephone Information Services Standards Council, to deal with user complaints;⁶¹⁹

⁶¹¹ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), ss. 57 & 58; *Classification of Publications, Films and Computer Games Act 1995* (NT), ss. 50Z & 50ZA; *Censorship Act 1996* (WA), ss. 101 & 102.

⁶¹² This report is subject to caveat and cannot be quoted. However, it provides a comprehensive analysis of the problems faced by law enforcement and a persuasive argument for the need for support to be given, on a national basis, to its research activities in this area.

⁶¹³ Australia Parliament, Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Regulation of Computer On-Line Services*, Part 3, AGPS, Canberra, June 1997, RCPS Exhibit 3211, Recommendation 1.

⁶¹⁴ *ibid*, Recommendations 3 & 4.

⁶¹⁵ *ibid*, Recommendation 5.

⁶¹⁶ *ibid*.

⁶¹⁷ *ibid*, Recommendation 11.

⁶¹⁸ *ibid*, Recommendation 5.

⁶¹⁹ *ibid*, Recommendation 2.

- the funding of an on-line advertising campaign to accompany the implementation of any regulatory measures, to make Internet users aware of existing legislation and their legal obligations respectively as recipients, content providers, and access providers;⁶²⁰
- the establishment of an e-mail, phone and fax hotline service to receive information about possible illegal material (including paedophile material and child pornography) found by Internet users;⁶²¹
- a direction to the ABA to investigate the development of reliable age verification procedures for accessing material not suitable for children through on-line services;⁶²²
- any community education campaign conducted to encourage user responsibility, to have, as one of its aims, the promotion of an awareness of the pros and cons of available blocking devices;⁶²³
- an on-line labelling task force to be convened to design a scheme for labelling on-line content that takes into account Australian cultural values and principles that govern the existing classification scheme;⁶²⁴
- the Australian Government continue international discussions, with the aim of developing co-operation in developing protocols for pursuing criminal activities carried out through computer on-line services;⁶²⁵ and
- the conduct of random audits by State and Territory police of material on-line for illegal activities.⁶²⁶

16.57 It is neither necessary, nor appropriate, to re-canvass the comprehensive analysis of the competing submissions, and issues, identified in the third report of the Select Senate Committee. It is sufficient to note that the views received ranged from:

- absolute opposition to any form of regulation based upon propositions concerning:
 - the notion that cyberspace is a new reality that should be allowed to operate outside the confines of national and international law;
 - philosophical objection to censorship, and restriction on freedom of expression and access to information, in any form;
 - the perceived adequacy of existing laws to deal with the underlying activities captured on the Net;
 - the circumstance that a positive effort and voluntary choice is needed to access material on the Net;
 - the unintentional harm that any system directed towards dealing with a small fraction of the objectionable material on the Net, might occasion to legitimate research and exchange of information; and
 - the private nature of the exchange;

⁶²⁰ ibid, Recommendation 10.

⁶²¹ ibid, Recommendation 14.

⁶²² ibid, Recommendation 7.

⁶²³ ibid, Recommendation 12.

⁶²⁴ ibid, Recommendation 15.

⁶²⁵ ibid.

⁶²⁶ ibid, Recommendation 9.

- support for some form of regulation but not of a kind which would give rise to unduly onerous costs, or unnecessary restrictions and thereby stifle the growth of the emerging on-line services industry, the proponents of which view argued for self-regulation by industry-devised codes of practice; to
- a statute-based regulatory regime that will adequately protect minors from inappropriate material, a view that, not without justification, queries why if Refused Classification (RC) material cannot be legally advertised or distributed through any other media, it should be available via on-line services.

16.58 The diverse views entertained on this topic, the wide variations between the draft codes of practice supplied to the Senate Select Committee and the criticisms expressed of its most recent Report,⁶²⁷ all point to the difficulty in obtaining consensus, or any approved code or codes, even one of a generic kind. The political will to intervene in an area as delicate, and as important, as the information industry, particularly one which is emerging and has the complexity and international ramifications of the Internet, is necessarily one of caution. Significant questions need to be resolved, including the definition of which aspects of the activities of service providers, content providers and recipients the Commonwealth and the States and Territories, respectively should regulate.

DEVELOPMENT OF A NATIONAL REGULATORY FRAMEWORK - CURRENT STATUS

16.59 In July 1997 the Department of Communication and the Arts released for public comment a set of 'Principles for a Regulatory Framework for On-line Services in the Broadcasting Services Act 1992'.⁶²⁸ The period for public comment expired on 8 August 1997 and the draft legislation is expected to follow.

16.60 The Principles provide for the registration by the ABA of industry codes of practice, and for the inclusion of rules in the *Broadcasting Services Act 1992* to apply to the conduct of all on-line service providers. E-mail transmissions are excluded from the definition of 'on-line service'.

16.61 The rules stipulate that:

- on-line service providers should not knowingly allow a person to use their service to publish content that would be refused classification under OFLC guidelines (this would include child pornography) or otherwise be illegal under a State or Territory law; and that
- an on-line service provider should not use an on-line service in the commission of an offence against another Act or a State or Territory law. This would have the effect that, regardless of the location of the service provider, it would be subject to the laws of the most restrictive or censorious State or Territory, a circumstance highlighting the desirability of the States and Territories agreeing on model provisions as soon as possible.

CURRENT LEGISLATIVE REGULATION

16.62 There is currently no express prohibition in NSW against the on-line transmission of objectionable material such as child pornography.⁶²⁹

⁶²⁷ F. Cumming & B. Thomas, 'Porn on the Internet: push for \$100,000 fines', *Sun Herald*, 29/6/97 and Editorial, 'Interporn', *Sydney Morning Herald*, 2/7/97.

⁶²⁸ Department of Communication and the Arts, Principles for a regulatory network for on-line services in the Broadcasting Services Act 1992, <http://www.dca.gov.au/policy.fwork_4_online_svces/framework.htm>, accessed 12 November 1996, RCPS Exhibit 3295.

⁶²⁹ Current legislative provisions relevant to child pornography generally are discussed earlier in this chapter under the heading 'Availability and Demand'.

16.63 Under the Commonwealth *Crimes Act 1914* it is an offence to 'knowingly or recklessly use a telecommunications service supplied by a carrier in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive'.⁶³⁰ The relevant section was originally intended to deal with obscene or harassing phone calls. Its application to on-line transmissions by computer remains to be fully tested, but the width of the section leaves it open to wide interpretation and possible legal debate, as to its application to on-line services. Any uncertainty in this regard should be removed.

16.64 The provisions in the NSW *Crimes Act 1900* regarding possession of child pornography commenced on 1 January 1996.⁶³¹ Those provisions were introduced as part of a national censorship scheme, under which the States and Territories introduced legislation to complement the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995*. The NSW *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (hereafter referred to as the Classification Act) also commenced on 1 January 1996.

16.65 The Classification Act was not intended to cover on-line transmissions. This was to be addressed separately in draft model State and Territory offence provisions prepared by the NSW Parliamentary Counsel, for the consideration of the Standing Committee of Attorneys General (SCAG) in 1996.⁶³²

16.66 The NSW draft would have made it an offence for any person to:

- publish objectionable material, or an advertisement for such material, on an on-line service; or to
- publish material or an advertisement unsuitable for minors on an on-line service in a way that makes it accessible for access by minors.⁶³³

16.67 Additionally, the NSW draft would have made it an offence for an on-line service provider (whether knowingly or not), to:

- permit objectionable material to be available for access or retrieval by users of the service; or to
- permit material unsuitable for minors to be available for access or retrieval by a minor using the service.⁶³⁴

16.68 In each case a defence would have been available if the defendant proved that he:

- complied with an applicable industry code or practice; or
- took reasonable steps in the circumstances to avoid the activity in question; or
- believed, on reasonable grounds, that the material was not of the kind prohibited;⁶³⁵

and in the case of the offences relevant to material unsuitable for minors, additionally that he:

- believed, on reasonable grounds, that the person accessing the material (or the users of the service) was (or would be) adults, or additionally, in the case of the last mentioned offence;
- believed, on reasonable grounds, that the minor who accessed or retrieved the material, was an adult.⁶³⁶

⁶³⁰ *Crimes Act 1914* (Cth), s. 85ZE.

⁶³¹ *Crimes Act 1900*, s. 578B-E.

⁶³² Hon. J. W. Shaw QC MLC, 'NSW clamps down on pornography on the Internet', Media Release, 2/4/96, RCPS Exhibit 3189.

⁶³³ NSW Parliamentary Counsel's Office, Discussion Draft: 'On-line Services', PCC-170Q.OLS, 11/7/96, draft s. 5(1), RCPS Exhibit 3190C.

⁶³⁴ *ibid*, draft s.6(1).

⁶³⁵ *Ibid*, draft ss. 5(2), 6(2), 7(2).

16.69 The draft provisions were intended to cover all transmissions which used a public telecommunications system, including all on-line services, such as the Internet, BBS and e-mail.⁶³⁷

16.70 There was considerable opposition to the NSW draft, which was argued to be draconian and unworkable. For example, the definition ascribed to 'transmit' was 'send or receive by means of an on-line service'.⁶³⁸ This was argued to be too broad as it could extend to computer users who received unsolicited transmissions of offending material from senders acting in bad faith.

16.71 The model provisions were not accepted and have still not been settled by SCAG, pending determination by the Commonwealth of the role it will play in the regulation of the industry.⁶³⁹ The legislators in Victoria, Northern Territory and Western Australia decided not to wait until model provisions had been agreed, and included in their Classification legislation, provisions creating offences for on-line transmission of objectionable material, transmission of unsuitable material to minors, and advertisement of the availability for transmission of objectionable material.⁶⁴⁰ These provisions are reproduced in Appendix P18 to this Report.⁶⁴¹

THE WAY AHEAD

16.72 The growth of the Internet and improvements in technology mean that increasing numbers of adults and children will have access to objectionable material.

16.73 Neither industry self-regulation, the exercise of parental responsibility, the deployment of filter and blocking software packages, or law enforcement, either alone or in combination, can hope to protect children completely from exposure to pornographic material or from predatory paedophiles on the Internet. Each has a role to play, and it is encouraging to see the efforts of the various Associations mentioned in the Senate Select Committee Report to develop industry-based codes of conduct. However, such a code will not deter rogue users of the Internet, and the capacity of service providers to monitor the activities of those using its services is limited.

16.74 Parents are unable to watch their children on a 24-hour a day basis, and in very many cases their familiarity or expertise with on-line services, if it exists at all, will be less than that of their children.

16.75 The software filter and blocking packages currently available,⁶⁴² similarly provide only a partial answer. These filter or blocking packages operate in various ways:

- some permit sites to be blocked with reference to a list of known newsgroups, World Wide Web sites and the like, pursuant to decisions made by the software producer or by user instruction;
- others block requests for, or receipt of information which contain specific key words or phrases, again selected by the software producer or by end users; and
- yet another form provides a blanket blocking of all sites except those which are selected by the supervisor.

⁶³⁶ *ibid*, draft ss. 8(2)(d), 8(2)(e).

⁶³⁷ Hon. J. W. Shaw QC MLC, 'NSW clamps down on pornography on the Internet' Media Release, 2/4/96, RCPS Exhibit 3189, p. 2.

⁶³⁸ NSW Parliamentary Counsel's Office, Discussion Draft: 'On-line Services', PCC-170Q.OLS, 11/7/96, draft s.2, RCPS Exhibit 3190C.

⁶³⁹ Briefing Paper on Censorship prepared for Standing Committee of Attorneys General, 'Censorship', 14/3/97, RCPS Exhibit 3073C.

⁶⁴⁰ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), ss. 57 & 58; *Classification of Publications, Films and Computer Games Act 1995* (NT), ss. 50Z & 50ZA; *Censorship Act 1996* (WA), ss. 101 & 102.

⁶⁴¹ See Volume VI, Appendix P18 of this Report.

⁶⁴² eg. Net Nanny, Surfwatch, Cyber Patrol, Cybersitter, and Net Shepherd. See *Australian Net Guide*, March 1996.

16.76 The difficulty with these devices is that they are blunt instruments and because of the nuances of the English language, and the need for context, they can unintentionally block access to sites containing useful and important information which do not in fact contain any objectionable material. Moreover, most of these devices only block World Wide Web sites, leaving the other on-line services, which are more likely to contain material of concern, accessible.

16.77 A more flexible and potentially useful approach would take advantage of the PICS labelling structure previously mentioned, which allows individual web pages to be rated and given selected access. The progress to date, and the industry reaction to this system, are helpfully analysed in the third Senate Select Committee Report.⁶⁴³ It clearly is an initiative worth pursuing, although again it cannot provide any protection against objectionable material created outside the World Wide Web.

16.78 The proposals mooted by the ABA and the Senate Committee, the recently released Principles for a Regulatory Framework, and the provisions of the legislation outlined above, are all concerned with the regulation of the Internet and other on-line services generally. This is an area where there is room for divergent views as to the weight to be accorded freedom of information, as against the maintenance of community standards. It is outside the scope of the terms of reference of this Commission to report on regulation of the on-line industry at large, or to attempt any reconciliation of these competing views.

16.79 The Commission's concern is with the electronic distribution of child pornography and the use of on-line services to solicit children to engage in sexual activity. In this area the issues are less clouded. There is no relevant public interest in permitting the Internet, and other on-line services, to be used as a medium for the distribution of child pornography or for the sexual exploitation of children generally.

16.80 At present the publication and distribution of child pornography in NSW is dealt with by the criminal law in the same way as other types of pornography and objectionable material.⁶⁴⁴ This fails to recognise the peculiarly abhorrent nature of child pornography in that its creation involves the defilement and exploitation of children.

16.81 The Commission favours the introduction into the *Crimes Act 1900* of an offence of publishing child pornography. This offence should include both conventional and on-line publication:

- the definition of 'publish', in addition to the matters set out in s. 578C of the Crimes Act (the publication of indecent articles), might also embrace:
 - the use of a computer service by a person to transmit, make available for transmission, obtain possession of, demonstrate, advertise the availability for transmission of, or request the transmission of, an article that is known or reasonably suspected by that person to contain child pornography (as defined in the Crimes Act);⁶⁴⁵
 - a defence should be available where the person charged shows that the article concerned is of recognised literary, artistic or scientific merit, or a bona fide medical article; and in either case that the relevant activity is justified as being for the public good;

⁶⁴³ Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Regulation of Computer On-Line Service*, Part 3, June 1997, RCPS Exhibit 3211, pp. 39-42.

⁶⁴⁴ *Crimes Act 1900*, s. 578C; *Classification (Publications, Films and Computer Games) Enforcement Act 1995*.

⁶⁴⁵ *Crimes Act 1900*, s. 578B(1).

- it would, in the Commission's view, be appropriate to exempt from this provision, any service provider or operator of a telecommunications facility, save where that person knowingly permits, offers or encourages its service or telecommunications facility to be used for any such activities.

16.82 The Commission also favours the introduction into the *Crimes Act 1900* of an offence to proscribe:

- the use of an on-line service to make any request, suggestion, or proposal constituting an invitation or encouragement to a person under the age of 16 years to engage in sexual activity (with the maker of that communication, or anyone else) knowing the recipient to be under 16 years of age, or recklessly careless as to whether the recipient is under that age.

16.83 Each offence should be an indictable offence and contain a substantial maximum available penalty.

16.84 The Commission acknowledges that it is desirable that any scheme for the regulation of the Internet and other on-line services reflect a uniform approach by the States and Territories and that it form a coherent package with such legislation as depends on the exercise of Commonwealth powers.⁶⁴⁶ The reasons for uniformity are persuasively identified in the third Senate Select Committee Report.⁶⁴⁷ Those considerations relate, among other things, to the difficulties service providers might face were they confronted by a host of differing regulatory schemes. The two offences which the Commission proposes relate to the control of computer paedophile activity.

By their terms they do not impose any burdensome obligations on service providers. It is an area which calls for prompt attention by the State of NSW and the enactment of the proposed offences should not stand in the way of the adoption of a uniform scheme for regulation of the Internet at large.

C. ADDITIONAL LAW ENFORCEMENT POWERS

16.85 Policing in this area of activity is difficult for a number of reasons:

- there is natural concern to respect the privacy of one-to-one communications, and to avoid subjecting on-line communication of this kind to any more onerous regulation than that applicable to the letter post or telephone conversations;
- this must, however, be subject to the legitimate interests of law enforcement for which interception of private communication is already permitted in defined circumstances;⁶⁴⁸
- encryption facilities are now publicly available to protect communications, along with a lesser range of data protection systems or practices designed to frustrate any audit of a computer;
- anonymous remailers can provide a conduit through which a communication is passed, and conceal the sender with a non-identifiable label;
- considerable time and effort is needed, by reason of the volume of traffic, to find material through random browsing, particularly as information sites come and go, or are transferred elsewhere;

⁶⁴⁶ It is noted that Senator Alston, Federal Minister for Communications, is reported to have announced the Federal Government's wish to work with the States in the development of uniform laws for the regulation of the Internet, *Sydney Morning Herald*, 16/7/97.

⁶⁴⁷ Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Regulation of Computer On-Line Service*, Part 3, June 1997, RCPS Exhibit 3211, pp. 28-29.

⁶⁴⁸ *Telecommunications (Interception) Act 1979* (Cth).

- illegal sites can be protected by passwords and subscription systems, which are bypassed by standard search engines, and the interrogation features of Internet robots, which automatically troll the Net, can be disabled by site owners, rendering them invisible;
- similarly, as pseudo-photographs can be produced, the capacity exists to 'morph' or electronically change the appearance of children or adults whose images appear, in any of the several forms available, making identification for prosecution difficult;
- current technology permits establishment of a closed realm which now earns the title of Undernet, to which the inquirer needs the correct Internet address or Uniform Resource Locator (only provided to trusted persons);
- problems can arise in tracing transmissions to their source or end recipients, when techniques of looping through service providers and hubs are used;
- possibilities exist for storing computer data offsite and for its rapid transfer elsewhere, so that it may not be accessible to a routine search under warrant;
- the creation of mirror sites, cross posting to other newsgroups and the use of e-mail to which material may be attached makes blocking or the close down of a site very difficult; and
- dangers exist in the use of unskilled investigators who may inadvertently destroy the opportunity for retrieval of deleted or dumped information.

16.86 The Commission is strongly of the view that, subject to the legitimate interests of privacy, and the introduction of appropriate offences, policing powers should be enhanced to deal with these problems. In this respect the following matters might be given consideration.

16.87 The *Listening Devices Act 1984* does not extend to the installation of devices capable of monitoring, recording or transmitting data stored in a computer. This is a matter which the Law Reform Commission (LRC) has addressed in its 1997 issues paper on surveillance.⁶⁴⁹ The LRC favours the amendment of the *Listening Devices Act* (possibly to be renamed the *Surveillance Act*) to broaden the definition of a listening device to include visual surveillance devices, signal devices and tracking devices. Signal devices are described as 'technology which allows the implanting within a computer of either a recording or transmitting device to pass raw data to an outside receiving point'.⁶⁵⁰

16.88 The LRC refers to the definition of listening device in the *Australian Security Intelligence Organisation Act 1979* (Cth). It is noted that the Police Service, in its submission to the LRC, supported this definition as being sufficiently broad to encompass signal devices and future technological developments. The *Australian Security Intelligence Organisation Act* definition is in these terms:

any instrument, device or equipment capable of being used, whether alone or in conjunction with any other instrument, device or equipment, to record or listen to words, images, sounds or signals.

16.89 The Commission favours the amendment of the *Listening Devices Act 1984* to incorporate a definition of listening device in the above terms. This would permit the installation of devices capable of recording or transmitting data from a computer together with the recording of information, either by video camera or otherwise, which might identify the user of the computer from time to time. The latter is an equally important consideration in the investigation of paedophile computer crime.

⁶⁴⁹ NSW Law Reform Commission, *Surveillance*, Issues Paper 12, Sydney, 1997.

⁶⁵⁰ *ibid*, para. 5.53.

16.90 Consideration should be given to including the offence of being in possession of child pornography as a prescribed offence pursuant to cl. 5 of the Listening Devices Regulation 1994 to enable a warrant to be obtained where a reasonable suspicion exists as to the commission of an offence. Alternatively, consideration might be given to making the possession of child pornography an indictable offence. This would serve to highlight the serious nature of the offence.

16.91 Currently, in appropriate cases, police have access to the subscriber call records maintained by telecommunications firms (known as 'call charge records').⁶⁵¹ These are a useful investigative aid. When it comes to on-line criminal activity call charge records are of no assistance since they merely record the making of a connection to the service provider. As noted elsewhere in this chapter, it appears that action is presently being taken at both the Federal and State level to introduce a scheme for regulation of the Internet industry. One measure that should be addressed in any such scheme is provision for service providers to disclose information (the identity of account holders, dates and times of access to on-lines services and the sites accessed) to a law enforcement agency when an authorised officer, employed by the agency, certifies that the disclosure is reasonably necessary for the enforcement of the criminal law.

16.92 The Commission notes that the difficulties created by sophisticated encryption programs will always create problems for law enforcement. The legitimate interests of commerce make it inappropriate to proscribe encryption software. However, in a case where a police officer has reasonable cause to suspect that a person has used computer encrypted information in connection with the commission of a criminal offence, he or she should have the power to require the user to supply the decryption key. Failure to do so, in the absence of a lawful excuse, should constitute an offence.

16.93 Currently it will be rare for police investigating paedophile activity to have a foundation for seeking the issue of a warrant authorising the interception of a telecommunications service.⁶⁵² In the event that offences are enacted relating to the publication of child pornography and the on-line solicitation of children for sexual purposes, they will not constitute Class 2 offences under the *Telecommunications (Interception) Act 1979*, (Cth), to support the issue of an interception warrant. Interception enables the collection of data transmitted over the telecommunications service by modem. The use of intercepts can be a valuable tool in investigating computer paedophile activity. This is a matter which it would be appropriate for the Commonwealth to review, when it next revisits the troublesome *Telecommunications (Interception) Act 1979* (Cth).

16.94 Additionally, the Commission supports the enhancement of the capacity of law enforcement generally to deal with computer crime. This includes:

- the provision of suitable funding, on a national basis, for the Computer Investigation Techniques (CIT) Program of the National Police Research Unit (NPRU);⁶⁵³
- the deployment, within the NSW Police Service, of computer investigative specialists, skilled in examining computer systems and in extracting information that may have been protected in the various ways available;
- the provision of suitable hardware and software tools, including current programs, so that police can deal with any equipment seized; and as previously mentioned
- the development of a uniform criminal code, to deal with computer based offences.

⁶⁵¹ *Telecommunications Act 1997* (Cth), s. 282(1).

⁶⁵² *Telecommunications (Interception) Act 1979*, (Cth). See s. 5D for the definition of 'Class 2 offences' - where the offence is a sexual one against a person who is under 16, and which carries a maximum of at least seven years imprisonment, and is characterised by substantial planning and organisation, the foundation for an interception warrant is made out.

⁶⁵³ NPRU, Strategies to improve co-ordination by Australasian law enforcement agencies in the investigation of the use of computers for criminal paedophile activity, 1996, RCPS Exhibit 5940C.

16.95 Recently, Mr Don Dovastan, the Deputy Chief Constable of Derbyshire and an adviser to Europol,⁶⁵⁴ cautioned that:

... the Internet is helping paedophiles to be increasingly devious. "We're struggling because of the way they use the net to exchange information ... They are building a database to inflict hideous injuries on children."

Paedophiles are becoming ever more ingenious in hiding information in innocuous-sounding discussion groups and the police need to know where such information is located.⁶⁵⁵

16.96 He advocated the need for police services to adopt up-to-date investigative software, a central network that can match data, and provide indexing and cross references far more quickly than is currently possible, in order to meet this challenge. This caution and advice are timely and current Australian developments in this area are mentioned later in this Report.⁶⁵⁶ The Police Service needs to be in a position where it can remain abreast of current technology, and have access to modern investigative software.

D. ADEQUACY OF PENALTIES IN RELATION TO CHILD PORNOGRAPHY

16.97 The possession of child pornography is currently a summary offence punishable in NSW by imprisonment for 12 months and/or a fine of up to \$10,000.⁶⁵⁷ In other jurisdictions like offences attract a heavier penalty.⁶⁵⁸ It is noted that in two recent NSW cases of which the Commission is aware, in which individuals were sentenced in respect of the possession of child pornography, non-custodial penalties were imposed.⁶⁵⁹

16.98 The possession for sale of pornographic material, films or publications, is dealt with by the Classification Act.⁶⁶⁰ A maximum penalty of 12 months imprisonment and/or a fine of \$10,000 is prescribed for an individual found guilty of possessing restricted films.⁶⁶¹ A person found guilty of the sale or delivery of restricted publications is liable to a similar penalty.⁶⁶²

16.99 As commented earlier, the child pornography industry is particularly abhorrent. Its production is inevitably associated with the degradation of children. Those who acquire child pornography create the market which promotes this abuse. The Commission considers that offences associated with child pornography, including its possession, should be treated as of greater seriousness than offences involving the publication of restricted material generally. To this end where the material in question involves child pornography the Commission recommends that consideration be given to amending those provisions earlier mentioned to make the offences indictable, and to increase the available maximum penalty.

⁶⁵⁴ Europol was created in 1990 to gather and exchange information between the member states of the European Union so as to assist the work of local police services in each member country.

⁶⁵⁵ 'Database can fight paedophile menace', *The Times*, 2/7/97, p. 3.

⁶⁵⁶ Volume V, Chapter 18 of this Report.

⁶⁵⁷ *Crimes Act 1900*, s.578B.

⁶⁵⁸ *Criminal Code Act 1983* (NT), s. 125B(1) provides for a two year maximum sentence in relation to possession of child pornography, and s. 125B(2) provides for a 10 year maximum sentence in respect of the offence of selling or offering for distribution (whether or not for reward); *Crimes Act 1900* (ACT), s. 92NB provides for 5 years imprisonment for a person knowingly in possession of child pornography.

⁶⁵⁹ JK pleaded guilty to 34 counts pursuant to s. 578B *Crimes Act 1900* before Waverley Local Court on 18/11/96 and was sentenced to 350 hours of community service and placed on a recognisance to be of good behaviour for three years; RW pleaded guilty to one count pursuant to s. 578B of the Act before the Byron Bay Local Court on 19/3/97 and was fined \$2,500 and placed on a recognisance to be of good behaviour for three years.

⁶⁶⁰ *Classification (Publications, Films and Computer Games) Enforcement Act 1995*.

⁶⁶¹ *Classification (Publications, Films and Computer Games) Enforcement Act 1995*, s. 18(2).

⁶⁶² *Classification (Publications, Films and Computer Games) Enforcement Act 1995*, s. 19(1).

E. CONCLUSIONS

16.100 The task of striking a balance between the protection of children from harmful material, and the interest of freedom of expression and research is a difficult one. Although the Internet is just another vehicle for communication, it operates on a scale so vastly different from existing media, that the same methods of content and distribution control will simply not be appropriate.

16.101 Television and radio broadcasters can control the content and the timing of their programs. Newsagents, bookshops and other outlets can control the display and sale of adult publications. Each is subject to regulation, for example in relation to the manner in which restricted publications are sold. Each is amenable to prosecution for the sale and offer for sale of such materials in breach of the relevant restrictions. On the Internet, however, everyone can be a publisher and a transmitter.

16.102 Censors and police cannot stay abreast of the new material appearing on the Internet, nor could any one regulatory body classify all the material on the Net in the way that the Office of Film and Literature Classification classifies material within its jurisdiction. It is equally unrealistic to make service providers responsible for everything which their clients access or create, or for the use by others of their services to develop paedophile rings.

16.103 However, it is essential for positive steps to be taken, on an industry basis, and at State and Commonwealth level, to monitor developments and to provide the most effective regulatory system possible. As part of this process, as a general deterrent, and to reflect the difficulties of law enforcement, the Commission favours a combination of measures involving the development of codes of practice and the creation of specific offences to support the regulatory efforts of the industry.

16.104 Offence provisions and codes of practice will still not be enough on their own. Parents must accept responsibility for the manner in which their children use on-line services. Programs should be developed to educate parents as to what is on the Internet and the filter and blocking technology available. The wealth of knowledge that children acquire by virtue of the time they spend at their computers should also be tapped by parents and educators. The children are in the best position to tell their parents and teachers what is popular and what sites are being accessed.

RECOMMENDATIONS

The Commission recommends:

- ◆ Creation of indictable criminal offences with respect to the following activities (paras. 16.63 - 16.67):
 - the publication of child pornography, including the transmission of the same by means of an on-line service (para. 16.81);
 - the use of an on-line service to encourage a person under the age of 16 years to engage in sexual activity (para. 16.82); and
 - the use of a child for pornographic purposes, whether ‘employed’ for that purpose or not (para. 16.35).
- ◆ Amendment of the definition of ‘listening device’ pursuant to the *Listening Devices Act 1984* to incorporate the definition of listening device used in the *Australian Security Intelligence Organisation Act 1979* (Cth) (paras. 16.87 - 16.89).
- ◆ Provision be made under Listening Devices Regulation 1994, to enable a listening device warrant to be obtained in connection with the investigation of offences relating to the possession of child pornography (para. 16.90).

- ◆ Any scheme for regulation of the Internet industry make provision for Internet service providers to disclose information (the identity of account holders, dates and times of access to on-lines services and the sites accessed) to a law enforcement agency when an authorised officer, employed by the agency, certifies that the disclosure is reasonably necessary for the enforcement of the criminal law (para. 16.91).
- ◆ The grant of legislative authority where a police officer has reasonable cause to suspect that a person has used computer encrypted information in connection with the commission of a criminal offence to require the user to supply the decryption key. Failure to supply the key, in the absence of a lawful excuse, should be made an offence (para. 16.92).
- ◆ Consideration be given by the Commonwealth to the amendment of the following Acts:
 - the *Telecommunications (Interception) Act 1979* (Cth) to include offences relating to the possession, distribution and production of child pornography and offences relating to the sexual assault or exploitation of children as 'Class 2' offences (para. 16.93);
 - the *Crimes Act 1914* (Cth), s. 85ZE to clarify the applicability of that provision to the transmission by means of an on-line service of material which would be regarded by reasonable persons as being, in all the circumstances, offensive (para. 16.63).
- ◆ Support be given to the development of a Website hotline, similar to those developed in Holland and the UK, to which offensive material can be reported, backed by industry, government and law enforcement agencies, with a requirement that the operator of the hotline report paedophile material immediately to a law enforcement agency without first giving any warning or opportunity for removal of the material (paras. 16.36 - 16.38).
- ◆ Support be given to the development of labelling technology, like PICS, which can be combined with appropriate software to limit the material which can be accessed by minors; and the development of reliable and practicable age verification procedures (para 16.77).

- ◆ Action, by way of funding, training and inter-Service co-operation, to enhance the capacity of law enforcement in relative to child sexual abuse, including promotion of the CIT program of the National Police Research Unit, the deployment within the Service of computer investigative specialists and the provision of current technology in the form of software and hardware in aid of investigation (para. 16.94).
- ◆ The offence of possession of child pornography (both for personal use and for sale) be made indictable and the maximum penalties increased (paras. 16.97 & 16.99).
- ◆ Development by the proposed Children's Commission of a program to educate parents as to what is on the Internet in terms of child pornography and the filter and blocking technology available to them (para. 16.104).

CHAPTER 17

PROTECTION AND SUPPORT FOR THE VICTIM

A. THE VICTIM

17.1 The victims of child sexual abuse are not confined to those children who are the subject of notification. Other victims include:

- the immediate family of the child;
- the immediate family of the alleged offender;
- the abused child whose existence has not been disclosed;
- any person against whom an untrue allegation has been made; and
- the child who has not been abused but is treated as such.

17.2 Often the harm caused to these other victims is minimised or ignored. However, the reality of collateral harm to persons other than the child who has been abused, should be recognised.

17.3 The possible existence of unidentified children who an offender has abused, should also never be lost sight of, since it is almost always the case that the offence which comes to notice is not the first or only offence. Moreover, the child who has not been abused but is treated as such needs to be managed with particular care and sensitivity to minimise the long-term effects of being drawn into a child abuse case.

17.4 For each category of victim the best safeguards relate to early intervention, committed and professional investigation, and the development of a co-ordinated case plan in which the families concerned are kept informed, and therapeutic assistance is provided in a way which is consistent with maintaining the integrity of the investigation, and any subsequent prosecution. The aim should be to:

- gather the facts in a way that is skilled, fair and not affected by contamination through leading questions, undue pressure on the child or the like;
- minimise the trauma of any judicial process by expeditious trial and by the adoption of procedures which are understandable and fair both to the child and the accused;
- provide appropriate pre-trial support, with suitable follow-up after the trial, irrespective of its result;
- provide suitable counselling and treatment to the offender who is convicted, or admits to a problem, along with advice to his immediate family as to what might be expected or available post release; and to
- provide appropriate protection, support and rehabilitation for those children and families involved in notifications and investigations which do not proceed to prosecution.

17.5 These considerations have relevance to each category of victim identified, since they are measures designed to reveal the truth, to minimise the trauma for those who have been sexually abused, and to discourage the self-destructive behaviour of the recidivist. Each is developed in more detail elsewhere in this Report. This chapter, however, concentrates upon the child who is shown to have been sexually abused, and who for simplicity is hereafter referred to as 'the victim'. In particular, it examines:

- the consequences of abuse, both immediate and long-term; and
- the resources available, or needed, for the protection, support and rehabilitation of such children.

17.6 The task here undertaken is neither easy, nor is it one that is capable of definitive statement. There is little in the way of expert consensus in the entire field of child sexual abuse. What is apparent is that the recent awareness of, and concerns about, child sexual abuse have led to a flurry of activity, some very emotive responses and a polarisation of opinions, approaches and even research. This has not necessarily produced any greater clarity. As one paediatrician has pointed out:

Unfortunately, as our understanding of the issues involved in the medical evaluation of the sexually abused child comes into focus the complexity of the issues also become apparent. In most areas of medicine, increased knowledge about a new clinical situation leads physicians to improved skills and confidence in approaching the problem. Paradoxically, it appears that increased awareness of the complexity of issues surrounding child sexual abuse cases often seems to increase rather than decrease the practitioner's anxiety and trepidation about handling these cases.⁶⁶³

17.7 These imbalances are gradually being redressed but the Commission strongly supports any moves to facilitate communications between those working in this field, and to focus upon impartial and careful research and practice designed to:

- fill significant gaps in knowledge about child sexual abuse;
- ensure the minimisation of harmful effects upon its victims; and
- develop and implement strategies for prevention and early intervention.

17.8 Earlier in this Report, the Commission surveyed existing studies and statistics which were designed to establish the prevalence and incidence of abuse, and the extent to which it is under-reported.⁶⁶⁴ It is not possible from that material to develop any profile of the victims, other than to note that:

- children are abused across all economic, religious, cultural and social backgrounds;⁶⁶⁵
- victims encompass children of both sexes, and span a wide age range from pre-schoolers to adolescents; and that

⁶⁶³ A. Finkel, Letter to the Editor, *Child Abuse and Neglect*, vol. 20, no. 1, 1996, pp. 93-94. See also R. K. Oates, 'It's time to have another look at the Medical Model', *Child Abuse and Neglect*, vol. 20, no. 1, 1996, p. 3, where it is suggested that other professions might benefit from application of the best medical model: studying the problem, experimentation regarding treatment, intervention, rigorous evaluation and long-term follow-up; and W. Glaser, Paedophilia: The public health problem of the decade, Paper delivered to the Australian Institute of Criminology (AIC) conference, Paedophilia: Policy and Prevention, Sydney, April 1997, RCPS Exhibit 3057/2, p. 5 where it is suggested that clinicians could benefit from knowledge of some criminological ideas.

⁶⁶⁴ See Volume IV, Chapter 3 of this Report.

⁶⁶⁵ See J. Fleming, 'Prevalence of childhood sexual abuse in a community sample of Australian women', *Medical Journal of Australia*, vol. 166, 20/1/97, pp. 65-68, a survey of 6,000 women randomly selected from federal electoral rolls; S. N. Ogata, K. R. Silk, S. Goodrich, N. E. Lohr, D. Weston & E. M. Hill, 'Childhood sexual and physical abuse in adult patients with borderline personality disorder', *The American Journal of Psychiatry*, 147 (8), 1990, pp. 1008-13; and as indicated in Volume IV, Chapter 3 paedophiles come from all walks of life.

- although females are over-represented in the statistics of reported and proven victims, particularly in the younger community, there is reason to believe that this is more attributable to reluctance on the part of males to report abuse than it is to the actual incidence of abuse.⁶⁶⁶

17.9 In dealing with victims, this inbuilt reluctance to report abuse and to become involved in the complex processes which follow, needs to be understood, as does the stage of maturation reached by the child. Knowledge of the dynamics and impact of abuse is also required to identify preventative measures and requirements for effective support and treatment.

B. CHILD DEVELOPMENT

17.10 As submissions and evidence to the Commission emphasised, those working in the area of child sexual abuse need to understand the normal development of children in order to:

- communicate effectively with them;
- competently investigate and assess allegations of abuse;
- provide the most appropriate response;
- avoid, as far as is possible, occasioning further trauma; and to
- avoid adult-centred systems, attitudes and beliefs which militate against identification and reduction of abuse.⁶⁶⁷

17.11 The degree and focus of understanding required will vary with each profession but there is a clear need for multi-disciplinary training. This was emphasised in the Draft Recommendations Paper recently issued by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC), in which they reported that:

- they had received extensive evidence of failures, by all entities within the legal process, to accommodate children's evolving maturity, responsibilities and intellectual independence, and in particular had seen a consistent failure to consult with and listen to children in matters that affect them;⁶⁶⁸
- in general, court and tribunal processes have not been appropriately adapted to allow the effective participation of child witnesses and parties;⁶⁶⁹ and that
- the generalised assumptions in law about children's development, which have been used to determine their capacity to participate in legal processes, need to be re-evaluated on the basis of psychological studies which provide a fuller, more sophisticated understanding of children's evolving capacity to understand legal processes and to make reasoned decisions.⁶⁷⁰

⁶⁶⁶ D. Finkelhor, *A Sourcebook on Child Sexual Abuse*, Beverly Hills, Sage, California, 1986; D. Finkelhor, *Child Sex Abuse: New Theory and Research*, Free Press, New York, 1984; A. N. Groth, *Men Who Rape*, Plenum, New York, 1979, as cited in A. Burgess & C. Grant, *Children Traumatized in Sex Rings*, National Center for Missing and Exploited Children, March 1988, RCPS Exhibit 2156. See also C. Wilson & D. Pence, RCT (video link to Alabama, USA), 2/7/96, pp. 28011-12; Y91, RCT, 2/7/96, pp. 28054-55; D. H. Jones, RCT (video link to USA), 3/7/96, p. 28096. However A. Blaszczyński, RCT, 30/10/96, p. 33698, and N. McConaghy, RCT, 6/9/96, p. 31706, both said the opinion in current literature was that there are twice as many female victims as male. As L. Mathews, the Co-ordinator of Caretaker's Cottage, confirmed, children, particularly those on the streets, do not want to complain. Boys especially do not like being seen as victims.

⁶⁶⁷ S. Bellett, *Getting It Right: Child Victim Witness Services: an International Perspective*, Report of a study conducted in 1992 as a Churchill Fellow. Bellett suggests that Australian systems and attitudes are far more adult-centred than those in the USA. L. Sullivan emphasises the importance however of ensuring that adults remain responsible for care, support, societal attitudes and their own behaviour: L. Sullivan, 'Preventing child sexual abuse: whose responsibility?', *Australian Journal of Early Childhood*, vol. 15, no. 2, June 1990, pp. 30-33.

⁶⁶⁸ ALRC & HREOC, *A Matter of Priority: Children and the Legal Process*, Draft recommendations paper no. 3, May 1997, RCPS Exhibit 3284.

⁶⁶⁹ *ibid.*, p. 10.

⁶⁷⁰ *ibid.*, p. 11.

17.12 Precisely the same considerations apply, in the view of this Commission, to all of the other processes involved in the management of child sexual abuse.

SOME RELEVANT ASPECTS OF DEVELOPMENT

17.13 Aspects of child development which need to be understood by those working with child sexual abuse victims include:

- cognitive and intellectual development, an understanding of which can better determine the child's level of comprehension and therefore the appropriate level at which to communicate with the child;
- language development generally, including body language and non-verbal behaviour, as well as stages of maturation,⁶⁷¹ which might affect the ability of the child to describe abuse and to articulate stress and underlying feelings;
- physical development and basic anatomy, in the light of which accurate information about the alleged abuse can be obtained and possible clinical signs of abuse can be understood;
- psychosexual development, particularly comprehension of sexual activity, from which those working with the child might identify sexual knowledge beyond that expected for the child's developmental age,⁶⁷² taking into account family practices, circumstances and attitudes;⁶⁷³
- emotional development, and attachment,⁶⁷⁴ an understanding of which might lead to better judgment as to the child's need for attention and comfort;
- the likely relationships of children at different ages with others within their family, against which their trust, need for support, and degree of dependency can be assessed;
- social awareness, from which their susceptibility to social pressure from adults and 'authority figures', as well as peer pressure, can be gauged;
- basic mental health requirements of children in the light of which counselling and support need to be framed;⁶⁷⁵
- memory theories and memory functions at different stages of development, including:
 - memory capacity, storage and recollection (recognition, reconstruction, free recall);
 - the processes of defensive repression⁶⁷⁶ and suppression,⁶⁷⁷ and normal forgetting;
 - the effect of rehearsal in elaborating or distorting memory generally, suggestibility;⁶⁷⁸ and
 - the impact upon memory of stress, intimidation, inducements to keep secrets and suggestive questions;⁶⁷⁹

⁶⁷¹ J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2, p. 59, a report for the CPC on their two-year research project. The Executive Summary of this report can be found in Volume VI, Appendix P14. Parliament of Victoria Crime Prevention Committee, Inquiry into Sexual Offences Against Children and Adults, *First Report: Combating Child Sexual Assault - An Integrated Model*, May 1995, RCPS Exhibit 1757, p. 206.

⁶⁷² Sydney Children's Hospital, Child Protection Team, Submission to RCPS, 8/8/96, RCPS Exhibit 2522.

⁶⁷³ Professor McConaghy suggested, however, that since the 1970s there has been an unofficial embargo on research investigating the sexual activity of normal children, so workers assessing the sexual behaviour of children suspected of being abused have not had the opportunity to learn about normal behaviour and commonly consider sexualised behaviour in itself evidence of abuse. N. McConaghy, Report to RCPS, 28/6/96, RCPS Exhibit 2548.

⁶⁷⁴ 'Attachment' is the biologically determined tendency of the young child to seek proximity with the parent in times of stress: R. D. Needelman, 'Growth and development', in W. E. Nelson (ed), 1996, op cit, p. 31.

⁶⁷⁵ The New Children's Hospital, Submission to RCPS, 20/7/96, Exhibit 2521.

⁶⁷⁶ A. Burgess & C. Grant, *Children Traumatized in Sex Rings*, National Center for Missing and Exploited Children, March 1988, RCPS Exhibit 2156, p. 22. See Volume IV, Chapter 4 for a discussion of the repression controversy.

⁶⁷⁷ A. Gibbs, RCT, 30/10/96, pp. 33673-74.

⁶⁷⁸ A. Gibbs, RCT, 30/10/96, pp. 33671-72 & 33683-84.

each of which has a significance in investigative techniques and the assessment of the reliability of the child as an accurate historian;

- the use and content of fantasy in normal play, and as a buffer, which may be relevant to the child's understanding of 'truth';
- embarrassment, self-consciousness, and awareness of sexual development, which may inhibit disclosure unless the child is comfortable with the interviewer;
- the concentration span of children at different ages, ignorance of which may lead to inappropriate assessment of the child's reliability or truthfulness;
- understanding of time and space and attribution of responsibility, again matters of importance in understanding the account the child gives;⁶⁸⁰
- indicators of possible physical, emotional or intellectual disabilities, which may impact on the child's response to abuse and have implications for investigation, support and treatment;⁶⁸¹
- likely responses of the child to gender, authority and appearance of the interviewer, therapist or child protection worker, which may impact on communications between them;
- the physical environment and other measures needed to make the child feel comfortable and safe, thereby reducing stress and facilitating disclosure;⁶⁸²
- the signs of behavioural disturbance that may be expected at different stages of maturation, in the presence of abuse, from which judgments may be made as to the reliability of any disclosure made;
- possible timeframes for appearance of post-abuse symptoms, including psychosomatic symptoms, the knowledge of which might assist counselling and support;
- possible parental reactions to disclosure, which may be visited on the child and either cause suppression of detail or encourage embellishment or even fabrication;
- cultural awareness, particularly relating to differences in acceptance or taboos concerning sexual behaviour, disclosure and the like which may affect the way the case is managed; and
- survival tactics of a child who has been abused, including dissociation techniques and the possibility of retraction, which again may affect the reliability of any interview and outcome of a prosecution.

⁶⁷⁹ eg. N. W. Perry, 'How children remember and why they forget', *The Advisor*, American Professional Society on the Abuse of Children, vol. 5, no. 3, 1992.

⁶⁸⁰ New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521.

⁶⁸¹ The Victorian Parliamentary Crime Prevention Committee noted that sexual offences are committed against both institutionalised and non-institutionalised people with intellectual and physical disabilities and recommended that training and facilities take this into account: Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, p. 115. See also J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2, p. 50.

⁶⁸² See eg. K. M. McConkey, RCT, 20/2/97, pp. 36031-32; S. M. Booth, RCT, 3/9/96, p. 31410.

17.14 Knowledge of broad patterns of development at different ages allows a full appreciation of the possible harm to a child's normal development caused by abuse, which can manifest itself in psychiatric symptoms, regression or precocious behaviour, and impact upon matters such as memory, use of fantasy and the like. Similarly, this understanding is important in moulding investigative and court procedures to accommodate the stage of maturation reached by the child and to meet his or her special needs. Each child will be different, and should be individually assessed using these developmental patterns as a guide only, taking account of the surrounding circumstances. Knowing the child's age is not enough.⁶⁸³

17.15 A further significant issue, affecting the legal process, is the developmental change that can occur in the child between the time of disclosure and the time he or she gives evidence. Use of videotape for initial interviews can be useful in this respect in capturing the age and development of the child proximate to the time of disclosure.⁶⁸⁴ It also minimises the risk that reaction to the abuse or intervention, which may be extreme, will adversely affect the child's evidence and the judicial response to that evidence. Decisions in relation to the timing of critical events and the course of any prosecution need also to be considered in the light of the particular vulnerability of children at certain stages of development.⁶⁸⁵

17.16 From the material available to the Commission, some of the likely developmental characteristics of children at different ages can be identified. These are set out in Table 1 at the end of this Chapter. The importance of understanding these matters is underlined in the warning given by Ceci and Bruck:

[The available] research shows that children are able to encode and retrieve large amounts of information, especially when it is personally experienced and highly meaningful. Equally true, however, is that no good will be served by ignoring that part of the research that demonstrates potentially serious social and cognitive hazards to young child witnesses if adults who have access to them attempt to usurp their memories. Inattention to the full corpus of empirical data will only forestall efforts to improve the way child witnesses are treated and delay needed research into ways of optimizing young children's testimonial accuracy through better interviewing techniques and judicial reform.⁶⁸⁶

C. EFFECTS OF ABUSE ON CHILDREN

17.17 Opinion is divided on the effects of child sexual abuse. Some studies, particularly earlier ones, have suggested that it does not necessarily or inevitably have a detrimental effect,⁶⁸⁷ and that factors such as personal strength and resourcefulness, or the presence of a supportive relationship with a parent or other adult, may help to prevent traumatising.⁶⁸⁸ The majority of researchers and practitioners have however concluded that, for most victims, the effects of child sexual abuse are harmful.⁶⁸⁹ Experts, workers and victims who assisted the Commission certainly considered this to be the case. Their experience suggested that:

⁶⁸³ G. Goodman & B. M. Schwartz-Kenney, 'Why knowing a child's age is not enough: influences of cognitive, social and emotional factors on children's testimony', in H. Dent & R. Flin (eds), *Children as Witnesses*, Wiley, Chichester, 1992, pp. 15-32.

⁶⁸⁴ New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521.

⁶⁸⁵ These matters are examined in Volume V, Chapter 15 of this Report.

⁶⁸⁶ S. Ceci & M. Bruck, 'Suggestibility of the child witness: a historical review and synthesis', *Psychological Bulletin*, vol. 113, no. 3, 1993, pp. 403-39 at p. 434.

⁶⁸⁷ A. Kinsey, W. Pomeroy, C. Martin & P. Gebhard, *Sexual Behaviour in the Human Female*, Saunders, Philadelphia, 1953; and L. Burton, *Vulnerable Children*, Routledge & K. Paul, London, 1968, as cited in R. K. Oates, 'The effects of child sexual abuse', *Australian Law Journal*, vol. 66, 1992, p. 187. Kinsey et al found that sexual abuse could contribute favourably to psychosexual development. Professor Oates notes that the design of recent studies is more sophisticated and results are more likely to be accurate.

⁶⁸⁸ J. Brennan, Letter to RCPS, 13/5/97, RCPS Exhibit 3059; NSW Health Department, Services for Adult Survivors of Child Sexual Assault (draft), June 1997, RCPS Exhibit 3106C, p. 21.

⁶⁸⁹ See eg. M. I. Hanger, Child abuse - short and long term consequences, Paper provided to RCPS, RCPS Exhibit 3051/44; and R. K. Oates, 'The effects of child sexual abuse', *Australian Law Journal*, vol. 66, 1992, p. 186. For reviews of research see J. Beitchman et al, 'A review of the long-term effects of child sexual abuse', *Child Abuse & Neglect*, vol. 16, 1992, pp. 101-18; and K. A. Kendall-Tackett et al, 'Impact of sexual abuse on children: a review and synthesis of recent empirical studies', *Psychological Bulletin*, vol. 113, no. 1, 1993, pp. 164-80.

- there is still a great deal to be learned in this area;
- it is difficult to separate the effects of abuse and the effects of disclosure;⁶⁹⁰
- the effects are not limited to the victim, but extend to the family and friends of the child, and sometimes involve a long-term, 'next generation' impact;⁶⁹¹ and that
- professionals and workers, both in the private and public sector, who deal with child sexual abuse, need to know how children respond to and are affected by abuse.⁶⁹²

17.18 Victims need not, and should not, be stereotyped as 'victims for life', nevertheless the impact upon them must be assessed, acknowledged and where necessary dealt with. An understanding of the causes of trauma should inform measures to reduce it, thus increasing the likelihood of obtaining complete and accurate information and evidence.

FACTORS RELEVANT TO IMPACT

Circumstances of the Abuse

17.19 A number of factors may affect the impact of abuse including:

- the manner in which the abuse occurred (that is, whether achieved by force, violence, coercion, bribery or mutual consent),⁶⁹³ although there is some disagreement on this as some studies have found force not relevant to degree of trauma, particularly in familial abuse;⁶⁹⁴
- age and maturity of the child when the abuse occurred;⁶⁹⁵
- whether the episode was isolated or abuse was ongoing over a long period;⁶⁹⁶
- the relationship of the offender to the victim;⁶⁹⁷
- the age difference between the parties;⁶⁹⁸
- the nature and extent of sexual contact,⁶⁹⁹ especially whether there was penetration;⁷⁰⁰

⁶⁹⁰ A. Blaszczyński, Submission to RCPS, 31/7/96, RCPS Exhibit 2549; H. R. Winefield, 'Child maltreatment effects and prevention: the advocacy role for professionals', *Australian Journal of Forensic Sciences*, vol. 24, no. 1, 1992.

⁶⁹¹ Sydney Children's Hospital, Child Protection Team, Submission to RCPS, 8/8/96, RCPS Exhibit 2522; L. Scott, Submission to RCPS, 9/4/96, RCPS Exhibit 1696; L. Palmer, 'The impact of sexual abuse on the children of survivors. Implications for forensic nursing', *Journal of Psychosocial Nursing and Mental Health Services*, vol. 34, no. 10, October 1996, pp. 42-46.

⁶⁹² eg. R. Spielman, Submission to RCPS, 8/8/96, RCPS Exhibit 2529/121; A. Blaszczyński, RCT, 30/10/96, p. 33713.

⁶⁹³ K. M. McConkey, RCT, 20/2/97, p. 36031; R. K. Oates, 1992, op cit, p. 187; T. A. Roesler & N. McKenzie, 'Effects of childhood trauma on physiological functioning in adults abused as children', *Journal of Nervous and Mental Disorders*, 182(3), 1994, pp. 145-50.

⁶⁹⁴ According to S. Bellett, op cit, p. 5, research has shown that the use of violence does not necessarily lead to a more severe impact. In a study undertaken after his 1992 article (above) Oates and others found that no characteristics of the abuse were associated with greater impact after five years on a child's depression, self-esteem and behaviour problems, family dysfunction was however found to be a significant factor: J. Tebbutt, H. Swanston, R. K. Oates & B. I. O'Toole, 'Five years after sexual abuse: persisting dysfunction and problems of prediction', *Journal of American Academy of Child Adolescent Psychiatry*, vol. 36, no. 3, March 1997, pp. 330-39 at 337.

⁶⁹⁵ R. K. Oates, 1992, op cit, p. 187.

⁶⁹⁶ R. K. Oates, 1992, op cit, p. 187. See also P. E. Mullen, J. L. Martin, J. C. Anderson, S. E. Romans & G. P. Herbison, 'The long-term impact of the physical, emotional and sexual abuse of children: a community study', *Child Abuse and Neglect*, vol. 20, no. 1, 1996, pp. 7-21; and K. R. Silk et al, 'Borderline personality disorder symptoms and severity of sexual abuse', *American Journal of Psychiatry*, vol. 152, no. 7, July 1995, p. 1059.

⁶⁹⁷ Mullen et al, 1995, say the closer the relationship the greater the trauma. Silk et al, 1995, op cit, found that further damage to interpersonal functioning occurs if abuse is at the hands of family members or close relatives: ibid p. 1062. Kluff considered that long lasting negative effects of child sexual abuse appeared to correlate with abuse by a father or step-father, the use of force, and lack of support from a close adult. He found it highly probable that sexual activities that were intrusive and of long duration were most destructive. See also J. A. Boots, 'A certain state of being', RCPS Exhibit 5880, p. 9.

⁶⁹⁸ R. K. Oates, 1992, op cit, p. 186.

⁶⁹⁹ ibid, p.186; M. Mian, P. Martin & D. Lebaron, 'The effects of sexual abuse on 3- to-5-year-old girls', *Child Abuse and Neglect*, vol. 20, no. 8, August 1996, pp. 731-45.

⁷⁰⁰ J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2, p. 91 citing K. Kendall-Tackett, L. M. Williams & D. Finkelhor, 'Impact of sexual abuse on children: A review of empirical studies', *Psychological Bulletin*, 113, 1993, pp. 164-80.

- the number of perpetrators;
- the gender of the perpetrator(s); and
- any perceived threat to life.⁷⁰¹

17.20 The sexually abused child may have had to contend with other adverse circumstances, such as poverty, neglect, emotional or physical abuse, chronic isolation, dysfunctional family, substance abuse, poor education and limited life skills.⁷⁰² Mullen and others in 1993 concluded that child sexual abuse is not usually an isolated trauma, and should be regarded in most cases as one element in a matrix of adverse family, social and interpersonal experiences which increase the individual's vulnerability to psychiatric disorders. They suggested treatment of the whole clinical picture. Current thinking is that child sexual abuse should be viewed and managed as part of a much wider problem involving physical abuse and neglect of children,⁷⁰³ and possibly social disadvantage.⁷⁰⁴

17.21 Evidence before the Royal Commission confirmed the need for this approach, and the tendency of the extrafamilial paedophile to seek out lonely, unhappy and unprotected children.⁷⁰⁵

17.22 By reason of the multiplicity of trauma and complexity of issues, a holistic understanding and treatment of child sexual abuse is essential, and community health staff and others working with children need to recognise and respond sensitively to the effects of child sexual abuse which may be underlying factors in other health problems.⁷⁰⁶

The Response to Disclosure

17.23 A critical event in the investigation of child sexual abuse, both in terms of the judicial outcome and the effect on the child, is the way that the initial disclosure is made and received.⁷⁰⁷ The immediate responses to a disclosure, whether made to a family member or person in authority such as a school principal or church leader, may include horror, disbelief, denial, blame, punishment, rejection, or failure to intervene at all, or any combination thereof. Acceptance and validation are critical, otherwise the problem can be driven underground and the victim left severely harmed.

⁷⁰¹ T. A. Roesler & N. McKenzie, 'Effects of childhood trauma on physiological functioning in adults abused as children', *Journal of Nervous and Mental Disorders*, 182(3), 1994, pp. 145-50.

⁷⁰² H. R. Winefield, 'Child maltreatment effects and prevention: the advocacy role for professionals', *Australian Journal of Forensic Sciences*, vol. 24, no. 1, 1992, p. 23.

⁷⁰³ F. Grunseit, RCT, 19/2/97, pp. 35896-97; A. Ford, RCT, 4/7/96, p. 28203; J. Wyn Owen, RCT, 10/7/96, p. 28509; A. L. Godfrey, RCT, 12/4/96, p. 23411. See also N. McConaghy, Report to RCPS, 24/6/96, RCPS Exhibit 2548, p. 5; and J. A. Boots, 'A certain state of being', RCPS Exhibit 5880, p. 10.

⁷⁰⁴ Department of Health (UK), *Child Protection: Messages from Research*, HMSO, London, 1995. This is not to say that all households with problems are unhappy and unsatisfactory environments for children; many parents manage to provide a positive and supportive home for their children despite great social disadvantage.

⁷⁰⁵ K. V. Lanning, *Child Molesters: a Behavioral Analysis for Law-Enforcement Officers Investigating Cases of Child Sexual Exploitation*, 2nd edn, National Center for Missing and Exploited Children, Quantico, 1987, RCPS Exhibit 2538/2, pp. 251-52; KR248, RCT, 20/8/96, p. 30932; W35, RCT, 20/8/96, p. 30990. See also the evidence of witnesses A1-A10, RCT, 27/3/96 - 2/4/96.

⁷⁰⁶ Women Incest Survivors Network, Submission to RCPS, 25/9/96, RCPS Exhibit 2529/168; NSW Health Department, Services for Adult Survivors of Child Sexual Assault (draft), June 1997, RCPS Exhibit 3106C, pp. 11, 42-43.

⁷⁰⁷ L. A. Scott, RCT, 16/4/96, p. 23590; K. M. McConkey, RCT, 20/2/97, p. 36031; R. K. Oates, 1992, op cit, p. 186. Disclosure may of course be quite tentative, or fearful, and gradual.

17.24 Distressed parents can easily and unwittingly question the child in an emotional or leading way, and it can be very traumatising for a child to be made the centre of attention because of an allegation of sexual abuse.⁷⁰⁸ On the other hand the child may be silenced and isolated in order to avoid embarrassment for the family.⁷⁰⁹ The parent or caregiver who communicates disbelief of an allegation to a child, even indirectly and in subtle ways, can cause the child to accept that denial in order to maintain their attachment to the parent.⁷¹⁰ The person in authority who responds in a similar way may cause the child to lose all faith in the justice of his or her claim.

17.25 The quality of the child's relationships is also an important element in impact⁷¹¹ and in cases of familial abuse a supportive, non-offending parent seems to be strongly correlated with resilience.⁷¹² A calm and practical, but positive and supportive, approach by the person to whom the abuse is disclosed may greatly reduce trauma, particularly where the circumstances of the abuse are not of the most serious kind. This may be extremely difficult for the parent who is torn between loyalty to and love of a partner and responsibility for and love of a child.⁷¹³ It may also be difficult for the person in authority who is torn between loyalty to a colleague and their institution and responsibility for the child. Ultimately, in each case the child should be placed first.

17.26 The importance of the initial response suggests that efforts to prepare and assist parents and caregivers to acknowledge and support any child who discloses abuse are likely to have significant benefits.⁷¹⁴

17.27 The response to disclosure by adult victims is also critical. Such persons have lived with the secret of abuse for many years and are usually extremely emotional and distressed, as evidenced by those adults who first disclosed to this Commission. Failure to respond appropriately, either personally or institutionally, can have a devastating effect on these adults, their families and others close to them.⁷¹⁵

Relevance of Age, Sex and Background of Victim

17.28 Dr John Brennan⁷¹⁶ informed the Commission that there was no research which clearly indicated that abuse early in life was more damaging than abuse in adolescence.

17.29 Professor Kevin McConkey of UNSW assisted the Commission by conducting a search and review of recent (1994-96) psychological literature on the impact of sexual abuse on children of different ages. He advised:

The research findings are mixed overall. Whereas some studies suggest that sexual abuse differentially affects children of different ages, the direction of this effect is not clear. Although some studies suggested that the impact of abuse is more severe for younger rather than older children, interpretation of these results is problematic because the age ranges of children (including whether they are pre vs post pubescent) is not consistent across studies. Also, other factors such as the identity of the perpetrator, the force or violence of the attack, whether the abuse is a one off or repeated event, whether penetration is involved, and the nature of the social, medical, and legal consequences of the abuse seem more influential in determining the impact of abuse than age of the child or age of abuse onset alone.⁷¹⁷

⁷⁰⁸ S. M. Booth, RCT, 3/9/96, pp. 31421-22, and Dr Booth suggested that the child's reaction may be either to say things to please the interviewer and shut them up, or to say nothing more after realising the disturbance created by initial disclosure. Upset and anxiety are easily transmitted to the child: P. L. McCarthy, 'The well child', in W. E. Nelson (ed), 1996, op cit, p. 27.

⁷⁰⁹ J. P. Keily, RCT, 15/4/96, p. 23510.

⁷¹⁰ K. M. McConkey, RCT, 20/2/97, pp. 36039-40. Professor McConkey called this 'transference of disbelief'.

⁷¹¹ H. R. Winefield, 1992, op cit, p. 23; E. Sharland et al, *Professional Intervention in Child Sexual Abuse*, HMSO, London, 1996, p. 3.

⁷¹² S. Spaccarelli & S. Kim, 'Resilience criteria and factors associated with resilience in sexually abused girls', *Child Abuse and Neglect*, vol. 19, 1995, pp. 1171-82; J. Tebbutt et al, March 1997, op cit, found family dysfunction the most important factor in trauma.

⁷¹³ K. M. McConkey, RCT, 20/2/97, p. 36032.

⁷¹⁴ See Chapter 18 of this Volume which deals with public education.

⁷¹⁵ See eg. S. K. Jackson, Submission to RCPS, 29/7/96, RCPS Exhibit 2529/65; A. L. Godfrey, RCT, 12/4/96, pp. 23376 & 23420-21.

⁷¹⁶ Dr Brennan is with the Department of Child, Adolescent and Family Psychiatry at Westmead Hospital and is also Chairman of the Faculty of Child Psychiatry, NSW Branch of the Royal Australian and New Zealand College of Psychiatrists (RANZCP).

⁷¹⁷ K. M. McConkey, Letter to RCPS, 30/1/97, RCPS Exhibit 5877C/2. See also K. M. McConkey, RCT, 20/2/97, p. 36031.

17.30 It is nevertheless possible to broadly state some characteristic responses to abuse at certain ages.⁷¹⁸ These are set out in Table 2 at the end of this chapter.

Gender Differences

17.31 Although the research is limited⁷¹⁹ some differences in reaction between girls and boys have been found. For example, it has been suggested that girls are more likely to show acute distress⁷²⁰ while boys are less likely to disclose at all, although if they do they will try to appear unaffected by the experience.⁷²¹

17.32 Many early studies concluded that both long-term and short-term effects are more harmful for girls,⁷²² and Professor McConaghy advised the Commission of retrospective studies which had found:

- boys more likely than girls to cite interest and pleasure as their reactions;
- boys who were neutral or even positive about the experience; and
- males who considered that their pre-pubertal activity with women five years or more older had a good effect on their adult sexual lives.⁷²³

On the other hand, a recent study in Holland concluded that although abuse was strongly associated with multiple problems for both sexes the aftermath for boys might be even worse or more complex than for girls.⁷²⁴

17.33 It has been suggested that male victims of sexual abuse are:

- more likely to turn rage outward in aggressive and anti-social behaviour, displacing pain and taking out their abuse on other people;⁷²⁵
- more intolerant of helplessness than the female victim, traumatised by beliefs about masculinity and fearful of being branded homosexual since they are most usually abused by someone of their own sex;⁷²⁶
- more likely to rationalise that they are exploiting the relationship for their own benefit; and are
- prone to clinging to an idealised past relationship with the adult abuser and attempting to recapture that through sexual relationships with a succession of young boys.⁷²⁷

⁷¹⁸ J. Tebbutt et al, March 1997, op cit, pp. 330-39 suggest that some symptoms may relate to the age at which the child is assessed while others are referable to the age at which they were abused.

⁷¹⁹ Child Abuse Prevention Service, Submission to RCPS, 1/7/96, RCPS Exhibit 2529/4; J. Beitchman et al, 'A review of the long-term effects of child sexual abuse', *Child Abuse & Neglect*, vol. 16, 1992, p. 111; and see B. Watkins & A. Bentovim, 'The sexual abuse of male children and adolescents: a review of current research', *Journal of Child Psychiatry*, vol. 33, no. 1, 1992, pp. 197-248.

⁷²⁰ J. A. Boots, 'A certain state of being', RCPS Exhibit 5880, p. 6.

⁷²¹ See eg. K. J. Buttrum, RCT, 29/5/96, p. 26111; D. Pence, RCT (video link to Alabama USA), 2/7/96, p. 28012; Y91, RCT, 2/7/96, p. 28054.

⁷²² N. McConaghy, Visiting Professor, School of Psychiatry, University of NSW, Report to RCPS, 24/6/96, RCPS Exhibit 2548, p. 2, citing research by Finkelhor (1979), Fritz, Stohl & Wagner (1981) and Stein, Golding, Siegal, Burnan & Sorenson (1981).

⁷²³ N. McConaghy, Report to RCPS, 24/6/96, RCPS Exhibit 2548, p. 8, citing studies by Finkelhor (1979), Fritz et al (1981), Fromuth & Burkhart (1989) and Condy et al (1987). Professor McConaghy noted also Finkelhor's view, six years after his particular study, that such retrospective reports may be false due to the male ethics of self-reliance and portrayal of youthful sex as adventurous. In a 1987 study the majority of adolescent male patients recalled the immediate impact as strong or devastating.

⁷²⁴ N. Garnefski & R. F. W. Diekstra, 'Child sexual abuse and emotional and behavioural problems in adolescence: gender differences', *Journal of the American Academy of Child Adolescent Psychiatry*, vol. 36, no. 3, March 1997, pp. 323-29. The authors believed that this was the first study to focus explicitly on gender differences. They compared the incidence of emotional problems, aggressive/criminal behaviours, addiction-risk behaviours and suicidality between sexually abused boys and sexually abused girls, aged 12 to 19 years. Sexually abused boys were found to have considerably more emotional and behavioural problems, including suicidality, than their female counterparts.

⁷²⁵ R. K. Wyre, RCT (video link to Birmingham, UK), 26/4/96, pp. 24210-12; J. Daverington, 'Help me teacher! - Sexual abuse of children', *Behavioural Problems Bulletin*, vol. 4, no. 1, 1990, p. 6. However other studies have found no difference in psychological adjustment and Garnefski and Diekstra describe the externalising/internalising distinction as 'popular belief'.

⁷²⁶ J. Daverington, 'Help me teacher! - Sexual abuse of children', *Behavioural Problems Bulletin*, 1990, vol. 4, no. 1, p. 6; Child Abuse Prevention Service, Submission to RCPS, 1/7/96, RCPS Exhibit 2529/4.

Cultural Differences

17.34 Language barriers and cultural differences may result in additional trauma because of religious implications, and cultural taboos concerning, for example, sexual defilement or activity outside marriage, and because of problems in communication. These need to be understood in dealing with the victim and family. Training, procedures and support all need to take account of differing family dynamics and child rearing practices, and of the potential for cultural bias to affect professional judgment and decisions.⁷²⁸ Children within these communities have a particular need for recognition of their circumstances.⁷²⁹

17.35 The problem of child sexual abuse within some Aboriginal communities has been raised and acknowledged and requires an effective and culturally appropriate response.⁷³⁰ The anxiety in such communities over the involvement of welfare agencies should not prevent their children and families receiving the same protection, counselling or support afforded other children.

Systems Abuse

17.36 The problems of 'systems abuse' are well recognised and have been referred to throughout this Report. It has been defined as 'harm done to children in the context of policies or programs that are designed to provide care and protection', including harm to children's welfare, development or security.⁷³¹ The removal of power and control caused by sexual assault can be aggravated and entrenched if agencies fail to understand victims or to recognise their needs and wishes. Bureaucratic bungling and frustrating personal interactions with government agencies add to trauma. Many witnesses confirmed this to the Commission.⁷³²

17.37 Agencies of course face the problem of 'burn-out' and of staff leaving before they become experienced or well trained.⁷³³ This needs to be addressed, as an unthinking untrained or case hardened worker can occasion great damage both to the prosecution process, and to the subsequent recovery of the child. Lack of continuity of service can also delay recovery.

17.38 Deficiencies previously documented as contributing to systems abuse, and confirmed by evidence to this Commission, include:

- failure to maintain a child focus and ensure that the child is heard, empowered and retains dignity throughout the process;
- inadequate co-ordination, communication and co-operation within and between agencies;
- different professional interests and perspectives within agencies;
- lack of commitment in some departments;

⁷²⁷ A. N. Groth, *Men Who Rape: The Psychology of the Offender*, New York, 1979, as cited in R. C. Summit, 'The child sexual abuse accommodation syndrome', *Child Abuse and Neglect*, vol. 7, 1983, p. 185.

⁷²⁸ J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2, pp. 13 & 123, quoting P. Harris, *All our children: Children's entitlements to health, education and community services*, Melbourne, 1990; C. Shand & R. Milford, *From Recognition to Recovery. A general practice guide to the medical management of sexual abuse*, Doctors for Sexual Abuse care, NZ, 1993, p. 45.

⁷²⁹ Youth Justice Coalition, Submission to RCPS, 15/7/96, RCPS Exhibit 2529/26.

⁷³⁰ A. Ford, RCT, 29/5/96, pp. 26238-39 & 26148; M. J. Hungerford, RCT, 26/3/96, p. 22574; CPC Child Protection and Aboriginal Communities: Working Party Report, undated, RCPS Exhibit 3197. CPC, *Child Protection in non-English-speaking background Communities: Culture - No Excuse*, 1994, RCPS Exhibit 3198. Abuse may include exploitation by paedophiles from outside the community as well as familial and extrafamilial abuse within the community.

⁷³¹ Dr F. Grunseit, NSW Child Advocate, Submission to RCPS, 14/7/96, RCPS Exhibit 5866; J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2.

⁷³² Dr Booth, for example, emphasised the need for investigators, child protection services and the legal system to understand the effect of fear, unpredictability and the lack of a loving, encouraging environment on a child: The New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521.

⁷³³ Dr F. Grunseit, NSW Child Advocate, Submission to RCPS, 14/7/96, RCPS Exhibit 5866; and F. Grunseit, RCT, 19/2/97, p. 35933-34; Police Association of NSW, Submission to RCPS, 9/8/97, RCPS Exhibit 2529/105; R. Spielman, Submission to RCPS, 8/8/96, RCPS Exhibit 2529/121; J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2, pp. 41-42.

- territorial rivalries and sensitivities;
- inadequate specialist training for investigators, judges and magistrates;
- inadequate supervision of, or resources for, those working with child abuse;
- the 'pillar to post' syndrome of multiple placements, many different District Officers, and ever-changing police officers, lawyers, youth workers and child protection workers;
- inadequate information systems and statistics to manage and monitor the progress of victims, or to conduct relevant research;
- lack of appropriate guidelines;
- lack of effective, accessible grievance procedures for children;
- traumatic medical examinations; and
- lack of a voice for children.⁷³⁴

17.39 The justice system has a particular part to play. It is important to understand the issues in this respect from the child's perspective.

17.40 Child sexual abuse may lead to a criminal prosecution, civil proceedings for damages, Children's Court protection proceedings, or a victim's compensation claim. It may also become an issue in a family law matter. Each may result in considerable trauma for the child concerned. Causes of that trauma include:

- the shock of sudden, involuntary disclosure, such as can occur during a proactive police investigation or publicity about abuse, and which may be accompanied by difficult decisions concerning the appropriate response;⁷³⁵
- the intrusiveness, sensitivity and length of any investigation;
- the failure to take the needs and concerns of the child into account, leading to feelings of helplessness and worthlessness;
- fear of the accused, and particularly of facing the accused in court or even seeing the accused during the proceedings;
- anxiety about the outcome for the accused;⁷³⁶
- intimidation and bullying by defence lawyers, failure of prosecution lawyers or the judge to intervene, and inability to understand and respond to language used by lawyers;
- lengthy delays between disclosure and trial, which are also likely to work in favour of the accused;⁷³⁷
- charges being considered but not laid, or failing, as others may then consider that the victim was not telling the truth, and the victim may feel more alienated and worthless;

⁷³⁴ See J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2; CPC, Submission to RCPS, 7/8/96, RCPS Exhibit 2529/68; F. Grunseit, Submission to RCPS, 14/7/96, RCPS Exhibit 5866; NSW Parliament, Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, September 1996, RCPS Exhibit 3054C/18. Witnesses included A. Godfrey, RCT, 12/4/96, K. J. Buttrum, RCT, 3/3/97, F. Grunseit, RCT, 19/2/97; many other submissions to the Commission referred to these deficiencies.

⁷³⁵ Social Work Department, Royal North Shore Hospital, *Northern Sydney Area Health Service Access Project Report*, 8/8/96, RCPS Exhibit 2349, pp. 1-2 & 27-28. The investigative response may differ for familial abuse, where it is likely to be reactive, and extrafamilial abuse, where it is more likely now to be proactive. See eg. M. J. Hungerford, RCT, 26/3/96, p. 22530.

⁷³⁶ J. Cashmore, *The Evidence of Children*, Judicial Commission of NSW, 1995, p. 28.

⁷³⁷ G. J. Rogers, RCT, 7/5/96, p. 24757.

- the unnatural and intimidating environment of the courtroom, coupled with embarrassment, shame, anger or fear of giving evidence in front of a large number of complete strangers about a sexual offence; and
- anger, frustration and continuing fear of the accused if the child's evidence is not accepted in court, particularly if the process was not seen to be fair.⁷³⁸

17.41 Some reforms have been introduced to counter trauma in the legal process, and others have been dealt with earlier in this Report.⁷³⁹ Their importance cannot be overstated.

17.42 Medical practitioners, including child psychiatrists, have a significant responsibility for prevention, detection and treatment of abuse but may in the course of their work contribute to trauma or fail to intervene when necessary. Dr Grunseit, formerly the Child Advocate, and a medical practitioner himself, suggested that there have always been problems regarding the involvement of medical practitioners in the child protection system.⁷⁴⁰ Other witnesses and submissions confirmed the existence of problems concerning:

- reluctance in reporting - due to a lack of confidence in the child protection system, or fear that reporting a suspicion may lead to over-reaction;
- uncertainty as to the doctor's role - investigator or provider of care and treatment;⁷⁴¹
- dislike of court appearances - associated with reluctance to become involved in child sexual abuse cases because of negative attitudes towards the justice system and interference with their practices;⁷⁴² and
- inadequacy of training - particularly in identifying possible abuse, reporting suspicions, the use of least traumatic medical procedures, legal system requirements for reports and evidence, and rehabilitation needs of victims.⁷⁴³

17.43 A number of victims confirmed the trauma caused by medical procedures, assessment and treatment. The Commission understands that some improvements have been made⁷⁴⁴ but there is clearly much yet to be done. In particular the establishment of Expert Children's Centres would be a step forward.⁷⁴⁵

17.44 In summary, investigation, prosecution, and any other legal proceedings in which the abuse is raised, may be as traumatic for the child and family as the original offence. This should not be so. Aside from the personal harm to the child it has been shown that stress and trauma interfere with a child's ability to give reliable testimony. The solution lies in communication and co-ordination, both interagency and intra-agency, greatly improved training and support, and multi-disciplinary teamwork.⁷⁴⁶

⁷³⁸ Northern Rivers Health Service, Submission to RCPS, August 1996, RCPS Exhibit 2529C/128.

⁷³⁹ See Volume V, Chapter 15.

⁷⁴⁰ Dr F. Grunseit, NSW Child Advocate, Submission to RCPS, 14/7/96, RCPS Exhibit 5866.

⁷⁴¹ eg. M. W. Cox, RCT, 30/10/96, p. 33661; L. A. Scott, RCT, 7/8/96, p. 30020.

⁷⁴² M. A. Reid, RCT, 6/3/97, p. 36776; D. Mulcahy, Submission to RCPS, 17/7/96, RCPS Exhibit 2529/36; RCT, 2/9/96, pp. 31300-02; S. M. Booth, RCT, 3/9/96, pp. 31415-16; Strategic Health Research Consultants, *A Study of Factors Influencing Child Abuse Reporting Behaviours*, CPC, undated, RCPS Exhibit 3127, found that 'fear of consequences for self' was the prominent reason for medical practitioners not reporting suspected abuse, p. 102.

⁷⁴³ D. L. Mulcahy, RCT, 2/9/96, p. 31299; Confidential Submission to RCPS; 15/7/96, RCPS Exhibit 2529C/24. Dr Booth went so far as to suggest that all undergraduate training for people who are involved with children - social work, welfare, teaching, education, law, medicine, nursing, the various therapies - should include training in normal child development, child abuse and perhaps offender behaviour. Graduates working in Children's Courts and prosecutions require an additional 4-6 weeks of intensive teaching and clinical training to develop adequate core skills and knowledge base: S. M. Booth, RCT, 3/9/96, pp. 31431-32. See also Volume IV, Chapter 9 of this Report.

⁷⁴⁴ F. Grunseit, RCT, 19/2/97, p. 35900.

⁷⁴⁵ See Volume IV, Chapter 8 of this Report.

⁷⁴⁶ See eg. F. Grunseit, RCT, 19/2/97, p. 35900-03 and Submission to RCPS, 14/7/96, RCPS Exhibit 5866; C. A. Stephenson, RCT (video link to San Diego, USA), 3/7/96, pp. 38124-25. Numerous submissions to the Commission emphasised the importance of interagency co-ordination and multi-disciplinary teamwork.

IMPACT

Generally

17.45 The common problems described in the literature, by therapists, youth workers and by victims themselves, include:

- physical injury and illness (genital or anal damage, HIV/AIDS, urinary infections) psychosomatic responses (eczema, asthma, anorexia nervosa),⁷⁴⁷ and inhibited physiological responsiveness to the environment;⁷⁴⁸
- emotional and psychological pain and trauma, fear both generalised and specifically of disbelief or rejection,⁷⁴⁹ and anxiety.⁷⁵⁰ Other emotional responses include insomnia, nightmares, mood swings, anxiety, depression, phobias,⁷⁵¹ sadness,⁷⁵² anger, and feelings of helplessness, hopelessness, isolation and self-blame;⁷⁵³
- behavioural symptoms - abusive language, aggressive or inappropriate sexual activity, substance abuse, and suicide;⁷⁵⁴
- social symptoms - difficulty in verbal contact,⁷⁵⁵ withdrawal, avoidance, running away, fighting and aggression;⁷⁵⁶
- isolation - arising out of the secrecy surrounding the abuse, efforts of the abuser to maintain that isolation, and fear, confusion, shame and self-blame on the part of the child;⁷⁵⁷
- general and specific learning difficulties, memory loss, attention deficit disorder,⁷⁵⁸ and delayed cognitive development,⁷⁵⁹ each of which can lead to a dramatic change in academic performance;⁷⁶⁰ and

⁷⁴⁷ M. James, 'Paedophilia', Trends and Issues in Crime and Criminal Justice, Issue 57, June 1996, RCPS Exhibit 2529/6, p. 4.

⁷⁴⁸ N. J. Carrey, H. J. Butler, M. A. Persinger & R. J. Bialik, 'Physiological and Cognitive Correlators of Child Abuse', *Journal of the American Academy of Child Adolescent Psychiatry*, vol. 34, no. 8, August 1995, pp. 1067-75.

⁷⁴⁹ Fear may be chronic and there may be feelings of insecurity, lack of safety, unpredictability and lack of attachment. The New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521; and A. Campbell, RCT, 14/8/96, pp. 30542-43.

⁷⁵⁰ J. A. Boots, 'A certain state of being', RCPS Exhibit 5880, pp. 7-8.

⁷⁵¹ A. Browne & D. Finkelhor, 'Impact of child sexual abuse: a review of the research', *Psychological Bulletin*, vol. 99, 1986, pp. 66-77. A 1993 review of 100 articles on child sexual abuse written during the previous seven years found that short-term symptoms included anxiety disorders with symptoms such as sleep disturbances, insomnia, nightmares and phobic avoidance, dissociation and hysterical symptoms (with periods of forgetfulness, excessive fantasising, daydreaming and sleepwalking), depression and low self-esteem (especially in adolescents): A. H. Green, 'child sexual abuse: immediate and long-term effects and intervention', *Journal of the American Academy of Child and Adolescent Psychiatry*, 32, (5), 1993, pp. 890-902; J. Brennan, Letter to RCPS, 13/5/97, RCPS Exhibit 3059.

⁷⁵² J. Tebbutt et al, March 1997, op cit, pp. 330-39.

⁷⁵³ R. C. Summit, 'The child sexual abuse accommodation syndrome', *Child Abuse and Neglect*, vol. 7, 1983, pp. 177-93. Finkelhor & Browne identified four aspects of abuse which may particularly contribute to psychological injury - traumatic sexualisation; betrayal; stigmatisation; and powerlessness: D. Finkelhor & A. Browne, 'The traumatic impact of child sexual abuse: a conceptualisation', *American Journal of Orthopsychiatry*, vol. 55, 1985, pp. 530-41; D. Finkelhor & A. Browne, 'Assessing the long-term impact of child sexual abuse: a review and conceptualisation', in *Handbook on Sexual Abuse of Children: Assessment and Treatment Issues*, New York, 1988.

⁷⁵⁴ Y91, RCT, 2/7/96, pp. 28044-48; A. Godfrey, RCT, 12/4/96, p. 23422; T. A. Roesler & C. E. Dafler, 'Chemical dissociation in adults sexually victimised as children: alcohol and drug use in adult survivors', *Journal of Substance Abuse and Treatment*, 10(6), 1993, pp. 527-43.

⁷⁵⁵ J. A. Boots, RCT, 29/2/97, pp. 36066-67.

⁷⁵⁶ YMCA, *Teenage Runaways - What Can a Parent Do?*, June 1993, RCPS Exhibit 5915; National Center for Missing and Exploited Children, *Children Traumatized in Sex Rings*, March 1988, RCPS Exhibit 2156, p. 9.

⁷⁵⁷ Women Incest Survivors Network, Submission to RCPS, 29/7/96, RCPS Exhibit 2529/168, p. 10.

⁷⁵⁸ J. A. Boots, 'A certain state of being', RCPS Exhibit 5880, p. 9.

⁷⁵⁹ N. J. Carrey, H. J. Butler, M. A. Persinger & R. J. Bialik, 'Physiological and Cognitive Correlators of Child Abuse', *Journal of the American Academy of Child Adolescent Psychiatry*, August 1995, vol. 34, no. 8, pp. 1067-75.

⁷⁶⁰ J. A. Boots, 'A certain state of being', RCPS Exhibit 5880, p. 8; J. Normand et al, 'Physiological and Cognitive Correlates of Child Abuse', *Journal of the American Academy of Child and Adolescent Psychiatry*, vol. 34, no. 8, August 1995, p. 1067.

- other impacts - low self-esteem, lack of empathy, sense of emptiness, lack of basic trust, resentment against authority and propensity for aggression which can lead to delinquent and criminal behaviour;⁷⁶¹ desire for justice and retribution, particularly once the abuse has been disclosed; and altered concepts of justice and morality, personal beliefs and view of the world.⁷⁶²

17.46 In some cases it is suggested that the child may resort to dissociation, a protective mechanism allowing detachment from the abuse through fantasy, deliberately thinking about something else, rationalisation, or reinterpretation.⁷⁶³ Various possibilities for accommodation in fact exist, ranging from:

- acceptance without apparent complaint or negotiation with the abuser of 'rules' for the relationship which might reduce the incidence of abuse, or render it less troublesome; to
- attempts to be an unusually popular high achiever, eager to please both teachers and peers.⁷⁶⁴

17.47 The abused child may go on to develop sexually inappropriate behaviour. Some become abusers in adult life, although the possibility of self-justification, or appeal for sympathy on the part of an offender recounting an untrue history of this kind cannot be discounted.⁷⁶⁵

17.48 Other difficulties the victim can experience in adulthood include psychiatric disorders,⁷⁶⁶ marital and sexual difficulties, abuse and neglect of their own or other children, depressive and eating disorders, low self-esteem, suicidal behaviour, and substance abuse.⁷⁶⁷

17.49 A parent who has been abused can also be retraumatised if they find or suspect that their own child has been abused. This can result in inability to cope with the demands of being a parent, going into profound depression, or denying the abuse of the child.⁷⁶⁸ In some cases the dysfunctional childhood of the adult is recreated when they have their own children. In other cases the parent who has been abused may be over-protective and unduly fearful of the same happening to their child.⁷⁶⁹

⁷⁶¹ Mr Wyre's view was that a high proportion of abused boys grow up to be criminals, although the accuracy of this statement is affected by the evidence that many boys do not disclose: R. K. Wyre, RCT (video link to Birmingham, UK), 26/4/96, pp. 24210-11.

⁷⁶² See eg. Social Work Department, Royal North Shore Hospital, *Northern Sydney Area Health Service Access Project Report*, 8/8/96, RCPS Exhibit 2349; and The New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521.

⁷⁶³ See eg. C. A. Glad & M. H. Teicher, 'Relationship between early abuse, posttraumatic stress disorder, and activity levels in prepubertal children', *Journal of the American Academy of Child Adolescent Psychiatry*, vol. 35, no. 10, October 1996, pp. 1384-93; P. K. Trickett et al, 'Hypnotisability and dissociativity in sexually abused girls', *Child Abuse and Neglect*, May 1995, vol. 19, no. 5, pp. 645-55; J. A. Boots, RCT, 29/2/97, pp. 36066-67, who distinguishes between fantasy and dissociativity; R. C. Summit, 'The child sexual abuse accommodation syndrome', *Child Abuse and Neglect*, vol. 7, 1983, pp. 177-93. L. Coleman, 'False allegations of child sexual abuse. Have the experts been caught with their pants down?', *Forum*, January/February 1986, p. 12 describes Summit's analysis as fatally flawed in that it is based on classic familial abuse within an intact family, yet had been used to evaluate abuse in quite different circumstances, such as separated, hostile parents, or an allegation of abuse by someone outside the family (p. 14). A 1996 study in Texas, USA found denial in only 6% of 234 cases, recantation in 4%, and concluded that Child Sexual Abuse Accommodation Syndrome seemed infrequent in cases seen by child protection agencies and that their finding did not support the view that disclosure is a quasi-developmental process with sequential stages: A. R. Bradley, J. M. Wood, 'How do children tell? The disclosure process in child sexual abuse', *Child Abuse and Neglect*, vol. 20, no. 9, September 1996, pp. 879-80.

⁷⁶⁴ R. C. Summit, 'The child sexual abuse accommodation syndrome', *Child Abuse and Neglect*, vol. 7, 1983, p. 186. See also Confidential submission to RCPS, RCPS Exhibit 3278C.

⁷⁶⁵ Professor Blaszczyński, Deputy Director, Psychiatry Research and Teaching Unit, UNSW, advised the Commission that no conclusive statements can be made regarding the potential for victims to themselves become abusers; not all abuse victims offend and not all offenders have been abused: Submission to RCPS, 31/7/96, RCPS Exhibit 2549. Mr Wyre's view was that the vast majority of victims will not grow up to be abusers. Professor Blaszczyński was cynical about 'paedophiles' using the excuse or seeking sympathy out of the fact that they were victims themselves. He said the empirical figures, although these may be biased, indicate about 30% have been victims: RCT, 30/10/96, pp. 33695-96; RCT, 26/4/96, p. 24200. See also, K. J. Buttrum, RCT, 29/5/96, p. 26099.

⁷⁶⁶ See eg. K. R. Silk et al, 'Borderline personality disorder symptoms and severity of sexual abuse', *American Journal of Psychiatry*, vol. 152, no. 7, July 1995, p. 1059. There is however no standard pattern of symptoms or psychiatric profile for an adult who has been abused as a child: K. M. McConkey, RCT, 20/2/97, pp. 36018-19.

⁷⁶⁷ J. H. Beitchman, K. J. Zucher, J. E. Hood, G. A. DaCosta, D. Akman & E. Cassavid, 'A review of the long-term effects of child sexual abuse', *Child Abuse and Neglect*, 1992, p. 16; T. A. Roesler & C. E. Dafler, 'Chemical dissociation in adults sexually victimised as children: alcohol and drug use in adult survivors', *Journal of Substance Abuse and Treatment*, 10(6), 1993, pp. 527-43.

⁷⁶⁸ S. M. Booth, RCT, 3/9/96, pp. 31407 & 31429-30. It is described as de-compensation.

⁷⁶⁹ Confidential submission to RCPS, RCPS Exhibit 3278C.

Familial Abuse

17.50 Some particular features of the trauma related to familial abuse can be identified:

- the betrayal of trust is likely to be particularly serious and damaging;
- it is likely that the abuse escalated over a long period, and in secret;
- confusion is likely on the part of the child who may believe that the activity must be all right because it was initiated by the parent, or was either an expression of love or accidental;⁷⁷⁰
- the wordless action or gesture of a parent can be an absolutely compelling force for a dependent child, and the threat of loss of love, or loss of family security, is more frightening to the child than any threat of violence;⁷⁷¹
- the child is likely to be particularly fearful of the consequences of prosecution of a family member which could lead to disintegration of the family, and loss of support; fears which may be exacerbated by the offender threatening to kill the non-offending parent if the abuse is disclosed;⁷⁷²
- there may be anger against non-offending members of the family for their ignorance or acceptance of the conduct, and consequent failure to provide protection;
- it may lead to the child running away from home with all the consequences of homelessness;⁷⁷³ and
- retraction is very likely unless intervention leads to the offending parent accepting responsibility; but whether or not that occurs reintegration of the child into the family, if that is the desired outcome, can be very problematic.⁷⁷⁴

17.51 In these circumstances, compliance in the absence of force or threat can never be equated with consent. Dr Boots observed that as a group, incest victims may be particularly vulnerable to re-victimisation including rape, masochistic behaviour, prostitution, substance abuse and becoming 'psychiatric patients'.⁷⁷⁵

Extrafamilial Abuse

17.52 Three features stand out for particular mention as aspects of the trauma caused by extrafamilial abuse, where it is more than an isolated incident with a stranger:

- there is a strong likelihood of the child being involved in damaging activities such as substance abuse, watching pornographic videos and being used to recruit new victims;
- at some stage those in 'relationships' will be discarded, with an enormous immediate sense of betrayal and loss, and long-term destructive consequences; and
- for those who are victims of persons in authority within churches, schools and institutions, there is likely to be a significant loss of confidence and respect for the organisation involved, as well as individual bitterness, and long-term loss of self-esteem.

⁷⁷⁰ P. Phelan, 'Incest and its meaning: the perspectives of fathers and daughters', *Child Abuse and Neglect*, vol. 19, no. 1, 1995, RCPS Exhibit 2378, pp. 7-24.

⁷⁷¹ R. C. Summit, 'The child sexual abuse accommodation syndrome', *Child Abuse and Neglect*, vol. 7, 1983, p. 183.

⁷⁷² F. J. Martin, RCT, 14/8/96, pp. 30573-75.

⁷⁷³ K. J. Buttrum, RCT, 29/5/96, pp. 26106-09; and see the later section in this chapter on homeless and runaway children.

⁷⁷⁴ F. Grunseit, RCT, 19/2/97, pp. 35918-24.

⁷⁷⁵ J. A. Boots, 'A certain state of being', RCPS Exhibit 5880, pp. 10-11. He considered incest the most deleterious of all forms of child sexual abuse.

17.53 The subsequent history of self-destructive behaviour, suicide, substance abuse, descent into prostitution and law breaking for these victims was well exposed in the hearings of the Royal Commission. This has been identified as a particular problem for those children who are abused while in care, who are then at considerable risk of progressing to career criminality.⁷⁷⁶

D. SUPPORT AND PROTECTION

17.54 The growing awareness of the nature and extent of child sexual abuse brings with it a responsibility to ensure that protection, support and treatment are provided in a way that is responsive, neutral, ethical and effective. Of equal importance are prevention and early intervention strategies which can reduce short and long-term consequences as well as the demand for costly services.⁷⁷⁷

RUNAWAYS AND HOMELESS CHILDREN - SPECIAL PROBLEMS

17.55 The Commission received various estimates of the size of this group, which mainly centres on the Sydney metropolitan area. Some of these children are on the streets because abuse within their family has caused them to run away. They constitute a transient population, whose members drift between refuges, squats, institutions, juvenile correctional centres, and their own homes.⁷⁷⁸ Very often they go by names other than their own -- working names, nicknames, gang names and the like, a factor which complicates any estimate of their numbers. Their population is far in excess of the capacity of existing institutions, homes and refuges to house or otherwise provide for them.

17.56 Without accommodation, or adequate financial support, they are easily driven into prostitution or acceptance of the approaches of paedophiles who offer accommodation and the like in return for sexual favours. Particularly vulnerable in this age group are the older children, between the ages of 15 and 18, who have largely been ignored by DCS in recent years.⁷⁷⁹

17.57 Graphic evidence of this was given by some of the boys who were drawn into the Bevan network, and also by W35 who described the activities of boys working 'the Wall' in Darlinghurst.⁷⁸⁰ The degrading conditions they endure, the evil presence of drug dealers, and the high risk activities involved are not confined to boys. Two female witnesses, Y10 and Y101, described the circumstances in which they had been forced to leave their homes, became exposed to drugs, made State wards, or placed into children's homes and drifted into prostitution at clubs or brothels in Kings Cross, where they worked with other girls of their own age, earning substantial sums because the younger girls were favoured and better paid.⁷⁸¹ Like their male companions, any moneys earned went on drugs. For those in this position the future is grim.

⁷⁷⁶ R. K. Wyre, RCT (video link to Birmingham, UK), 26/4/96, pp. 24203 & 24210-11. Mr Wyre gave evidence that 97% of the witnesses in a current UK sexual abuse case against 88 residential social workers had become career criminals. See also K. J. Buttrum, RCT, 3/3/97, pp. 36529 & 36557: Community Services Commission, Discussion paper, The drift of children into care in the juvenile justice system: Turning victims into criminals, December 1996, RCPS Exhibit 5956.

⁷⁷⁷ Many submissions to the Commission emphasised the importance of maintaining a balance between prevention, early intervention, investigation and treatment. Child abuse prevention is considered to include:

- primary prevention - programs targeted at whole community with the aim of stopping abuse before it starts;
- secondary prevention - programs targeting high risks groups of children and/or adults; and
- tertiary prevention - intervention to assist those who have been abused and to prevent re-abuse.

The CPC is presently developing a Child Abuse Prevention Strategy for NSW: CPC, Prevention Questionnaire, 10/12/96, RCPS Exhibit 3051/25a.

⁷⁷⁸ A. L. Godfrey, RCT, 12/4/96, p. 23410.

⁷⁷⁹ C. K. Riley, RCT, 30/10/96, pp. 33735-36; K. J. Buttrum, RCT, 29/5/96, pp. 26106-09; Barnardos Australia, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/124.

⁷⁸⁰ W35, RCT, 20/8/96, p. 30972-76; see also W61, RCT, 15/5/96, p. 25237.

⁷⁸¹ Y10, RCT, 1/7/96, pp. 27963-81; Y101, RCT, 12/8/96, pp. 30331-47.

17.58 Neither Y10 nor Y101 received any assistance from police or FACS/DCS staff. One said that she was in fact sexually abused by a Community Services Worker (Y25), who befriended her and offered to find her employment.⁷⁸²

17.59 Mr Laurie Matthews, the Co-ordinator of the Caretaker's Cottage Youth Refuge, which provides short-term accommodation for young people, gave some insight into the problems faced by these children.⁷⁸³ He was aware of young girls working in the clubs and brothels being encouraged to bring younger friends, including brothers and sisters, some as young as 10 years old, to Kings Cross where they are lured into sexual abuse.

17.60 He saw a specific need to focus on adolescents as they are pushed out of a system which gives priority to younger victims, and because adolescents are sometimes difficult to manage:

They vote with their feet and ruin case plans and are frustrating.⁷⁸⁴

17.61 He confirmed the Commission's view that a multi-disciplinary approach with improved protocols and interagency relationships is needed. While a compromise needs to be made if refuges such as his are to work more closely with police, in that the trust of the child may be lost, he saw this as a necessary risk. Significantly, he observed that for the first time in 20 years he had been approached by police (CPEA officers) during the life of the Commission, to work with them.⁷⁸⁵

17.62 Father Christopher Riley, of St Vinnies for Youth, gave similar evidence. He explained that St Vinnies provides services to children and young people at risk and particularly caters for groups, including juvenile sex offenders, that other organisations are reluctant to accept. It receives some government funding, but the majority of its services are privately funded, despite the fact that government organisations frequently refer children to its facilities.⁷⁸⁶ Apart from its city refuges, it also provides rural accommodation, wilderness programs, schooling and outreach services for chronically homeless children, generally aged 15-18 years, many of whom are State wards or children who might otherwise be bail refused.⁷⁸⁷ St Vinnie's farms are taking children as young as 12 year olds and it is being pushed to house 9-10 year olds.⁷⁸⁸

17.63 The picture he painted for the harder cases was somewhat grim:

... there would be probably 20 reports on my desk of very, very desperate cases and as you read through those reports you begin to think how much worse is it going to get for these kids? It certainly doesn't surprise me when they start perpetrating violence themselves because they have been treated so violently for so long with horrendous things done to them that they basically learn what they live ... The interesting thing is that in an environment of trust, support and care they change pretty dramatically and it is only wanting to be made safe that brings about changes like that. They can be reached, most of these kids, they are not lost causes in any shape or form.⁷⁸⁹

He had similarly seen positive developments within the Police Service since the Royal Commission, particularly after the formation of the CPEA with which there had been some joint efforts.⁷⁹⁰

⁷⁸² Y10, RCT 1/7/96, p. 27976-78.

⁷⁸³ Mr Matthews obtained an Associate Diploma in Social Work and since 1982 has had many years experience in the youth welfare area, such as in refuges, share accommodation facilities and for a short time with DCS: L. C. Matthews, RCT, 3/7/96, pp. 28142-44.

⁷⁸⁴ L. C. Matthews, RCT, 3/7/96, pp. 28164-73.

⁷⁸⁵ L. C. Matthews, RCT, 3/7/96, p. 28159.

⁷⁸⁶ C. K. Riley, RCT, 30/10/96, pp. 33739-40.

⁷⁸⁷ Father Riley joined the seminary in 1973, was at Boys Town as a teacher and residential worker from 1976 to 1977, worked as a probation officer, a teacher, director of a program for adolescent drug substance abuse. He has a Bachelor of Theology and Diplomas in Teaching and Residential Care and is a member of the Australian Institute of Australian Counselling.

⁷⁸⁸ C. K. Riley, RCT, 30/10/96, pp. 33729-30.

⁷⁸⁹ C. K. Riley, RCT, 30/10/96, p. 33739.

⁷⁹⁰ C. K. Riley, RCT, 30/10/96, pp. 33732-33.

17.64 Y91, a child welfare worker of 10 years' experience, the last four of which have been with adolescents at Kings Cross, also gave evidence. Her aim is to divert children from prostitution, and drugs to a supportive environment. She explained that girls of 13-15, with backgrounds of abuse, linked up with other street children and worked out of the clubs or back streets (where they were less visible and less likely to threaten the business of adult street workers), and quickly began to use drugs. Most had serious health problems and many were suicidal, as were some boys who work 'the Wall'. These boys were similarly aged 13-15 years, although some were as young as 12.⁷⁹¹

17.65 State wards, and children in institutions and detention centres, are particularly vulnerable to the trauma of subsequent abuse since they very often come from the most disturbed families.⁷⁹² Early intervention is essential if the behavioural or other problems of these children are not to expose them to sexual abuse.⁷⁹³ The present moves towards keeping children within their families, or reintegrating them as quickly as possible, are a positive step but they alone are not enough, since many children cannot be sent back to an abusive environment.

17.66 The picture Commission witnesses painted was one of official neglect and lack of concern for the 'problem children' of the community. While they may be troubled and difficult, they cannot be abandoned to the mercy of paedophiles, or to a life of crime. Greater funding and government support of the refuges and other institutions struggling to house, educate and encourage these children away from drugs and prostitution is essential.

17.67 In April 1996 Premier Carr announced a review of the circumstances of all children currently in care, and indicated that a mechanism for an ongoing, and independent review would be established. This has not yet been fully implemented. According to the Community Services Commissioner, Mr Roger West, the Interim Review Committee (IRC) only monitors children who are affected by the closure of DCS institutions and is not an independent body. Funding promised by the Premier has been directed by DCS toward continuation of the Case Planning and Management Strategy (CP&MS) project which is an important task, but it does not constitute an independent review of children in care.⁷⁹⁴ This Commission certainly supports the regular review of children in care, but review alone, unmatched by the funding or establishment of appropriate refuges or residential centres, is unlikely to achieve much.⁷⁹⁵

⁷⁹¹ Y91, RCT, 2/7/96, pp. 28044-48.

⁷⁹² K. J. Buttrum, RCT, 29/5/96, pp. 26115 & 36537-38; R. K. Wyre, RCT (video link to Birmingham, UK), 26/4/96, p. 24207; The 1989 National Inquiry into Homeless Children found a high representation of wards amongst homeless children: *Our Homeless Children: Report of the National Inquiry into Homeless Children*, Human Rights and Equal Opportunity Commission, 1989, p. 109 et seq.

⁷⁹³ See eg. M. Ryan, Submission to RCPS, 9/7/96, RCPS Exhibit 2529/22; Women Incest Survivors Network, Submission to RCPS, 27/9/96, RCPS Exhibit 2529/168.

⁷⁹⁴ R. West, NSW Community Services Commission, Submission to RCPS, 12/8/96, RCPS Exhibit 2529/145.

⁷⁹⁵ Youth Justice Coalition made a submission to this effect (Youth Justice Coalition, Submission to RCPS, 15/7/96, RCPS Exhibit 2529/26) and the Standing Committee on Advocacy made a similar recommendation to Government in 1996: NSW Parliament, Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, September 1996, RCPS Exhibit 3054.

17.68 A further cause for concern is that many children in care appear to receive little, if any, preparation for an independent adult life and no follow-up once they leave the refuge/protection system.⁷⁹⁶ Failure to do this is only likely to lead to other problems. The Commission understands that the Government has now allocated funds for After-Care Centres and for the appointment of Leaving Care Workers⁷⁹⁷ and commends this initiative. Continuing review and evaluation of these centres is obviously important.⁷⁹⁸ The Commission is of the view that such a review and evaluation should be undertaken. In addition the practical needs of children leaving care, some of which were identified by Dr Cashmore and Ms Paxman in their 1996 report for DCS on wards leaving care, must be addressed.⁷⁹⁹

CHILD AND ADOLESCENT OFFENDERS

17.69 The submission from St Vinnies for Youth expressed considerable concern about the largely neglected area of juvenile sexual abuse, and the need for treatment of those children displaying sexually aggressive and abusive behaviours.⁸⁰⁰ This problem has been identified elsewhere.⁸⁰¹ Although the position of juvenile offenders is examined later in this Report, it is worthy of mention here, as there does seem to be some overlap in the offender/abuser role at this stage of maturation. The Child Protection Council (CPC) submitted that the need for early recognition, early intervention and more effective management in this area cannot be over-emphasised. In their view, the focus should be on treatment appropriate to age and developmental stage:

- for children under 10 - specialist, accredited, developmentally appropriate treatment together with legislative change to allow mandatory referral for treatment; and
- for juveniles aged 10-17 - criminal charge but referral, upon conviction to specialist treatment, either through the juvenile justice program, or through DCS intervention to arrange specialist treatment outside the criminal justice system.⁸⁰²

17.70 This Commission is of the view that a prompt and effective response to the child or adolescent victim/offender is absolutely critical, particularly as there is some evidence that treatment of a young offender can be successful. Ms Rhonda Murrey, Director of the Sexual Offenders Treatment and Assessment Program in South Australia, submitted that community-based programs targeting young offenders should be given priority as the younger the offender the greater the opportunity to alter deviant behaviour, and thus protect potential victims.⁸⁰³

17.71 It has been suggested that the pre-trial diversion program for adult offenders be extended to, or used for, juvenile victims/offenders.⁸⁰⁴ The Royal Commission strongly supports its expansion where the abuse is familial. Further exploration of its use as a sentencing option in other cases, would be appropriate.

⁷⁹⁶ J. Cashmore & M. Paxman, *Wards Leaving Care: A Longitudinal Study*, for DCS, January 1996; K. J. Buttrum, RCT, 29/5/96, p. 26099.

⁷⁹⁷ NSW Parliament, Social Justice Budget Statement, *Budget 1997-98*, RCPS Exhibit 3077, p. 25.

⁷⁹⁸ As recommended by the NSW Parliament, Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, September 1996, RCPS Exhibit 3054.

⁷⁹⁹ Identified needs included: financial assistance, accommodation and training, personal support, practical advice and 'befriending', access to counselling, access to personal information & files, and information about available resources. Importantly, it is suggested that assistance needs to be available to these young people until they are at least 21 and perhaps even 25: J. Cashmore & M. Paxman, *Wards Leaving Care: A Longitudinal Study*, for DCS, January 1996, pp. 214-15.

⁸⁰⁰ St Vinnies for Youth, Submission to RCPS, 9/8/96, RCPS Exhibit 2738. Father Riley advised in evidence that the Department of Juvenile Justice supported a residential program to be commenced by St Vinnies for Youth: C. K. Riley, RCT, 30/10/96, p. 33727. This program, the Milestones Juvenile Sex Offender Program for early adolescent offenders conducted by Youth Off the Streets Inc, commenced accepting referrals in May 1997, YOTS, Invitation for referrals, May 1997, RCPS Exhibit 3122. See also K. V. Lanning, RCT (video link to Washington, USA), 5/9/96, p. 31599-600.

⁸⁰¹ eg. C. Humphreys, *The Referral of Families Associated with Child Sexual Assault*, A Study for the NSW Department of Community Services, December 1993, RCPS Exhibit 3116C. Among other things her study showed that young offenders made up 31% of the alleged offenders and were not being consistently notified and interviewed, p. 77. See also South West Child Adolescent and Family Services Association, Submission to RCPS, 1/8/96, RCPS Exhibit 2529/60.

⁸⁰² CPC, Submission to RCPS, 7/8/96, RCPS Exhibit 2529/68, pp. 4-5. The CPC advises that research suggests around 50% of adolescent offenders and 70-90% of younger children who molest were themselves abused.

⁸⁰³ Confidential Submission to RCPS, 21/8/96, RCPS Exhibit 2529C/159.

⁸⁰⁴ F. Grunseit, NSW Child Advocate, Submission to RCPS, 14/7/96, RCPS Exhibit 5866.

FUNDING AND CO-ORDINATION OF SUPPORT SERVICES

17.72 A number of witnesses expressed concern that the increase in reports of abuse had not been matched by an increase in funding or resources.⁸⁰⁵ Submissions and expert advice to the Commission strongly confirmed that most available services are stretched to their limits and are unable to meet existing needs, with possibly disastrous long- and short-term consequences for victims.

17.73 The assessment made by the Commission is that:

- the existing resources for support and treatment of victims, both on an institutional and individual level, are in fact vastly inadequate;
- there are many gaps in the geographical area covered by existing sexual assault services and one of the biggest groups - those adults who are still affected by childhood abuse - has the least access to services;⁸⁰⁶
- there is very little available for male victims, particularly adolescents;⁸⁰⁷
- the system of non-government services is fragmented and confusing with a variety of different groups forming and dissolving all the time;
- many victims face a severe financial burden as the healing process can be very long and Medicare only covers psychiatric counselling, not psychological counselling.⁸⁰⁸ As a consequence for many victims the only recourse is to privately funded specialist services, an option which for many is not financially possible;
- similar problems apply to other family members who are traumatised by the experience and need therapeutic assistance; and
- the demand for crisis services means that prevention and early intervention, critical aspects of protection, are often given a lower priority.

17.74 Some of the organisations currently working in this field can be mentioned in this chapter.

The NSW Child Protection Council

17.75 The role of the CPC has been referred to earlier in this Report.⁸⁰⁹ The CPC has no coercive powers and has struggled with reductions in status, funding and staff, and sometimes with lack of co-operation from government agencies and departments. Nevertheless it has carried out some valuable 'cutting edge' work and has identified many problems and solutions within the child protection system. It is seen as a nucleus for the proposed Children's Commission, mentioned in the concluding chapter of this Report.

⁸⁰⁵ eg. F. Grunseit, RCT, 19/2/97, p. 35888; A. Ford, RCT, 4/7/96, p. 28204.

⁸⁰⁶ Women Incest Survivors Network, Submission to RCPS, 27/9/96, RCPS Exhibit 2529/168.

⁸⁰⁷ M. Lawson, RCT 14/8/96, pp. 30587-88; NSW Department of Community Services, Department of Juvenile Justice & Aging and Disability Department, Submission to RCPS Exhibit 2529/109, p. 48.

⁸⁰⁸ Advocates for Survivors of Child Abuse, Submission to RCPS, RCPS Exhibit 2529C/83, p. 5.

⁸⁰⁹ Volume IV, Chapters 2 & 8. Briefly, the CPC was established following the NSW Child Sexual Assault Task Force and its initial role and focus was the development of programs to assist child sexual assault victims. In 1989 its charter was widened to include physical abuse and neglect of children. CPC, *The NSW Child Protection Council: its role and functions*, RCPS Exhibit 2142.

Area Child Protection Committees

17.76 These local committees, one for each of the 16 DCS administrative areas, are formed and operated by DCS Area Office managers but are composed of local representatives of relevant government departments and agencies and representatives of local community groups. Their role has been to:

- discuss child protection policy and suggest developments based on regional/local needs;
- plan implementation of programs such as the Child Sexual Assault Program;
- communicate State initiatives and intelligence to local professionals;
- assist in community education; and
- facilitate interagency co-operation.⁸¹⁰

Committee roles and projects vary, but they are in an excellent position to develop and promote child abuse prevention and protection initiatives and services at a local level.⁸¹¹

Sexual Assault Centres

17.77 NSW Health has established Sexual Assault Centres in various hospitals and community health centres throughout NSW.⁸¹² They are staffed by specially trained, experienced counsellors and provide counselling, information and medical services for victims and non-offending family members. The centres are also involved in community education, and act as access/referral points.⁸¹³

17.78 Staff provide counselling and support for court appearances and may accompany the witness to court.⁸¹⁴ They do not always have the resources to meet the demand for long-term counselling and support.

Victims of Crime Bureau (VCB)

17.78 Recently established⁸¹⁵ within the Attorney General's Department, the stated role of the VCB is to:

- provide support and referral services;
- co-ordinate support and counselling by government and community agencies;
- oversee implementation of the statutory Charter of Victims Rights;
- act as an information resource for victims and community and victim support agencies;
- organise seminars and training sessions for government and non-government agencies; and to
- advise and assist victims with compensation applications, prepare victim impact statements, and maintain a Victims Register.

⁸¹⁰ Strategic Health Research Consultants, *A Study of Factors Influencing Child Abuse Reporting Behaviours*, CPC, undated, RCPS Exhibit 3127, p. 121.

⁸¹¹ CPC, *Report for the Year 1 July 1995 - 30 June 1996*, RCPS Exhibit 3071/1.

⁸¹² These were first established in the mid-1970s.

⁸¹³ Social Work Department, Royal North Shore Hospital, *Northern Sydney Area Health Service Access Project Report*, 8/8/96, RCPS Exhibit 2349, p. 2; Liverpool Sexual Assault Service, Submission to RCPS, August 1996, RCPS Exhibit 2526C/133.

⁸¹⁴ N. R. Cowdery QC, Statement of Information, 26/6/96, RCPS Exhibit 2101/2.

⁸¹⁵ The Bureau was established under the *Victims Rights Act 1996* (December) and became operational in April 1997.

Victims referred to the VCB by police and other services will be assessed and if necessary referred to specialist services, including counsellors accredited by the VCB.⁸¹⁶ This is again an initiative that needs to be commended.

Family Support Services

17.79 There are approximately 160 Family Support Services throughout NSW; funded principally by grants from DCS, staffed by both skilled employees and by volunteers, and controlled by local management committees and bodies such as Centacare.⁸¹⁷ These support services were established to work, on an early intervention basis, with disadvantaged families or families under stress, where children are at risk of abuse or neglect. They provide advocacy, counselling and group work. Due to a lack of resources elsewhere, DCS refers many victims of abuse, neglect and domestic violence to these services for treatment.⁸¹⁸ As has been the case with many other groups and agencies, prevention and early intervention work are at risk of receiving lower priority because of the demand for crisis work. In the long-term this can only be detrimental to overall child protection goals.

NSW State Network of Young People in Care (SNYPIC)

17.80 SNYPIC, which describes itself as a consumer organisation, is comprised of young people who have been in care themselves. Its aim is to ensure that all people who are or have been in care take a more active role in decisions made about their lives. SNYPIC is involved in co-ordination, policy development, network development and peer advocacy at a service and State level for children and young people in the care system. It does not become involved in individual cases.⁸¹⁹ The Government has allocated additional funds to SNYPIC in the 1997-98 budget.

Non-Government Support Groups

17.81 There are a great many such groups, including:

- Women Incest Survivors Network, which provides outreach services for the victims of child sexual abuse, refers victims to counselling, acts as an advocate for law and policy reform and seeks to raise community awareness of the problem;⁸²⁰
- Advocates for Survivors of Child Abuse, which similarly provides victim support and acts as an advocacy and social action group;⁸²¹
- Victims of Crime Assistance League Incorporated, which provides assistance for victims and has a special support group for male victims of paedophile offences;⁸²²
- Friends of Susanna, a survivors group which was formed originally to cater for those who suffered abuse within the Catholic Church, but now caters for all victims of abuse at the hands of the clergy.⁸²³

⁸¹⁶ Victims of Crime Bureau, Information Package, RCPS Exhibit 3217.

⁸¹⁷ The peak body of this network is the Family Support Services Association (FSSA). Centacare is a family welfare agency run by the Roman Catholic Church.

⁸¹⁸ A. Ford, RCT, 4/7/96, p. 28206; Child Protection Policy for NSW Department of Community Services, October 1994, RCPS Exhibit 5997C.

⁸¹⁹ SNYPIC, Submission to RCPS, 30/7/97, RCPS Exhibit 3218; Youth Justice Coalition, Submission to RCPS, 15/7/96, RCPS Exhibit 2529/26.

⁸²⁰ Women Incest Survivors Network, Submission to RCPS 27/9/96, RCPS Exhibit 2529/168; A Campbell, RCT, 14/8/96, pp. 30542-43; M. Lawson, RCT, 14/8/96, pp. 30582-90.

⁸²¹ Advocates for Survivors of Child Abuse (ASCA), Submission to RCPS, August 1996, RCPS Exhibit 2529C/83.

⁸²² VOCAL, Submission to Parliamentary Joint Committee on the NCA Inquiry into Organised Paedophile Activity, 10/3/95, pp. 1-4, RCPS Exhibit 3220.

⁸²³ Bishop Reid, Memorandum re Friends of Susanna, 28/4/93, RCPS Exhibit 3219C.

⁸²³ A. Burgess & C. Hartmann, 'Treatment Issues in Child Sexual Trauma', in A. Burgess & C. Grant, *Children Traumatized in Sex Rings*, National Center for Missing and Exploited Children, March 1988, RCPS Exhibit 2156, p. 39.

- The Sexual Abuse Counselling Service, which provides individual and group therapy to male victims of sexual abuse, as well as drug and alcohol counselling and services for sex offenders. It is not government funded and clients must pay a fee;⁸²⁴
- The Child Abuse Prevention Service, a community funded service which since 1973 has provided a free 24 hour telephone crisis line for parents under stress. It also runs 'drop-in centres' (Child and Parent Stress Centres) in the city and in the country, conducts home or personal visits and group sessions, provides community education on family stress, assists in training community counsellors and case workers, and arranges referrals to relevant resources;⁸²⁵ and
- various church funded welfare and counselling agencies such as Centacare, Lifeline, the Family Life Movement and Anglican Counselling.

PROTECTIVE PROGRAMS

Protective Behaviours Programs

17.82 Elsewhere in this report consideration is given to Protective Behaviours programs, designed to teach strategies and practical methods to assist children from becoming victims,⁸²⁶ and to the Witness Assistance Service of the ODPP, designed to prepare and assist witnesses including those in child sexual assault cases, so as to reduce the risk of system abuse.⁸²⁷

17.83 These programs are obviously of value and need to be encouraged.

The Pre-Trial Diversion Program

17.84 This is a community-based offender treatment program which protects children who have been abused by:

- providing an incentive for the offender to plead guilty, thus absolving the child of any responsibility for the abuse;
- sparing children the additional trauma of giving evidence in court;
- enabling rehabilitation to commence at an earlier stage;
- keeping the family together; and
- preventing or reducing the risk of further abuse by treating the offender.⁸²⁸

It has obvious advantages in sparing the child from the responsibility for placing the offender in gaol, and in providing counselling to family members as well as the victim. It is examined elsewhere.⁸²⁹

⁸²⁴ 'Sexual abuse counselling for men and boys', *NSW Police News*, October 1994, p. 8.

⁸²⁵ Child Abuse Prevention Service, Submission to RCPS, 1/7/96, RCPS Exhibit 2529C/4.

⁸²⁶ Volume V, Chapter 18.

⁸²⁷ Volume V, Chapter 15.

⁸²⁸ CPC, Submission to RCPS, 7/8/96, RCPS Exhibit 2529/68; D. Tolliday, RCT, p. 26152.

⁸²⁹ Volume V, Chapter 19.

THERAPY AND COUNSELLING

Services Needed

17.85 Despite its importance there has been very little research on treatment effectiveness.⁸³⁰ It is apparent that evaluation of treatments and programs is not funded, is given a low priority, or is not even considered, within many public and private sector organisations working with victims.⁸³¹ This is unsatisfactory. Resources for rehabilitation are limited, and costs are high, so that it is imperative for proper evaluation and development to be built into future plans. The role of the proposed Children's Commission in the co-ordination of research and services should go some way towards achieving this. However, government and non-government organisations should also take responsibility for ensuring that their work is independently evaluated, and subject to peer review.

17.86 The evidence before the Commission suggests that to reduce long-term damage, the following accountable services are likely to be needed:

- crisis counselling for the victim and family or caregivers, at the time of disclosure, or as soon as it is needed;
- focused counselling during times of increased trauma, such as court proceedings;
- remedial counselling and therapy, responsive to the needs of the individual;
- follow-up evaluation with access to long-term support and treatment in order to deal with any retraumatisation, to reduce the 'next generation' impact, and to minimise the risk of violent or criminal tendencies in later life;⁸³²
- services catering specifically for the needs of
 - particularly vulnerable groups, such as physically or intellectually disabled, homeless, institutionalised and Aboriginal children, and
 - cultural, or other groups requiring special skills and approaches; and
- risk management and counselling to prevent abuse, for example in disadvantaged or dysfunctional families.

17.87 Counselling prior to prosecution should be available, but provided by therapists who are trained to remain impartial, and who have a clear understanding of the problems of contamination of evidence. With the consent of the child and the parents videotapes of the investigative interviews with the child could be made available to the therapist to minimise the need to seek facts from the child.

17.88 The role of those health care professionals who assist in the investigative process is also important, and calls for clear definition and training to ensure that they:

- can provide effective advice to child protection teams on the best way to manage the emotional and behavioural consequences of the abuse for the child and family;⁸³³ and that
- any investigation is not contaminated by external pressures.

⁸³⁰ K. M. McConkey, RCT, 20/2/97, p. 36018; CPC, *A Review of the Literature on the Effectiveness of Child Abuse Prevention Programs*, March 1995, RCPS Exhibit 3123, pp. 49-50; E. Sharland et al, *Professional Intervention in Child Sexual Abuse*, HMSO, London, 1996, p. 10; D. Gough, *Child Abuse Interventions: A Review of the Research Literature*, Public Health Research Unit, University of Glasgow, 1993, p. 254. See also A. Blaszczyński, RCT, 30/10/96, p. 33705.

⁸³¹ CPC, *A Review of the Literature on the Effectiveness of Child Abuse Prevention Programs*, March 1995, RCPS Exhibit 3123.

⁸³² Social Work Department, Royal North Shore Hospital, *Northern Sydney Area Health Service Access Project Report*, 8/8/96, RCPS Exhibit 2349, p. 2; M. James, *Paedophilia*, Trends & issues in crime and criminal justice, no. 57, Australian Institute of Criminology, June 1996, RCPS Exhibit 2174.

⁸³³ J. Brennan, Letter to RCPS, 12/12/96, RCPS Exhibit 3196.

17.89 In 1993 Dr Catherine Humphreys found that nearly half of the children and young people who had been abused were not able to access counselling due to lack of interagency co-ordination or lack of services.⁸³⁴ The Commission received a great deal of evidence of the continuing inadequacy of counselling services. This should be addressed by the provision of services which are:

- available to all children (regardless of their status) and to caregivers, with financial support or health care funding covering the costs, provided the service is accredited;
- available on a crisis basis, 24 hours a day;
- available quickly upon referral so that the victim does not fall into a vacuum;
- convenient, with a choice for victims and family and outreach services where necessary; and
- regularly evaluated and improved in response to evaluation.

17.90 The Police Service reported that the absence of consistent support services has meant that police were often the only constant presence throughout an intervention. They have taken on support roles beyond their responsibilities and abilities, which risk undermining the impartiality of investigation and which can have an adverse effect on both the victim and the well-being of the police officer.⁸³⁵ The Joint Investigation Team (JIT) model has the potential to remove this very real problem.

Accreditation or Registration

17.91 At the moment the terms 'counsellor' and 'therapist' and even 'psychotherapist' can be used by anyone including:

- professionals such as psychiatrists, psychologists, social workers, trained nurses, members of the clergy and occupational therapists, including professionals who have been struck off; and
- non-professionals who may have a basic counselling certificate or diploma, some training or experience in alternative therapies, or no qualifications at all.⁸³⁶

Mental health qualifications are not compulsory, and neither is specialist training and experience required by law for many people who hold themselves out as able to assist or counsel victims of sexual abuse and their families. Many are well-meaning but because of their absence of expert training, they may be potentially dangerous. Others are charlatans, who are obsessed or unbalanced and likely to occasion much distress and harm to persons who have never truly been victims of sexual abuse.

⁸³⁴ C. Humphreys, *The Referral of Families Associated with Child Sexual Assault*, A Study for the NSW Department of Community Services, December 1993, RCPS Exhibit 3116C. Objectives of the study were to determine the incidence and nature of referral by DCS to other agencies of substantiated child sexual assault cases, time scale and degree of uptake, impediments to uptake and other referral problems, and to identify additional/unmet service needs.

⁸³⁵ NSW Police Service, Submission to RCPS, August 1996, RCPS Exhibit 2529C/106; J. Westernik, P. Sheaves & M. Perkins, Child Protection Worker Survey in Police Association of NSW, Submission to RCPS, 9/8/97, RCPS Exhibit 2529/105, p. 2; and relevant witnesses include A. L. Godfrey, RCT, 15/4/96, pp. 23421-23; J. A. Crawford, RCT, 15/4/96, pp. 23512-59.

⁸³⁶ Australian Medical Association, Submission to RCPS, 15/5/97, RCPS Exhibit 3125; M. Walton, 'The Public Interest and the Struck Off Therapist', 13/4/96, RCPS Exhibit 5875.

17.92 The enormous influence of the therapist or counsellor is well recognised and it calls for careful and professional oversight and management. These persons hold themselves out as having special skills and knowledge and are in a position of trust with vulnerable clients. Registration and accreditation have been suggested in a number of submissions, and in the evidence.⁸³⁷ They have been dealt with earlier in this Report.⁸³⁸

ADULTS WHO WERE ABUSED AS CHILDREN

17.93 Adults who disclose abuse may find that they are unable to access support and treatment because of the competing demands for crisis work with children or prevention and early intervention focus. A research and consultation project commissioned by NSW Health in October 1995 noted that there had been no co-ordinated policy and service provision framework for adult survivors in NSW.⁸³⁹

17.94 The Commission's investigations and hearings revealed the extent of the trauma felt by adults who have not previously disclosed abuse and it developed means of securing professional assistance for those of its witnesses who needed it. Public awareness arising out of the Commission's work may result in an increase in disclosure by adults. Action is necessary to identify and redress the gaps in the provision of services to adult victims, possibly with the assistance of those who have been through the experience.⁸⁴⁰

THE CHURCHES

17.95 The response of the churches to victims of child sexual abuse has been dealt with earlier in this Report.⁸⁴¹ The pattern of failure to protect children, the absence of appropriate procedures to deal with allegations or suspicions of abuse, and the responses of denial, damage control and cover-up, are hopefully things of the past. While the churches either have in place, or are working towards, protocols for the management of complaints of abuse, and have some programs for the treatment of offenders, more work is required in:

- the development of protective behaviour programs; and in
- the provision of crisis care, counselling, therapeutic treatment and support for both child victims and adult survivors.

RURAL AREAS

17.96 Children in rural communities are as much at risk of sexual abuse as those in cities.⁸⁴² Many submissions and reports highlighted particular problems for victims in rural areas, it being suggested that:

- pre-school, child care, foster care and accommodation services are lacking;⁸⁴³
- delays, multiple appointments and frustrating communications with government departments associated with the stress and disruption of lengthy travel to Sydney or other major centres where services are located increase the trauma of those involved in these cases;

⁸³⁷ eg. K. M. McConkey, RCT, 20/2/97, pp. 36020-21; M. J. Edwards, RCT, 11/7/96, p. 28610; A. Gibbs, Submission to RCPS, 6/9/96, RCPS Exhibit 2735, p. 17-18. See also M. Walton, Public Interest and the Struck Off Therapist, Paper provided to RCPS, Exhibit 5875. See Volume IV, Chapter 9 of this Report.

⁸³⁸ See Volume IV, Chapter 9 of this Report.

⁸³⁹ NSW Health Department, Services for Adult Survivors of Child Sexual Assault (draft), June 1997, RCPS Exhibit 3106C, p. 11.

⁸⁴⁰ Inner City Legal Centre, Submission to RCPS, 7/8/96, RCPS Exhibit 2529C/9.

⁸⁴¹ Volume V, Chapter 11.

⁸⁴² R. Goldman & J. Goldman, 'The prevalence and nature of child sexual abuse in Australia', *Australian Journal of Sex, Marriage and Family*, vol. 9, no. 2, 1988, pp. 94-106.

⁸⁴³ J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2, p. 23.

- there is an absence of medical practitioners in country areas trained to deal with child sexual abuse;⁸⁴⁴
- specialist medium to long-term community health counselling services for adult survivors of abuse are inadequate;⁸⁴⁵
- there is a scarcity of rural paediatric services specialising in behavioural problems and in mental health;⁸⁴⁶
- there is very limited access to advocacy services such as community legal centres and youth advocacy networks;⁸⁴⁷
- child protection services are limited;⁸⁴⁸ and
- there is restricted access to training for counsellors and support services.⁸⁴⁹

17.97 These problems and others affecting victims in rural areas need to be addressed in the review recommended by the Commission.

VICTIMS COMPENSATION

17.98 The *Victims Compensation Act 1996* now makes provision for the compensation of child sexual assault in that:

- a compensable 'act of violence' includes sexual intercourse without consent, acts of indecency, child prostitution and child pornography, even when not accompanied by physical violence;
- a range of psychological trauma is recognised; and
- there is an emphasis on rehabilitation by direct provision of counselling as well as compensation awards.⁸⁵⁰

17.99 Although some submissions were directed to the Commission suggesting that this scheme was inadequate in relation to the victims of child sexual abuse, the Commission does not concur with that view. No recommendation for change in this respect is made.

ADVOCACY FOR CHILDREN

17.100 A Child Advocate was appointed in NSW following the Sexual Assault Task Force and was made a member of the CPC. His powers and role, however, have been limited. In April 1997 the Office of Children and Young People was established within The Cabinet Office as a result of the recommendations of the NSW Standing Committee on Social Justice inquiry into children's advocacy.

⁸⁴⁴ See M. A. Reid, RCT, 6/3/97, p. 36779; P. P. Clear, RCT, 12/8/96, p. 30285.

⁸⁴⁵ S. K. Jackson, Submission to RCPS, 29/7/96, RCPS Exhibit 2529/65; Dymrna House, Submission to RCPS, August 1996, RCPS Exhibit 2529/85. Apart from lack of counselling for victims it is difficult to find people with adequate training and experience to work with sex offenders: S. Goodman, RCT, 9/7/96, p. 28457; J. R. P. Paget, RCT, 10/7/96, p. 28565. See also NSW Agriculture, *Review of Counselling and Support Services in Rural and Remote Areas: Issues Paper*, April 1997, RCPS Exhibit 3126.

⁸⁴⁶ J. Cashmore, R. Dolby & D. Brennan, *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, February 1994, RCPS Exhibit 2356/2. See also D. L. Mulcahy, RCT, 2/9/96, p. 31301; and The New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521.

⁸⁴⁷ Youth Justice Coalition, Submission to RCPS, 15/7/96, RCPS Exhibit 2529/26, p. 15.

⁸⁴⁸ *ibid.*

⁸⁴⁹ NSW Health Department, *Services for Adult Survivors of Child Sexual Assault (draft)*, June 1997, p. 43, RCPS Exhibit 3106C. On the other hand there can be greater flexibility in rural areas, with agencies accepting clients who fall outside their guidelines, because of the lack of other support. Liaison may also be more effective as agencies are likely to be closer together and workers known to each other. Any positive features of rural services should be identified, built upon and incorporated into non-rural services.

⁸⁵⁰ *Victims Compensation Act 1996*, Dictionary, Schedule 1 and s. 21; Attorney General's Department, Submission to RCPS, 25/7/96, RCPS Exhibit 2529/40. There is an automatic entitlement to two hours counselling with a further 20 hours on the basis of an assessment report, and counselling exceeding 20 hours in special circumstances.

Its role is to provide policy advice to the Premier on issues affecting children and young people and to co-ordinate government policy relating to or affecting children.⁸⁵¹ It is not however a politically independent office, nor can it be seen as an independent advocate for children.

17.101 It is obvious that apart from advocacy in relation to policy development children need accessible and effective, child-oriented grievance mechanisms.⁸⁵² An overall scheme of advocacy and complaints mechanisms for children is dealt with in the concluding chapter of this Report.

E. CONCLUSIONS

17.102 Not all victims are severely traumatised but for the majority of known victims trauma is serious and has long-term consequences. The 'next generation' impact upon families, and upon those who are affected by the victim's difficulties in adulthood, is of great concern. Neither a sentencing court,⁸⁵³ nor the perpetrator of abuse can ever be certain of the outcome for the victim.

17.103 Protection, support and effective treatment of victims and potential victims from an early stage, are critical. The Commission has identified many gaps and deficiencies in this respect, which need to be addressed. In addition there is a need for greater co-ordination of effort between agencies, along with data collection and analysis, and evaluation of the effectiveness of the services provided.

RECOMMENDATIONS

The Commission recommends the following:

- ◆ An immediate review of the present support and protection services for victims of child sexual abuse with a view to ensuring more effective co-ordination, equitable distribution and accessibility (paras. 17.54 & 17.103).
- ◆ Increased funding and government support to refuges and other institutions which house, support and attempt to rehabilitate homeless and runaway children, including adolescents (para. 17.66).
- ◆ Development by the Bureau of Crime Statistics and Research and the Children's Commission of a strategy and procedures for effective collection and analysis of information on child sexual abuse (para. 17.7).
- ◆ Introduction of a systematic program for research, co-ordinated by the Children's Commission, into areas where there are significant gaps in knowledge or support services in relation to the victims of child sexual abuse (paras. 17.7 & 17.85).

⁸⁵¹ The Cabinet Office, Documents regarding the Office of Children and Young People, 18/6/97, RCPS Exhibit 3124.

⁸⁵² NSW Parliament, Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, September 1996, RCPS Exhibit 3054C/18; F. Grunseit, NSW Child Advocate, Submission to RCPS, 14/7/96, Exhibit 5866, p. 10; The NSW State Network of Young People in Care (SNYPIC), *Towards Effective Management of Complaints Concerning the Care of Children in Foster Care*, November 1996, included in SNYPIC Submission to RCPS, 30/7/97, RCPS Exhibit 3218.

⁸⁵³ *Regina v L CCA* (NSW) 3 July 1986, unreported.

TABLE 1

PATTERNS OF CHILD DEVELOPMENT

It is emphasised that these descriptions of development through childhood are a guide only. Each child will be different and must be individually assessed and understood.

0-5 years (pre-school)

This is the most problematic age group, insofar as evidence of abuse is concerned, as has been seen with the experience of the kindergarten cases. In general children of this age are likely to share the following characteristics:

- thinking is quite concrete and literal; with a very limited cognitive capacity and ability to think abstractly; cognition is likely to be magical, egocentric and perceptually bound;¹
- limited concepts of time and space and general inability to place things in chronological order;
- limited understanding of cause-and-effect relationships, which may be further confused by magical thinking and unrealistic beliefs about wishes coming true;²
- responses are generally intuitive and learning is by play,³ which becomes increasingly complex and imaginative but also increasingly rule governed⁴;
- a need to use imagination and fantasy in play as an important part of emotional development and exploration of external and internal worlds.⁵ A child who has the capacity for fantasy, and is able to utilise it, may have a buffer against trauma⁶ but trauma can also reduce the capacity to fantasise;
- imaginative thinking can generate intense fears⁷;
- aged from three to five have particular difficulty in making the distinction between reality and fantasy and can quite easily tell adults a fantasy with conviction⁸;
- limited or no verbal skills, so that overt actions are of great significance in communications,⁹ until language development enables the child to describe events and express feelings;
- control is a central issue and inability to control the external environment can lead to loss of internal control, eg. temper tantrums;¹⁰
- likely to mirror the emotions of people close to them¹¹;
- likely to be extroverted and impetuous, and possibly extremely mobile when stressed or anxious¹²;
- very dependent upon family or caregivers, with awareness and fear of strangers beginning at around 8 months of age and gradually moving to feeling comfortable with strangers and being willing to separate from parents¹³;
- generally experience complicated feelings towards parents - intense love, jealousy and resentment, and fear that angry feelings might lead to abandonment¹⁴;
- a developing understanding of expectations for acceptable behaviour and emotions¹⁵;
- freely concede authority to adults;
- some ability at the upper limit to recall events; although there is conflict between experts on this point, it is believed that:
 - there is a period of 'infantile amnesia' from birth to about three or four years of age, and that;
 - while a child of two has the capacity to register a memory, his or her capacity to store and retrieve it is debatable;¹⁶
- generally much more suggestible than school age children using a series of 'yes/no' questions¹⁷;
- less capable of keeping a secret than older children¹⁸;
- sometimes do lie, with full appreciation of the differing perspectives of their listeners¹⁹;
- will consciously distort their reports of what they witnessed and will do so more in response to some motives (eg. fear of reprisal, avoidance of embarrassment) than others (eg. to sustain a game, gain rewards²⁰);
- moral thinking mirrors and is constrained by cognitive level, with guilt initially assigned for bad outcomes

regardless of motive, and fairness taken to mean equal treatment regardless of different circumstances;²¹

- unlikely to be familiar with sexual terms, anatomy or sexual behaviour, but curious about genitalia and adult sexual organs and masturbation is normal;²²
- no understanding of the norms and expectations of society regarding sexual behaviour;²³ and therefore less likely to be embarrassed about bodily touching²⁴ and likely to display more sexualised behaviour than older children.²⁵

5-12 years (primary school)

This period, sometimes referred to as middle childhood or latency, involves a substantial degree of maturation, extending from primary school entry to puberty in some cases. Within this age range, children are likely to share the following characteristics:

- competent knowledge of time and space;²⁶
- increasing ability to take account of multiple dimensions and points of view and to interpret perceptions in light of realistic theories;
- self-esteem becomes a central issue;
- feelings about own physical attributes can range from pride to shame to apparent nonchalance;
- increasing separation from parents and involvement in relationships outside home, including the need for acceptance in peer group and to negotiate challenges in the world;²⁷
- capacity to see the viewpoint of others;²⁸
- may use fantasies (eg. hero worship, dressing up) to compensate for feelings of powerlessness;²⁹
- development of moral thinking roughly parallels general cognitive development and most pre-adolescents perceive right and wrong as unquestionable;³⁰
- ability to comprehend truth and lies;³¹
- some awareness in the upper age bracket of sexual relationships but less than that of adolescents;
- begin to seek more privacy, shutting bedroom and bathroom doors and so on;³²
- development of some defences to cope with anxiety.³³

12 years plus (adolescence)

Within this age range, which again encompasses a period of great change and variation in individual development, children are likely to show the following characteristics:

- a well developed ability to order and interpret perceptions;³⁴
- able to manipulate abstractions, and weigh multiple points of view according to varying criteria;
- young adolescents may be able to apply formal thinking to schoolwork but not to personal dilemmas. 'When the emotional stakes are high, magical thinking, such as the conviction of invulnerability, may interfere with higher order cognition';³⁵
- accelerated trend towards separation from family, which may involve selecting and developing close relationships with other adult role models; opportunities to talk confidentially to non-judgmental, informed adults are likely to be valued;³⁶
- increasing involvement in peer activities³⁷ and vulnerability to peer pressure,³⁸ gradually reducing towards adulthood;³⁹
- propensity to challenge authority of parents, but absence of equal power; and likely to continue to strive to please their parents despite disagreement on certain points;⁴⁰
- greater ability to articulate feelings, but usually unwilling to acknowledge that they are afraid;
- consciousness of sexual development, but prone to embarrassment and possibly a greater need for privacy, especially in early adolescence;
- development of sexual interest, curiosity, and fantasies, sexual orientation, awareness of socially defined roles and mores, beginning to sort out aspects of sexual identity including beliefs about love, honesty and propriety

- capacity to be sexually attractive, even seductive or provocative⁴¹;
- homosexual experimentation is common and does not necessarily reflect the child's ultimate sexual orientation⁴²;
- ability to use mechanisms to deal with stress and panic; but may have intense feelings of inner turmoil and misery⁴³;
- memory recall which is likely to be just as good as that of adults;
- as they become older question and analyse more extensively, developing their own personal code of ethics, becoming less selfcentred and more idealistic, but perhaps absolutist and intolerant of opposing views⁴⁴;
- self esteem and autonomy are likely to become the central issues, and self-concept becomes increasingly bound up in the adolescent's role in society⁴⁵; and
- ability to give accurate and reliable evidence.

TABLE 2

POSSIBLE IMPACT OF ABUSE

This is a guide to possible impacts. Adverse effects are not inevitable and the existence of one or more of them does not mean that abuse has occurred since there may be other causes altogether. Each child will be different and must be individually assessed and understood.

0-5 years (pre-school)

Children within this group:

- are highly vulnerable to traumatic situations which intensify their sense of helplessness and dependence⁴⁶;
- may show a rapid onset of general anxiety symptoms such as agitation, stomach aches, headaches, masturbatory behaviour⁴⁷;
- have a limited sense of time which contributes to their fear that the abuse can recur at any moment⁴⁸;
- lacking language skills, they express their reactions to trauma through behaviour and 'acting out', anxiety, outrage and terror⁴⁹;
- may internalise problems, such as anxiety, and inappropriate sexual behaviour⁵⁰;
- are sensitive to aspects of their environment that remind them of the event⁵¹;
- may show open and compulsive sexualised behaviour, or may regress to wetting and soiling.⁵² One recent study found that onset of sexual abuse prior to seven years of age was significantly associated with hypersexual exposing and victimising sexual behaviours in a sample of seriously mentally ill youths⁵³;
- lack awareness of sex; may feel no pain or embarrassment from the sexual experience but can sense badness and danger arising out of the secrecy⁵⁴;
- are less likely to experience guilt at the time, but do so later;
- are at risk for on-going abuse and neglect, partly due to their sexually aggressive response to the initial trauma,⁵⁵ and
- may be neglected by child protection workers because they are pre-verbal or considered difficult to engage.⁵⁶

In children of this age, it is likely to be very difficult to be certain that abuse has occurred, unless there is physical evidence.⁵⁷ Special care is needed with any interview, experts having suggested to the Commission that:

- the pre-school child should be assessed by a multidisciplinary team rather than 'investigated';
- videotaped interviews should be observed at the time by other professionals and time taken to put their questions to the child. The taped interview can be later used for protection and treatment⁵⁸;
- interviews are best limited to 30 minutes⁵⁹;
- surroundings are important, it being difficult to engage the attention of the child when distracted by other things of interest in the room, for example the uniform worn by a police officer⁶⁰ and
- techniques such as 'play-talk' are useful as children do not naturally sit on a chair and discuss their problems.⁶¹

5-12 years (primary school)

Children within this age group:

- are better able to verbalise and communicate their experience⁶²;
- have a greater awareness that they are being violated by the abuser;
- often blame themselves, wonder why the abuse happened, and feel victimised⁶³;
- display behaviour indicating a disturbance of perception and thinking which adversely affects their school performance and learning, and leads to an inability to concentrate and preoccupation with intrusive images⁶⁴;
- are aware of social opinion, so that they avoid talking about the event and may exhibit general anxiety symptoms including sexual and aggressive thoughts and behaviours, sleep problems and nightmares, flashbacks, fears and phobias, eating disorders, nervousness and irritability, temper tantrums, mood swings, and confusion about sex⁶⁵;
- may avoid social activities, withdraw from people, feel different from others, have disturbed relations with peers and begin alcohol and drug use⁶⁶;
- exhibit lack of self esteem; and
- develop distorted gender identity and body boundary disturbances, along with primitive defences such as massive denial, avoidance and action⁶⁷.

12 years plus (adolescence)

Children within this group:

- may feel more personal responsibility for participation in the sexual activities⁶⁸;
- may feel acute embarrassment and shame which prevents disclosure⁶⁹;
- reveal avoidance and anti-social behaviours such as running away, cheating in school, chronic lying, truancy, physical violence, arson and sexually explicit mannerisms and language.⁷⁰ Such anti-social behaviour can then preclude the child from support and assistance⁷¹;
- may have a serious tendency to self-directed violence and to the use of drugs and alcohol as a reaction to painful memories⁷²;
- may suffer interference with psychological defences leading to the development of unreal thinking and fears of losing their mind, loss of humour, lack of capacity for pleasurable experiences, and an aversion to age appropriate sex⁷³;
- may develop confusion regarding sexuality, especially for boys who have been abused by a male⁷⁴;
- fear of pregnancy⁷⁵, or pregnancy and its consequences⁷⁶;
- develop ideas of suicide, self mutilation, self hatred and promiscuity which they may well act out;
- may turn to criminal activity and in particular violent criminal activity⁷⁷;
- may perpetuate abuse on younger children⁷⁸.

- R. C. Underwager, Transcript of Police v Deren and Ors, 19/7/89, RCPS Exhibit 2305/1 at Doc. 481507; R. N. Needlman, 'Preschool years' and 'Early school years', in W. E. Nelson (ed), *Textbook of Pediatrics*, 15th edn, 1996, pp. 52 & 57, citing research by Piaget.
- P. L. McCarthy, 'The well child', and R. N. Needlman, 'Preschool years', both in W. E. Nelson (ed), 1996, op cit, pp. 26 & 52.
- National Center for Missing and Exploited Children, *Interviewing Child Victims of Sexual Exploitation*, February 1987, p. 9.
- R. N. Needlman, 'Preschool years', in W. E. Nelson (ed), 1996, op cit, p. 52.
- A. Schlebaum, RCT, 29/10/96, pp. 33531-32; J. A. Boots, RCT, 20/2/97, pp. 36060-85.
- J. A. Boots, RCT, 20/2/97, pp. 36060-85. As a staff child psychiatrist at the Royal Alexandra Hospital for Children Dr Boots worked with the CPU and was also a member of the task force involved in establishment of child sexual assault referral centres. He then became supervisor to the CPU, responsible for meeting weekly with that multi-disciplinary group. He is a psychoanalyst and child and family psychiatrist. See also, A. Schlebaum, RCT, 29/10/96, pp. 33531-32.
- R. N. Needlman, 'Preschool years', in W. E. Nelson (ed), 1996, op cit, p. 55.
- S. M. Booth, RCT, 3/9/96, pp. 31422-23. K. Hoogenraad and B. E. McKenzie, 'Maternal reports of children's deceptive behaviour', *Australian Journal of Psychiatry*, vol 47, no 1, 1995, RCPS Exhibit 2512, pp. 42-46 found that children aged from three to seven could have a pervasive tendency to engage in deception for self-interest. The authors noted the limitations of their study and suggested confirmatory analysis on a larger sample, plus experimental investigation.
- A. W. Burgess & C. A. Grant, *Children Traumatized in Sex Rings*, National Center for Missing and Exploited Children, March 1988, RCPS Exhibit 2156, p.45. Language is a critical barometer of cognitive and emotional development: R. N. Needlman, 'Preschool years', in W. E. Nelson (ed), 1996, op cit, p. 49.
- R. N. Needlman, 'Preschool years', in W. E. Nelson (ed), 1996, op cit, p. 55.
- This is common to all age groups - at first parents and close family members, then peers, then those with whom the child develops bonds outside the family: National Center for Missing and Exploited Children, February 1987, op cit, p. 7.
- ibid p. 7.
- P. L. McCarthy, 'The well child', in W. E. Nelson (ed), 1996, op cit, p. 26.
- R. N. Needlman, 'Preschool years', in W. E. Nelson (ed), 1996, op cit, p. 55.
- ibid.
- A. Gibbs, RCT, 30/10/96, p. 33671-2.
- T. Lyon, Responding to research on children's suggestibility, Paper presented at San Diego Conference on Responding to Child Maltreatment, January 1997, RCPS Exhibit 3121, p.4.
- ibid.
- S. Ceci & M. Bruck, 'Suggestibility of the child witness: a historical review and synthesis', *Psychological Bulletin*, vol 113, no 3, 1993, p. 426, citing 1989 study by Lewis, Stranger and Sullivan.
- S. Ceci & M. Bruck, 1993, op cit, p. 427.
- R. N. Needlman, 'Preschool years', in W. E. Nelson (ed), 1996, op cit, p. 55.
- ibid.
- Dr J. Brennan, Letter to RCPS, 13/5/97, RCPS Exhibit 3059.
- T. Lyon, January 1997, op cit.
- W. N. Friedrichet al, 'Normative sexual behaviour in children', *Paediatrics*, vol 88, 1991, pp. 456-64.
- New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521.
- R. N. Needlman, 'Early school years', in W. E. Nelson (ed), 1996, op cit, pp. 56 & 58.
- National Center for Missing and Exploited Children, February 1987, op cit, p. 9.
- R. N. Needlman, 'Early school years', in W. E. Nelson (ed), 1996, op cit, p. 58.
- R. N. Needlman, 'Adolescence', in W. E. Nelson (ed), 1996, op cit, p. 60.
- New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521. According to Dr Underwager, the research evidence in 1989 was that children do not begin to think abstractedly, and cannot consider concepts such as duty, honour, truth, honesty, and so on until aged about 10 or 11: R. C. Underwager evidence in Seabeach committal proceedings, 13/7/89-24/7/89, RCPS Exhibit 2305.
- L. Sullivan, 'Preventing Child Sexual Abuse: Whose Responsibility?', *Australian Journal of Early Childhood*, June 1990, vol 15, no 2, pp. 30-33 at p. 31.
- National Center for Missing and Exploited Children, February 1987, op cit, p. 9.
- N W Perry, 'How Children Remember and Why They Forget', *The Advisor*, American Professional Society on the Abuse of Children, 1992, vol 5, no 3.
- R. N. Needlman, 'Adolescence', in W. E. Nelson (ed), 1996, op cit, p. 61.
- ibid, pp. 61-63.
- ibid, p. 61.
- And this can be pressure against disclosure of abuse: N. D. Kellogg and T. J. Hoffman, 'Unwanted and illegal sexual experiences in childhood and adolescence', *Child Abuse and Neglect*, 1995, vol 19, no 12, pp. 1457-68.
- R. N. Needlman, 'Adolescence', in W. E. Nelson (ed), 1996, op cit, p. 61.
- ibid, p. 61.
- C. E. Cosentino, H. F. L. Meyer-Bahlburg, J. L. Alpert, S. L. Weinberg and R. Gaines, 'Sexual behaviour problems and psychopathology symptoms in sexually abused girls', *Journal of the American Academy of Adolescent Psychiatry*, August 1995, vol 34, no 8, p. 1033 at 1041.
- R. N. Needlman, 'Adolescence', in W. E. Nelson (ed), 1996, op cit, p. 62.
- ibid, p. 61.
- ibid, p. 63.
- ibid, p. 63.
- A. W. Burgess & C. A. Grant, March 1988, op cit, p. 37.
- ibid.
- ibid.
- ibid.
- P. K. Trickett & C. McBride-Chang, 'The Developmental Impact of Different Forms of Child Abuse and Neglect', *Developmental Review*, 15, 1995, pp. 311-37. This literature review took a developmental perspective and compared the effects of abuse at different ages. J. Brennan, Letter to RCPS, 13/5/97, RCPS Exhibit 3059.
- A. W. Burgess & C. A. Grant, March 1988, op cit, p. 37. For this reason Mr Wyre suggests that it is important to learn as much as possible from the offender about what they did and how they did it. This information can free up the child if it pinpoints aspects of the abuse that trigger memory and emotions. R. K. Wyre, RCT, 26/4/96, p. 24246.
- M. James, 'Paedophilia', *Trends and Issues in Crime and Criminal Justice*, no 57, June 1996, RCPS Exhibit 2529C/6.

- 53 J. McClellan et al, 'Age of onset of sexual abuse: relationship to sexually inappropriate behaviours', *Journal of the American Academy Child Adolescent Psychiatry*, Volume 34, Number 10, October 1996, pp. 1375-83. The authors point out the limitations of their methodology (a retrospective chart review and inherent selection bias) and recommend further research.
- 54 R. C. Summit, 'The child sexual abuse accommodation syndrome', *Child Abuse and Neglect*, vol. 7, 1983, p. 180.
- 55 J. McClellan et al, October 1996, op cit, pp. 1375-83.
- 56 NSW Child Protection Council, Submission to RCPS, 7/8/96, RCPS Exhibit 2529C/68, p. 35.
- 57 Sydney Children's Hospital, Child Protection Team, Submission to RCPS, 8/8/96, RCPS Exhibit 2522.
- 58 ibid.
- 59 New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521.
- 60 D H Jones, RCT, 3/7/96, p. 28107.
- 61 A. Schlebaum, RCT, 29/10/96, pp. 33532-33.
- 62 National Center for Missing and Exploited Children, March 1988, op cit, pp. 37-38.
- 63 ibid.
- 64 ibid.
- 65 ibid.
- 66 A. W. Burgess & C. A. Grant, March 1988, op cit, pp. 37-38; P. K. Trickett & C. McBride-Chang, 1995, op cit, pp. 311-337; K. J. Buttrum, RCT, 29/5/96, pp. 26101-02.
- 67 J. A. Boots, 'A Certain State of Being', RCPS Exhibit 5880, p6
- 68 A. W. Burgess & C. A. Grant, March 1988, op cit, p. 38.
- 69 X9, RCT, 17/4/96, p. 23755; W3, RCT, 14/5/96, p. 25144.
- 70 See, for example, L. C. Matthews, RCT, 3/7/96, 28163 and National Center for Missing and Exploited Children, March 1988, op cit, p. 38.
- 71 L. C. Matthews, RCT, 3/7/96, 28148, who gave evidence of accommodation services being unavailable to such adolescents.
- 72 K. J. Buttrum, RCT, 29/5/96, p. 26113. National Center for Missing and Exploited Children, March 1988, op cit, p. 38.
- 73 A. W. Burgess & C. A. Grant, March 1988, op cit, p. 38.
- 74 Y91, RCT, 2/7/96, p. 28054-55; K. J. Buttrum, RCT, 29/5/96, p. 26111.
- 75 A. Blaszczyński, RCT, 30/10/96, p. 33711.
- 76 Aside from the trauma of the pregnancy itself the child may be traumatised and grief-stricken by any abortion which follows. See, for example, J. Brennan, Letter to RCPS, 12/12/96, RCPS Exhibit 3196.
- 77 R. K. Oates & L. Tong, 'Child sexual abuse: an area with room for professional reforms', *Medical Journal of Australia*, vol 147, 1987, pp. 544-48. This study of 176 sexually abused children found that by the time they had reached 14 years 21% of the 93 boys and 6% of the 83 girls had been convicted of a crime, usually of a violent nature.
- 78 S. Goodman, RCT, 9/7/96, p. 28460.

CHAPTER 18

PUBLIC AWARENESS AND REGISTRATION

18.1 Any program aimed at increasing public awareness, and educating the public as to 'protective' behaviour concerning child sexual abuse needs to include:

- preventative education for adults:
 - increasing public awareness of the issues which arise;
- preventative education for children:
 - educating children as to their rights and how to recognise and prevent an abuse of those rights;
- education in identification of victims or potential victims:
 - arming parents and those who work with children with the skills to recognise the indicators of abuse, and the physical and emotional environments in which children are most vulnerable; and
- support and understanding for victims and their families:
 - giving those adults who have been abused as children the support and skills needed to break the abuse cycle.

18.2 Until the early 1980s public awareness of child sexual abuse as a problem within the community, was based largely on the concept of 'stranger danger'. A change in community attitudes began in the early 1980s, influenced by the final report of the NSW Child Sexual Abuse Task Force (the Task Force) in 1985. The community then became more aware of the existence of the familial offender, particularly in relation to young girls. Later still, the concept of the 'predatory' or fixated paedophile became of community concern. There is now a greatly increased awareness that child sexual abuse is a crime perpetrated against both boys and girls across all socio-economic, cultural and ethnic boundaries both within the confines of the home and within the community at large.

18.3 Three aspects of public awareness are examined in this chapter:

- general education of the community, including parents, children and child carers in protective and preventative strategies;
- the collection and storage of intelligence concerning convicted and suspected paedophile offenders; and
- mandatory notification and sharing of information concerning individual offenders.

18.4 Each has a common objective, namely an enhancement of the capacity of the community, law enforcement agencies and those departments, agencies and other bodies which have a responsibility for children, to protect them from sexual abuse. Where this concerns the holding and dissemination of information relating to individual offenders, or persons suspected of child sexual abuse, significant issues arise which require resolution and call for a balance between the:

- public interest in the prevention and detection of paedophile activity; and the
- interest of the individual in maintaining his privacy.

A. HISTORY OF GROWING PUBLIC AWARENESS

18.5 The terms of reference of the NSW Child Sexual Abuse Task Force included making recommendations 'on strategies to prevent or alleviate the incidence of child sexual abuse'.⁸⁵⁴ In its March 1985 report⁸⁵⁵ it concluded that ignorance of child sexual abuse was one of the principal factors inhibiting its prevention and prolonging the suffering and distress of its many victims.

Sexual abuse on children is more than any other offence dependent of secretiveness even in relation to the offender's own peer group. For that reason, the threat of exposure may be a much more effective deterrent than for other types of offences. If children from primary school onwards were alerted to the risk in the same way they are taught how to cross the road or that they should not accept lollies from strangers; if they were taught that they need not put up with sexual advances from members or friends of their own family, but should threaten the offender with exposure to neighbours, teachers or authorities, I believe that over a period of time this would be not only the most appropriate but also the most effective method of reducing the incidence of sexual abuse on children.⁸⁵⁶

18.6 The Task Force reported that community ignorance of child sexual abuse contributed to children's vulnerability as they could not prepare them for something that they did not understand themselves. It believed that children could be told in simple, non-threatening language about types of behaviour on the part of adults which are abusive, and foster further discussions about safety, assertion and the availability of help.

18.7 The Task Force recommended that:⁸⁵⁷

- a broad community education program on both attitudes and services be undertaken;
- a range of materials, which accounted for cultural variables and the needs of the physically and developmentally disabled, be produced and actively promoted by the Government through all media channels;
- the program be directed at children who are or have been abused, adults who were abused as children, non-offending parents, offenders, and siblings of victims, as well as those who have not had any exposure to this kind of activity;
- the following messages be incorporated into the education program:
 - children have rights, including the right to be loved and cared for in an environment free of abuse of any kind;

⁸⁵⁴ Report of the NSW Child Sexual Assault Task Force to the Hon. Neville Wran QC, MP, Premier of NSW, NSW Government Printer, Sydney, 1985, RCPS Exhibit 1501, Terms of Reference A(iii), p. 1. See also Volume IV, Chapter 8 of this Report.

⁸⁵⁵ Report of the NSW Child Sexual Assault Task Force to the Hon. Neville Wran QC, MP, Premier of NSW, NSW Government Printer, Sydney, 1985, RCPS Exhibit 1501, Chapter 2: Community Education, pp. 36-50.

⁸⁵⁶ O. Ekstein, Penal Reform Council of NSW, in Report of the NSW Child Sexual Assault Task Force to the Hon. Neville Wran QC, MP, Premier of NSW, NSW Government Printer, Sydney, 1985, RCPS Exhibit 1501, Chapter 2: Community Education, p. 38.

⁸⁵⁷ Report of the NSW Child Sexual Assault Task Force to the Hon. Neville Wran QC, MP, Premier of NSW, NSW Government Printer, Sydney, 1985, RCPS Exhibit 1501, Recommendations, p. 1.

- children can and do, accurately describe what has happened or is happening to them when they feel safe enough to do so. Failure to report is the result of fear and guilt, not deceit;
- children come from diverse cultural backgrounds with various levels of understanding about the world in which they live;
- children become victims of sexual abuse in a society that is organised around relationships that are characterised by power and powerlessness; and
- child sexual abuse is not an uncommon occurrence and is not restricted to any one socio-economic, racial, geographical or age group;
- pre-school to 18 year-old children in NSW be given access to education on sexual abuse, which should emphasise:
 - the child's right to say no to adults who touch them in ways that make them feel uncomfortable; and
 - strategies that focus on autonomy and strength rather than avoidance and fear, that is, the child's right to be safe, strong and free;
- an inter-disciplinary Community Education Sub-Committee be established as part of a State Child Sexual Abuse Council (subsequently established in 1985 as the New South Wales Child Protection Council (CPC)) with wide community representation; and that
- the focus of the Community Education Sub-Committee be to develop community education programs that directly address the issues of child sexual abuse.

18.8 It recommended that the NSW Government take responsibility for the development and implementation of the Community Education Program, including the introduction of a child sexual abuse component into school and pre-school curricula. This encompassed the Government taking the initiative, in consultation with non-government agencies, and educational authorities, for the development and dissemination of community education material.

18.9 The Task Force favoured an inter-disciplinary, co-ordinated approach to education and considered the proposed State Child Sexual Abuse Council to be the most appropriate 'umbrella', under which to house a Community Education Sub-Committee, representing both government and non-government agencies with expertise in the field.

18.10 It recognised that the role of the media, both in forming belief systems and attitudes to sexuality and sexual practices generally, and in raising community awareness of the problem of child sexual abuse, could not be overestimated. It recommended:

- the production of pamphlets, resource manuals, posters and demountable displays for distribution throughout the community; and for specific material to be produced for different religious/ethnic groups and for the physically and developmentally disabled, who were acknowledged as being acutely vulnerable;
- the expansion of film and video collections which would then be made available through government and audio visual libraries;
- the use of TV and radio community service announcements to be broadcast during children's viewing/listening hours; and
- the production of films and videos for sale to TV networks and cinema chains.

B. IMPLEMENTATION OF THE TASK FORCE'S RECOMMENDATIONS

18.11 The NSW Government accepted the recommendations of the Task Force and provided funding in 1985 for the establishment of a wide range of programs and services.

THE CHILD PROTECTION COUNCIL

18.12 The CPC, embodying a Community Education Sub-Committee, was established in 1985 as the co-ordinating and monitoring body. Its first task was to supervise the implementation of the Task Force's recommendations.⁸⁵⁸

18.13 The first three years of the CPC's existence saw:

- increased funding to government and non-government organisations, including the establishment of community-based counselling and support services;
- development of training programs for those people working with children;
- development of curriculum materials by the NSW Department of School Education (DSE);
- monitoring by the CPC of the effectiveness of child protection laws and procedures and making recommendations to resolve problems;
- establishment of Area Committees, forming a State-wide network of government and non-government organisations which provided services to child sexual abuse victims and families;⁸⁵⁹ and
- development of mass media community education campaigns.

18.14 The CPC's first State-wide community education campaign was launched on 1 October 1986. It was designed to break the silence surrounding the subject of child sexual abuse and to 'give the public of NSW the facts'. It included a 30-second television message around the theme that children faced a greater threat of sexual abuse from relatives and family friends than they did from the then more widely accepted 'stranger danger'.⁸⁶⁰

18.15 Two booklets were produced for the campaign:

- *Child Sexual Abuse, It's Often Closer to Home Than You Think*⁸⁶¹

This booklet advised the public that:

- 85% of these cases involve a relative or trusted friend;
- 90-97% of the offenders are male; and that
- 75% of reported cases involve females as victims.

⁸⁵⁸ CPC, Submission to RCPS, August 1996, RCPS Exhibit 2529/68, paras. 1-2.

⁸⁵⁹ *ibid*, para. 1.

⁸⁶⁰ G. Calvert, A. Ford & P. Parkinson (eds), *The Practice of Child Protection: Australian Approaches*, Hale & Iremonger, Sydney, 1992, RCPS Exhibit 2159, pp. 24-25.

⁸⁶¹ CPC, *Child Sexual Abuse: It's Often Closer to Home Than You Think*, 1986, RCPS Exhibit 3182.

- *Child Sexual Abuse: How to Talk to Children*⁸⁶²

This booklet repeated some of the information contained in the first booklet and gave advice to parents and other adults as to the type of information to be given to children to help make them safer from child sexual abuse. It challenged some of the then commonly held myths and countered these with facts. It contained information on where to get help, services for victims and families and further reading material.

18.16 CPC's second State-wide community education campaign was launched in May 1987 on the theme *Child Sexual Abuse: No Excuses, Never, Ever*.⁸⁶³ It looked at the underlying issues of child sexual abuse including who were the offenders, why they offend, how societal attitudes influence behaviour, and how these attitudes arose in the first place. It focused on the behaviour of men, stressing the need for offenders to take responsibility for their actions and not to blame the victim. For this reason the television commercial targeted viewing times that would attract a male audience. The pamphlet included a section on the influence of the media and referred to the negative effect of women being portrayed as sex objects.

18.17 The third phase of the mass media community education campaign was launched on 19 June 1988 and stressed the need for greater emphasis on providing support for families.⁸⁶⁴ Two booklets were released as part of this campaign:⁸⁶⁵

- a second version of the *It's Often Closer to Home than you Think* booklet; and
- a booklet entitled *Where to Get Help* which contained a detailed directory of government and non-government services.

18.18 In addition, the radio and television advertisements used in the first two campaigns were replayed as community service announcements. The media donated significant free air time for these advertisements to supplement the paid air time.

18.19 To monitor the impact of the CPC media campaigns a series of market research studies were undertaken. The benchmark study was conducted in September 1986, a month before the launch of the first campaign, and two further studies, which tracked and monitored the public reactions to the campaigns, were undertaken in 1986 and 1987.⁸⁶⁶ The results indicated some change in the community's knowledge about child sexual abuse. Respondents were able to identify more accurately the extent to which it occurs⁸⁶⁷ and who was most likely to offend.⁸⁶⁸ They were also more specific about who they would report the offences to, suggesting greater knowledge of the services available to victims.⁸⁶⁹

18.20 Despite the apparent success of the CPC media campaigns, by 1989 its role had been significantly diminished. Although the charter was broadened in 1989 to include physical abuse and neglect as well as child sexual abuse, its funding and staffing were cut. Its reduced status over the succeeding period has to some extent been reversed, for example, by an increase in its annual budget from \$915,000 in 1994-95, to \$1,303,630 in 1995-96.⁸⁷⁰

18.21 The Commission endorses the CPC public education campaigns conducted in the three years after the Task Force. It considers that:

⁸⁶² CPC, *Child Sexual Abuse: How to Talk to Children*, First published 1986, RCPS Exhibit 2158.

⁸⁶³ CPC, *Child Sexual Abuse: No Excuses, Never, Ever*, First published 1987, RCPS Exhibit 3183.

⁸⁶⁴ G. Calvert, A. Ford & P. Parkinson (eds), 1992, op cit, p. 26.

⁸⁶⁵ ibid.

⁸⁶⁶ G. Calvert, A. Ford & P. Parkinson (eds), 1992, op cit, pp. 26-27.

⁸⁶⁷ The number of respondents who believed it to be a 'common' problem increased from 75% to 84%.

⁸⁶⁸ The number of respondents who believed the offender to be a person 'known to child' increased from 77% to 85%.

⁸⁶⁹ G. Calvert, A. Ford & P. Parkinson (eds), 1992, op cit, p. 35.

⁸⁷⁰ Figure from the NSW Child Protection Council, *Report for the Year 1 July 1995 - 30 June 1996*, RCPS Exhibit 3071/1, p. 53.

- such materials should be constantly updated, and reviewed, as further information is accumulated and further services are established; and that
- education campaigns of this kind should be an ongoing part of the drive to educate the community in preventative and protective behaviour.

THE DEPARTMENT OF SCHOOL EDUCATION

18.22 In 1989, the DSE, with the support of the CPC, produced primary and secondary child protection curriculum materials. The materials were designed to compliment a range of other materials provided to schools, as part of the DSE response to the introduction of mandatory reporting legislation for teachers.⁸⁷¹ The DSE curriculum materials included:

- *Child Protection: Preventing Child Sexual Abuse, Early Childhood Curriculum Ideas*;⁸⁷²
- *Child Protection: Preventing Child Sexual Abuse, Kindergarten to Year 6*;⁸⁷³
- *Child Protection: Preventing Child Sexual Abuse, Years 7-12*;⁸⁷⁴
- *Child Protection: Staff Development Support Document*;
- *Child Protection: Parents and Community Information Manual*; and
- *Child Protection: Preventing Child Sexual Abuse, Students with an Intellectual Disability*.

The DSE, additionally, produced in 1989 a *Child Protection: Parents & Community Information Manual*.⁸⁷⁵

18.23 The DSE has advised the Commission of the following initiatives currently included in the Department's child protection program:⁸⁷⁶

- a student welfare consultant has been appointed to each District Office;⁸⁷⁷
- special parents meetings are held in schools;⁸⁷⁸
- many schools participate in special activities as part of Child Protection Week;⁸⁷⁹
- child protection issues are featured in the DSE fortnightly newspaper;⁸⁸⁰
- in 1996 further materials designed to form part of the existing materials for Kindergarten-Year 2 were distributed to primary schools;⁸⁸¹ and
- additional materials aimed at assisting teachers to program child protection education for students Kindergarten-Year 10, are currently being developed.⁸⁸²

⁸⁷¹ Legislation making it mandatory for teachers to notify child sexual abuse was introduced in 1987.

⁸⁷² DSE, *Child Protection, Preventing child sexual abuse, Early Childhood Curriculum Ideas*, 1989, RCPS Exhibit 3072. The emphasis is on providing students with basic self protection skills. The two concept strands, *Protecting Oneself* and *Nature of Relationships* are inter-woven with three main learning areas: *Feelings*, *Safe/Unsafe Situations*, and *No/Go/Tell*.

⁸⁷³ DSE, *Child Protection, Preventing child sexual abuse: K-6, Curriculum Statement K-12 and support materials*, 1989, RCPS Exhibit 3072. The curriculum attempts to make a distinction for the children between a 'good touch' and a 'bad touch'.

⁸⁷⁴ DSE, *Child Protection, Preventing child sexual abuse: 7-12, Curriculum Statement K-12 and support materials*, 1989, RCPS Exhibit 3072. The curriculum is divided into two strands: *Protecting Oneself* and *Nature of Relationships* which is broken into two sub-sections, *Abuse of Power Within Relationships* and *Positive Personal Relationships*.

⁸⁷⁵ DSE, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/92, p. 9.

⁸⁷⁶ Letter from DSE to RCPS enclosing Child Protection Education curriculum support materials, 15/5/97, RCPS Exhibit 3072, para. 4; DSE, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/92, p. 9.

⁸⁷⁷ The 40 consultants in District Offices across the State will be able to provide information to the community on resources, policies and local initiatives.

⁸⁷⁸ The meetings are used to explain to parents the detail and rationale of the Child Protection Curriculum and materials are designed to inform parents about the programs they provide.

⁸⁷⁹ These are held each year during the first week of September. DSE, Submission to RCPS, 9/8/96, RCPS Exhibit 2519C/92, p. 9.

⁸⁸⁰ It is entitled *School Education News* and is distributed to all schools.

⁸⁸¹ Materials entitled *A Fair Go For All, Enhancing Student Welfare by Teaching and Learning About Positive Relationships and Personal Safety*, DSE, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/92, para. 5.

18.24 The DSE has also advised the Commission that:

It is expected that the school will continue to communicate with parents about sensitive issues in the curriculum, including child protection. Active permission from parents for students to participate in these programs is required. Parents retain their right to withdraw their child from a particular session or sessions.⁸⁸³

The Commission accepts the necessity for a sensitive approach to be adopted in this area of education, and for parental approval, in view of ethnic and cultural considerations which may not permit sexual instruction outside the family.

18.25 In August 1997, DSE advised the Royal Commission of the implementation of its new Child Protection Training Strategy⁸⁸⁴ as follows:

- Phase 1 completed by 30 June 1997 which involved:
 - initial briefings on child protection policy and procedures to ensure that all DSE staff are aware of their responsibilities;
 - initial training of DSE staff in those procedures; and
 - initial training of targeted groups with special roles and responsibilities;
- Phase 2 (to be completed by 31 December 1997) which is to focus on:
 - school-based and district-based training and development activities in child protection; and
 - evaluation of the initial training;
- Phase 3 (to follow implementation of Phase 2) which is to involve annual training in child protection to all staff, on an ongoing basis.

18.26 The video and materials supplied to the Commission in respect of this strategy are impressive.⁸⁸⁵**Non-Government Schools**

18.27 As indicated earlier⁸⁸⁶ there are approximately 950 non-government schools in NSW, of which about 500 are Catholic systemic schools, mandated and controlled from the relevant Diocesan Catholic Education Office. The remainder are independent or non-systemic schools controlled by whichever group runs the school.⁸⁸⁷

18.28 These non-government schools are not mandated to follow the DSE Child Protection Curriculum. While some of the schools do in fact follow that curriculum it is essentially up to the individual school to determine the instruction (if any) it gives in this area.

⁸⁸² Materials entitled *Child Protection Education: Curriculum materials to support teaching and learning in Personal Development, Health and Physical Education*. They aim to protect children from abuse, assist them to seek help effectively and support the development of skills for positive, non-coercive relationships. They recognise Aboriginal and other cultural perspectives, address physical and emotional abuse and neglect, and include a range of literacy levels and experiences. The materials will be provided to all primary and secondary schools progressively in Terms 2 and 3, 1997. Draft of this material supplied to the RCPS in a brief on 15/5/97, RCPS Exhibit 3072.

⁸⁸³ Letter from the DSE to RCPS enclosing Child Protection Education curriculum support materials, 15/5/97, RCPS Exhibit 3072, para. 6.

⁸⁸⁴ DSE, 'Child Protection Training and Development', RCPS Exhibit 3238, at Doc. 2478637.

⁸⁸⁵ *ibid.*

⁸⁸⁶ See Volume IV, Chapter 10.

⁸⁸⁷ School Council or Board, religious order, community/parent association, church etc. P. Lee, NSW Independent Education Union, Submission to RCPS, 22/5/97, RCPS Exhibit 3184, pp. 1-2.

NSW POLICE SERVICE

18.29 In December 1993, the Police Service released an Action Plan for the Investigation and Management of Child Abuse. Strategy 7 of the Plan states:

This strategy recognises the need for the NSW Police Service to be involved in prevention not just at a tertiary level, but also at a primary and secondary level. The recommendations in this strategy recommend active participation in the National Strategy on Preventing Child Abuse and becoming involved in community education by targeting risk groups.⁸⁸⁸

18.30 The Plan recommends that 'the NSWPol become involved in community education which actively targets 'at risk' groups'.⁸⁸⁹ It was not stated how it was intended to implement the strategy. Several initiatives have however been developed.

The Safety House Program

18.31 The Safety House Program is a preventative education campaign run by the Service and the community that aims to provide:

- children with the skills and confidence to feel safe; and
- a network of safe places within the community.

School Visits and Displays

18.32 Police visit schools to explain the program to children and to reassure them that they are safe to use any house carrying the 'Safety House' logo as a refuge should they feel frightened for any reason.

18.33 The Police Service has a stand at the Royal Easter Show each year which includes information on child sexual abuse, and has developed a video,⁸⁹⁰ in consultation with DSE, aimed at educating primary school students on general safety issues and reinforcing protective behaviours. The video stresses the need for children to look after themselves and emphasises the child's right to say 'no' to inappropriate touching.

Operation Paradox

18.34 Operation Paradox is a one-day 'phone-in', conducted by the police services in NSW and other States, during Child Protection Awareness Week each year. The operation began in NSW in 1990 as a joint Police Service and DCS project.⁸⁹¹ Principally it is an information gathering exercise which advertises, mainly on radio and television, for members of the community to phone in and report child abuse, particularly child sexual abuse.⁸⁹²

⁸⁸⁸ NSW Police Service, Action Plan for the Investigation and Management of Child Abuse: Working with others for the care and protection of children, RCPS Exhibit 1515, p. 7.

⁸⁸⁹ *ibid.*, p. 10.

⁸⁹⁰ The 'Pete and Penny' video referred to in material received from NSW Police Service Public Affairs, Director-General, DSE, Memorandum to all Principals, 91/053 (s.038), 15/4/91, RCPS Exhibit 3185.

⁸⁹¹ NSW Police Service, Future Directions in the Delivery of Child Protection Services, Submission to RCPS, August 1966, RCPS Exhibit 2529C/106, p. 34.

⁸⁹² ABCI Report, *Paedophiles and Child Sexual Abuse, a national assessment*, May 1993, Exhibit 3054C/60, p. 29, para. 1 states 'Police in NSW consider community awareness campaigns promoting the reporting of child sexual abuse to be beneficial. Most Australian States have been running Operation Paradox since 1990 and find that it provides useful intelligence on both previously unknown paedophiles and on known paedophiles'.

18.35 In the Operation Paradox National Report 1994, the operation was hailed as a success predominantly in 'raising the awareness and collective consciousness of the general community to the issue of child abuse and of the need for child protection'.⁸⁹³ The operation was seen to be shifting the guilt and responsibility of reporting child sexual abuse 'from the victim to the wider community'⁸⁹⁴ and, by earlier intervention, providing an opportunity to prevent the increased likelihood 'of delinquency, adult criminality and violent behaviour' which can result from this form of behaviour.⁸⁹⁵

18.36 The 1995 operation was described in the Police Service Annual Report as 'an outstanding success'.⁸⁹⁶ In 1996, the media campaign for the Operation was on the theme 'Silence is a crime' and TV, radio, poster and press material used the line 'If you are not reporting child abuse, you might as well be doing it'.⁸⁹⁷ The campaign was targeted at the general community, as well as mandatory reporters and child victims. It resulted in an increase in calls of 174%⁸⁹⁸ from 1995 (690 calls) to 1996 (1,896 calls).

18.37 While Operation Paradox does raise community awareness of the problem of child sexual abuse, it does this as part of an information gathering process primarily for investigative purposes. Furthermore the 'phone-in' is run for one day only each year and the advertising is aimed at reporting on that day. While it is true that information can be given to 'Crime Stoppers' (a 'phone-in' line for the reporting of general information to police) at any time, this service is not advertised to anywhere near the extent of Operation Paradox.

Child Protection Enforcement Agency

18.38 One of the functions of the CPEA is to develop strategies in relation to the prevention of child sexual abuse, and the education of the police and the public in relation to it. By reason of its direct experience in dealing with serious offenders, it can make a substantial contribution in this respect.

Protective Behaviours Program

18.39 In 1986 the Police Service co-ordinated a Protective Behaviours Program throughout NSW assisted by a consultancy group comprised of representatives from DES, Health, CSC and non-government organisations. The Program was introduced as an anti-victimisation program and is designed to teach living skills and personal safety including strategies and practical methods to assist those at risk, particularly children, from becoming victims.⁸⁹⁹

18.40 In 1989 the program was given funding from the CPC and became entirely community-based, under the management of the Protective Behaviours Consultancy Group.⁹⁰⁰ The Group provides workshops and overviews to facilitate the implementation of protective behaviour programs in both government and non-government departments.⁹⁰¹

⁸⁹³ NSW Police Service, *Operation Paradox 1994 National Report*, RCPS Exhibit 3070, para. 6.

⁸⁹⁴ *ibid.*, para. 3.

⁸⁹⁵ *ibid.*, para. 2.

⁸⁹⁶ NSW Police Service, *Annual Report 1995-1996*, RCPS Exhibit 5999/46, p. 37.

⁸⁹⁷ Media release, *Saatchi saves the children*, Ad News, 18/7/97, RCPS Exhibit 3201, p. 21.

⁸⁹⁸ *ibid.*

⁸⁹⁹ The Protective Behaviours Consultancy Group of NSW Inc, Submission to RCPS, August 1996, RCPS Exhibit 2529/102, p. 1; C. McLoughan, RCT, 22/4/96, p. 23991.

⁹⁰⁰ The Protective Behaviours Consultancy Group of NSW Inc, Submission to RCPS, August 1996, RCPS Exhibit 2529/102, pp. 1-5.

⁹⁰¹ *ibid.*, p. 2.

18.41 The Police Service continues to support the Protective Behaviours Program, as an appropriate means of educating the community about child protection issues. It submitted that there should be compulsory protective behaviours training for all school children and that the child's regular teacher is the best person to deliver this training.⁹⁰²

18.42 The Department of Juvenile Justice (DJJ) has also recently introduced protective behaviours training for detainees at some detention centres.⁹⁰³

18.43 Some argue that protective behaviours programs are of little value and may be counter-productive.⁹⁰⁴ Some of the criticisms levelled at these programs are that:

- they place too much responsibility on the child;⁹⁰⁵ and
- children are often unable to distinguish between 'good' and 'bad' physical contact and as a consequence adopt negative attitudes to all forms of physical contact with adults, and develop increased anxiety, fear of adults and a loss of confidence in their parents.⁹⁰⁶

18.44 These are not fatal criticisms. What is needed is a balance. Such programs need to be able to:

- empower children to take action, without placing responsibility for the adult's behaviour on the child;
- ensure that children are not frightened by the issue and that their positive relationships with adults are not damaged; and
- ensure that children do not feel blame or guilt if they are unable to prevent an assault.

18.45 The need to recognise the likely extent of sexual abuse of males and to direct education and protective behaviours programs towards boys has been emphasised to the Commission. Aside from self-protection this may have a preventative impact since the majority of adult offenders are males.⁹⁰⁷

DEPARTMENT OF COMMUNITY SERVICES

18.46 DCS considers that public education campaigns are most effectively designed and implemented with an interagency approach, through a central agency such as the CPC.⁹⁰⁸ The recently appointed DCS specialist Child Protection Officers are however seen by DCS as having an important role both in ensuring that the CPC campaigns are effectively implemented and in informing the public and other professionals about its role.⁹⁰⁹ The promotion of awareness of child protection issues within local area boundaries is undertaken by the Child Protection Officers, via local Child Protection Committees, and through contact with other agencies operating within their local area, including DSE and the NSW Department of Health (Health).⁹¹⁰ DCS is in the course of producing a series of pamphlets to provide the public with up-to-date information about its programs.⁹¹¹

⁹⁰² NSW Police Service, Future Directions in the Delivery of Child Protection Services, Submission to RCPS, August 1996, RCPS Exhibit 2529C/106, p. 34.

⁹⁰³ K. J. Buttrum, RCT, 29/5/96, p. 26130.

⁹⁰⁴ G. Partington, 'Schools and Child Abuse', *The Australian Quarterly*, Winter 1989, pp. 276-81.

⁹⁰⁵ Wingecarribee Health Service, Submission to RCPS, 18/9/96, RCPS Exhibit 2529C/166.

⁹⁰⁶ G. Partington, 'Schools and Child Abuse', *The Australian Quarterly*, Winter 1989, pp. 276-81.

⁹⁰⁷ Child Abuse Prevention Service, Submission to RCPS, 1/7/96, RCPS Exhibit 2529/4.

⁹⁰⁸ DCS, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/109, para. 6.

⁹⁰⁹ *ibid*, para. 1.

⁹¹⁰ *ibid*, para. 10.

⁹¹¹ *ibid*.

THE NSW HEALTH DEPARTMENT

18.47 While Health has not been specifically involved in the provision of community education campaigns targeting child sexual abuse, its Sexual Assault Services have provided education to agencies and interested groups focused on referrals and presentations for counselling, support and court presentation. A range of educational materials, including kits designed to be presented to community groups, and a package on mandatory notification, have been produced by the Women's Health and Sexual Assault Education Unit. This Unit has also produced an information pamphlet targeting males who experienced sexual abuse in childhood. The Department is currently preparing a comprehensive Child Protection and Care Policy focusing on the needs of the child.⁹¹²

VOLUNTEER AGENCIES AND ADVOCACY GROUPS

18.48 There are also a number of volunteer agencies and advocacy groups⁹¹³ actively involved in raising public awareness of child protection issues. An example of such an agency is the Child Abuse Prevention Service, which produces a brochure explaining its services.⁹¹⁴

THE ROLE OF THE MEDIA

18.49 The media continues to play a crucial role in raising public awareness of the issues surrounding child sexual abuse, and in the preventative and protective education of both children and adults.

18.50 The media's handling of the evidence received and the issues arising during this Commission, and of other cases before the courts, has brought to light the way in which professional journalists can have a significant impact, raising awareness of child sexual abuse as a problem in the community, alerting the public to the issues involved and thereby playing a real and meaningful role in preventative education.

18.51 The media also plays a significant role in providing coverage to child protection programs such as those run by the DSE and the Police Service, including Operation Paradox. The media played a crucial role in the most recent campaign donating a large amount of air time free as a community service.⁹¹⁵

18.52 Over 90% of callers quoted TV, radio, press or poster as either their motivation for calling or their source of information about the operation.⁹¹⁶ The responsibility of journalists in the area of child protection education is accordingly considerable.

18.53 Although suppression of the publication of names of children in child sexual abuse cases, or of details which might identify them is appropriate, there is a significant public interest, otherwise, in allowing the cases to be reported in detail. Unless this is permitted, the community may be deceived into a false sense of security as to the incidence of abuse.

⁹¹² NSW Health Department, Submission to RCPS, 30/8/96, RCPS Exhibit 2529C/151, p. 28.

⁹¹³ These are referred to in detail in Chapter 17 of this Volume and include: Advocates for Survivors of Child Abuse, Family Support Services Association, Centacare, The Association of Children's Welfare Agencies, State Network of Young People in Care, Women Incest Survivors Network, Advocates for Survivors of Child Abuse, Victims of Crime Assistance League Incorporated, Men Against Sexual Abuse, Friends of Susanna, The Sexual Abuse Counselling Service, Child Abuse Prevention Service, Youth Justice Coalition, and church funded welfare and counselling agencies such as Lifeline, the Family Life Movement and Anglican Counselling.

⁹¹⁴ D. Ginn, Child Abuse Prevention Service, Submission to RCPS, 1/7/96, RCPS Exhibit 2529/4. See also Chapter 19 of this Volume.

⁹¹⁵ Media Release, *Saatchi saves the children*, Ad News, 18/7/97, RCPS Exhibit 3201, p. 21, states that nearly \$500,000 in media air time was donated and used over a three-week period by the press, radio and television.

⁹¹⁶ *ibid.*

C. FUTURE DIRECTIONS FOR PUBLIC EDUCATION

COMMUNITY AWARENESS CAMPAIGNS

18.53 The Commission endorses the CPC mass media campaigns and their use on an ongoing basis. No single or occasional program will achieve the desired outcome.

The resistance on the part of many communities to talking openly about child sexual abuse and the range of defences used to resist these messages means mass media campaigns will only have an impact on attitudes and behaviour if they are run over long time periods and are supported by a range of other activities.⁹¹⁷

18.54 Such campaigns need to empower children to engage in self protective behaviour and be aimed at developing skills in identifying and responding to unsafe situations. In particular they need to address:

- defining sexual abuse in language children can understand;
- increasing children's awareness of the distinction between appropriate and inappropriate touching;
- helping children to be aware of potential sexual offenders;
- increasing children's understanding of their rights and that it is appropriate to say 'no' to adults in certain circumstances, no matter what position of power they hold;
- raising awareness that boys are victims as well as girls;
- encouraging children to disclose/seek assistance;
- overriding the offender's use of fear/guilt to prevent the child telling;
- helping abused children to dispel any claims made by an offender that he and the child have a 'special secret relationship';
- giving children the message that it is the adult's wrong behaviour that is the issue, not their own behaviour;
- letting them know that they are not alone and that there is help available; and
- ensuring that a balance is maintained between what is good and what is bad so that the material does not engender in children a fear of all relationships with adults or encourage negative feelings about their own sexuality.

18.55 Parents and child carers need information in order to be able to recognise the indicators of child sexual abuse in children.⁹¹⁸ Adults generally need information to help them recognise what physical and emotional environments make a child vulnerable to child sexual abuse, the likely perpetrators and the forces at work that make a child reluctant to disclose abuse or threat of abuse. The message of the 1996 Operation Paradox Program should be emphasised, namely that concealing or ignoring the problem is not acceptable and risks its perpetuation.

⁹¹⁷ G. Calvert, A. Ford & P. Parkinson (eds), *The Practice of Child Protection: Australian Approaches*, Hale & Iremonger, Sydney, 1992, RCPS Exhibit 2159, p. 39, para. 2.

⁹¹⁸ '... what is needed is an intensive campaign to teach parents how to recognise warning signs of child sexual abuse. Parents are the ones who detect a majority of abuse, yet many fail to recognise the signs and symptoms. Public awareness should stress particularly, signs of genital irritation and discomfort, unusual sexual knowledge, and fearfulness ...', D. Finkelhor, 'Sexual Abuse in Day Care', Family Research Laboratory, University of New Hampshire, March 1988, *Child Protection Council Seminar Series: Seminar No. 2*, Paper no. 1, Sydney, March 1993, RCPS Exhibit 3051/53, p. 13.

18.56 Any public education campaign should also address the need for adults to seek professional help if they suspect or learn that a child is being abused, rather than attempting to deal with the matter themselves. It needs to bring to their attention the support facilities and other services available, and the dangers of contaminating any prosecution if they seek to question the child extensively, or involve other families in group discussions.

18.57 The Commission agrees with DCS that any public education initiatives should incorporate material relating to children with intellectual or physical disabilities with a focus on their greater vulnerability, decreased capacity to report and specific support needs.⁹¹⁹ In addition, special attention needs to be paid to ensure that any campaign reaches those in isolated rural communities, and State wards, who are possibly the most neglected group of all.

18.58 The campaign should take into account diverse cultural and ethnic attitudes, including Aboriginal cultures, as to what is permissible behaviour. It is important that a balanced view is presented in order not to unduly alarm the community, so that women are aware of the issues but not to the point that they no longer trust any man with their children, and so that men, particularly fathers and stepfathers, do not become confused, anxious, or insecure about their normal relationships with children.

18.59 Any such broad-based campaign needs to involve all agencies and to be carefully co-ordinated, using the expertise of those working in the field of child sexual abuse and those skilled in mass media communication. This should be co-ordinated in conjunction with the proposed Children's Commission, in particular with the Centre for Child Protection within that body.

18.60 The Internet is used effectively by offenders⁹²⁰ and it may also be possible for it to be used by the agencies working in the field of child sexual abuse as another medium for raising community awareness. Care would, however, be needed in its use to avoid attempts by paedophiles to ridicule any such program, or to use it as a means for spreading child pornography or securing inappropriate contacts. Equally, the material would need to be carefully crafted so as not to be unacceptable to children, or to send the wrong message to them.

NSW POLICE SERVICE

18.61 One of the ways the Police Service can contribute to public education is by maintaining a year round 'phone-in' program. Several submissions favoured such a program on a permanent basis, rather than for only one day per year as in the case with Operation Paradox.⁹²¹ The Police Service has recommended that Operation Paradox be promoted to the community at regular intervals throughout the year, and it proposes to enhance the outcomes of Operation Paradox by:

- increasing the analysis of the intelligence received; and
- maintaining an increased awareness of child protection issues in the community via the media, at regular intervals throughout the year.⁹²²

18.62 Such a program would ideally involve the other agencies, including DSE and Health in conjunction with and co-ordinated by the Children's Commission, and would extend to the provision of preventative and protective information in addition to intelligence on specific offences or offenders.

⁹¹⁹ DCS, Submission to RCPS, 12/8/96, RCPS Exhibit 2529/109, p. 59.

⁹²⁰ As discussed in detail in Chapter 16 of this Volume.

⁹²¹ ABCI Report, *Paedophiles and Child Sexual Abuse, a national assessment*, May 1993, RCPS Exhibit 3054C/60, p. 29; J. Herlihy, 'Paedophilia, child sexual abuse and practical approaches to prevention', Violence Prevention Unit, Australian Institute of Criminology, July 1992, suggests a low key child focused approach using a 'children's phone-in' program.

⁹²² NSW Police Service, *Future Directions in the Delivery of Child Protection Services*, Submission to RCPS, August 1996, RCPS Exhibit 2529C/106, p. 34. The Police Service has also recommended that CPEA be responsible for the analysis of intelligence gained in Operation Paradox.

PREVENTATIVE EDUCATION PROGRAMS IN SCHOOLS

Government Schools

18.63 While the DSE Child Protection program has gone a long way toward raising children's awareness of child sexual abuse, and arming them with self-protective and preventative knowledge, there is a continuing need for it to be reviewed, kept relevant, and delivered in a way that is responsive to the circumstances in which children may meet potential offenders and deal with them.

Non-Government Schools

18.64 Children need to be given preventative and protective education no matter what their socio-economic background and no matter what school they happen to attend. The non-government schools need to be encouraged to introduce a program equivalent to that provided by the DSE, and if necessary to seek assistance from the proposed Children's Commission for that purpose.

HEALTH PROFESSIONALS

18.65 As previously indicated, there is a particular need to introduce undergraduate and postgraduate training in the treatment and management of child sexual abuse in all courses qualifying graduates to work in the care or supervision of children.⁹²³

18.66 A valuable precedent for consideration is the San Diego Annual Conference on Child Mistreatment, conducted under the auspices of the American Society on the Abuse of Children. Such a conference could be organised by the proposed Children's Commission, on a State basis, to assist in fostering a uniform and acceptable standard of training for the staff of all agencies, and in encouraging the exchange of experiences.

ADVOCACY CENTRES

18.67 As discussed earlier,⁹²⁴ Children's Advocacy Centres are established in a number of States in the USA.⁹²⁵ They are non-government, community-based centres staffed by professionals who are integrally involved in the investigation of child sexual abuse, and in the management of its immediate aftermath.

18.68 They also fulfil a role in community education by:

- raising the community profile of children's issues in a positive way;
- creating a strong community network of services; and by
- enhancing the skills of professionals and volunteers through work experience training.

18.69 Earlier in this Report⁹²⁶ the Commission has recommended that an advocacy centre for children be trialed at the new Children's Hospital at Westmead which would also have a role to play in public education programs.

⁹²³ See Volume IV, Chapter 9 of this Report.

⁹²⁴ Volume IV, Chapter 8 of this Report.

⁹²⁵ The National Children's Advocacy Centre, Huntsville, Alabama, pamphlets entitled *Regional Children's Advocacy Centres: Helping to improve community response to child abuse*, RCPS Exhibit 3186 and *Children's Advocacy Centers: Improving Community Response to Child Abuse*, RCPS Exhibit 2115.

⁹²⁶ See Volume IV, Chapters 8 & 9 of this Report.

CHILD PROTECTION CENTRE

18.70 It is suggested that the proposed Children's Commission contain a Centre for Child Protection⁹²⁷ which would be a central point for the children's advocacy networks and promote continuing public education in protective and preventative strategies. Its role is examined in more detail later in this Report, where relevant recommendations are made.⁹²⁸

D. REGISTRATION OF SEX OFFENDERS

18.71 The Royal Commission received a number of submissions in support of the establishment of a system for the registration of convicted or suspected child sexual offenders,⁹²⁹ although not necessarily in the same form. There has been a great deal of pressure internationally to establish registers of those convicted of such offences, placing them under an obligation to:

- register with a relevant agency within a limited period of time after release from prison;
- notify any subsequent change of address; and to
- submit to verification as appropriate.

18.72 In most instances legislation of this kind is limited to convicted offenders, and creates a further offence for non-compliance. In some cases the information required to be supplied is extensive and extends to fingerprints, photographs and a DNA profile.

18.73 Within some jurisdictions, the purpose of the legislation is restricted to the reception of information for the assistance of law enforcement agencies and accordingly is confined to a request for registration with police. In other jurisdictions, it has extended to mandated or discretionary communication of the information to schools, child care facilities, pre-schools and day care centres, Family and Community Services, and similar organisations within the neighbourhood, as well as to immediate neighbours, and to the victim. In yet other jurisdictions, for example California and New York, the register is accessible by the public on inquiry.

18.74 Most such legislation creates specific offences for conduct involving harassment or violence directed at registered offenders.

UNITED STATES

18.75 One of the leading States in the development of these laws was the State of Illinois, which in 1986 passed the *Habitual Child Sex Offender Registration Act*, requiring registration with local law enforcement agencies, of all sex offenders convicted of at least two sex crimes where the victim was aged under 18 years. It was replaced in 1992 by the *Child Sex Offender Registration Act* which requires the registration of all child sexual offenders upon their first conviction, a requirement extended in 1995 to all convicted sex offenders.

⁹²⁷ See Chapter 20 of this Volume.

⁹²⁸ See Chapter 20 of this Volume.

⁹²⁹ eg. Confidential Submission to RCPS, 17/7/96, RCPS Exhibit 2529C/24; Confidential Submission to RCPS, 15/7/96, RCPS Exhibit 2529C/25; Chief Superintendent L. Scott, Submission to RCPS, July 1996, Exhibit 2529/42; E. King, Submission to RCPS, 29/7/96, RCPS Exhibit 2529/50; L. Schofield, Submission to RCPS, 30/6/96, RCPS Exhibit 2529/53; Confidential Submission to RCPS, 31/7/96, RCPS Exhibit 2529C/59; Confidential Submission to RCPS, August 1996, RCPS Exhibit 2529C/80; Coffs Harbour CSA Service, Submission to RCPS, 5/8/96, RCPS Exhibit 2529/81; Confidential Submission to RCPS, 2/8/96, RCPS Exhibit 2529C/97; Barnardos Australia, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/124; Scripture Union NSW, Submission to RCPS, 18/9/96, RCPS Exhibit 2925C/163; Australian Law Reform Commission and Australian Human Rights Commission, Submission to RCPS, June 1996, RCPS Exhibit 2529C/172; Confidential Submission to RCPS, 5/12/96, RCPS Exhibit 2529C/175.

18.76 In 1995, following the abduction and murder of a young boy by an offender who had previously been convicted of a similar crime, Illinois passed the *Child Sex Offender Community Notification Act*, which provided for a 10-year period of community notification based upon an assessment of the offender's risk of reoffending.

18.77 In the meantime, similar horrific crimes involving the sexual abuse and murder of young children, including Megan Kanka in New Jersey (July 1994) and Earl Shriner in Washington (1989), by offenders with previous records for sexual violence, who were living unnoticed in the immediate neighbourhoods of the victims (in one case with two other paedophile offenders) and the resulting community outrage, led to those States passing similar legislation.

18.78 The legislation in New Jersey,⁹³⁰ which has come to be known as 'Megan's Law' provides for:

- a three-tier system of classification of sex offenders (the assessment to be made by the relevant County prosecutor), under which for a person:
 - classified Tier 1 (low-risk) the information is provided only to law enforcement agencies;
 - classified Tier 2 (moderate-risk) the information is provided additionally to schools and religious and youth organisations;
 - classified Tier 3 (high-risk) the information is provided additionally to those members of the general public who are likely to encounter the offender.

18.79 The legislation in Washington,⁹³¹ is in some respects even more far-reaching, in that it:

- requires police in certain cases to hand deliver letters to schools, churches, day care centres and local news organisations informing them of the imminent arrival to their area of a convicted sex offender;
- provides for preventative detention for life upon a second conviction; and
- permits civil commitment to a mental hospital of offenders considered the most dangerous, until or unless fitness to return to society can be established.⁹³²

18.80 There are numerous variations in these laws, it being the case that as at May 1996,⁹³³ some 47 States had passed registration legislation, of which 30 additionally made provision for community notification. Many are, or have been subject to challenge on constitutional grounds. In Pennsylvania,⁹³⁴ the touchstone for release of information to the community is the declaration of the offender as a 'sexually violent predator' by the trial court, following assessment by a State Board, carried out between conviction and sentencing. The legislation in that State also provides for lifetime parole and monthly counselling sessions in a program approved by the Board; as well as for simple registration of present and future addresses, for a period of 10 years, in relation to a lesser category of sex offenders.

18.81 In California, the information recorded is stored on CD-ROM held at police stations across the State. It may be viewed, subject to certain conditions concerning the age of the inquirer, by visit to a police station. It is possible, by use of this system, and also by use of a 900 telephone number, for considerable information to be acquired in relation to offenders including details of physical appearance, modus operandi, and the like.

⁹³⁰ *Registration and Notification of Release of Certain Offenders Act 1994.*

⁹³¹ *The Community Protection Act 1990.*

⁹³² In *Kansas v Hendricks* (23/6/97) the United States Supreme Court upheld the validity of a similar law of the State of Kansas.

⁹³³ Reuters News Report, 9/5/96, attached to ABCI briefing paper, July 1996, RCPS Exhibit 2529C/41, at Doc. 2144800.

⁹³⁴ Pennsylvania Act No. 1995-24, Pa Legis. Serv. 552.

18.82 This legislation has been passed against the background of the Federal *Violent Crime Control and Law Enforcement Act 1994* (USA), signed into law by President Clinton in September 1994. The *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act 1994* (USA) which forms part of this package of legislation, requires States, as a condition for the receipt of undiminished Federal crime fighting funds, to register, with State law enforcement agencies, offenders convicted of a criminal offence against a minor, all sexually violent offenders, and all offenders declared sexually violent predators.

18.83 It additionally makes provision for:

- disclosure of the registrant's personal information when necessary for the protection of the public; and for
- immunity from civil and criminal liability for state law enforcement agencies who act in good faith pursuant to the Act.

18.84 Moreover, in August 1996 President Clinton directed the Federal Bureau of Investigation (FBI) to establish a national database of registered sex offenders⁹³⁵ which will allow the FBI to track the movement of such offenders from State to State.

UNITED KINGDOM

18.85 In June 1996, a consultation paper was presented to the UK Parliament, *Sentencing and Supervision of Sex Offenders - A Consultation Document*⁹³⁶ pursuant to the earlier White Paper *Protecting the Public - the Government's Strategy on Crime in England & Wales*.⁹³⁷ The proposals developed in the consultation paper included the following:

- strengthening the arrangements for supervising convicted sex offenders following their release from custody so as to provide greater protection for the public and to improve the opportunity for such offenders to deal with their offending behaviour;
- extending the power in the *Criminal Justice and Public Order Act 1994* (UK) so as to enable samples to be taken for the purposes of DNA testing from convicted sex offenders who are serving a prison sentence which was imposed before that power came into force. This would aim to deter them from further offending on release and to aid their detection should they not be deterred;
- requiring sex offenders to notify the police of their address and any subsequent changes to it, so as to provide the police with a register of the current whereabouts of convicted sex offenders;
- introducing provisions to prohibit sex offenders from seeking employment involving access to children; and
- providing supervised access by defendants to victim statements and photographs in sexual offence cases so as to reduce the opportunities for such material to be copied and circulated for pornographic purposes.

18.86 In March 1997 the Royal Assent was given to the *Sex Offenders Act 1997* (UK):

- Part I requires prescribed categories of convicted or self-confessed sex offenders to notify to police their name and address along with any later changes of name and address, for periods that vary according to the length of the sentence imposed for the offence (for example, indefinitely for a sentence of imprisonment for life or 30 months or more, and seven years for a sentence of imprisonment for a term of six months or less). Failure to comply with the notification requirements constitutes an offence; and

⁹³⁵ NSW Parliamentary Library Research Service, *Registration of paedophiles*, briefing paper no. 12/97, July 1997, p. 22; The database is to be implemented by the *Pam Lyncher Sexual Offender Tracking and Identification Act 1996* (USA).

⁹³⁶ *Sentencing and Supervision of Sex Offenders: A Consultation Document*, Cm. 3304, HMSO, London, 1996, RCPS Exhibit 2506, p. 1.

⁹³⁷ White Paper, *Protecting the Public - the Government's Strategy on Crime in England & Wales*, (Cmnd 3190).

- Part II permits prosecution in the UK of sex crimes committed against children abroad.

18.87 There has been progress with some of the other proposals in the consultation paper, for example:

- the *Crimes (Sentences) Act 1997* (UK) which is yet to commence will permit extension of the post release supervision of sex offenders;
- the *Criminal Evidence (Amendment) Act 1997* (UK) allows DNA samples to be taken from prisoners who have committed serious violent or sexual offences;
- a consultation paper was produced in January 1997 entitled *Sex Offenders: a ban on working with children*⁹³⁸ outlining a proposal for the creation of a new offence prohibiting sex offenders from securing work, accepting an offer of work, offering services or working in any areas involving unsupervised access to children;
- the *Sexual Offences (Protected Material) Act 1997* (UK), which is yet to commence, will regulate access by defendants under supervision to sensitive victim statements;⁹³⁹
- guidelines have been announced for the release by police to community interests of information concerning the presence in their area of registered child sexual offenders, where it is believed that they represent a threat to children;
- the *Police Act 1997* (UK) contains a detailed code for criminal records checks including an enhanced criminal record certificate for those working on a regular, unsupervised basis with children, including non-conviction information, which may be obtained for licensing persons and for pre appointment screening of judges and magistrates.

THE VICTORIAN MODEL CRIME PREVENTION COMMITTEE

18.88 In May 1995 the Parliament of Victoria Crime Prevention Committee published a Report entitled 'Combating Child Sexual Assault: An Integrated Model'⁹⁴⁰ in which they noted:

Given the high recidivism rate of sex offenders and their propensity to continue to reoffend over their lifetime, the State must take whatever steps necessary to reduce the incidence of child sexual abuse and protect the community.⁹⁴¹

and recommended that:

- a system for registration and monitoring be established with the following features:⁹⁴²
 1. Lifetime registration for all adult offenders convicted of an indictable sexual offence;
 2. Requirement that adolescents against whom a summary sexual offence is found proven, to be registered for a period of 5 years;
 3. Requirement that adolescents convicted of an indictable sexual offence be registered until they are 21 years of age, providing they have not reoffended;
 4. Requirement that a Sex Offender Registry Review Panel be established to review the registration status of adolescent sex offenders;
 5. Requirement that registration should include sex offenders released from custody and offenders serving their sentence in the community;
 6. Requirement for the sex offender to appear in person at the Registry;

⁹³⁸ Home Office, London, *Sex Offenders: A ban on Working with Children. A Consultation Paper*, January 1997, RCPS Exhibit 3200.

⁹³⁹ *Sentencing and Supervision of Sex Offenders: A consultation Document*, Cm. 3304, HMSO, London, 1996, RCPS Exhibit 2506.

⁹⁴⁰ Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757.

⁹⁴¹ *ibid*, p. 260.

⁹⁴² *ibid*, pp. 260-62.

7. Requirement for offenders to be notified of the requirement to register by the courts;
 8. Information registered should include name; date of birth; address of residence, source of employment; physical description; set of fingerprints; DNA sample and photograph;
 9. Government Departments including Corrections and Courts are to advise the Victorian Sex Offender Registry when persons are convicted of a sex offence and when they are released from prison;
 10. Requirement of written notification to the Registry of change of address or source of employment within 10 days of move;
 11. Requirement that any person moving into the State of Victoria who has been convicted interstate of a sexual offence, to register within 10 days of arrival and be subject to the same registration requirements;
 12. Requirement that failure to register or provide false information will be an indictable offence;
 13. Requirement of regular verification of the sex offender's address and source of employment by the Victoria Police. Such inquiries are to be made discreetly where possible; and
 14. Requirement that the sex offender must register within 10 days of being released or commencing his/her community based sentence.
- that the Victoria Police establish and maintain the Victorian Sex Offender Registry; and that
 - the Attorney General and the Police Minister lobby for an extension of the sex offender registration program nationally.

The recommendation has not at the time of reporting been implemented.

ADVANTAGES AND DISADVANTAGES OF COMPULSORY REGISTRATION

18.89 The stated advantages of a registration/community notification system relate to:

- the public's right to know that an offender is living in their community, so that they can take precautionary measures;
- the use to which the register could be put as a law enforcement tool in tracking possible offenders, particularly if associated with compulsory DNA profiling;
- the deterrent effect attaching to knowledge of an offender that he is being monitored;
- the sense of security or satisfaction acquired by victims in knowing that their abuser is being monitored; and
- the opportunity for intervention which arises where an offender fails to comply with registration laws.

18.90 Despite the well-meaning nature of this form of legislation, and the compelling political pressures that have led to its enactment, a number of objections have been raised, principally although not exclusively directed to the provisions concerning community notification consequent upon registration. The objections include the circumstance that:

- an element of double punishment is involved, which does not apply to other categories of offender, some of whose crimes, for example, murder, are no less serious;
- these laws have the effect of 'outlawing' or 'branding' the offender for whatever period of time registration or notification applies;

- their provisions are defeated by the non-co-operation of the offender who either refuses to register, or provides a false name and address;⁹⁴³
- offenders who are minded to reoffend can easily defeat the purpose of these provisions by living in one jurisdiction, and offending outside that jurisdiction, where they are not known;
- within a non-uniform system, offenders will be encouraged to move to States which have less draconian legislation, or will be forced underground into parts of a State or city where they are less noticeable, and probably lost from monitoring or supervision;
- if offenders are hounded from place to place they are less likely to remain in a stable, and supportive environment, thereby decreasing the prospects of rehabilitation and increasing the stress and other factors that may only encourage them to reoffend;⁹⁴⁴
- these laws may heighten community anger and encourage retaliation or harassment of offenders and lawlessness by others, a problem which is compounded by the errors in identification which can arise;
- legislation of this type tends to stereotype all offenders within a broad category, and fails to take account of the important distinctions which exist, for example between the fixated offender and the familial offender, in terms of risk of recidivism;
- the register may inadvertently disclose the name of victims, particularly in the case of the familial offender, and add to their trauma;
- the stigmatisation of the offender is likely to extend to and harm innocent members of his family;
- considerable law enforcement resources can be tied up in pursuing offenders who have failed to register, or in the verification of current records of addresses and the like;
- a false sense of security can be created by the impression that all sex offenders are known, registered and tracked, whereas in fact a very large proportion of offenders are never placed before the courts, and a significant section of convicted offenders do not register, and are lost to the system;
- the consequences of registration and community notification or shaming may discourage guilty pleas in these cases and also reporting of familial abuse; and
- the fear of the consequences of discovery at the time of the initial offence, may drive the perpetrator to drastic solutions to cover up the offence.

PRIVATE INDEXES OR REGISTERS

18.91 Deborah Coddington has now published two private indexes of paedophile and sex offenders, one for New Zealand and one for Australia.⁹⁴⁵ Each is an unofficial publication, said to have been derived from information in the public domain, including details of persons convicted of various forms of sexual offence, listed alphabetically and cross-referenced by occupation and location. In some cases photographs are supplied, along with details of the offence and sentence.

⁹⁴³ Studies do suggest a high incidence of non-compliance, particularly in the States, with community notification, eg. J. R. Ball, 'Public Disclosure of "America's Secret Shame": Child Sex Offender Notification in Illinois', *Loyola University of Chicago Law Journal*, vol. 27, no. 2, Winter 1996, pp. 401-48 at 439; M. L. Bell, 'Pennsylvania's Sex Offender Community Notification Law: Will it Protect Communities from Repeat Sex Offenders?', *Duquesne Law Review*, vol. 34, 1996, pp. 635-60 at 657.

⁹⁴⁴ J. R. Ball, 'Public Disclosure of "America's Secret Shame": Child Sex Offender Notification in Illinois', *Loyola University of Chicago Law Journal*, vol. 27, no. 2, Winter 1996, pp. 401-48 at 442; L. A. S. Turner, 'Sex Offender Statutes: Society's Need for Protection Versus an Individual's Constitutional Rights', *Law and Psychology Review*, vol. 20, Spring 1996, p. 268, para. 1.

⁹⁴⁵ D. Coddington, *The New Zealand Paedophile and Sex Offender Index, 1996; The Australian Paedophile and Sex Offender Index*, Sydney, 1997.

So far as NSW was concerned, the author was refused access by the Courts and by the Office of the Director of Public Prosecutions, NSW (ODPP) to official records.⁹⁴⁶

18.92 From a number of quarters this index attracted strong criticism.⁹⁴⁷ From other quarters it attracted praise.

18.93 The problems with this form of publication were identified in the evidence, and are in many respects similar to those applying to the official registration and community notification systems mentioned above. Apart from the common dangers concerning double punishment, discrimination (compared with other offenders), negative impact on rehabilitation, encouragement of vigilantism, and unfair flow-on to relatives, additional disadvantages flow from the circumstances that:

- any entry sourced to media coverage risks inaccuracy in reporting, and in failing to detect reversal of a conviction on appeal, a circumstance only rarely reported;
- the entries are not specific as to the actual facts of the offence, and include many items which are relatively trivial, or which from the bare statement of the offence in its short form may present a very misleading picture of the actual conduct involved;
- this type of index may also present a false picture, and a false sense of security so far as it does not report the outcome of the many matters determined in closed court, through pre-trial diversion programs, or subject to restrictions on reporting;
- its availability to the public may prejudice a jury trial were jurors empanelled in such a trial tempted to read the book to determine whether an accused in their hands had a prior record for sexual offences;
- such a register being publicly available, may be used by paedophiles to establish links or networks;
- this kind of register is very difficult to correct, given the fact that it may be in currency for some years between editions; and
- while an incorrect entry may lead to an action for defamation, such proceedings are beyond the reach of most persons, are uncertain in their outcome, and any injury sustained is unlikely to be adequately compensated by an award of damages.

CONCLUSIONS

18.94 For the reasons identified, the Commission does not favour the introduction of legislation which would provide for registration and community notification along the lines of Megan's Law. It is not convinced that the advantages outweigh the disadvantages identified. Rather, it sees the solution in a more controlled and co-ordinated system for the storage and release upon a needs basis of information concerning convicted or suspected paedophiles, as outlined later in this chapter, and in the final chapter of this Report.

18.95 The Commission has less concern in relation to registration requirements of the UK kind, which already occurs de facto, to some extent, in the course of probation and parole supervision. There would be some merit in its further consideration, following consultation between the ODPP, the Police Service, Corrective Services, and the Privacy Committee to identify:

⁹⁴⁶ D. Coddington, *The Australian Paedophile and Sex Offender Index*, Sydney, 1997, pp. 5-6.

⁹⁴⁷ Including from the DPP (N. Cowdery, RCT, 1/7/96, pp. 27956-57); NSW Council for Civil Liberties, Letter to RCPS re paedophile register, 11/7/96, RCPS Exhibit 2529/19; C. Puplick, RCT, 6/9/96, p. 31720; N. Waters, Head Privacy Branch, Office of the Federal Privacy Commissioner, 'Implications for Civil Liberties and Implications of Privacy Laws', paper presented at 'Paedophilia: Policy and Prevention', AIC Conference, University of Sydney, 14/4/97 - 15/4/97, RCPS Exhibit 3057/19.

- its potential efficacy for law enforcement in monitoring offenders (including the provision of post release supervision);
- the extent to which it might add value to existing provisions for the recording of convictions and of criminal intelligence;
- the extent of the resources needed;
- identification of the classes of offenders who should be subject to ongoing registration and reporting provisions (which might be confined either to repeat offenders, or those involved in more serious offences);
- suitable privacy safeguards; and
- any practical difficulties in securing its application to offenders entering the State from other countries or from interstate.

18.96 The Commission, however, cautions that registration legislation of this kind, would be of limited value unless it formed part of a uniform national system. Otherwise it could risk:

- presenting a false sense of security in relation to offenders from outside the State who enter the State either as visitors, or without knowledge of the registration requirements; and
- driving offenders interstate.

18.97 The Commission believes that the publication of private registers or indexes should be firmly discouraged, as potentially misleading and damaging. Official encouragement or assistance for their compilation is inappropriate. Specific banning legislation is not, however, possible, since the information republished is already in the public domain.

E. NOTIFICATION OF SUSPECTED ABUSE

NOTIFICATION REQUIREMENTS

18.98 Mandatory notification of child sexual abuse was introduced in 1977 through amendment of the *Child Welfare Act 1939*.⁹⁴⁸ The mandatory notification provisions were carried over to the *Community Welfare Act 1982*,⁹⁴⁹ and thereafter to the *Children (Care and Protection) Act 1987*.⁹⁵⁰

18.99 The current notification provisions under the *Children (Care and Protection) Act 1987*, which comprise both mandatory and permissive notification, are as follows:

- 22(1) Any person who forms the belief upon reasonable grounds that a child who is under the age of 16 years -
- (a) has been or is in danger of being, abused; or
 - (b) is a child in need of care;
- may cause the Director-General to be notified of that belief and the grounds therefor, either orally or in writing.
- (1A) Any person who forms the belief on reasonable grounds that a child who is aged 16 or 17 years has been, or is in danger of being abused may notify the Director-General of that belief, and of the grounds for that belief, either orally or in writing.
- (2) A person who, in the course of -

⁹⁴⁸ *Child Welfare Act 1939*, s. 148B introduced by *Child Welfare (Amendment) Act 1977*.

⁹⁴⁹ *Community Welfare Act 1982*, s. 102.

⁹⁵⁰ *Children (Care and Protection Act) 1987*, s. 22.

- (a) practising as a medical practitioner;
- (b) following another profession, calling or vocation prescribed by the regulations for the purpose of this sub-section (other than the profession of a barrister or solicitor); or
- (c) exercising the functions of an office so prescribed,

has reasonable grounds to suspect that a child who is under the age of 16 years has been abused (whether the abuse consisted of sexual abuse or any other form of abuse) is required to comply with sub-section (4) in respect of those grounds unless the person is a minister of religion or a person who is declared by the regulations to be exempt from the provisions of this sub-section.

- (3) A person who, in the course of -

- (a) following a profession, calling or vocation prescribed by the regulations for the purposes of this sub-section (other than the profession of a barrister or solicitor); or
- (b) exercising the functions of an office so prescribed,

has reasonable grounds to suspect that a child who is under the age of 16 years has been sexually abused is required to comply with sub-section (4) in respect of those grounds unless the person is a minister of religion or a person who is declared by the regulations to be exempt from the provisions of this sub-section.

- (4) A person who is required to comply with this sub-section in respect of having any grounds to suspect that a child who is under the age of 16 years has been abused (whether the abuse consisted of sexual abuse or any other form of abuse) shall-

- (a) notify the Director-General of the name or a description of the child and those grounds; or
- (b) cause the Director-General to be so notified,

promptly after those grounds arise.

- (5)-(6) ...

- (7) Where the Director-General has been notified under sub-section (1) or (4), the Director-General shall-
 - (a) promptly cause an investigation to be made into the matters notified to the Director-General; and
 - (b) if the Director-General is satisfied that the child in respect of whom the Director-General was notified may have been or is in danger of being, abused or is a child in need of care, take such action as the Director-General considers appropriate, which may include reporting those matters to a member of the police force.

- (7A) ...

- (7B) For the purposes of any investigation under this section or of any action arising out of such an investigation, the Director-General may do either or both of the following:

- (a) the Director-General may, in accordance with the requirements (if any) prescribed by the regulations, furnish a prescribed body with information relating to the welfare of a particular child or class of children
- (b) the Director-General may, in accordance with the requirements (if any) prescribed by the regulations, direct a prescribed body to furnish the Director-General with information relating to the welfare of a particular child or class of children

- (7C) ...

- (8) Where a notification is given under sub-section (1), (1A) or (4) or information is furnished under sub-section (7B) or (7C) -

- (a) the making of the notification or the furnishing of the information shall not, in any proceedings before a court, tribunal or committee, be held to constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct;
- (b) no liability for defamation is incurred because of the making of the notification or the furnishing of the information;

- (c) the making of the notification or the furnishing of the information shall not constitute a ground for civil proceedings for malicious prosecution or for conspiracy;
- (d) - (e) ...

(8A)- (12) ...

(13) In this section:

prescribed body means:

- (a) the Police Service, a Government Department or a public authority; or
- (b) a government school or a registered non-government school within the meaning of the *Education Reform Act 1990*, or
- (c) an area health service within the meaning of the *Area Health Services Act 1986*, or
- (d) a hospital or an authorized hospital within the meaning of the *Mental Health Act 1900*, or
- (e) an incorporated hospital or a separate institution within the meaning of the *Public Hospitals Act 1929*, or
- (f) any other body or class of bodies (including an unincorporated body or bodies) prescribed by the regulations for the purposes of this section.

No other bodies have been prescribed for the purposes of disseminating information under this Section.

18.100 Under the *Family Law Act 1975* (Cth) court personnel, counsellors and mediators are required to notify DCS when reasonable suspicion exists that a child is in danger of abuse including sexual abuse.⁹⁵¹

18.101 The purpose of the notification legislation is two-fold:

- to ensure that information collected by those persons who have the closest ongoing contact with children bring to official notice, for appropriate investigation, cases of suspected child abuse (including sexual abuse); and
- to provide protection from civil or other liability, in respect of the provision of such information, and to permit its further dissemination to appropriate agencies.

As such it constitutes an important part of the system for the reception and dissemination at an official level, of information concerning child sexual abuse. The repetitive nature of the offence, its considerable under-reporting, and the risks in allowing a known or suspected offender to remain unreported are such that its impact should not be minimised.

18.102 Currently the mandatory obligations under State legislation are confined to medical practitioners, teachers, school counsellors, and school social workers.

18.103 They expressly do not extend to ministers of religion, or legal practitioners, nor in the absence of any relevant prescription by regulation do they currently extend to:

- chief executives of bodies conducting non-government schools;
- other health workers such as nurses, psychologists, psychotherapists, natural health practitioners, paramedics, therapists and the like;
- social workers, welfare workers and youth workers outside schools;

⁹⁵¹ *Family Law Act 1975* (Cth), s. 672A.

- persons in charge of residential care centres, refuges and the like conducted for children, or child care centres; or
- chief executives or persons in charge of bodies providing welfare, social and sporting activities involving children,

even though each of these involves a high risk area for child sexual abuse. Police are not mandatory notifiers, save where the *Children (Parental Responsibility) Act 1994* applies, but de facto this position has been achieved through Commissioner's Instructions.⁹⁵² The Commission considers that the mandatory notification obligations should extend to the categories mentioned above.

ISSUES ARISING

18.104 Some problems do arise in relation to the notification of suspected child sexual abuse, particularly concerning mandatory notification. This can present as a particular problem for medical practitioners. Additionally, though not mandatory notifiers, a dilemma as to notification can arise in the case of Ministers of Religion when they learn of child sexual abuse, outside the confessional.

18.105 Within all categories of persons who deal with children, or offenders, within a therapeutic or pastoral setting, there is often a conflict between:

- maintaining confidentiality of the information received, where:
 - it is accompanied by an express desire on the part of its provider that it be passed no further;
 - official intervention risks traumatising the victim or non-offending members of the family; or
 - reporting would deter a self-confessed perpetrator from co-operating any further with disclosure or therapy thereby leaving other children at risk; and
- disclosing the information received so that a child sexual abuser is brought to notice and punished for known offences, and so that any risk to potential future victims is removed.

18.106 Difficulties can also arise under s. 316(1) of the *Crimes Act 1900* (NSW) which creates an offence where a person who knows or believes that a 'serious offence' (a category including most child sexual abuse offences) has been committed, fails to report information in his or her possession which might be of material assistance in securing the apprehension, prosecution or conviction of the offender, unless that person has a 'reasonable excuse' for not doing so.

18.107 The offence under s. 316(1), which is the statutory successor to the common law offence of misprision of felony, is rarely prosecuted and shares some of the uncertainty which attached to that offence, specifically in relation to the just limitations concerning non-disclosure arising in relationships of privilege or confidentiality.⁹⁵³ The absence of statutory guidance as to what might constitute 'reasonable excuse', for which at least an evidentiary onus would fall upon the accused, was the subject of comment by the High Court in *Taikato v R*⁹⁵⁴ which confirmed the need for a case-by-case approach in determining whether a 'reasonable excuse' defence is available. Whether disclosure in any of the therapeutic or pastoral settings previously mentioned would qualify remains open for determination.

⁹⁵² Commissioner's Instructions 67 and 76, RCPS Exhibit 1510.

⁹⁵³ *Sykes v Director of Public Prosecutions* (1962) AC 528 at 564.

⁹⁵⁴ *Taikato v R*, (1996) 139 ALR 386.

18.108 It is undesirable:

- for mandatory notifiers, that both s. 22 of the *Children (Care and Protection) Act* and s. 316(1) of the *Crimes Act 1900* (NSW) should be potentially applicable; and that
- if s. 316(1) continues to be relevantly applicable for it to do so without greater definition of the 'reasonable excuse' exception, or specific guidance as to the circumstances in which those who deal with children, in a therapeutic or pastoral setting, might be subject to its reach.

18.109 The Commission is mindful of the competing interests which arise in this area, and has given careful consideration to four options including:

- reducing non-reporting to a disciplinary, as distinct from a criminal offence;
- establishing a specific exception to the reporting requirement in circumstances to be defined;
- establishing a specific defence, again in circumstances to be defined; or
- leaving the matter to a prosecutorial discretion in which matters such as the nature of the relationship in the course of which the disclosure was made, the terms of disclosure, the age and seriousness of the offence disclosed, the wishes of the victim, any adverse consequences to those immediately concerned, as well as the potential risk to other victims, might be taken into account.

CONCLUSIONS

18.110 In the light of the matters outlined, the Commission considers that there is merit in approaching the matter of non-disclosure, by those working in the relevant categories, as a disciplinary matter rather than as a criminal matter. Their 'culpability' is secondary to that of the offender who has been guilty of actual abuse, and a real question arises as to whether it justifies the sanction of the criminal law.

18.111 If, however, this approach does not meet with favour, then the Commission considers that failure to notify should be dealt with as a summary offence under the *Children (Care & Protection) Act* and not under the *Crimes Act*. By reason of the short limitation period for prosecution of such an offence,⁹⁵⁵ and the difficulty in detecting any breach of the Section, it would be appropriate to extend the period for instituting a prosecution to, say, three years.

18.112 If the matter remains to be dealt with as a criminal offence, then a very real difficulty persists in creating any specific exemption or defence applicable to defined categories of notifiers without destroying the utility of the Sections. Rather than attempting to redress the problem in that way, the Commission prefers the third option, that is, leaving the matter to the discretion of the police or the Director of Public Prosecutions. It would be appropriate in those circumstances for the notifier:

- to inform the victim or self reporting perpetrator, at any outset, of any obligation to notify a disclosure of child sexual abuse; and
- in the case of the self reporting perpetrator:
 - to offer him assistance in dealing with the police,
 - to invite him to receive legal advice concerning the more lenient approach which might be taken by the justice system to self reported criminality, and

- to advise him of the provisions of the *Evidence Amendment (Confidential Communications) Bill 1997* if it is passed into law, (which would preclude the use of a protected counselling communication in evidence, without leave, although without affecting its derivative use for investigation purposes) and of part 3.4 of the *Evidence Act 1995*.

18.113 As mentioned later, the availability of a greater range of sentencing options in appropriate cases, including pre trial diversion and deferred sentence or recognisance, conditioned on a period of treatment and supervision, might assist in overcoming any disincentive to frank disclosure of the kind mentioned.

F. SHARING OF INFORMATION

18.114 There has been considerable uncertainty, and difference in practice concerning the exchange of information between the Police Service, and the other agencies involved in the care and protection of children, both in relation to:

- employee screening; and in relation to
- the provision of information which might be of use for the investigation of paedophile offences.

18.115 In part this derives from respect for privacy principles; and in part it derives from assumed legislative restriction arising by reason of secrecy provisions within the legislation under which certain departments or agencies operate, or under general Statute law.

PRIVACY FRAMEWORK

18.116 Without being exhaustive, the Commission has identified the following relevant provisions:

- The Police Service Regulation 1990 provides, in relation to Police:

55. Confidential Information

A police officer must treat all information which comes to the officer's knowledge in his or her official capacity as strictly confidential, and on no account without proper authority divulge it to anyone.

56. Secrecy in official matters

Without affecting the generality of clause 55, a police officer must observe the strictest secrecy in regard to the Police Service business, and is forbidden to communicate without proper authority in any way whatever to any person outside the Police Service any information in regard to police or other official public business connected with his or her duties, or which may come to his or her knowledge in the performance of them.

57. Reports of accidents etc.

A police officer must not, unless authorised to do so, give any information to any person outside the Police Service concerning any reports or records of accidents, convictions or other occurrences, nor is any such person to be shown such documents.

Failure to comply with these regulations would constitute a neglect of duty, and as such would appear to be a summary offence;⁹⁵⁶

⁹⁵⁵ *Justices Act 1902*, s. 56.

⁹⁵⁶ *Police Service Act 1900*, s. 201.

- the *Crimes Act 1900* (NSW) creates an offence relating to the unauthorised use of a computer in the following terms:

309(3) A person who, without authority or lawful excuse, intentionally obtains access to a program or data stored in a computer, being a program or data that the person knows or ought reasonably to know relates to:

- (b) the existence or identity of any confidential source of information in relation to the enforcement or administration of the law; or

...

- (e) the personal affairs of any person (whether living or deceased) ...

Commissioner's Instruction 27.03 defines and limits the circumstances in which there can be computer access and dissemination of information. It does not prohibit the unauthorised release or disclosure of information or data, unlike the *Criminal Records Act 1991*, s. 13 (which applies to spent records of no immediate relevance having regard to the exception of sexual offences) however unauthorised supply of information improperly accessed would almost certainly constitute a disciplinary offence;

- the Public Sector Management (General) Regulation 1996 prohibits a Departmental Head or other person conducting a disciplinary inquiry from disclosing confidential information obtained during such inquiry except for the purpose of the inquiry and any proceedings arising therefrom;⁹⁵⁷
- information notified to DCS pursuant to s. 22 *Children (Care and Protection) Act 1987* may be disseminated to prescribed bodies, but not otherwise. Additionally that Act, in s. 115, provides:

A person who discloses any information obtained in connection with the administration or execution of this Act is guilty of an offence unless the disclosure is made:

- (a) with the consent of the person from whom the information was obtained;
- (b) in connection with the administration or execution of this Act;
- (c) for the purpose of any legal proceedings arising out of this Act or of any report of any such proceedings;
- (d) in accordance with a requirement imposed under the Ombudsman Act 1974; or
- (e) with other lawful excuse.

- the *Health Administration Act 1982*,⁹⁵⁸ and the *Public Health Act 1991*,⁹⁵⁹ both provide for offences for the unauthorised disclosure of information obtained in connection with the administration or execution of those Acts respectively;
- at a Commonwealth level, there are several applicable secrecy provisions:
 - the *Crimes Act 1914* (Cth), which by virtue of s. 70 makes the unauthorised disclosure of information by Commonwealth officers an offence, and which in s. 76B deals with unlawful access to data in Commonwealth computers;
 - employees of the Department of Social Security,⁹⁶⁰ and the Health Insurance Commission,⁹⁶¹ are subject to secrecy provisions;

⁹⁵⁷ But see *Children (Care and Protection) Act 1987*, s. 22(12).

⁹⁵⁸ *Health Administration Act 1982*, s. 22.

⁹⁵⁹ *Public Health Act 1991*, s. 75.

⁹⁶⁰ *Social Security Act 1991*, ss. 1312A & 1312B.

⁹⁶¹ *Health Insurance Act 1973*, s. 130.

- additionally, the *Privacy Act 1988* (Cth) prescribes a series of Information Privacy Principles,⁹⁶² with which the relevant agencies under the Act are required to comply.⁹⁶³

18.117 So far as any State privacy legislation has an application, it is presently contained in the *Privacy Committee Act 1975*. The Committee established under that Act has powers which are largely confined to an investigative, reporting and advisory role in relation to matters that affect privacy interests.⁹⁶⁴ Otherwise, the legislation does not prescribe or regulate the reception, retention, dissemination or other use of information of a confidential or official nature. In exercising its powers, the Privacy Committee has, however, developed various guidelines and codes of practice, in consultation with relevant agencies.

18.118 The ICAC in its Report on *Unauthorised Release of Government Information*,⁹⁶⁵ noted that:

- the laws of NSW were not designed to control the handling of confidential information;⁹⁶⁶
- the relevant law was riddled with gaps and inconsistencies;⁹⁶⁷
- there was no settled policy among government departments and agencies for the handling of personal information, nor any settled practice for the instruction of staff who handle information or have access to it;⁹⁶⁸ and that
- information exchange arrangements and practices in a number of departments and agencies have developed through the initiatives of individual officers, and as a consequence access to information has in many instances depended on unofficial personal contacts, rather than official policy.⁹⁶⁹

18.119 As a consequence of this review which was primarily concerned with the unauthorised release of confidential information to lawyers, private inquiry agents, and commercial entities, in the context of corruption, the ICAC concluded that:

- the existing uncertainties and inconsistencies in practice should be removed by development of a co-ordinated policy under which all information held by government departments and agencies was classified according to its public availability or confidentiality, on the basis of a consistently maintained set of principles;⁹⁷⁰
- subject only to emergency situations, all releases of otherwise confidential information should be made on a department-to-department basis, through designated officers;⁹⁷¹
- within all government departments and agencies where confidential information was held, there should be a review of current systems;⁹⁷²
- all non-publicly available government information should be protected by legislation that prohibits its unauthorised release and dissemination;⁹⁷³ and that
- consistency should be sought in relation both to the rules for handling government information and in the law relating to its unauthorised release and disclosure.

⁹⁶² *ibid*, s. 14.

⁹⁶³ *Privacy Act 1988*, s. 16.

⁹⁶⁴ *Privacy Committee Act 1975*, s. 15.

⁹⁶⁵ ICAC, *Report on Unauthorised Release of Government Information*, Volume II, August 1992.

⁹⁶⁶ *ibid*, p. 165.

⁹⁶⁷ *ibid*, p. 166.

⁹⁶⁸ *ibid*, p. 150.

⁹⁶⁹ *ibid*, p. 153.

⁹⁷⁰ *ibid*, p. 157.

⁹⁷¹ *ibid*, p. 157.

⁹⁷² *ibid*, p. 161.

⁹⁷³ *ibid*, p. 171.

A series of recommendations were developed to reflect these findings.

18.120 At the time of the ICAC Report the Data Protection Bill (1992) had been introduced in Parliament, and was subject to an adjourned debate. Neither it, nor its several successors including the draft Privacy & Personal Information Protection Bill 1997, met with favour, and currently no legislation to construct a statutory regime for data protection is before the Parliament. The ICAC recommendations accordingly remain largely unimplemented. At least so far as information relating to the sexual abuse of children is concerned, the Commission considers it imperative that there be a review of the legislation, and current practices of the relevant departments and agencies. What is required is the establishment of a system, through legislation or memoranda of understanding, whereby information of this kind can be communicated, bona fide, between those agencies and departments that have a legitimate need for it, and without risk of exposure to civil or criminal liability.

SCREENING FOR EMPLOYMENT

18.121 For NSW Public Service personnel, comprehensive guidelines have been developed by the Privacy Committee and adopted, permitting criminal records (*Criminal Names Index* (CNI)) checks to be made concerning applicants selected for positions identified as 'sensitive'.⁹⁷⁴ These guidelines:

- relevantly exclude from such checks immediate school leavers (to avoid burdening them with records acquired for unacceptable behaviour during their formative years);
- are dependent upon the applicant supplying a correct name; (fingerprints not being required);
- confine the checks to convictions over the preceding five years, save in the case of DSE where an exemption was endorsed by the Privacy Committee to extend the period to 10 years;
- confine the checks to NSW convictions;
- do not reveal dismissed charges or juvenile offences (unless a conviction for an indictable offence or a current recognisance is recorded);
- do not reveal cases where a conviction was not recorded, (for example, under *Crimes Act 1900*, s. 556A);
- depend on the classification each department makes of 'sensitive positions', a classification which is not consistent and can allow a transfer from a non-sensitive position to a sensitive position without any check; and
- require destruction of the information received after it has been used for the purpose for which it was acquired.

18.122 The five year limitation on criminal record checks does not appear to take into account the policy reasons which exempt sexual offences from the spent conviction provisions of the *Criminal Records Act 1991*, and similarly from the provision of the *Crimes Act 1914* (Cth).⁹⁷⁵ In 1991 the Privacy Commission appropriately agreed to DCS extending criminal record checks to private sector child care workers, that is, licensees and authorised supervisors of care centres, home based child care providers, including foster parents and other adults living with them, and all family day care co-ordinators⁹⁷⁶ including information concerning sexual offences more than five years old.

⁹⁷⁴ NSW Public Service Personnel Handbook, 1.10.4 to 1.10.26.

⁹⁷⁵ In broad terms, where the individual is employed to care for or supervise minors or to provide services of that nature to children.

⁹⁷⁶ NSW Privacy Committee, Submission to RCPS, 9/8/96, RCPS Exhibit 2532.

18.123 The Commission considers that there should be no time limitation on the supply of information in relation to convictions for sexual offences involving children in response to CNI checks and recommends uniformity for all agencies and departments in this regard.

18.124 As a result of informal arrangements, some organisations outside the government sector have been able to secure criminal records checks on potential staff and carers, although in some instances a fee is charged. Organisations with such arrangements, of which the Commission learned, include Barnardos and the Scout Association. In some cases it seems that as a matter of practice, potential employees have been required to approach the Police Service directly to secure a personal check which they then pass to the potential employer. In other instances the inquiry is made through a liaison officer. An absence of any clear policy or practice in this regard was however indicated by the conflicting understanding of some of the senior police called.⁹⁷⁷ There is a need for the adoption of a clear and uniform practice in this regard.

18.125 Criminal records checks, whether made available to government or non-government organisations, are confined to inquiry of the Police Service for recorded convictions, and do not extend to intelligence concerning suspected offenders in the hands of the Service or other agencies. In this respect there seemingly is no consistent policy or guideline for intelligence of this kind. The evidence received by the Commission strongly suggests that a good deal of intelligence of this kind rests within different departments or agencies and is simply not shared. This information should, in the Commission's view, be available to the Children's Commission, and to the relevant departments or agencies working in this area, in accordance with the system and safeguards outlined in the final chapter of this Report.

18.126 A constraint in this regard for some bodies has been the fear of the consequences of the dissemination of information, which may be unverified, if it has the effect of denying employment to a potential applicant. The same problem arises in relation to information capable of being used for investigative purposes, a matter separately addressed later in this chapter.

18.127 In September 1996, the Chairman of the Privacy Committee of NSW, when giving evidence to the Commission concerning the proposed Privacy & Personal Information Protection Bill, indicated his general support for the development of data protection principles which would accommodate the need for co-ordinated investigation in child sexual abuse cases.⁹⁷⁸ He also agreed that subject to suitable safeguards, it would be in the public interest:

- for information to be disclosed to prospective employers, in both the public and private sector, where they are involved in the care, education or support of children,⁹⁷⁹ concerning charges that were pending, as well as those that had been dealt with under s. 556A *Crimes Act 1900*, or through a pre-trial diversion program;⁹⁸⁰ and for
- allegations that have been dealt with, but which had not led to charges being laid, to remain, for example, on a teacher's file.⁹⁸¹

18.128 A number of witnesses or organisations expressed their concern in relation to the difficulties in accessing information of this kind, or of conducting effective screening of workers and volunteers. They included Roger West,⁹⁸² the Commissioner of the Community Services Commission (CSC) who had earlier recommended:⁹⁸³

⁹⁷⁷ eg. J. R. Heslop, RCT, 27/5/96, pp. 25992-93; B. A. Lawson, RCT, 27/5/96, pp. 25952-53.

⁹⁷⁸ C. J. G. Puplick, RCT, 6/9/96, p. 31719.

⁹⁷⁹ C. J. G. Puplick, RCT, 6/9/96, p. 31720.

⁹⁸⁰ C. J. G. Puplick, RCT, 4/9/96, p. 31510; NSW Privacy Committee, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/104.

⁹⁸¹ C. J. G. Puplick, RCT, 4/9/96, p. 31515.

⁹⁸² R. West, RCT, 3/3/97, pp. 36597-98.

⁹⁸³ CSC, 'Who Cares? Protecting People in Residential Care', September 1996, RCPS Exhibit 3051/11, p. 15.

- criminal records checks for all applicants for positions in DCS, DSE, DJJ, DSR and CSC, as well as for employed or volunteer positions with non-government organisations funded or approved to provide residential care; and
- the establishment of an independent Community Service Probity Unit to carry out inquiries into the integrity and suitability of recommended applicants for such positions.

18.129 Similarly a group of agencies involved in family and children's services supported the need for such a system.⁹⁸⁴

18.130 The concept of a Probity Unit or similar procedure received support elsewhere.⁹⁸⁵ The Royal Commission favours a system which will assist employers in a broader check being made but which is not held out as an official probity clearance system. This is detailed in the final chapter of this Report where recommendations are made in relation to the creation of an Employment Information Centre (EIC) within the Children's Commission.

18.131 Additionally, as addressed later in this chapter, it would be appropriate for there to be:

- legislative protection to protect all persons and agencies supplying information to the Children's Commission in good faith, pursuant to this scheme;
- similar protection for the Children's Commission where it supplies information to prospective employers; and
- suitable guidelines for confidentiality in the management of such material, to be worked out in consultation with the relevant departments and agencies and the Privacy Committee. In this regard the existing guidelines concerning CNI checks would provide a suitable starting point for discussion, although some modification may be needed to encompass intelligence information in addition to information concerning convictions.

18.132 In developing suitable protective legislation, attention needs also to be given to employee references, or information provided in response to a direct inquiry by a prospective employer. As has been noted elsewhere, there has been considerable difficulty in this area, with bare certificates of employment, and equivocal references being supplied which were unlikely to signal even an amber light for employees who had been forced to resign, or even dismissed following allegations of child sexual abuse. Employers arguably face potential civil liability:

- in defamation, and possibly negligence,⁹⁸⁶ for inappropriate references, at the hands of the employee where a negative reference is given; and
- in negligence at the hands of a new employer, and possibly subsequent victims, where a positive reference is given in respect of a known or suspect offender who reoffends.

⁹⁸⁴ Illawarra Children's Service, CPC, Centacare Catholic Family Services, Federation of Parents and Citizens Associations, J. Halton and Department of Employment, Education and Training, RCPS Exhibit 1792.

⁹⁸⁵ L. Wakeman, Submission to RCPS, 29/7/96, RCPS Exhibit 2529/57; DSE, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/92, pp. 7-8; G. Wright, Wollondilly Shire Council, Submission to RCPS, 7/8/96, RCPS Exhibit 2529/95, pp. 1-2; Confidential Submission to RCPS, 2/8/98, RCPS Exhibit 2529C/97, p. 3; K U Children's Services, Submission to RCPS, 8/8/96, RCPS Exhibit 2529/114, pp. 1-2; P. Parkinson, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/117, p. 11; L. Blayney, Deniliquin Family Support Services, Submission to RCPS, 8/8/96, RCPS Exhibit 2529/129; Confidential Submission to RCPS, August 1996, RCPS Exhibit 2529C/146, p. 19; Interchange Respite Care, Submission to RCPS, 10/9/96, RCPS Exhibit 2529/158, p. 2; Wingecarribee Health Service, Submission to RCPS, 18/9/96, RCPS Exhibit 2529C/166; Brother R. J. McDonald and the Provincial Council of the St Mary's Province of the Christian Brothers, Submission to RCPS, 12/2/97, RCPS Exhibit 2519C/178, pp. 34-36; and see M. J. Edwards, RCT, 11/7/96, p. 28611.

⁹⁸⁶ *Spring v Guardian Assurance Plc* [1195] 2 AC 296; although see *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32.

This should not be the case, as was suggested in a number of submissions,⁹⁸⁷ and the Commission recommends legislation accordingly.

18.133 Additionally, there would be a need to amend the existing requirements under Clause 28 of the Public Sector Management (General) Regulation 1996 under the *Public Sector Management Act 1988* to permit the retention of information concerning disciplinary charges which are not established, where the information relates to alleged child sexual abuse. This is in recognition of the circumstance that for all kinds of reasons, having nothing to do with the underlying truth of the allegation, these charges may not proceed, or may fail at the disciplinary level, yet patterns of conduct of this kind may be essential in any consideration of the question whether an employee presents an unacceptable risk. The equivalent regulation has already been amended in relation to DSE teachers.⁹⁸⁸ The Commission would have no objection to the development of suitable guidelines for the secure retention of this material, and for the manner in which it might be used.⁹⁸⁹

G. LAW ENFORCEMENT INTELLIGENCE DATABASE

18.134 A further matter for consideration, is the establishment of a suitable mechanism for the central collection of intelligence concerning paedophile activity, to facilitate its dissemination, on an appropriate basis, subject to suitable safeguards, to all who may have a legitimate requirement for access to it.

18.135 The need for some such system is obvious given the present disorganised system, in which:

- critical information available to some agencies remains unknown to others, and in which;
- paedophiles have been known to move from job to job, or from place to place, without being detected, although it later becomes known that one or other agency holds information concerning them.

A NATIONAL REGISTER ?

18.136 It is an issue that transcends State boundaries and calls for national co-operation, because of the mobility of paedophiles, and because of the developing use of on-line services which may facilitate interstate links. There have already been moves in the direction of securing greater co-operation, for example:

- in March 1997, the State and Territory Education Ministers agreed in principle to the establishment of a National Register of persons deemed unsuitable for teaching because of convictions or dismissal for sexual misconduct;⁹⁹⁰ and

⁹⁸⁷ Brother R. J. McDonald and the Provincial Council of the St Mary's Province of the Christian Brothers, Submission to RCPS, 12/2/97, RCPS Exhibit 2519C/178.

⁹⁸⁸ Teaching Services (Education Teaching Service) Regulation 1994, cl. 19, amended by Teaching Services (Education Teaching Service) Amendment Regulation 1997, NSW Government Gazette, 8/4/97, p. 1891.

⁹⁸⁹ NSW Privacy Committee, Submission to RCPS, 9/8/96, RCPS Exhibit 2532, appeared to accept such an approach at p. 7.

⁹⁹⁰ See Volume IV, Chapter 10 of this Report.

- in a report prepared in May 1996 for the Australasian Police Ministers' Council (APMC) the Australian Bureau of Criminal Intelligence (ABCI) proposed the development of a national database for law enforcement agencies;⁹⁹¹ with the following features:
 - the use of the Australian Criminal Intelligence Database (ACID) nationally to collect and store intelligence in this area of activity;
 - the placement of paedophile activities on the Violent Crime Linkage Analysis System (ViCLAS); and
 - the provision to the ABCI by participating agencies of names of all known or suspected paedophile and child sexual offenders for inclusion on a national index.

18.137 The NSW Police Service has commenced work towards implementation of the ABCI recommendations, and in a Status Report, as at May 1997,⁹⁹² it noted that:

- it has committed to using ACID as the national database for information concerning paedophiles with CPEA having had the ability to download intelligence reports to ACID from February, 1997.
- familiarisation training for CPEA with the re-engineered version of ACID has been implemented;
- the CPEA plans to adopt and utilise ViCLAS for more detailed profiling of paedophile suspects; and that
- the CPEA has provided ABCI, via disseminations of intelligence reports through ACID, with the names of all known or suspect paedophiles and child sexual offenders for inclusion on the national index.

18.138 The Service intends that the CPEA should hold, on behalf of the State Intelligence Group (SIG), all of its intelligence holdings on child abuse offenders, including child sexual abuse offenders.⁹⁹³ This clearly is appropriate.

18.139 The ABCI involvement in the area of paedophilia is lengthy:

- in 1989 it began a probe into child sexual abuse and paedophilia at a national level;
- in 1990, a national project, code named 'Egret', was commenced to co-ordinate the collection and dissemination between law enforcement agencies of intelligence on organised paedophile activity;
- in 1992, the Australian Police Ministers' Council directed the ABCI to produce a national assessment on paedophiles and child sexual abuse - an assessment which conservatively estimated that some 40,000 children per year were being abused within familial and extrafamilial settings, and that paedophiles come from all walks of life and all social and financial strata of society; and
- in May 1996, as earlier mentioned, in response to the Parliamentary Joint Committee Report on Organised Criminal Paedophile Activity,⁹⁹⁴ the ABCI presented its Report *How the Flow of Information on Paedophile Suspects can be Enhanced*.⁹⁹⁵

⁹⁹¹ ABCI, Report to APMC, *How the Flow of Information on Paedophile Suspects Can be Enhanced*, 1/5/96, RCPS Exhibit 2353C.

⁹⁹² NSW Police Service, CPEA Status Report on the implementation of recommendations of ABCI Paedophile Report, 7/5/97, RCPS Exhibit 3187C.

⁹⁹³ J. R. Heslop, RCT, 28/5/96, pp. 25990 & 26019.

⁹⁹⁴ Report by the Parliamentary Joint Committee on the National Crime Authority, National Strategic Assessment, *Organised Paedophile Activity*, November 1995.

⁹⁹⁵ ABCI, Report to APMC, *How the Flow of Information on Paedophile Suspects Can be Enhanced*, 1/5/96, RCPS Exhibit 2353C.

18.140 The ABCI currently offers a number of services in the field of child abuse and missing persons, including:

- assistance with the implementation of and training for the ViCLAS system through the Australian Violent Crime Analysis Centre (AVCAC); and
- investigative support and public awareness strategies for missing persons inquiries through the National Missing Persons Unit (NMPU).

18.141 It has also established valuable links with law enforcement agencies in North America and Europe having specialised experience in exploited and missing children. These links may assist in expanding the training and information available to law enforcement agencies in this country, in tracing missing children.

18.142 This accumulated expertise should be utilised by the NSW Police Service, and the Commission supports the creation of a National Index or Register of paedophiles, having regard to their mobility and potential for recidivism.

A REGISTER OF CONVICTIONS OR INTELLIGENCE ?

18.143 The Commission notes the privacy concerns expressed by the Parliamentary Joint Committee on the National Crime Authority⁹⁹⁶ in respect of the establishment of any national register which includes information other than convictions, and in ensuring equity to those who might be the subject of false allegations.⁹⁹⁷

18.144 The danger with a national register confined to convictions, however, is that:

- its law enforcement utility would be limited, and
- by its incompleteness it might lull users into a false sense of security.

18.145 If there were to be a national register including intelligence as well as convictions, available for both law enforcement and screening purposes, then it would need to accommodate:

- a caveat system for sensitive information relevant to ongoing inquiries;
- the flagging of sufficient details for those offences which by reason of variations between States and Territories concerning, for example, the 'ages of consent' might mean that behaviour, which is unlawful in one jurisdiction, would not constitute an offence in another State;
- any impediments on dissemination, arising by virtue of the *Commonwealth Privacy Act 1988*, (particularly Principal 10);
- the development of suitable threshold tests for each possible user before information is released; and
- the development of some mechanism whereby a person who challenges the accuracy of information placed on the system could correct the entry if incorrect, or at least place his own account on the record.

⁹⁹⁶ Australia Parliament, *Organised Criminal Paedophile Activity: A Report by the Parliamentary Joint Committee on the National Crime Authority*, Parliament House, Canberra, 1995, RCPS Exhibit 3220, pp. 63-70 .

⁹⁹⁷ Report by the Parliamentary Joint Committee on the National Crime Authority, National Strategic Assessment, *Organised Paedophile Activity*, November 1995, pp. 63-70.

18.146 Safeguards of this kind would obviously risk the integrity and worth of the system as a law enforcement intelligence based system. It is impracticable to allow full freedom of information access to intelligence holdings or to provide a review or 'appeals' system. The solution is not to abandon such holdings, but to ensure integrity in intelligence gathering as well as tight controls on the security of the information collected, and to confine access to law enforcement agencies. Upon this basis, the proposals would provide a positive step forward. The details for implementation are better left to the relevant ABCI partners and Police Ministers.

18.147 For these reasons, the Royal Commission favours so much of the proposal as would establish the ABCI as a central national repository of paedophile intelligence for law enforcement purposes. For employment screening, however, it prefers the system proposed in the final chapter of this Report. The Employment Information Centre (EIC) within that Commission could inform itself through access to the Police Service, which in turn would have access to the ABCI, subject to caveat and operational need for security and have the capacity to disseminate information on a controlled basis. Moreover, the procedures contemplated would ensure fairness to an applicant for employment in settling any dispute concerning allegedly inaccurate information.

H. DISSEMINATION OF WARNINGS

18.148 There remains a need for the Police Service to have the capacity to provide a warning concerning the presence of a paedophile offender (convicted or reasonably suspected of such conduct) in a particular neighbourhood, to other government departments and agencies, to the proposed Children's Commission, and to other approved parties where:

- that information is based on reasonable suspicion;
- the dissemination is made bona fide; and
- it is necessary for such a warning to be given to protect a child or children at possible risk of sexual abuse, from that person.

18.149 The Commission considers that guidelines should be developed to govern such dissemination, in the form of Commissioner's Instructions. A policy of this kind, adopted by the North Wales Police, was examined recently by the Court of Appeal (UK).⁹⁹⁸ The policy was challenged by two convicted paedophiles following release of information to the owner of a caravan site concerning their presence at that site, at a time approaching a holiday period. Relevantly the policy provided:

... where an officer acts in the honest belief that his/her disclosure of certain information is necessary for the protection of an individual who may otherwise become the victim of crime that disclosure would be defensible. The disclosure must only be made on a need to know basis.

The Police have an obvious duty to protect the public and would no doubt be subject to adverse publicity were they to fail to do so.

...

In any situation where it is considered that the release of a person's name or any personal details should be made known to the public either by circulation to statutory bodies such as Education Authorities or the media, the rationale being that it is in the public interest, then:

- A report must be submitted prior to any decision being made to Headquarters CID (Detective Superintendent Operations) for the advice of the Force Solicitor to be obtained;
- Agreement by the Force Solicitor is received before further action is taken.

⁹⁹⁸ *R v Chief Constable for the North Wales Police Area Authority and others: Ex parte AB & CD*, High Court of Justice, Queen's Bench Division, 10/7/97; see also 'Police entitled to make limited disclosure of paedophiles' whereabouts', Law Report, *The Times*, 14/7/97, p. 41.

18.150 The validity of the policy was upheld, the Court noting that it:

- recognised the general principle that police information about former paedophile offenders should not be disclosed unless the public interest required it;
- acknowledged that disclosure could only be justified for the protection of a member of the public who might otherwise become the victim of crime and who might be in need of protection; and that it
- was clear that each case would be considered on its merits and subject to clearance at the highest level before disclosure was made.⁹⁹⁹

The release of general guidelines prepared by the Home Office has recently been announced.¹⁰⁰⁰

18.151 The Commission considers that the balance of the public interest would favour the release of warnings of this kind by the Police Service, in accordance with similar guidelines. The release of warnings on a case by case basis, and in response to a genuine threat, is far preferable to the Megan's law approach earlier mentioned. As in the case reviewed, it would normally be appropriate to inform the paedophile in advance as to the proposed release of such warning, so that he could voluntarily move away from a high risk situation, or withdraw any application for paid or voluntary work that might place him in close proximity to children.

18.152 Again, it would be appropriate to provide suitable statutory protection from civil liability in relation to the provision of a warning within these guidelines.

18.153 In the event of privacy legislation being introduced in NSW, the Commission considers it essential that the legitimate needs of law enforcement, and of the screening of employees working in close contact with children identified in this Report, be taken into account. In this regard it considers Principle 10 under the *Commonwealth Privacy Act 1988*, to be unduly restrictive in that it would not seem to permit the supply of a warning of the kind examined in this Section, or the dissemination of information for screening purposes.

18.154 For completeness, it would also be appropriate for the Regulations under the *Public Sector Management Act 1988*¹⁰⁰¹ to be amended to permit information obtained during a disciplinary inquiry to be released to the Police Service and to the Children's Commission where it concerns child sexual abuse.

18.155 In considering the need for a warning system, the Royal Commission has taken into account the practical difficulties which arise, for example, with any system of self notification as is revealed in the following case study:

CASE STUDY

18.156 In brief summary, in 1995 BP1 pleaded guilty to seven counts including the aggravated sexual abuse of a child under 10 years. Sentence was deferred conditional upon him entering into a recognisance to be of good behaviour for three years, which was itself conditional upon him obeying all reasonable directions of an officer of the NSW Probation Service and attending such counselling as directed:

- a direction was given that he not have contact with persons under the age of 16 years unless supervised by a responsible adult;

⁹⁹⁹ *R v Chief Constable for the North Wales Police Area Authority and others: Ex parte AB & CD*, High Court of Justice, Queen's Bench Division, 10/7/97; see also 'Police entitled to make limited disclosure of paedophiles' whereabouts', Law Report, *The Times*, 14/7/97, p. 41.

¹⁰⁰⁰ *The Australian*, 12/8/97.

¹⁰⁰¹ Public Sector Management (General) Regulation 1966, cl. 26(3).

- as a result of concern by a counsellor as to his contact with prepubescent females, he was required to sign a contract which, as subsequently amended, recorded that:
 - he had been directed by the probation and parole officer not to be in the company of persons under the age of 16 years unless accompanied by a responsible adult as approved by a probation officer; and that
 - should he have associations with persons who have children under the age of 16 years he would advise such persons of his offending history and disclose details to his probation officer so that reasonable inquiries could be undertaken, and so that the officer could give a direction that such person be informed of his offending background;
- in November 1996, the probation officer received a telephone call from a local tour operator reporting that he had received a very large number of complaints concerning BP1, which among other matters of misconduct, included inappropriate contact with children. His prior record had not been disclosed to the tour operator who had referred families to him, in respect of the recreational facility he conducted, nor had his contacts with children been reported to the probation officer.
- after being made aware of these allegations, BP1 moved to another country town; and
- in mid-1997, the probation officer was informed by local police that BP1 was again in contact with school children under the age of 16, in connection with his business, a contact that he had not notified either to those in charge of the children, or to his probation officer.

18.157 Although a carefully structured regime for monitoring of BP1 had been established, including an obligation to self notify in circumstances of potential high risk, those arrangements did not work.¹⁰⁰²

18.158 An even more compelling case concerning the dangers arising from the ease with which paedophiles have been able to move between towns and jobs, and the need for the Police Service to be able to supply a suitable warning, is that of HE1, examined earlier in this Report.¹⁰⁰³

18.159 The proposed model outlined earlier and the system outlined in the final chapter of this Report would cater for these cases, and act as a far more effective restraint on the capacity of paedophiles to transfer from one situation of abuse to another.

RECOMMENDATIONS

The Commission recommends the following:

- ◆ An ongoing public awareness campaign co-ordinated in conjunction with the Centre for Child Protection in the Children's Commission, designed to reach both city and rural communities, focused on preventative and protective education and directed to children, their families and those who deal with children on a regular basis (paras. 18.57 & - 18.59).
- ◆ Consideration be given to a permanent phone-in program to be set up by the Police Service, DSE and Health in conjunction with the Children's Commission along the lines of Operation Paradox, both to collect information and also to provide preventative and protective advice (paras. 18.61 & 18.62).

¹⁰⁰² An even more compelling case demonstrating the need for access to information is detailed in Volume IV, Chapter 9 in relation to HE1.

◆ Encouragement be given to continuing education in relation to child sexual abuse issues and protective behaviours provided through government and non-government schools, which is regularly updated (paras. 18.63 & 18.64).

◆ Consideration be given to the introduction of a system for the compulsory registration with the Police Service of all convicted child sexual offenders, to be accompanied by requirements for:

- the notification of changes of name and address; and for
- verification of the register;

following consultation with the Police Service, ODPP, Corrective Services, the Privacy Committee and other interested parties.

◆ The extension (by Regulations) of the mandatory reporting obligations under the *Children (Care and Protection) Act 1987* to a wider category of prescribed persons, to include, in addition to those already named:

- chief executives of bodies conducting schools;
- persons in charge of child care centres;
- chief executives or persons in charge of bodies providing welfare, social and sporting activities involving children;
- persons in charge of residential care centres and refuges for children;
- social workers, welfare workers and youth workers outside schools; and
- health workers generally (para. 18.103).

¹⁰⁰³ Volume IV Chapter 10 of this Report.

- ◆ Consideration be given to dealing with non-notification as a disciplinary offence, rather than as a criminal offence (para. 18.109):
 - alternatively, confining the consequence of non-disclosure by a mandatory notifier, as defined under the *Children (Care and Protection) Act 1987*, to a summary offence under that Act, and amending the Crimes Act s. 316(1) accordingly to exempt such categories of notifier from its reach, in relation to information received in the course of their official duties (para. 18.111); and
 - extending the time for prosecution of such an offence to 3 years (para. 18.111).
- ◆ A review of the legislation under which the Police Service and the other departments and agencies charged with the care and protection of children operate, and of their current practices, with the assistance of the Children's Commission and the Privacy Committee to ensure that a comprehensive and acceptable system exists to permit the exchange, bona fide, between those agencies of information concerning the sexual abuse of children, and of persons suspected of such abuse (para. 18.120).
- ◆ Removal of any time restriction as to the supply of information upon a CNI check concerning past convictions for sexual offences against children, where the information is sought for the purpose of employee screening (paras. 18.122 & 18.123).
- ◆ Amendment of Clause 28 of the Public Sector Management (General) Regulations 1996 under the *Public Sector Management Act 1988* to permit the retention of information concerning disciplinary charges which are not established, where it relates to the alleged sexual abuse of children, subject to a requirement that:

- such information be kept in a separate and secure file; and that
- the employee be permitted to place on the file a statement in reply to the allegation (para. 18.133).
- ◆ Encouragement be given to the establishment of a National Index of Intelligence concerning paedophile offenders for use by law enforcement agencies, through the agency of the ABCI (paras. 18.141 & 18.147).
- ◆ Empowerment of the Police Service to give a warning to relevant government departments, agencies and community groups relating to the presence of a person convicted or seriously suspected of child sexual assault offences, subject to guidelines to be established in consultation with the Privacy Committee, where reasonable grounds exist for the fear that such person may place a child or children in the immediate neighbourhood of the offender in serious risk of sexual abuse (paras. 18.141 & 18.153).
- ◆ Amendment of Regulation 26(3) under the Public Sector Management Act to permit information obtained during disciplinary inquiries to be released to the Police Service and to the Children's Commission, where it concerns child sexual abuse (para. 18.154).

CHAPTER 19

THE MANAGEMENT OF THE PAEDOPHILE

19.1 A necessary element in dealing with child sexual abuse is the response of the system towards the offender, and in particular striking an appropriate balance between the objectives of punishment and rehabilitation/management.¹⁰⁰⁴ A number of problems arise in this respect which need to be identified and addressed. In summary, they concern:

- the circumstance that for many offenders their behaviour is strongly addictive, and not something they wish either to acknowledge or alter;
- the fact that for almost all offenders there is a good deal of cognitive distortion involved, and disclosure is invariably accompanied by denial, rationalisation and minimisation;
- the fact that the greater proportion of abusers go undetected, and as a result are not forced to confront their criminality or wrongdoing in a way that forces them into any form of treatment;
- the uncertainty, and lack of definitive empirical research as to whether treatment is of long-term value in reducing recidivism, let alone any convincing comparative study of the modalities of treatment offered;
- the heterogenous nature of offenders, some of whom are suitable for and prepared to seek out treatment for behaviour modification, others of whom are utterly resistant to any such opportunity;
- the community reaction which places a premium on punishment for such offenders, and would prefer to see the limited funding resources available directed to the victim rather than the offender;
- the ethical and legal restrictions which arise in relation to any form of compulsory submission to behaviour modification;
- the extent to which the victim or victims should be involved in any decision or decisions as to the manner in which the offender should be punished, treated and/or managed; and
- the conflict which can arise between securing the full and frank co-operation and disclosure of the offender to maximise any gain in treatment, and the obligation to notify any disclosure of prior offences in order to protect children who may still be at risk.

19.2 These are important issues, because as was pointed out in the evidence, to make society safer for children it is necessary to work with the offenders who are involved in their abuse.¹⁰⁰⁵ If by education, treatment, or some other form of management, their behaviour can be modified, and recidivism reduced or in the best case, reoffending prevented, then that is a matter to be seriously explored.

¹⁰⁰⁴ What may be considered clinically effective, ie., a reduction in the number of offences committed by a particular in a year, would not be considered legally or socially effective, as legally a single offence is considered as a failure of the treatment. See A. Blaszczyński, RCT, 30/10/96, p. 33703.

¹⁰⁰⁵ R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24188.

19.3 Although there is no consensus among experts, whether from the fields of mental health or criminology, as to the classification of paedophile offenders, let alone any one typical profile,¹⁰⁰⁶ the Commission sees these offenders as broadly grouped within the following categories, at least for the purposes of treatment:¹⁰⁰⁷

- the intellectually disadvantaged or brain damaged offender,¹⁰⁰⁸ whose lack of awareness of moral standards or lack of communication skills has prevented him or her from establishing appropriate relationships, and who by default, has offended against children;
- the offender whose primary orientation is towards an adult partner and who for various reasons, usually as a result of stress or crisis offends against children, often his or her own¹⁰⁰⁹ and for whom the risk of recidivism is generally considered to be less;¹⁰¹⁰
- the offender whose primary and compulsory sexual fixation is towards children¹⁰¹¹ but who possesses emotional or moral problems with that orientation, and who would wish professional help to modify or control his or her behaviour, and to avoid imprisonment;¹⁰¹²
- the offender who has no problems with his or her conscience, who sees sexual relationships with children, as simply a variant of normal sexuality, and who regards the prohibition of that conduct, and the punishment of it, as a wrong against himself or herself, and who has not the slightest interest in changing the behaviour.¹⁰¹³ This offender is considered the hardest to treat and the most likely to reoffend;¹⁰¹⁴
- the psychopathic offender, who when driven by frank psychiatric disorder, is capable of sadistic psychosexual crime, but for whom the age or sex of the victim may be more a matter of convenience or opportunity, than any primary sexual orientation;¹⁰¹⁵ and
- the adolescent offender who may fit into any one of the above categories, but whose offending is harder to define or detect and for whom there is thought to be a compelling case for therapeutic intervention.¹⁰¹⁶

These categories are not definitive and there may be a cross-over between them. The circumstances of the abuse such as whether the offender commits familially or extrafamilially, or both, are important considerations when treatment is being determined.¹⁰¹⁷

¹⁰⁰⁶ See Volume IV, Chapter 3, of this Report.

¹⁰⁰⁷ See Volume IV, Chapter 3 for a general discussion of the categories of paedophile offenders.

¹⁰⁰⁸ Known as the 'inadequate paedophile' by R. K. Wyre, (videolink to Birmingham, UK), RCT, 26/4/96, p. 24195 and K. V. Lanning, *Child Molesters: a Behavioral Analysis for Law-Enforcement Officers Investigating Cases of Child Sexual Exploitation*, 2nd edn, National Center for Missing and Exploited Children, Quantico, 1987, RCPS Exhibit 2538/2, pp. 272-73; or 'secondary paedophilia', M. Glasser, 'The Psychodynamic Approach to Understanding and Working with the Paedophile', in *Understanding the Paedophile*, Portman Clinic, 1989, p. 1. See also K. J. Wallis, RCT, 8/7/96, p. 28321 and Volume IV, Chapter 3 of this Report.

¹⁰⁰⁹ Known as the 'regressed' paedophile in *DSM-IV: Diagnostic and Statistical Manual of Mental Disorders*, 4th edn, American Psychiatric Association, Washington DC, 1994, RCPS Exhibit 3119; and by R. Wyre & A Swift, *Women, Men & Rape*, Headway, Sevenoaks, 1990, pp. 39-40; as the 'situational regressed offender' by K. V. Lanning, *Child Molesters: a Behavioral Analysis for Law-Enforcement Officers Investigating Cases of Child Sexual Exploitation*, 2nd edn, National Center for Missing and Exploited Children, Quantico, 1987, RCPS Exhibit 2538/2, p. 6; and as the primary pseudo-neurotic offender by M. Glasser, 1989, op cit, p. 1. See also Volume IV, Chapter 3 of this Report.

¹⁰¹⁰ Professor Pithers believes that there are some individuals who may never reoffend, but it depends on the circumstances and under further stress without support, the risk of reoffending is higher. See W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, pp. 31380-82.

¹⁰¹¹ Known as the 'fixated paedophile' in *DSM-IV* and by R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24194, and as the 'preferential seduction' offender by K. V. Lanning, *Child Molesters: a Behavioral Analysis for Law-Enforcement Officers Investigating Cases of Child Sexual Exploitation*, 2nd edn, National Center for Missing and Exploited Children, Quantico, 1987, RCPS Exhibit 2538/2, p. 7.

¹⁰¹² See K. J. Wallis, RCT, 8/7/96, pp. 28320-21; D1, RCT, 18/3/96, p. 22042.

¹⁰¹³ Known as the 'fixated paedophile' in *DSM-IV*, the non-predatory/predatory paedophile by R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24198, and as the 'primary invariant paedophile' by M. Glasser, 'The psychodynamic approach to understanding and working with the paedophile', in Institute for the Study and Treatment of Delinquency, *Understanding the Paedophile*, Portman Clinic, 1989 p. 1; K. J. Wallis, RCT, 8/7/96, p. 28321; K. Doyle, RCT, 4/7/96, p. 28255.

¹⁰¹⁴ R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, pp. 24227-28.

¹⁰¹⁵ Also known as the 'sadistic offender', *DSM-IV*; the 'predatory paedophile', R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24198; or the 'sadistic preferential offender', K. V. Lanning, *Child Molesters: a Behavioral Analysis for Law-Enforcement Officers Investigating Cases of Child Sexual Exploitation*, 2nd edn, National Center for Missing and Exploited Children, Quantico, 1987, RCPS Exhibit 2538/2, pp. 7-8. See also Volume IV, Chapter 3 of this Report.

¹⁰¹⁶ See Volume IV, Chapter 3 of this Report.

¹⁰¹⁷ Professor Blaszczyński emphasises the need for different approaches and that offenders need to be assessed to find the basis of the problem with treatment directed to that basis; A. Blaszczyński, RCT, 30/10/96, p. 33721; Professor Pithers believes that to have any

19.4 For none, on the evidence received by the Royal Commission, can there be any certainty that the experience or threat of imprisonment will act as an effective deterrent, or that treatment will prevent an offender from reoffending.¹⁰¹⁸ Clearly, however, there may need to be some difference in the response of the system, according to the characteristics of the individual offender. That response involves at least three possible stages of intervention:

- treatment of an offender outside the corrections system, either in response to a voluntary request for assistance¹⁰¹⁹ or as part of a pre-trial diversion program;
- assistance and counselling while serving a sentence; and
- supervision and treatment during, or as a condition of probation and parole.

19.5 The purpose of this chapter is to explore these issues, to survey some management and treatment options, and to consider any appropriate recommendations for reform.

A. TREATMENT TECHNIQUES

19.6 Formerly there was a degree of despair about the effectiveness of any form of treatment for sex offenders, which in some countries led to drastic measures such as long term incarceration, admission to psychiatric hospitals, and physical methods such as castration and even brain surgery.¹⁰²⁰

19.7 A more enlightened approach now in vogue is not to expect a cure,¹⁰²¹ but rather to concentrate on treatment that controls the conduct, through providing the offender with:

- greater insight and understanding into his or her behaviour;
- the means of avoiding high risk situations and managing the factors which are known to disinhibit or precede offending;
- an awareness of life long vulnerability and liability to relapse; and
- a resource for ongoing support and supervision.

THERAPIES AVAILABLE

19.8 Although no single treatment is suggested as the sole or preferable option, there are a variety of therapies available which can be employed, sometimes in combination. In summary, they include the following:

success with treatment, the myth that all sex offenders are alike has to be dispelled, W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, p. 31378; Dr Glaser says there is no one test, investigation or form of assessment which will identify a person as a sex offender or predict patterns of offending, W. F. Glaser, 'Sex Offenders', in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 283.

¹⁰¹⁸ The general consensus is that paedophiles cannot be cured only managed and that offending only ceases while the offender is imprisoned. See W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, pp. 31380-81; A. Blaszczyński, RCT, 30/10/96, pp. 33703-04; A. S. Gray, RCT, 3/9/96, p. 31388; W. F. Glaser, 'Sex Offenders', in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 280; and N. McConaghy, RCT, 6/9/96, p. 31696.

¹⁰¹⁹ Currently, for offenders there is no investment in being truthful about offences, R. K. Wyre (videolink to Birmingham, UK), RCT, 26/4/96, pp. 24215-16. Although requests for treatment from offenders who have been detected are rare, many will accept treatment when faced with imprisonment. Requests for treatment from individuals who have not yet been detected are especially rare. See A. Blaszczyński, Submission to RCPS, 29/7/96, RCPS Exhibit 2529/52. One offender informed the Commission that many paedophiles would come forward if they could talk about their problem without being arrested, KR248, RCT, 20/8/96, p. 30951. Another offender said that current penalties encourage paedophiles to cover up their activities and that counselling and remedial action would be better, W35, RCT, 20/8/96, p. 30969.

¹⁰²⁰ W. F. Glaser, 'Sex Offenders', in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 276.

¹⁰²¹ Several witnesses suggested operating on the basis that there is 'cure' implies that the offender is sick thus supplying the offender with a clinical justification for their behaviour rather than addressing the need to correct the behaviour. It also implies they should be treated differently to other persons who commit criminal offences. See S. Goodman, RCT, 9/7/96, p. 28461; R. K. Wyre, RCT (videolink to Birmingham, UK), 3/9/96, p. 31379.

Aversion Therapy

19.9 This involves subjecting the patient to unpleasant stimuli (electric shock applied to the fingers, or unpleasant odours such as ammonia) paired with verbalised deviant fantasies or images, for example, of naked children.¹⁰²² This procedure is expected to act by classical conditioning to produce an aversion to the stimulus which provokes the inappropriate sexual response, and by generalisation of that aversion to the behaviour in reality.¹⁰²³

Covert Sensitisation

19.10 This form of therapy requires the offender to visualise the offending behaviour as well as visualising the aversive aspect of his or actions, such as arrest or discovery, in an attempt to discourage the behaviour.¹⁰²⁴

Imaginal Sensitisation

19.11 Similar to aversion therapy, this treatment attempts to train a patient to relax and visualise situations where an offence is carried out but also to visualise remaining relaxed and in control and leaving the situation without offending; the aim being that to condition the offender into no longer experiencing sexual excitement in the situation.¹⁰²⁵ This form of therapy is sometimes paired with chemical or pharmacological treatment.

Pharmacological Methods

19.12 Three types of agents are currently in use:

- anti-psychotic medications such as Thioridazine Hydrochloride (Melleril), a major tranquilliser which, used in small doses, can decrease sexual arousal, although it has a side effect of sedation;¹⁰²⁶
- anti-androgen medications, such as Depo Medroxyprogesterone Acetate (Depo-Provera)¹⁰²⁷ administered by long term injection, and Cyproterone Acetate (Androcur) which is taken orally, each of which acts as an inhibitor of the production of testosterone in the male (thereby decreasing the frequency of erection and ejaculation) and as a tranquilliser on the central nervous system, inducing sexual calm. Both can have side effects including reduction in fertility, weight gain, increased blood pressure, hot flushes, fatigue, headaches, sleep disturbance, disturbances in sugar and lipid metabolism, and breast enlargement; and
- antidepressant medication such as Fluoxetine Hydrochloride (Prozac) and Clomipramine Hydrochloride (Anafranil), which have an effect on the serotonin neurotransmitters of the brain, and have been observed to have some therapeutic value in the treatment of obsessive-compulsive paraphilias. They are relatively free of side effects, but their comparative effectiveness compared with the anti-androgens is not yet established.¹⁰²⁸

¹⁰²² This form of treatment works on the 'arousal' of the offender, it does not address the behavioural aspects of offending. See R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24222.

¹⁰²³ N. McConaghy, RCT, 6/9/96, pp. 31690-91.

¹⁰²⁴ N. McConaghy, RCT, 6/9/96, p. 31691.

¹⁰²⁵ N. McConaghy, RCT, 6/9/96, p. 31691.

¹⁰²⁶ W. F. Glaser, 'Sex Offenders', in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 278.

¹⁰²⁷ Depo-Provera treatment has been used on sex offenders in Cooma prison, K. L. Wallis, RCT, 8/7/96, pp. 28320-21. Therapeutic effects are observed where the testosterone levels are reduced to somewhere between 10 and 30% of pre-treatment levels. See N. McConaghy, RCT, 6/9/96, p. 31703; and W. F. Glaser, 'Sex Offenders,' in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 279.

¹⁰²⁸ W. F. Glaser, 'Sex Offenders,' in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 279.

Family Therapy

19.13 Family therapy¹⁰²⁹ has questionable success for familial child sex offenders. It involves intensive treatment for the offender, the victim and the family members, using a combination of individual, paired and family group sessions.¹⁰³⁰

Cognitive Behavioural Therapy

19.14 There are a number of programs currently in use in Australia and overseas, most of which are prison based, although some are available in the community, either as part of a follow-up structure for prisoners released on parole or probation, or for voluntary patients.¹⁰³¹

19.15 They are based on similar aims, philosophies and methods,¹⁰³² and have as their key elements, development by the offender of an:

- acceptance of full responsibility for offending;
- an understanding of the antecedents to the offence;
- an understanding of the situations which involve a high risk of reoffending, and of the means of dealing with those situations in a non-offending way;
- an awareness of the distorted cognition and deviant beliefs which assist in justifying and rationalising the behaviour (for example, to repudiate the notion that children like sex with adults, or that early 'sex education' involving actual intercourse is good for them);
- appreciation of the impact of the offence on the victim or victims, and an empathy for them;
- acceptance of the existence of a life-long potential to reoffend; and
- establishment of a support network to monitor and assist post release.¹⁰³³

19.16 Treatment in cognitive behavioural programs normally takes place in groups, the members of which are encouraged both to support each other and to challenge each other's deviant ways of thinking and acting.¹⁰³⁴ Typically the program includes educational models such as:

- victim empathy - exposure to videos, discussions, and even victims, to help offenders understand the impact of their offending behaviour;
- social relationship and living skills - to assist offenders in developing appropriate means of interacting with others;
- sex education - to provide instruction on basic anatomical and physiological facts, and normal dating and sexual practices;
- anger management and relaxation skills - to deal with stress and mood changes;
- alcohol and drug awareness - to provide an understanding of their disinhibiting qualities.¹⁰³⁵

¹⁰²⁹ This therapy was devised by Mr H. Giaretto, but its reported low recidivism rate has not been replicated elsewhere, *ibid*, pp. 279-80.
¹⁰³⁰ *ibid*, p. 280.

¹⁰³¹ Programs using this method include, Mr Ray Wyre's Faithful Foundation, Kia Marama Programme in New Zealand, the prison programs in Queensland and Western Australia. Cognitive Behavioural Therapy is considered by some as one of the most effective therapies. See Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, p. 231.

¹⁰³² W. F. Glaser, 1996, *op cit*, p. 277.

¹⁰³³ See also Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, p. 231.

¹⁰³⁴ W. F. Glaser, 'Sex Offenders,' in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 277.

¹⁰³⁵ W. F. Glaser, 'Sex Offenders,' in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 278.

Such programs often employ a combination of treatment techniques to help offenders control their individual deviant sexual arousal, such as those already mentioned (covert sensitisation, imaginal sensitisation, aversion therapy and pharmacological treatment).

THE OUTCOME OF TREATMENT

19.17 There is ample evidence that conventional forms of punishment, whether they involve imprisonment or supervision in the community, have little value in reducing recidivism.

19.18 It is not suggested that imprisonment should be replaced as an outcome following disclosure. It is important that sexual offenders be punished, and be seen to be punished. It is also of value so far as it removes the offender from circulation for the duration of the sentence, although preventative detention is not something that the law embraces as an end in itself.¹⁰³⁶

19.19 Whether treatment provides any long term benefits in the reduction of recidivism has been questioned, and still is far from resolved.¹⁰³⁷

19.20 A number of problems do exist in reaching any firm conclusion in this regard, relating to the circumstances that:

- there is no completely objective measure in determining whether a treated offender has reoffended; re-arrest or further complaint are more reliable than a self report, but it is also known that the vast majority of offences do not lead either to a complaint or an arrest;
- there are practical difficulties in obtaining adequate sample sizes of treated offenders, and of maintaining them for long term follow up;¹⁰³⁸
- ethical and legal difficulties attach to any study, particularly double blind studies, using control groups whose members either get treatment or an inferior treatment, yet are allowed to remain in the community where they are at risk of reoffending;¹⁰³⁹
- many of the studies undertaken have involved the best motivated subjects, or those for whom a more positive outcome could be predicted from their behaviour characteristics and personal profile; and
- most studies involve offenders in prison who represent only a fraction of the total population of child sexual abusers, and even then constitute a heterogeneous group, making predictions for any subgroup very uncertain.

19.21 Notwithstanding these difficulties, and the now widely accepted proposition that there can be no promise of a cure for the committed paedophile, some recent work does suggest that generally, treated sex offenders reoffend less, and also less often than their untreated counterparts.¹⁰⁴⁰ Dr William Glaser¹⁰⁴¹ summarises this work as suggesting, *inter alia*, that:

¹⁰³⁶ *Veen v The Queen* (No. 2) 1983 164 CLR 465 at 472; Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, p. 230; W. F. Glaser, 'Sex Offenders,' in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 280.

¹⁰³⁷ NSW Child Protection Council Committee on Sex Offences Committed Against Children, Position Paper, Managing Sex offenders: a Child Protection Perspective (draft), June 1996, RCPS Exhibit 2146, p. 23.

¹⁰³⁸ W. F. Glaser, 'Sex Offenders,' in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 280.

¹⁰³⁹ *ibid*, p. 280; N. McConaghy, RCT 6/9/96, p. 31694.

¹⁰⁴⁰ *ibid*, p. 280.

¹⁰⁴¹ Dr William Glaser is an honorary Senior Lecturer, Department of Psychiatry at the University of Melbourne. He is also a consultant psychiatrist for the Psychosexual Treatment Program, Forensic Psychiatry Services and Health and Community Services Victoria.

- programs which are more comprehensive in nature tend to be more successful than those with more limited aims;
- institutional and community-based programs appear to produce similar results;
- the most effective type of treatments are those which are based on cognitive behavioural principles and/or which use pharmacological measures; and that
- there are no consistent predictors of treatment outcome, although motivation for the treatment seems to be very important.¹⁰⁴²

ETHICAL AND LEGAL IMPLICATIONS

19.22 Without attempting any exhaustive study, this area of treatment can involve something of a legal and ethical minefield. Several issues arise:

Consent

19.23 In general, it appears that treatment is more likely to be accepted if the offender is driven by a potential sanction;¹⁰⁴³ for example, pending imprisonment, Family Law proceedings, or pressure from the family. Voluntary clients may have less reason for full compliance with the program, and there may be less opportunity for the therapist to obtain a full history of the patient of the kind which is likely to emerge in a police investigation. On the other hand, the quality of the consent to treatment, and the truth of the reported response to it, may be affected if the submission to treatment is forced by fear of a sanction, or mandated by the Court, for example, as a condition of parole. Particular caution needs to be taken in these circumstances, in subjecting offenders to pharmacological treatments, which may have side effects. Additionally, concerns can arise as to any form of treatment that seeks to 'change' a person, particularly against his or her will, and even more so if the result of that 'change' is to bring out anger, frustration or other undesirable anti-social behaviour.¹⁰⁴⁴

The Role of the Therapist

19.24 The role of the therapist in treating sex offenders can present unique challenges not evident in the treatment of other offenders. It is important that the therapist remains aware of the needs and interests of the offender, the victim and the community. At times this may involve approaches which are coercive and less confidential than in other situations.¹⁰⁴⁵ The Royal Commission has noted with interest the differences between various programs in identifying whether the victim, the offender, or the community should be regarded as the 'client'. This is important in relation to any obligations of confidentiality or of notification that may attach, and in the provision of therapy which is coercive and contrary to the values and beliefs of the offender.¹⁰⁴⁶

Accountability

19.25 There is now an increasing possibility of therapists becoming involved in litigation, especially if their client reoffends. The therapist could then be accused of negligence, either in relation to the treatment itself or if their professional assessment had been that the offender presented a low risk of post-treatment recidivism.

¹⁰⁴² W. F. Glaser, 1996, op cit, pp. 280-81.

¹⁰⁴³ W. F. Glaser, 'Sex Offenders,' in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, p. 281.

¹⁰⁴⁴ *ibid.*

¹⁰⁴⁵ *ibid.*

¹⁰⁴⁶ *ibid.*

19.26 Care needs to be taken not to overstate the prognosis, or to encourage or permit an offender to return to high risk activities. Additionally there is a need for a system to prevent those who present an unacceptable risk from resuming, or taking up, work in activities involving close contact with children.¹⁰⁴⁷

B. MANAGEMENT AND TREATMENT WITHIN THE JUSTICE SYSTEM

19.27 Offenders convicted of child sexual abuse are poorly regarded by the remainder of the prison population, commonly being referred to as 'rock spiders'. As such they risk serious physical assault, harassment and reprisal, to the point that many need or choose to go on protection, rather than serve their sentence as a mainstream prisoner. Such circumstance is not conducive to their rehabilitation, since it tends to act as a disincentive to any frank confrontation of their criminality, and can deny them access to educational and other programs.

19.28 In the past the problem was reduced in NSW by the transfer of a large proportion of such offenders to one of three correctional centres, (Cooma, Junee and Kirkconnell) depending on their classification and length of sentence. As at July 1997 there were approximately 600 prisoners within the NSW Corrections system serving sentences (including periodic detention) for sexual offences involving children.¹⁰⁴⁸

19.29 Ad hoc programs for the counselling and rehabilitation of sexual offenders have existed within NSW since about 1986 but there have been interruptions and new directions from time to time. In part this has been due to lack of resources, or the absence of suitably qualified staff. Additionally, there seems to have been, at times, an absence of any clear understanding or policy as to the way these prisoners should be managed, or any attempt to differentiate, for the purpose of behavioural modification programs, between sexual offenders whose victims were respectively adults or children.

THE COOMA PROGRAM

19.30 A pilot program was established in 1986¹⁰⁴⁹ with the aim of assessing whether Cooma would be a suitable place for male sex offenders and whether they would add positively to the gaol culture. It followed:

- a comparison of work output of sex offenders and non-sex offenders in the tailor shop which showed that the former were generally more productive and more reliable than the other prisoners; and
- a survey of all the prisoners, of whom the majority were not sex offenders, which resulted in an 87% response in favour of the introduction of a sex offenders program at the gaol.¹⁰⁵⁰

19.31 When the program, known as the Sexual Offenders Assessment Program (SOAP), was subsequently established, there was a notable decrease in the incidence of physical assault within the prison, although there was some continuation of verbal harassment.¹⁰⁵¹

19.32 In essence, although the program went through several changes of staff, and was for a time interrupted, it involved a probation and parole officer, a welfare officer, and later a psychologist. There were two main components:

¹⁰⁴⁷ See Chapter 20 of this Volume.

¹⁰⁴⁸ Department of Corrective Services, Memorandum, 14/7/97, RCPS Exhibit 3173.

¹⁰⁴⁹ The pilot program was established by Mr Kevin Wallis, a probation and parole officer at Cooma prison who ran a six-month program with the 13 sex offenders at Cooma at the time: K. J. Wallis, RCT, 8/7/96, pp. 28315-17; K. L. Doyle, RCT, 4/7/96, pp. 28251-53.

¹⁰⁵⁰ K. J. Wallis, RCT, 8/7/96, p. 28315.

¹⁰⁵¹ K. J. Wallis, RCT, 8/7/96, p. 28316.

- a focus group, run by a psychologist, which concentrated on establishing a greater awareness by the inmate of the offence, and an acceptance of responsibility for it;¹⁰⁵² and
- a consolidation group, which aimed at building social and communication skills, as well as an external support network to prepare the prisoner for release.¹⁰⁵³

19.33 The program was originally planned to involve the inmate for two years, but because of the demand and limited resources it was confined to 12 months. Fixated paedophiles who were unable to accept the wrongness of their acts, or who attempted to disrupt the program, were excluded.¹⁰⁵⁴

19.34 In 1993, the newly appointed Director of Psychological Programs, Ms Catriona McComish became very concerned about the situation at Cooma.¹⁰⁵⁵ She gained the impression that there was:

- a deal of conflict at the institution in relation to the program;
- some confusion as to whether it was a psychological/therapeutic program or an assessment program;
- a problem as to accountability and supervision, particularly relating to the fact that a joint co-ordinator of the program was a private practitioner on a sessional contract;¹⁰⁵⁶ and
- a degree of conflict between the delivery of a service and the collection of intelligence, an aspect which had emerged when one of the staff involved intercepted and gave to the police a list of paedophiles which had been addressed to an inmate.

19.35 The SOAP was altered and became SOPE (Sexual Offenders Psychosexual Education) and an attempt was made to extend the program to Kirkconnell.¹⁰⁵⁷ The program has been affected by lack of support and lack of regular staff and, it seems, by some difference in opinion about its value. At times it has been terminated and then recommenced.¹⁰⁵⁸ While a program of one sort or another has remained in place, it is clear that it has never been adequate,¹⁰⁵⁹ or made available to all child sexual offenders.

19.36 Some aspects of the Cooma experience as recounted by Mr Kevin Wallis, who established the program, are of interest. It was his firm belief that it was inappropriate to speak in terms of 'treatment' for sex offenders, as to do so is to:

- acknowledge that they are sick, and provide them with a justification for their behaviour;¹⁰⁶⁰ and
- raise the prospect that they should be dealt with differently from other prisoners, for example, in linking their release to cure.

¹⁰⁵² K. L. Doyle, RCT, 4/7/96, pp. 28254 & 28257.

¹⁰⁵³ K. L. Doyle, RCT, 4/7/96, pp. 28254 & 28257.

¹⁰⁵⁴ K. L. Doyle, RCT, 4/7/96, p. 28256.

¹⁰⁵⁵ C. McComish, RCT, 10/7/96, pp. 28572-75.

¹⁰⁵⁶ C. McComish, RCT, 10/7/96, pp. 28577-78.

¹⁰⁵⁷ C. McComish, RCT, 10/7/96, pp. 28600-01.

¹⁰⁵⁸ K. L. Doyle, RCT, 4/7/96, p. 28277.

¹⁰⁵⁹ K. L. Doyle, RCT, 4/7/96, pp. 28278-79.

¹⁰⁶⁰ K. J. Wallis, RCT, 8/7/96, p. 28319.

19.37 Based on his experience at Cooma, Mr Wallis believed that there were positive signs for intervention in relation to the intellectually disabled group, and in relation to those offenders who have some moral conflict about their actions.¹⁰⁶¹ In the case of the former, that would essentially involve education in relation to sexually appropriate behaviour and in the formation of suitable relationships.¹⁰⁶² In the case of the latter Mr Wallis saw Depo-Provera as having some value as a treatment.¹⁰⁶³

19.38 Those offenders who do not see the inappropriateness of their activity, who endeavoured to manipulate the system, and had no intention of moderating their behaviour, were in Mr Wallis's view a group for which nothing could be achieved.¹⁰⁶⁴

19.39 He also saw advantages in a staged approach and for that reason once the offender had been through the program at Cooma, and had an appropriate classification, he was sent to Kirkconnell. It was expected that through the use of day leave, and additional visits, a more accurate assessment of their post-release risk could be made.¹⁰⁶⁵

19.40 Throughout the program Mr Wallis took the position that the child who had been abused was the client, and that his or her protection from further abuse should be the focus of the program. If, in the process of going through the program, the prisoner arrived at a new perspective of himself, adopted new behaviour, overcame low self esteem and felt a new confidence, then something had been achieved. The program was not, however, put forward as a treatment program.¹⁰⁶⁶ Rather it was described as management and assessment oriented.

19.41 Another matter which emerged during the Commission's hearings concerning the management of prisoners at Cooma, related to the circulation of child pornography and of pictures of children (advertisements and the like) which to most people would be regarded as inoffensive. Obviously the housing together of a group of like-minded prisoners is likely to encourage this type of exchange, and to generate discussions in which details of prior offences, fantasies, names of children and places for possible contact with them are revealed. For the unrepentant offender this was clearly seen as a problem and it provides a reason for weaning out, at an early stage, those offenders who are likely to disrupt any program, or who may wish to discourage those who are trying to do something about their criminality.

19.42 There were some positive assessments of the Cooma program. Professor Freda Briggs¹⁰⁶⁷ from South Australia found that:

- Cooma inmates in the SOAP were generally more open and frank than those she had encountered elsewhere;
- while offenders in the South Australian system denied their offences and responsibility, Cooma inmates were prepared to admit to their offences; and that
- inmates exhibited a high degree of respect for the staff at Cooma and towards SOAP.¹⁰⁶⁸

19.43 She recommended to the SA Corrective Services that the model be emulated in South Australia.¹⁰⁶⁹

¹⁰⁶¹ Mr Wallis called this group the 'moral conflict' group or 'transitory fixated paedophiles'. See K. J. Wallis, RCT, 8/7/96, pp. 28322-23.

¹⁰⁶² K. J. Wallis, RCT, 8/7/96, p. 28323.

¹⁰⁶³ K. J. Wallis, RCT, 8/7/96, p. 28321.

¹⁰⁶⁴ K. J. Wallis, RCT, 8/7/96, p. 28324. Mr Wallis called this group the 'social conflict group'.

¹⁰⁶⁵ K. J. Wallis, RCT, 8/7/96, p. 28326.

¹⁰⁶⁶ K. J. Wallis, RCT, 8/7/96, p. 28300.

¹⁰⁶⁷ Freda Briggs is the editor of *From Victim to Offender: How Child Sexual Abuse Victims Become Offenders*, Allen and Unwin, St Leonards, 1995, which in part was based on some interviews with and contributions of Cooma inmates. RCPS Exhibit 2160.

¹⁰⁶⁸ Letter from Professor Freda Briggs to the Commissioner for Corrective Services, Sydney. See B. Leonard, Statement of Information, 18/6/96, RCPS Exhibit 2163C/2.

¹⁰⁶⁹ See B. Leonard, RCT, 8/7/96, p. 28295.

CUBIT AND COBAC PROGRAMS - NSW CORRECTIONS SYSTEM

19.44 During 1996, the Department of Corrective Services¹⁰⁷⁰ released plans for the establishment of a Custody Based Intensive Treatment (CUBIT) Unit,¹⁰⁷¹ within the Long Bay-Malabar complex, for adult male sex offenders only,¹⁰⁷² including those whose offences involve the abuse of children.

19.45 The unit was to be purpose built to provide a safe, long stay, therapeutic environment for those male inmates assessed by the co-ordinator of the sex offenders program as suitable, willing and likely to benefit from a long term residential treatment program, aimed at reducing the risk of recidivism. It was also to serve as the assessment centre and feeder for CUBIT and as a venue for the psychosexual education program which was introduced at Cooma.

19.46 It was stressed in the management plan that CUBIT was to be only one of the Department's programs to address the problems of sexual aggression. It is the last of the programs to be implemented because its efficient operation depends on a combination of assessment, research, training, supervision, transition and after care, through the Community Based After Care Program (COBAC), which is an essential adjunct to it.

19.47 The aims of CUBIT, which is essentially based on cognitive behavioural relapse prevention therapy, are to:

- provide appropriate ethical treatment for sexual offenders;
- assist offenders to change patterns of sexually assaultive behaviour;
- assist offenders to understand the experience of their victims;
- assist offenders to respect the wishes and needs of their victims;
- establish and maintain program monitoring procedures;
- conduct and publish research on the programs and their implementation;
- maintain up-to-date knowledge and information on legislation and government policy on sexual violence and child abuse; and to
- provide adequate and expert training for those personnel employed in the unit.¹⁰⁷³

19.48 The following key features of CUBIT may be noted:¹⁰⁷⁴

- the offender is defined as the client;
- treatment is voluntary and the offender is to be kept well informed about the treatment contract, and the conditions of the treatment before making any decision to proceed further with it;

¹⁰⁷⁰ The NSW Department of Corrective Services is responsible for the administration of:

- *The Community Services Orders Act 1979* ;
- *Parole Orders (Transfer) Act 1983* ;
- *Periodic Detention of Prisoners Act 1981* (except Part 2);
- *Prisons Act 1952* ;
- *Prisoners (Interstate Transfer) Act 1982* ;
- *Sentencing Act 1989* (parts 3 & 5).

¹⁰⁷¹ See Cubit Intensive Treatment Unit for Sex Offenders, Management Plan, 14/6/96, RCPS Exhibit 2182; CUBIT Treatment Unit for Sexual Abusers, Operational Plan, 14/6/96, RCPS Exhibit 2183.

¹⁰⁷² The Management Plan for CUBIT states that 'There are too few female offenders to make it viable to establish a women's group'. See CUBIT Intensive Treatment Unit for Sex Offenders, Management Plan, 14/6/96, RCPS Exhibit 2182, p. 3.

¹⁰⁷³ CUBIT Intensive Treatment Unit for Sex Offenders, Management Plan, 14/6/96, RCPS Exhibit 2182, p. 3.

¹⁰⁷⁴ *ibid*, pp. 3-4.

- the offender is to be treated with respect regardless of the offence;
- the offender is to take responsibility for the abusive behaviour without minimisation and without shifting the blame;
- providers of the treatment are to maintain up-to-date records and to keep those records safe and confidential;
- information gathered during the treatment, is not normally to be released without the written permission of the offender, save where the safety of a child or other person is at risk; and
- staff are to have adequate training supported by regular supervision, and therapeutic work is to be balanced with research, non-contact times, relaxation and change of duties at regular intervals.¹⁰⁷⁵

19.49 There are three rights of the victim outlined in the management plan:¹⁰⁷⁶

- the victim is to have the right to be informed of the offender's projected release or temporary release dates;
- the victim's wishes, safety and well-being are to be taken into account and to have priority in considering contact with the offender;¹⁰⁷⁷ and
- where the rights and the interests of the offender clash with the rights and interest of the victim the victim's rights are to take priority.

19.50 The CUBIT program is to operate on an on-going process of therapy groups, in which a key element is uncovering the dynamic of each inmate's abusive behaviour, and the integration of what is learned.¹⁰⁷⁸

19.51 The program itself is to be for a minimum of 33 weeks and will usually take 44 weeks to complete. The inmate's stay may be extended if a satisfactory rate of progress is not maintained.¹⁰⁷⁹ At the end of 52 weeks, all inmates are required to leave the unit.

19.52 The first goal of the CUBIT program was to provide a secure safe therapeutic unit designed with 40 single occupancy rooms, to accommodate inmates who are classified C2, and who are assessed by the sex offenders program assessment teams as suitable for intensive intervention for their sexual aggression. Only those inmates who have sufficient time to complete the program, and move to the transitional program, are to be accepted. This will normally mean that inmates would be within 24 months of their expected release date.

19.53 Other criteria include requirements that the offender:

- have an IQ of not less than 85 or an assessment of ability to cope with the cognitive demands of the program;
- have an ability to speak and write English well;
- not be physically disabled;
- not possess psychotic or organic conditions;

¹⁰⁷⁵ No staff member is to remain in the one contact therapeutic position for more than two years.

¹⁰⁷⁶ CUBIT Intensive Treatment Unit for Sex Offenders, Management Plan, 14/6/96, RCPS Exhibit 2182, p. 4.

¹⁰⁷⁷ In most cases that will be achieved by consultation between the offender, the treatment provider and the child protection worker or therapist for the child.

¹⁰⁷⁸ CUBIT Treatment Unit for Sexual Abusers, Operational Plan, 14/6/96, RCPS Exhibit 2183.

¹⁰⁷⁹ CUBIT Intensive Treatment Unit for Sex Offenders, Management Plan, 14/6/96, RCPS Exhibit 2182.

- accepts responsibility for his criminality, the minimum requirement for which would involve acceptances of all offences for which he has been convicted and imprisoned, but preferably would extend to full responsibility for all abusive acts committed, and their repercussions;
- not be on remand or appeal;
- have no serious competing demands, for example, a medical condition requiring hospitalisation;
- have not been a severe management problem while in prison; and
- not be politically committed to paedophile sex.¹⁰⁸⁰

19.54 There is to be a staged process, to allow the inmate to orientate to the program, to inform himself about its operation, and to give a carefully considered consent to its procedures and conditions. Admission is to be reviewed, within seven days of entry, by way of a thorough assessment conducted by the therapeutic team of CUBIT. During that period, new entrants are to participate in all aspects of the program, but are not to be required to be actively engaged until they make a formal commitment to it. At the end of the period, an agreement is to be drawn up between the inmate and the therapeutic manager which will acknowledge the conditions and case plan.

19.55 There is provision for a Transition program, during the period between graduation from CUBIT, and release, to test the treatment gains; as well as provision for long-term follow-up post release through the COBAC program. These are seen as an integral adjunct to the CUBIT program. The follow-up will normally be mandated for the length of the offender's parole, licence or probation.¹⁰⁸¹

19.56 Mr Michael Edwards, the senior clinical psychologist, co-ordinator of the sex offenders programs, and author of CUBIT, cautioned that without supporting programs, any attempt at intensive intervention will be wasted. This meant that:

- a good quality assessment at the beginning of a person's sentence was required, which might preferably be done before the offender was sentenced, so that the court was given a realistic and expert risk assessment, assistance which currently was very often lacking;¹⁰⁸² and that
- this type of management is a life-long management plan and it needs to be supported and monitored by someone on the outside, with follow-up through COBAC, for a period which is likely to depend on the probation or parole period.¹⁰⁸³

19.57 Although the opportunity for assistance after expiry of a relevant probation or parole period will be limited, Mr Edwards hoped that it could be extended on a voluntary basis. Some budgetary supplementation might be needed, because of the demands of the other offenders within the programs.¹⁰⁸⁴

19.58 Mr Edwards was concerned at the need for proper training because unachievable expectations might be raised if the program was inadequate or not delivered by suitably qualified staff. The identification of prisoners going through the motions in order to secure early release will also require considerable attention and may occasion difficulties because of the lack of experienced psychotherapists, whether they be social workers or psychologists, experienced in this field.¹⁰⁸⁵

¹⁰⁸⁰ CUBIT Treatment Unit for Sexual Abusers, Operational Plan, 14/6/96, RCPS Exhibit 2183, at Doc. 2021620-21.

¹⁰⁸¹ CUBIT Intensive Treatment Unit for Sex Offenders, Management Plan, 14/6/96, RCPS Exhibit 2182, p. 7.

¹⁰⁸² M. Edwards, RCT, 11/7/96, p. 28613.

¹⁰⁸³ M. Edwards, RCT, 11/7/96, p. 28614.

¹⁰⁸⁴ M. Edwards, RCT, 11/7/96, p. 28614-15.

¹⁰⁸⁵ M. Edwards, RCT, 11/7/96, p. 28616.

19.59 This initiative was planned to commence in June/July 1997, in anticipation of the closure of the Cooma Correctional Centre, which is expected to be completed by mid-1998. A large number of offenders against children (73) and a lesser number of offenders against adults (7) have been moved to the sex offenders No. 4 Wing/Area 3 MSPC from other prisons, for that purpose.¹⁰⁸⁶ Unfortunately, commencement of the program has been delayed by reasons of staffing problems, and in particular difficulties in recruiting the therapeutic managers who are to head the relevant programs. An interim CUBIT unit is scheduled to start in October 1997 with the permanent unit to be established in 1999.¹⁰⁸⁷

19.60 The status of the psychosexual education program, which aims to provide information, increase awareness, challenge myths, and increase motivation for treatment, is at this stage uncertain. It has potential value for offenders serving short sentences as well as those with community-based sentences.

19.61 It is of concern that staffing problems and the absence of suitably skilled and experienced personnel in Australia have held up the program and may risk its maintenance. Mr Edwards hoped to address this by:

- offering clinical psychologists, at least junior psychologists, 'apprenticeships' before setting them to work inside the unit;¹⁰⁸⁸ and by
- establishing links between the Department of Corrective Services and a post graduate university course which might focus attention on the management of sex offenders.¹⁰⁸⁹

19.62 COBAC was established in November 1996, on a limited basis in Roden Cutler House, although this is not considered to be a suitable long term location, since:

- two of the core functions - the interview and post-release maintenance - cannot be conducted in those premises; and
- the number of staff now employed far exceeds the space available.¹⁰⁹⁰

19.63 There has been a delay in finding alternative suitable accommodation due to the necessity for confirmation of the budget for the implementation of the Sex Offenders Program for 1997/1998. A request for funding enhancement has now been approved by the Treasury, which would commit \$4.38 million to the implementation of the sex offender programs in 1997/1999, and permit the lease of the three potential sites identified for COBAC and their fit-out ready for occupation by October 1997.¹⁰⁹¹

19.64 The staffing problem is likely to continue, because of the need for rotation to avoid burn-out.¹⁰⁹² If the program can be suitably implemented there are opportunities for its wider application, which could in part meet the problems of burn-out. In this regard, Mr Edwards identified a serious deficiency, also mentioned in a number of submissions, concerning the adequacy of the assessments currently prepared in relation to sex offenders.

¹⁰⁸⁶ The specialist sex offenders wing became operative on 28/6/97. See C. McComish, NSW Corrective Services Sex Offenders Programmes, Statement of Information, 23/6/97, RCPS Exhibit 3105C.

¹⁰⁸⁷ The interim unit will house 20 offenders and the permanent unit will house 50 offenders. See C. McComish, NSW Corrective Services Sex Offenders Programmes, Statement of Information, 23/6/97, RCPS Exhibit 3105C.

¹⁰⁸⁸ M. Edwards, RCT, 11/7/96, p. 28614.

¹⁰⁸⁹ M. Edwards, RCT, 11/7/96, p. 28618.

¹⁰⁹⁰ See C. McComish, NSW Corrective Services Sex Offenders Programmes, Statement of Information, 23/6/97, RCPS Exhibit 3105C.

¹⁰⁹¹ See C. McComish, NSW Corrective Services Sex Offenders Programmes, Statement of Information, 23/6/97, RCPS Exhibit 3105C.

¹⁰⁹² M. Edwards, RCT, 11/7/96, p. 28615; see also CUBIT Intensive Treatment Unit for Sex Offenders, Management Plan, 14/6/96, RCPS Exhibit 2182, p. 4.

19.65 It was Mr Edwards' experience that the psychological assessments which accompanied pre-sentence reports, while giving a useful profile of the offender, often do not say much about the risk of reoffending. This he attributed to the fact that the majority of forensic psychologists do not know enough about sex offending to be giving an adequate assessment. Wittingly or unwittingly, they have been taken in by offenders, some of whom are aware of the standard explanations and are well able to manipulate psychologists inexperienced in this area,¹⁰⁹³ and others of whom believe that there were circumstances other than their own failing, such as their own abuse as a child, or provocative behaviour of the victim, which caused them to offend.

19.66 To meet this problem, Mr Edwards proposed the formation of expert assessment teams, comprising psychologists, trained social workers, and COBAC staff who might be able to make more reliable assessments.¹⁰⁹⁴

19.67 Mr Edwards saw accurate assessment reports of an offender, undertaken by the team as soon as possible after reception into the system, as the basis for case management including the determination of what education or other program the inmate should be included in and in classification of the inmate. Mr Edwards considered it to be a small step to bring that assessment forward and make it available as part of the sentencing process. Even if sentencing did not result in imprisonment, he believed the report would assist in providing a management strategy for the probation officer, and provide a risk assessment and indication of the key areas that needed to be managed.¹⁰⁹⁵

19.68 The Commission endorses Mr Edwards' views that such assessment reports would be an appropriate and helpful service. The establishment of a prison-based program, including an intensive residential treatment program based on relapse prevention is recommended.

PRE-TRIAL DIVERSION - CEDAR HOUSE

19.69 The pre-trial diversion of offenders program was established under the *Pre-Trial Diversion of Offenders Act 1985*. It applies to a person charged with a child sexual assault offence committed with or upon that person's child, or the child of that person's spouse or de facto partner.¹⁰⁹⁶ It does not apply if the person charged is a juvenile.¹⁰⁹⁷ It is not available to anyone who has a previous conviction.¹⁰⁹⁸

19.70 Although passed in 1985, the Act did not commence until 1989. It is administered by the Department of Health, with the assistance of a joint board of management comprising representatives of that Department, the Attorney General's Department, the DCS, the CPC, Western Sydney Area Health Service and the Police Service.¹⁰⁹⁹

¹⁰⁹³ M. Edwards, RCT, 11/7/96, p. 28618.

¹⁰⁹⁴ M. Edwards, RCT, 11/7/96, p. 28619.

¹⁰⁹⁵ M. Edwards, RCT, 11/7/96, p. 28621.

¹⁰⁹⁶ *Pre-Trial Diversion of Offenders Act 1985*, s. 3A. It does not apply to person charged with an offence before the commencement of the Act, s. 4(1)(a).

¹⁰⁹⁷ *Pre-Trial Diversion of Offenders Act 1985*, s. 4(1)(b).

¹⁰⁹⁸ D. L. Tolliday, RCT, 29/5/96, p. 26155; T. Vinson, An Evaluation of the NSW Pre-trial Diversion of Offenders Program, June 1992, RCPS Exhibit 1956/2, pp. 6-7.

¹⁰⁹⁹ D. L. Tolliday, RCT, 29/5/96, p. 26170; NSW Pre-Trial Diversion of Offenders Programme (Child Sexual Assault), Annual Report 1994/95, RCPS Exhibit 1956/1, p. 7.

19.71 The goals of the pre-trial diversion program are:

- the protection of children;
- the prevention of further child sexual assault in families where this has occurred; and
- an increase in responsible thinking and behaviour by offenders.¹¹⁰⁰

19.72 It is structured to provide treatment:

- for persons charged with child sexual assault offences referred by the Director of Public Prosecutions (DPP);
- which enables child victims and non-offending family members to resolve the emotional and psychological concerns which arise from the offence;¹¹⁰¹ and
- which establishes community-based treatment for the offender, as an alternative to custodial disposition.¹¹⁰²

19.73 The foundations for the treatment program are that:¹¹⁰³

- it is of fundamental importance that the offender should take responsibility for the sexual assault, as a consequence of which he must plead guilty;
- the safety and needs of the child victim are of paramount importance in all treatment decisions, particularly relating to contact between the offender and the child, the timing of family therapy, and reunification where the latter is considered appropriate;
- an attempt will be made to repair the damage to the mother/child relationship which occurs where the abuser is a father, even though the mother is not responsible for her partner's abusive behaviour;
- assistance will be provided for all family members to prevent further victimisation of the child; and
- satisfactory progress by an offender is to be gauged by behaviour consistent with the goals, objectives and standards of the treatment program.¹¹⁰⁴

19.74 On entering the program, offenders sign a treatment agreement to comply with all reasonable directions of the program director,¹¹⁰⁵ which includes:

- acceptance of full responsibility for the abuse;
- relieving the victim and others involved of any responsibility in the abuse;¹¹⁰⁶ and
- any other conditions relevant to the specific offender, for example:
 - the absence of contact with the victim or children under the age of 16; or
 - in the case of a medical practitioner, notification to the Medical Registration Board that he had entered a plea of guilty to a sexual offence against a child.¹¹⁰⁷

¹¹⁰⁰ NSW Pre-Trial Diversion of Offenders Programme (Child Sexual Assault), Annual Report 1994/95, RCPS Exhibit 1956/1, p. 3.

¹¹⁰¹ T. Vinson, An Evaluation of the NSW Pre-trial Diversion of Offenders Program, June 1992, RCPS Exhibit 1956/2, pp. 4-5.

¹¹⁰² D. L. Tolliday, RCT, 29/5/96, p. 26151.

¹¹⁰³ Family reunification is not a goal of the Pre-trial Diversion Program. T. Vinson, An Evaluation of the NSW Pre-trial Diversion of Offenders Program, June 1992, RCPS Exhibit 1956/2, p. 4.

¹¹⁰⁴ T. Vinson, An Evaluation of the NSW Pre-trial Diversion of Offenders Program, June 1992, RCPS Exhibit 1956/2, p. 5.

¹¹⁰⁵ The offender must make an undertaking to the Supreme Court or District Court as per the *Pre-Trial Diversion Offenders Act 1985*, s. 23A.

¹¹⁰⁶ T. Vinson, An Evaluation of the NSW Pre-trial Diversion of Offenders Program, June 1992, RCPS Exhibit 1956/2, p. 8.

¹¹⁰⁷ T. Vinson, An Evaluation of the NSW Pre-trial Diversion of Offenders Program, June 1992, RCPS Exhibit 1956/2.

19.75 Mr Dale Tolliday, the Director of the pre-trial diversion program, identified the benefits for this class of offender of an alternative track within the justice system, whereby they might avoid imprisonment and enter a community-based treatment program. They include:

- the protection of children by providing an incentive for a plea of guilty;
- avoidance of the trauma associated with a trial;
- acknowledgment that the child was telling the truth;
- commencement by the child of his or her own rehabilitation at an early stage; and
- the greater opportunity for rehabilitation of the offender which occurs where the offender confronts his or her guilt.¹¹⁰⁸

19.76 The offenders' program is structured, and designed to take place over a period of two years with a combination of various forms of therapy, including individual therapy, group therapy, and conjoint work where it is appropriate. There is no drug therapy involved.¹¹⁰⁹

JUVENILE JUSTICE PROGRAMS

19.77 Another program available within NSW, but limited to juvenile offenders, is the Juvenile Sex Offender Program run by the Department of Juvenile Justice (DJJ). It was developed by the Child Protection Council (CPC) and introduced in 1991/92.¹¹¹⁰ To be eligible for that program, the offender must have committed the offence prior to turning 18, however facilities are available to offenders until they reach the age of 21. It is aimed at reducing both sexual and non-sexual offending, helping the young offender to take responsibility for his actions, and to encourage the development of a positive identity and non-abuse sexuality.

19.78 Apart from delivering a program for behaviour modification, pre-sentence assessments of young persons convicted of sexual assault are also provided.¹¹¹¹

19.79 The clinical co-ordinator for the program, Ms Susan Goodman, gave evidence to the Commission explaining its structure. She suggested that it was important for offenders to be charged and convicted within the legal system, so that they can experience the consequences of their behaviour, and realise that the community will not accept it.¹¹¹² Often with young offenders, the possibility of facing a court and detention is the single motivating factor in them deciding to do something about their behaviour. It is not a prerequisite to entry into the program to have a custodial sentence.¹¹¹³

19.80 Ms Goodman acknowledged that sometimes the program was seen as punitive but believed that was due to the fact that it does not minimise the sex offence or pretend that it did not occur. She said that the aim of the program is to support the perpetrator and to assist him or her to confront the offence, understand it, and find ways of managing it.¹¹¹⁴

¹¹⁰⁸ D. R. Tolliday, RCT, 29/5/96, pp. 26151-52.

¹¹⁰⁹ D. R. Tolliday, RCT 29/5/96, p. 26152.

¹¹¹⁰ NSW Child Protection Council, Submission to RCPS, 7/8/96, RCPS Exhibit 2529/68.

¹¹¹¹ K. J. Buttrum, RCT, 29/5/96, p. 26100; S. Goodman, RCT, 9/7/96, p. 28456.

¹¹¹² S. Goodman, RCT, 9/7/96, p. 28457.

¹¹¹³ S. Goodman, RCT, 9/7/96, p. 28458.

¹¹¹⁴ S. Goodman, RCT, 9/7/96, p. 28460.

19.81 Like other witnesses Ms Goodman suggested that a 'sickness model' was not helpful in treating sex offenders.¹¹¹⁵ A major problem she saw with adolescent sex offenders was the risk that the offence was minimised - an approach which only sends a message to the offender that he or she can avoid detection and/or punishment.¹¹¹⁶

19.82 Although the program is not funded to work with families, it endeavours to do so where it can. It was Ms Goodman's assessment that when the victim was a member of the family of the offender, it was important to include the family in the program.¹¹¹⁷

19.83 She also pointed out that interagency interaction was very important to address the problem of adolescent sex offending in NSW with a need for the DCS, Health, the DJJ, Housing and DSE to be involved in the different aspects of managing adolescent offenders.¹¹¹⁸

19.84 Some problems were identified to the Commission concerning the Juvenile Sex Offender Program including:

- the fact that sexual offenders are not segregated from other detainees, giving rise to a potential for abuse of the latter;
- the lack of sufficient staff with the training required to meet the needs of offenders; and
- the absence of post-release supervision.¹¹¹⁹

19.85 A similar program funded by Health, operates within a non-government agency at Wyong,¹¹²⁰ but otherwise these resources are stretched, and are not capable of accommodating non-Court mandated cases.

19.86 The problem of the adolescent sex offender is one that has loomed large in recent studies. In the past this form of offending has often been dismissed as healthy experimentation or natural exploration, often between 'consenting parties' and for that reason not regarded as harmful.¹¹²¹

19.87 Current research, confirmed by the evidence of a number of witnesses to the Royal Commission indicates that:

- deviant sexual behaviour very often has its beginning during late childhood and adolescence,¹¹²² and
- on very many occasions such conduct is associated with aggressive behaviour, including force, intimidation and threat.¹¹²³

¹¹¹⁵ S. Goodman, RCT, 9/7/96, p. 28461; R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24216; N. McConaghy, RCT, 6/9/96, p. 31689; K. J. Wallis, RCT, 8/7/96, p. 28319.

¹¹¹⁶ S. Goodman, RCT, 9/7/96, pp. 28461-62.

¹¹¹⁷ S. Goodman, RCT, 9/7/96, p. 28462.

¹¹¹⁸ S. Goodman, RCT, 9/7/96, p. 28464.

¹¹¹⁹ S. Goodman, RCT, 9/7/96, pp. 28465-67; Confidential Submission to RCPS, August 1996, RCPS Exhibit 2529C/122.

¹¹²⁰ Wyong Family and Youth Support Service. See A. Blaszczyński, Submission to RCPS, 29/7/96, RCPS Exhibit 2529/52.

¹¹²¹ Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, p. 251; NSW Child Protection Council Committee on Sex Offences Committed Against Children, Position Paper, Managing sex offenders: a child protection perspective (draft), June 1996, RCPS Exhibit 2146, pp. 13-14 & 18-19; W. F. Glaser, 'Sex Offenders', in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks (ed), Brookers, Wellington, 1996, pp. 256-89 at p. 271.

¹¹²² S. Goodman, RCT 9/7/96, pp. 28461-62; Sydney Rape Crisis Centre, Submission to RCPS, 15/8/96, RCPS Exhibit 2529/132, p. 7; G. Green, Submission to RCPS, 30/7/96, RCPS Exhibit 2529/48, p. 8.

¹¹²³ NSW Child Protection Council Committee on Sex Offences Committed Against Children, Position Paper, Managing sex offenders: a child protection perspective (draft), June 1996, RCPS Exhibit 2146, p. 16.

19.88 There are strong indications that adolescent sexual offending differs from other forms of offending, in that it is a crime which offenders grow into rather than out of.¹¹²⁴

19.89 Clearly there are problems in dismissing or minimising these activities as adolescent adjustment or exploratory behaviour when on the evidence available they are positive indicators of an emerging problem for which early intervention appears to be favourably indicated.¹¹²⁵

19.90 In this regard, as is addressed later, the Commission considers it essential for resources to be applied to:

- the early detection of indicators of abuse by children and adolescents; and to
- the provision of an enhanced capacity on the part of the DJJ and DCS to respond to this form of conduct, preferably with suitable residential programs,¹¹²⁶ and also by post-release support and monitoring.

CHILD ABUSE PREVENTION SERVICE (CAPS)

19.91 The Child Abuse Prevention Service is a community-based and non-government funded service which was established in 1973,¹¹²⁷ to prevent and alleviate all forms of child abuse. Among its functions, it provides a counselling service for child sexual assault offenders, most of whom are referred to it by Department of Corrective Services, post release, and are undergoing a medically-based treatment program of the kind conducted at St Luke's Hospital.¹¹²⁸

19.92 Its services are offered without charge, and involve group work along cognitive behavioural lines. The approach adopted is firm and not minimising either of the offence or of the addictive-compulsive nature of the behaviour. Its experience working with these offenders, who do not include those from the fixated class, has been reported as positive.

19.93 Subject to accreditation, qualified staffing and integration within a co-ordinated structure, this kind of community-based service, as an adjunct to the criminal justice and corrections systems, presents considerable promise.¹¹²⁹

PROGRAMS IN OTHER JURISDICTIONS

19.94 There are precedents in other jurisdictions of comprehensive prison and community-based programs, against which the NSW experience compares poorly. These may be briefly mentioned as examples of what can be achieved. The Commission is aware of, although it has not had the opportunity of examining, similar schemes in existence in Queensland,¹¹³⁰ and in South Australia.¹¹³¹ The former is prison-based and the latter is a community-based program linked to a university.

¹¹²⁴ Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, pp. 251-52; Longo & McFadin, 'Sexually inappropriate behaviour: development of the sexual offender', *Law & Order*, December 1981, pp. 21-23; Longo & Groth, 'Juvenile sexual offences in the histories of adult rapists and child molesters', *International Journal of Offender Therapy & Comparative Criminology*, 1983, vol. 27 no. 2; Abel et al, *The treatment of child molesters: a manual*, unpublished manuscript, NY State Psychiatric Institute, 1984.

¹¹²⁵ See Volume IV, Chapter 3 of this Report.

¹¹²⁶ See *St Vinnies for Youth*, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/118; and Confidential Submission to RCPS, August 1996, RCPS Exhibit 2529C/122.

¹¹²⁷ See Child Abuse Prevention Service, Submission to RCPS, 1/7/96, RCPS Exhibit 2529/4.

¹¹²⁸ Discussed in more detail under Section C 'Treatment Evaluation' in this chapter.

¹¹²⁹ See Child Abuse Prevention Service, Submission to RCPS, 1/7/96, RCPS Exhibit 2529/4.

¹¹³⁰ The Queensland Corrective Services Commission Sexual Offender Treatment Program at Moreton Correctional Centre provides intensive group based intervention to adult males convicted of sexual offences. Program based on cognitive behavioural therapy within a relapse prevention framework. See K. Lancefield, Submission to RCPS, 18/7/96, RCPS Exhibit 2529/43.

¹¹³¹ See R. Murrey, Director Sexual Offenders Treatment and Assessment Program (SOTAP), South Australia, 21/8/96, RCPS Exhibit 2529C/159.

Sex Offenders Treatment Unit - Western Australia

19.95 The Western Australian Sex Offenders Treatment Unit (SOTU)¹¹³² commenced operations in 1987, as a prison-based service, in response to concerns expressed by the Parole Board. The initial program was modelled on institution-based programs similar to those seen in Canada and the United States. In 1990 it was expanded to include community-based programs, and in 1994 it extended its services from a metropolitan to State-wide focus.¹¹³³

19.96 The objectives of the unit, which is staffed by a mixture of full-time and part-time contracted psychologists and social workers, are to provide:

- treatment programs for convicted sex offenders; and
- expert advice for courts, parole authorities and others involved in the administration of justice, concerning the management and treatment of sex offenders.¹¹³⁴

19.97 Offenders may participate in all or part of the program, as is necessary, or dependent upon the length of the sentence they are serving. Resources are limited and entry into the program is based upon an assessment of the amenability and suitability of the individual offender for treatment. Intellectual and psychiatric factors have excluded some offenders in the past, but specific programs are now being developed for the intellectually disabled offender. Absolute denial of responsibility by the offender, and refusal to avail themselves of the service are exclusionary circumstances. Where the offender denies culpability, or refuses to participate in the program, and is assessed as a high risk to the community, control strategies such as denial of parole, and intensive supervision in the community are recommended. Special conditions on parole are used to place 'boundaries' on offenders in the community.¹¹³⁵

19.98 The therapeutic process is based upon cognitive behavioural theory and relapse prevention.

19.99 The intensive 38-week program for the offenders who pose the greatest risk of reoffending, occurs within a therapeutic environment, with participants living in separate, but not isolated, units within a mainstream prison, to enable them to practice newly developing skills, in a less threatening situation.

19.100 In addition to the intensive program that is run through two prisons in WA, there is a pre-release program for sex offenders who are considered to present a significant risk of reoffending, but with a less severe offending characteristic than those listed for an intensive program. The program for this group consists of 36 three-hour sessions, with additional out-of-hours homework completed between sessions. It is similarly based on the cognitive behavioural theory and relapse prevention model.

19.101 A specific pre-release program has also been developed for Aboriginal offenders to ensure that it is culturally relevant, in that it addresses the interaction of alcohol, violence and inappropriate sexuality, the role of shame in Aboriginal culture and similar issues. It is otherwise similar to the standard pre-release program.

19.102 The community-based program is for those sex offenders who have a community-based order, such as probation or parole. The parolee participating in the program will have been assessed as being at the lower end of the risk assessment scale. This program is conducted over an eight month period, meeting one night per week for three hours.

¹¹³² WA Ministry of Justice, An Overview of the West Australian Ministry of Justice's Sex Offender Treatment Unit, 24/1/97, RCPS Exhibit 3174.

¹¹³³ *ibid.*

¹¹³⁴ *ibid.*

¹¹³⁵ WA Ministry of Justice, An Overview of the West Australian Ministry of Justice's Sex Offender Treatment Unit, 24/1/97, RCPS Exhibit 3174, p. 1.

19.103 The community-based program prioritises assistance in effectively managing the daily difficulties which may precede offending. There are homework tasks which entail practicing new skills and behaviours in the community, and reviewing them the following week.

19.104 There are also maintenance programs, which are designed for offenders who have completed one of the prison-based programs, but who are still considered to represent some risk of reoffending. These are open-ended groups which meet fortnightly for two hours to discuss issues related to the day-to-day management of their offending behaviour. The specific focus is to ensure that previous treatment gains are maintained when they are back in the community.

19.105 There is also a program for the intellectually disabled, in which the content is adjusted to ensure comprehension. It includes information on sex education, appropriate sexuality, problem solving, social behaviours and appropriate boundaries. The duration of this program is open-ended and acknowledges the fact that those with intellectual disabilities may take longer to acquire new skills to effectively manage their inappropriate behaviour.

19.106 The SOTU has completed two recidivism evaluations of male offenders who have participated in the intensive and pre-release prison-based program, covering the period from July 1990 to June 1995 which, although early studies, are encouraging.¹¹³⁶

Kia Marama Program - New Zealand

19.107 In 1989 the Kia Marama sexual offenders program was established at the Rolleston Prison, New Zealand.¹¹³⁷ The criteria for entering the program are that the inmate:

- has committed one or more sexual offences against a person under the age of 16;
- has been informed about and voluntarily consents to entering the treatment program;
- has a sentence long enough to complete the 37-week program before the earliest possible release date;
- is not intellectually disabled and has a sufficient intellectual ability to comprehend and participate in the treatment program;
- is currently free of any major psychotic disorder; and
- does not require maximum security classification.¹¹³⁸

19.108 Intakes of approximately 10 prisoners occur every two months. This system allows them to complete the offenders program without having to spend longer than a few months in prison before their release date.¹¹³⁹

19.109 The Kia Marama program is based on a combination of cognitive behavioural and psychotherapeutic principles and rests on the assumption that sexual aggression shares common features with other addictive behaviours.

¹¹³⁶ See correspondence from the WA Ministry of Justice, 24/1/97, RCPS Exhibit 3174, pp. 7-8.

¹¹³⁷ This program was referred to in evidence by Michael Edwards, the Department of Corrective Services senior clinical psychologist co-ordinator sex offender programs. See M. J. Edwards, RCT, 11/7/96, p. 28616.

¹¹³⁸ The Kia Marama Programme for Sexual Offenders, RCPS Exhibit 2185, p. 3.

¹¹³⁹ The Kia Marama Programme for Sexual Offenders, RCPS Exhibit 2185, p. 3. Fifty men may be involved in the program at any one time. New Zealand Department of Corrections, Kia Marama, A Description of the Treatment Programme, July 1997, RCPS Exhibit 3172, p. 3.

19.110 There is a balance between an educative approach and process-orientated learning, whereby naturally arising situations are explored in the therapy group and utilised to help the participants learn about themselves, and develop more appropriate social behaviours and self concepts. Sexually aggressive behaviour is viewed primarily as learned behaviour, rather than a manifestation of an underlying illness or disease of which the person might be 'cured'. The major therapeutic goal is life-long maintenance of control.¹¹⁴⁰

19.111 All treatment is provided in a group format with eight to 10 participants and one therapist. Admission depends upon favourable initial assessment, and as a result of a decision made between the offender and the treatment team. The program lasts for a period of 37 weeks, the first and last four weeks of which are devoted to assessment. For the remaining 29 weeks, the group meets for 2.5 hours per day four days a week. The program essentially consists of two phases:

- in the first phase, the focus is on the inmate's 'offence chain', increasing motivation to change, by enabling the participants to understand the factors that motivated their offending in the first place, to challenge any distorted beliefs they hold concerning their behaviour, to encourage them to take responsibility for their behaviour and to develop empathy for their victims;¹¹⁴¹
- the remainder of the program concentrates on skills acquisition centred around mood management and social competence (relationships, sex education, social skills, anger and stress management and social problem solving), followed by relapse prevention strategies.¹¹⁴²

19.112 During the relapse prevention phase, a six-month post-release program is formulated, co-ordinated by the unit social worker, which aims to develop:

- ongoing psychological therapy;
- contact with a probation officer;
- attendance at a follow-up/support group; and
- the establishment of a community support network.

19.113 The unit is actively engaged in research and evaluation, with the aim of improving the treatment and developing strategies for preventive initiatives. Progress to date has been reported as encouraging.¹¹⁴³

Vermont Treatment Program

19.114 The Vermont Treatment Program for Sexual Aggressors was developed by Professor William Pithers¹¹⁴⁴ in 1982. It was the first program in the United States to adopt a relapse prevention model for the treatment and supervision of sexual abusers.¹¹⁴⁵ The program is offered to offenders against children and offenders against adults, notwithstanding initial misgivings that the two groups presented very different characteristics, and that those offenders whose victims were adults would be aggressive towards the paedophiles and dominate them. In fact it was found that the intermingling of the two groups created a more dynamic and effective environment.¹¹⁴⁶

¹¹⁴⁰ The Kia Marama Programme for Sexual Offenders, RCPS Exhibit 2185, pp. 5-6.

¹¹⁴¹ The Kia Marama Programme for Sexual Offenders, RCPS Exhibit 2185, p. 7

¹¹⁴² The Kia Marama Programme for Sexual Offenders, RCPS Exhibit 2185, pp. 7 & 16.

¹¹⁴³ As at 1/11/95, 366 men had commenced the programme, 26 of whom commenced but did not complete the program, and 310 had actually completed the program. New Zealand Department of Corrections, Kia Marama, A Description of the Treatment Programme, July 1997, RCPS Exhibit 3172, p. 11.

¹¹⁴⁴ Professor Pithers is a PhD doctorate level psychologist who has worked in the area of assessment and treatment of sexual abusers for almost 20 years. See W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, p. 31369.

¹¹⁴⁵ W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, pp. 31369 & 31372-75.

¹¹⁴⁶ W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, pp. 31370-71.

19.115 The success of the program led to the establishment of the Vermont Center for the Prevention and Treatment of Sexual Abuse in 1989, with the objective of developing a systemic approach to the problem of sexual abuse. It is a multi-purpose centre which has:

- developed a model county-based interagency agreement specifying the way in which each department involved in an investigation and the prosecution of an abuser should perform its role;
- created supervision groups for individuals offering treatment to abusers or victims, so that they could ensure the quality of the service offered; and
- procured legislative change to provide a more compassionate treatment to victims, and more effective treatment and options for the offenders.¹¹⁴⁷

19.116 The development of the treatment program for sexual aggressors is of immediate relevance. As explained by Professor Pithers, the relapse prevention model used has three different dimensions:

- a thorough risk analysis of the abuser, to understand his behaviour and excesses so that a specific treatment program can be designed that might make use of his assets and compensate for his deficits. This also facilitates an assessment as to whether for the particular abuser treatment should begin in prison, or be provided as a condition of probation;¹¹⁴⁸
- internal self management, in which the offender is helped to identify the different risk factors that predispose, precipitate or perpetuate his interest in sexual abuse, including seemingly unimportant decisions such as whether to walk to an intended destination by a route which might pass a school playground, or by a different route;¹¹⁴⁹ and
- continuing supervision within the community, it being assumed that sex offenders can never be cured. This involves professionally trained supervisors, and a collateral network of associates who live and work with the offender and are able to make a much more informed assessment of behaviour in the context of any risk factors that are specific to abuse patterns; and to observe the offender at times when he or she is unguarded or not trying to present a favourable impression for a probation officer.¹¹⁵⁰

19.117 Entry into the prison-based program is encouraged by the policy of the Department of Corrections to refuse parole to any sex offender, convicted and sentenced to prison, unless he chooses to enter and complete it.¹¹⁵¹

19.118 Those offenders who enter the program solely to obtain early release and lack any genuine intention of changing their behaviour are usually identified rapidly because their residency within the unit and the intensity of the treatment call for close monitoring. Offenders who do not have a genuine motivation and are reluctant to embrace the level of disclosure required tend to leave the program even though that will effectively extend their term in prison. The providers also have the authority to terminate participation by disruptive or non-co-operative members.¹¹⁵²

¹¹⁴⁷ W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, p. 31372.

¹¹⁴⁸ W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, p. 31378.

¹¹⁴⁹ W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, pp. 31378-79.

¹¹⁵⁰ W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, pp. 31379-80.

¹¹⁵¹ W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, p. 31383. The Parole Board can still refuse parole to an offender regardless of the Department of Corrections recommendations; W. Pithers RCT (videolink to Vermont, USA), 3/9/96, pp. 31383-84.

¹¹⁵² W. Pithers, RCT (videolink to Vermont, USA), 3/9/96, pp. 31384-85.

C. TREATMENT EVALUATION

19.119 As noted earlier, there is a deal of uncertainty, and little by way of empirical research as to the long term benefits of the treatment of paedophiles, either in situations where they seek help voluntarily or are effectively forced into it, once they come to the notice of the criminal justice system. In an endeavour to gain some enlightenment in this area, the Commission received evidence, advice and submissions from a number of experts who have been working in the field.

19.120 Professor McConaghy described a program conducted originally at the Prince of Wales Hospital, and later at St Lukes Hospital, offering Depo-Provera pharmacological treatment or imaginal sensitisation, or a combination of both.¹¹⁵³

19.121 Professor McConaghy said that in the short-term follow-ups carried out with members of the group who had remained subject to monitoring, there had been a marked reduction in their reported sexual urges and fantasies, corresponding to a reduction or cessation of their deviant behaviours.¹¹⁵⁴ The strongest evidence in support of the efficacy of the androgen suppressing medication (Depo-Provera) he saw was in the very high correlation between reports of the patients' reduced sexual interest and the actual reduction in their testosterone level.¹¹⁵⁵

19.122 He suggested that there was a category of patients who could be predicted to respond well - namely those with:

- an absence of a criminal record;
- absence of psychopathic personality features; and
- an ability to empathise with the victim, to accept the harm which has been done and to accept responsibility.

19.123 The Royal Commission received evidence from Mr Ray Wyre in relation to the Gracewell Clinic, founded in the UK in 1988, which was a residential centre and day clinic that offered treatment to clients who were variously referred through:

- the social service system;
- the court system (suitable offenders were normally received at the clinic, on three year probation with a condition of residence for one year at the clinic);
- the probation and parole service after offenders had served a prison sentence; and through
- institutions like the church, whose clergy sought help on a voluntary basis.¹¹⁵⁶

19.124 The clinic closed in 1993, but has effectively been replaced by a program established under the auspices of the Faithful Foundation. Following a research report¹¹⁵⁷ on the Gracewell Clinic prepared by the Home Office, the new clinic was established. The Home Office currently funds a substantial proportion¹¹⁵⁸ of the available bed spaces.

¹¹⁵³ Professor McConaghy, 'Assessment and treatment of sex offenders: Prince of Wales programme', *Australian and New Zealand Journal of Psychiatry*, 1990, vol. 24, pp. 175-81; and RCT, 6/9/96, pp. 31689-91.

¹¹⁵⁴ N. McConaghy, RCT, 6/9/96, pp. 31691-92.

¹¹⁵⁵ N. McConaghy, RCT, 6/9/96, p. 31692. Results do depend on the self-reporting of offenders about their reduction in sexual interest and are limited in this regard.

¹¹⁵⁶ R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24191.

¹¹⁵⁷ The Sex Offender Evaluation Treatment Program (SOETP) Report was a product of the British Home Office research unit. See R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24192.

¹¹⁵⁸ 75% of the beds are funded by the Home Office. See R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24192.

19.125 The Faithful Foundation works with offenders, and also with non-abusing partners and with the victims, although in a different setting. There is also an adolescent sex offending program.¹¹⁵⁹

19.126 Mr Wyre, said that one year's residence at the clinic, followed by a two-year relapse prevention program, conducted along cognitive behavioural lines was not regarded as a soft alternative to a prison sentence. Sometimes it exceeds the term of the likely sentence, and if a participant is unwilling or unable to continue with the program he is breached and returned to the courts for sentencing.¹¹⁶⁰

19.127 Mr Wyre explained that the program involves three phases:

- it begins with a four-week residential assessment to determine motivation, ability to comply with the program, psychological testing and so on;¹¹⁶¹
- this is followed by the residential program using in-depth individual and group work, concentrating on the usual cognitive behavioural aspects mentioned earlier, to overcome distorted thinking, and to develop victim empathy, social skills, and relapse prevention strategies;¹¹⁶² and
- the final phase involves the second and third stages of the highly structured relapse prevention program, which go out with the offender at the end of the residential phase.¹¹⁶³

19.128 It was his assessment that the Gracewell and Faithful programs had produced positive results, a circumstance which would seem to be supported by the continuation of Home Office funding.

19.129 Professor Andrew Blaszczyński, who provided a report and was called as a witness, generally agreed with Mr Wyre's evidence, and confirmed that:

- it is imperative to treat offenders to reduce the risk of recidivism;
- there is no recommended gold standard or best practice method in dealing with them.¹¹⁶⁴

19.130 It was his overall assessment that while no treatment programs can claim to cure, the evidence from existing methodological reviews of the treatment outcome and recidivism rates show that a 'reduction in behaviour following increased control over urges is possible'.¹¹⁶⁵ Comprehensive individual and group programs administered in either residential or community settings which have a cognitive behavioural orientation seem, in his view, to offer the greatest hope. The skill, he pointed out, was in 'identifying which offenders benefit from which treatment intervention at what time in the phase of their disorder'.¹¹⁶⁶

19.131 He rejected as negligent and baseless the contention that treatment programs were not effective in reducing recidivism rates and hence should not be funded. On the contrary, if that proposition were true, it would provide a reason to allocate funds to the criminal justice and mental health systems to develop and evaluate the long term effectiveness of existing and innovative interventions.¹¹⁶⁷

¹¹⁵⁹ R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24192.

¹¹⁶⁰ R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24218.

¹¹⁶¹ R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, p. 24216.

¹¹⁶² R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, pp. 24221-23 & 24228.

¹¹⁶³ R. K. Wyre, RCT (videolink to Birmingham, UK), 26/4/96, pp. 24219 & 24228-29.

¹¹⁶⁴ A. Blaszczyński, Submission to the RCPS, 29/7/96, RCPS Exhibit 2529/52, p. 1.

¹¹⁶⁵ A. Blaszczyński, Submission to the RCPS, 29/7/96, RCPS Exhibit 2529/52.

¹¹⁶⁶ A. Blaszczyński, Submission to the RCPS, 29/7/96, RCPS Exhibit 2529/52.

¹¹⁶⁷ A. Blaszczyński, Submission to the RCPS, 29/7/96, RCPS Exhibit 2529/52, at Doc. 2239212.

D. SUFFICIENCY OF EXISTING RESOURCES

19.132 Although some sex offenders programs have been introduced within Corrective Services, the experience with the ad hoc development of the Cooma program, and the current difficulties in implementing COBAC and CUBIT, remain of considerable concern. This concern, along with an overall concern as to the paucity and disparate nature of the community-based services, was shared by a number of the witnesses called, and was also evident in the submissions received.¹¹⁶⁸

LIMITED RESOURCES

19.133 The overall position was perhaps best summarised in Professor Blaszczyński's submission and evidence,¹¹⁶⁹ suggesting that there were deficiencies in almost every area:

Health System

- No Department of Health funding is directed towards the provision of specific residential or special program treatment services for adult paedophiles; and apart from the Wyong Family & Youth Support Service, no funds are allocated to provide specialised sex offender services for adolescent, intellectually disabled or brain damaged paedophiles or those suffering other types of paraphilias. Otherwise, apart from the St Luke's Hospital program, and treatment not necessarily of a specialised nature offered by psychologists, psychiatrists and counsellors within their private practices, little is available.

Criminal Justice System

- Apart from the Adolescent Sex Offenders Program, conducted by the Department of Juvenile Justice; the Cedar House program (limited to a small group of eligible offenders) and the pending CUBIT and COBAC programs, there are very few services available to convicted offenders. Moreover, once parole, probation or a recognisance expires there is virtually nothing available by way of continuity of care or subsequent treatment for a convicted offender.

Therapists

- There are few therapists available for direct referral, and only a limited number of psychiatrists, psychologists, social workers or other counsellors with specialised training in the treatment of child sexual offenders. Moreover, there is lacking the degree of empirical research from which:
 - better informed views as to treatment and prognosis could be gained; and from which
 - best practice guidelines could be developed.¹¹⁷⁰

Additionally, there is minimal dialogue between therapists, child protection workers and the criminal justice/correction system, with resultant limitations on the opportunity for continuity of care for offenders released into the community.

¹¹⁶⁸ See Australian Institute of Criminology, Submission to RCPS, 2/7/96, RCPS Exhibit 2529/6; C. Basset, Submission to RCPS, 23/7/96, RCPS Exhibit 2529/34; K. Lancefield, Submission to RCPS, 18/7/96, RCPS Exhibit 2529/43; NSW Privacy Committee, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/103; NSW Police Service, Submission to RCPS, August 1996, RCPS Exhibit 2529C/106; NSW Department of Community Services, Ageing & Disability Department and Department of Juvenile Justice, Joint submission to RCPS, August 1996, RCPS Exhibit 2529/109; St Vinnies for Youth, Submission to RCPS, 9/8/96, RCPS Exhibit 2529/118; Sydney Rape Crisis Centre, Submission to RCPS, 15/8/96, RCPS Exhibit 2529/132; and National Association for the Prevention of Child Abuse and Neglect (NAPCAN), Submission to RCPS, 26/7/96, RCPS Exhibit 2529C/141.

¹¹⁶⁹ A. Blaszczyński, Submission to the RCPS, 29/7/96, RCPS Exhibit 2529/52, at Doc. 2239204-08; A. Blaszczyński, RCT, 30/10/96, pp. 33712-13.

¹¹⁷⁰ See K. Lancefield, Submission to RCPS, 18/7/96, RCPS Exhibit 2529/43; and R. Murrey, Director Sexual Offenders Treatment and Assessment Program (SOTAP), South Australia, 21/8/96, RCPS Exhibit 2529C/159.

19.134 An overall consequence for the justice system is that the options on sentencing in dealing with paedophiles are limited, particularly the opportunity for community-based orders with provision for mandated treatment. Of concern in this regard has been the use of community service orders which, on more than one occasion of which the Commission is aware, have been performed by work placing the offender into close proximity with children.

19.135 For the individual paedophile who wishes to seek assistance outside of the justice system, or more accurately, prefers not to be drawn into it, there is very little available. Such assistance as might be sought from professionals in private practice could be very expensive, particularly in the case of psychologists, and in the case of psychiatrists who are not prepared to bulk bill.

19.136 Otherwise, there are various non-government funded welfare organisations, and private facilities, with varying treatment philosophies and expertise, whose organisers and staff are sometimes untrained volunteers, and not subject to any code of ethics or practice. Their understanding of the issues, and the legal obligations that attach, is not necessarily complete, nor are the limitations of treatment always obvious to those who use their services.¹¹⁷¹ The urgent need for proper training and experienced staff in this area were identified in a number of submissions.¹¹⁷²

POSSIBLE COMMUNITY-BASED MODEL

19.137 A recent initiative, in which Professor Blaszczyński was heavily involved, may however be noted, even though it is available to only a limited group of offenders. The National Professional Standards Committee, a Joint Committee of the Australian Catholic Bishops Conference and the Australian Conference of Leaders of Religious Institutes, issued a report in April 1996¹¹⁷³ proposing a national therapy program on behalf of the Australian Catholic Community, directed at modifying or preventing sexually abusive behaviour of all kinds, by priests and by religious personnel. The program is outlined earlier in this Report¹¹⁷⁴ and has only just come into effect. It operates on cognitive behavioural lines and involves the creation of a National Therapy Program Unit to direct, and co-ordinate therapy for those who enter the program, principally using community-based services, but with special provisions available for residential care and support, particularly for those who may be suicidal, or present severe risks to children.

19.138 Both self-referral and open intake, following disclosure or the making of an allegation (which may or may not be accompanied by police action and trial), are available, under the program.

19.139 In many ways, this program provides a potential model for a community-based program available to a much wider group of offenders. Indeed, an interagency model along these lines, as demonstrated in the following diagram, was proposed by Professor Blaszczyński:

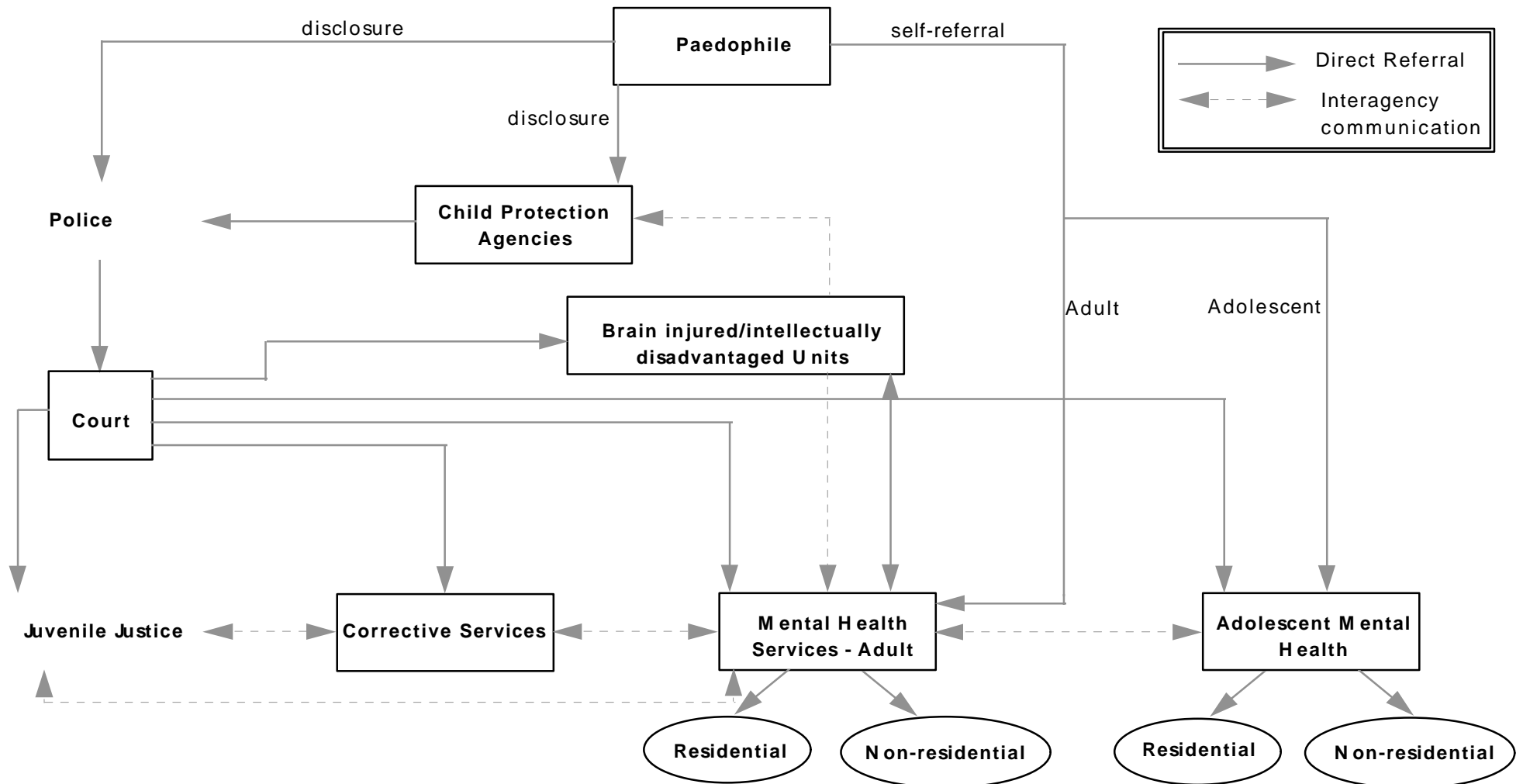
¹¹⁷¹ NSW Child Protection Council Committee on Sex Offences Committed Against Children, Position Paper, Managing sex offenders: a child protection perspective (draft), June 1996, RCPS Exhibit 2146, pp. 23-24.

¹¹⁷² See K. Lancefield, Submission to RCPS, 18/7/96, RCPS Exhibit 2529/43; G. Green, Submission to RCPS, 30/7/96, RCPS Exhibit 2529/48; Confidential Submission to RCPS, August 1996, RCPS Exhibit 2529C/122; R. Murrey, Director Sexual Offenders Treatment and Assessment Program (SOTAP), South Australia, 21/8/96, RCPS Exhibit 2529C/159.

¹¹⁷³ Australian Catholic Bishops' Conference, Australian Conference of Leaders of Religious Institutes, Professional Standards Research Project: A National Treatment Program for Priests or Religious with Psycho-sexual Disorders: Final Report, 1996, RCPS Exhibit 2513C.

¹¹⁷⁴ See Volume V, Chapter 11 of this Report.

Proposed Interagency Model for Treatment Services for Paedophiles



19.140 Offenders who are aware of aberrant urges but have either not acted upon them or have so far avoided the criminal justice system may come to recognise that they need assistance. This model allows those offenders to gain access to appropriate services, which may include residential care, particularly in cases involving serious risk, psychiatric conditions, or brain damage.

19.141 Similarly, referral from within the criminal justice system would be possible, as determined appropriate for the needs and justice of the individual case.

19.142 As envisaged by Professor Blaszczyński,¹¹⁷⁵ this model would ensure integration of effort, and disclosure of information between:

- the Police Service;
- child protection agencies;
- the Department of Juvenile Justice;
- Corrective Services (including Probation & Parole); and
- mental health services;

from which there could be continuity of care, the establishment of a database concerning offenders for subsequent use by police and child protection agencies, greater consistency and development of best practices, along with data collection for research purposes.

MANDATORY REPORTING

19.143 The problems which mandatory reporting occasions in the therapeutic setting are obvious and were touched on in the preceding chapter of this Report. A national survey in the USA in 1993 was reported by Professor McConaghy¹¹⁷⁶ to suggest a non-compliance rate by professionals mandated to report as high as 40%, arising out of their concerns that it may cause more harm to the child and discourage both abuser and victim from seeking treatment or revealing abuse.¹¹⁷⁷

19.144 Various approaches exist, ranging from:

- an absolute obligation by the medical practitioner to notify, which should be pointed out to the patient before any disclosure is made, even though that may result in him or her going away untreated;
- allowing the practitioner a discretion not to report cases if the patient is responding appropriately to therapy;¹¹⁷⁸
- granting qualified immunity from prosecution for abuse conducted prior to seeking therapy;¹¹⁷⁹
- freedom from reporting where no child is in immediate danger;¹¹⁸⁰

¹¹⁷⁵ A. Blaszczyński, Submission to the RCPS, 29/7/96, RCPS Exhibit 2529/52.

¹¹⁷⁶ N. McConaghy, Report to the RCPS, June 1996, RCPS Exhibit 2548, pp. 9-10.

¹¹⁷⁷ See N. McConaghy, Report to the RCPS, June 1996, RCPS Exhibit 2548, pp. 9-10, where he refers to L. Thompson-Cooper, R. Fugere, B. M. Cormier, 'The child abuse reporting laws: an ethical dilemma for professionals', *Canadian Journal of Psychiatry*, 1993, vol. 38, pp. 557-62.

¹¹⁷⁸ See N. McConaghy, Report to the RCPS, June 1996, RCPS Exhibit 2548, pp. 9-10, where he refers to L. Thompson-Cooper, R. Fugere, B. M. Cormier, 'The child abuse reporting laws: an ethical dilemma for professionals', *Canadian Journal of Psychiatry*, 1993, vol. 38, pp. 557-62.

¹¹⁷⁹ See N. McConaghy, Report to the RCPS, June 1996, RCPS Exhibit 2548, p. 10, where he refers to S. R. Smith & R. G. Meyer, 'Child abuse reporting laws and Psychotherapy: a time for reconsideration', *International Journal of Law and Psychiatry*, 1984, vol. 7, pp. 351-66.

¹¹⁸⁰ See N. McConaghy, Report to the RCPS, June 1996, RCPS Exhibit 2548, p. 10, where he refers to R. Weinstock & D. Weinstock, 'Child abuse reporting trends: An unprecedented threat to confidentiality', *Journal of Forensic Science*, 1988, vol. 33, pp. 418-31.

- absolute protection when the offender deals with a select group of practitioners authorised to deal with self-reporting offenders, as the Commission understands has been the case with a Confidential Doctors' clinic in Belgium; and
- reporting but in the assurance that the conduct would be dealt with by a diversion program, without risk of imprisonment, so long as the offender continues with the program.

19.145 These various options raise very difficult policy issues, which are complicated by the circumstance that the nature of the abuse involved may range from touching or indecent exposure, to penetration accompanied by violence. Additionally, the position is made more complex by the circumstance that, in the current state of knowledge, there is no certainty that any form of treatment will end, or even reduce, the risk of recidivism for any given offender. Professor Blaszczyński was of the opinion that an important part of the therapeutic process for offenders was to make full disclosure and acknowledge the extent of their behaviour.¹¹⁸¹ Wherever uncertainty exists as to whether possible arrest and imprisonment would follow disclosure, few offenders are likely to be fully frank.

19.146 Part of this problem is attributable to lack of clarity as to:

- the basis upon which the offender is seeing the therapist, that is, as a patient, or on behalf of a third party;
- whether the purpose of the session is to conduct an assessment for the purpose of sentencing or acceptance into a program, or for management, or for treatment;
- whether the therapist would be entitled to refuse to treat an offender mandated by the Court; and
- the limits of confidentiality and of privileged information under the law.

19.147 These are not issues which the Commission considers it can resolve in any definitive way, but which do call for urgent resolution after discussions between the Australian Medical Association, the Director of Public Prosecutions and other agencies involved. The *prima facie* approach of the Commission is that the existing obligation of notification should remain, because of the continuing risk to children posed by any offender.¹¹⁸² The assertion by such an offender that no child is at immediate risk can never be taken at more than face value, having regard to the capacity of the paedophile for cognitive distortion, minimisation and deception, and to the propensity to reoffend. However, as outlined earlier, the Commission would prefer to see non-reporting dealt with as a disciplinary matter, or alternatively as a summary offence under the *Children (Care and Protection) Act 1987*, subject to a prosecutorial discretion.

19.148 The preferable option the Commission sees at this stage (so far as the offender is concerned) is for formal recognition to be given either by express provision in the Crimes Act, or by sentencing practice, to take into account as a matter that might properly justify a non-custodial option, the circumstance that an offender has self-reported (as opposed to being detected), and has sought, and is receiving treatment (particularly in a case not involving force, or penetrative abuse). In essence, an expansion of the pre-trial diversion approach might overcome some, although it is recognised not all, of the problem.

¹¹⁸¹ A. Blaszczyński, RCT, 30/10/96, pp. 33696-97.

¹¹⁸² See Chapter 18 of this Volume for further discussion of this topic.

E. CONCLUSIONS

19.149 The Commission recognises that the diversion of funding to treat child sexual abusers is not necessarily an option that has popular support. Many see the only option as lengthy imprisonment. Others can readily identify more deserving and needy causes. However, the reality remains that:

- there are substantial numbers of child abusers in the community who are at the present undetected;
- all imprisoned sex offenders will be released one day and returned to the community; and that
- each in their own way constitutes a real risk to children.

19.150 Where there is credible evidence that something can be done to reduce that risk, and to save the personal and financial cost of victimisation¹¹⁸³ then it seems to the Commission imperative that the natural resistance to assisting and working with proven and potential child sex offenders be overcome.

19.151 The misconception about treatment of offenders is that it is a soft option. This is not the case. The treatment techniques described are often coupled with imprisonment or some other form of restriction on the offender and aim to make the offender take responsibility for his or her actions while reducing the chances of reoffending.¹¹⁸⁴

19.152 Comprehensive proposals for the provision of assistance have been developed by the Child Protection Council¹¹⁸⁵ and by the Crime Prevention Committee, Parliament of Victoria¹¹⁸⁶ with which the Commission broadly agrees. In particular, it accepts the appropriateness of the CPC basic principles of working with child sex offenders.

¹¹⁸³ J. Nicholson SC, Defence of alleged paedophiles - why do we need to bother?, Paper presented at Australian Institute of Criminology Conference - Paedophilia, Policy and Prevention, University of Sydney, 14/4/97, pp. 10-11.

¹¹⁸⁴ W. F. Glaser, Paedophilia: the public health problem of the decade, keynote address presented at Australian Institute of Criminology Conference - Paedophilia, Policy and Prevention, University of Sydney, 14/4/97, p. 10.

¹¹⁸⁵ NSW Child Protection Council Committee on Sex Offences Committed Against Children, Position Paper, Managing sex offenders: a child protection perspective (draft), June 1996, RCPS Exhibit 2146.

¹¹⁸⁶ Victoria Parliament Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model: First Report upon the Inquiry into Sexual Offences Against Children and Adults*, Government Printer, Melbourne, 1995, RCPS Exhibit 1757, Chapter 9.

RECOMMENDATIONS

The Commission makes the following recommendations:

- ◆ Establishment of a prison-based program which can deliver:
 - specialist assessment of offenders for the purpose of sentencing, and also for the purpose of selecting inmates suitable for treatment;
 - an intensive residential treatment program for suitable prisoners based on relapse prevention;
 - post-release support and supervision (para. 19.68).
- ◆ Continuation of the psychosexual education program for offenders serving short sentences or with community-based orders (para. 19.60).
- ◆ Establishment of accredited community-based programs, which can supplement the prison-based program in delivering:
 - specialist residential and outpatient treatment of the relapse prevention type to assist offenders who are the subject of diversion programs, or who are otherwise dealt with by non-custodial orders requiring submission to treatment as a condition of probation;
 - similar treatment to those persons who voluntarily seek treatment but who have not come to the notice of the justice system (paras. 19.137 - 19.140).

- ◆ In the event of a suitable external treatment program being established, which has a residential and follow-up capacity, the use of a range of sentencing options including:
 - deferred sentence conditional upon the offender's admission into such program, and compliance with it;
 - Griffiths type remand under which sentencing is postponed until the offender has completed the treatment program;¹¹⁸⁷
 - a substantial discount on sentence for an offender prepared to enter such a program, subject to a right of appeal by the DPP, in similar form to that provided under s. 5DA *Criminal Appeal Act 1912*, where the offender fails wholly or partly to comply with the program.
- ◆ Removal of Community Service Orders as an available sentencing option for this type of offence, and their replacement, in cases not requiring a custodial sentence, by supervised recognisance with conditions for submission to an approved treatment program, and supervision, residence, reporting and the like.
- ◆ Monitoring of the national program established by the Catholic Church, to determine its efficacy, cost effectiveness and suitability for extension of community-based resources.

- ◆ Review and co-ordination of such services as are currently available and publicly funded, with a first priority being given to post-release support.
- ◆ Development of specialist accredited services to deal with the adolescent offender, as well as the intellectually disadvantaged and brain damaged offenders, including:
 - in the case of adolescent offenders, extension of the Juvenile Justice Program to permit treatment being provided not only to adolescents convicted of sex offences, but also to those children who disclose a tendency to this form of behaviour but who are either too young to be charged, or who are detained for other reasons;
 - in the case of intellectually disadvantaged and brain damaged offenders, establishment of suitable residential programs where their additional intellectual, health or psychological problems can be investigated and managed in conjunction with treatment for their sexual offending;

- ◆ Amendment of the Children (Care and Protection) Act to extend the definition of children in need of care and protection to include children, particularly those aged under 10 years, but not necessarily confined to them, who are found to be engaged in inappropriate sexual behaviour towards other children, and to permit the making of suitable orders including orders for their treatment either under the Adolescent Offenders Program or other appropriate program.
- ◆ Encouragement of training and research to address the following areas:
 - the establishment of postgraduate training in partnership with a selected university for psychiatrists and psychologists, social workers, probation and parole officers, and prison officers in the field of sex offending;
 - the co-ordination and initiation of research, with a view to acquiring greater knowledge as to the effectiveness of treatment for child sexual abuse offenders and of the individual therapies with differential groups of offenders in the immediate, short and long term;
 - the preparation of reliable forensic assessments; and
 - the provision of information to judicial officers concerning the treatment potential, and resources available, so that they can make better informed decisions when considering the options for sentencing currently available.
- ◆ The establishment of an accreditation system for all services and therapists working in this area.

¹¹⁸⁷ This latter option may require legislative amendment of the Sentencing Act. *R v Tindall & Gunton* (1995) 74 ACrimR at 275.

CHAPTER 20

A CHILDREN'S COMMISSION

20.1 Since 1990, notwithstanding:

- the existence of interagency guidelines;
- a stated commitment by each of the responsible agencies to co-operation in the management of child sexual abuse;
- a myriad of reports and reviews calling for such co-operation; and
- numerous meetings of the Child Protection Council supporting the principle of interagency co-operation;

the objective of interagency co-operation has not been satisfactorily met.

20.2 The reform already achieved throughout the life of the Royal Commission has been encouraging but the history outlined earlier leads to the irresistible conclusion that change would not have happened without its presence.

A. A SUPERVISORY AGENCY

20.3 No one department or agency can adequately discharge the obligation of the State to provide reasonable protection for children from abuse. Co-operation and co-ordination of effort are essential to create a protected environment. The need for a co-ordinating agency has been recognised in the creation of the Child Protection Council and the Office for Children and Young People, although each has a largely advisory role.

20.4 The Royal Commission has concluded that it is now necessary to establish a new Commission with appropriate powers and capacity to oversee and co-ordinate the delivery of service for the protection of children from abuse (including sexual, physical and emotional abuse and neglect). It should be set up in the context of a rationalisation of the roles of existing agencies and it should have more than a mere advisory role.

20.5 The desirability of establishing an effectively resourced and empowered umbrella organisation along these lines was identified in several submissions received by the Royal Commission.¹¹⁸⁸ It was also advanced by a number of the experts who were consulted.

¹¹⁸⁸ eg. G. Cahill, Submission to RCPS, 17/6/96, RCPS Exhibit 2529/3; The New Children's Hospital, Submission to RCPS, 20/7/96, RCPS Exhibit 2521; National Association for the Prevention of Child Abuse and Neglect (NAPCAN), Submission to RCPS, 26/7/96, RCPS Exhibit 2529C/141.

20.6 If such a Commission is to be established, it need not be large but would require the resources and powers to ensure that it can:

- achieve greater accountability and transparency across the spectrum of child protection services;
- provide a centre of excellence which can be relied upon for:
 - up-to-date professional practice and independent advice on policy and planning; and
 - professional review which agencies will respect as a necessary step for improvement in the way in which the community protects children;
- facilitate a confidential and professional checking process in aid of the pre-employment vetting of those engaged in activities involving the care or supervision of children;
- operate a system under which certificates can be issued in relation to those who are considered to constitute an unacceptable risk to children, thereby precluding them from direct access to children whether in paid or voluntary employment;
- secure effective co-ordination of effort by the agencies and departments involved in child protection; and
- act as an effective and independent advocate for children's interests.

20.7 Importantly, the Commission should have actual and perceived independence from government and the relevant departments and agencies delivering services, so that it can report fearlessly and objectively on matters within its field.

THE STRUCTURE OF THE COMMISSION

20.8 In considering the most effective structure for an umbrella agency of the kind contemplated, the Royal Commission has considered the following options:

- **Option One**

Vesting responsibility for the services outlined in this chapter, together with a disciplinary investigative function, in the Office of the Ombudsman;

- **Option Two**

Establishing a separate Children's Commission with the functions outlined in this chapter, together with the responsibility for disciplinary investigations into allegations of child sexual abuse on the part of employees or volunteers working for government departments or government funded agencies;

- **Option Three**

Establishing a Children's Commission with the functions outlined in this chapter but vesting the investigative functions mentioned in Option Two in other agencies.

OPTION ONE

20.9 In considering this option, an important factor in the Royal Commission's considerations was the lack of an independent agency to investigate allegations of child abuse involving DCS, DSE, DSR and DJJ employees. As has been noted, the only existing independent investigative agency is that relating to Health workers, although that will change if a Teacher Registration Authority, with a similar jurisdiction, is introduced.

20.10 History has shown that there are problems in leaving internal investigations to the employing agency. They suffer from conflicting staff loyalties, they discourage internal informants, they run into problems of institutional bias and self-protection, and they are not perceived as open, transparent or impartial. For this reason, the Commission considers it desirable in any new system to make provision for independent investigation of this kind of allegation.

20.11 In the Royal Commission's view it is inappropriate to have the same body, whether it be the Office of the Ombudsman, or a purpose created agency:

- conducting disciplinary investigations requiring a judgment as to whether specific acts have been proved to the standard required to sustain a 'charge' of 'misconduct' or 'disgraceful or improper conduct';
- reviewing information and material for the quite different process of making an administrative decision that a person is an unacceptable risk to be employed or allowed to provide any service in the care or supervision of children; and also
- monitoring or providing direction in the provision of child protective services.

20.12 Different approaches are called for in each of these functions, particularly the first two, which may blur the focus of the agency.

20.13 Moreover, the Ombudsman has significant responsibilities in respect of very many other matters relating to government agencies and services that do not touch upon children's interests. The intention of the Royal Commission is that the supervisory agency should have a singular focus upon children's issues and upon creating a safer environment for children. It is critical that such focus is not lost by reason of responsibilities to other groups, or by competing demands on resources.

20.14 For these reasons the first option is not preferred.

OPTION TWO

20.15 For similar reasons to those identified above, the Royal Commission does not consider it appropriate to vest within a purpose created umbrella agency all of the functions contemplated in this chapter. While theoretically it might be possible to establish a separate disciplinary unit within such an agency, that would be more a response of form than substance.

20.16 The imperative of creating a Children's Commission with its focus on the protection of the child leads the Royal Commission to reject this option.

OPTION THREE

20.17 This option would preserve for the proposed Children's Commission, the necessary independence and authority to monitor and advise on the performance of the relevant departments and agencies involved in child protection, to assist in policy development, to collect intelligence, to assist in the dissemination of information concerning suspected child abuse and offenders, and to perform an important role in making administrative decisions as to whether persons working, or seeking work in positions involving close contact with children, are suitable for that purpose, without being diverted by an investigative/disciplinary role.

20.18 The Royal Commission has given consideration to the possibility of restructuring the Child Protection Council and/or the Community Services Commission to perform this role. It does not consider that to be possible given the absence of statutory authority of the former, and the responsibility of the latter for matters other than children's issues. Rather, it sees it as more appropriate to transfer their relevant functions to a properly empowered and resourced Children's Commission, as outlined in the next section of this chapter.

20.19 Additionally it is envisaged that under this model, the investigative function for each department concerning alleged or suspected child sexual abuse would pass to the Office of the Ombudsman save:

- in the case of Health, where it would remain with the Health Care Complaints Commission; and
- in the case of DSE, if the Teacher Registration Authority is established and is vested with a similar disciplinary function to the Health Care Complaints Commission.

B. THE CHILDREN'S COMMISSION

20.20 As proposed by the Royal Commission, the Children's Commission would take over the functions previously carried out by the Community Services Commission (as they relate to children) and all of the existing functions of the Child Protection Council. It would need to be established by statute as an independent body, with jurisdiction *inter alia* to protect children who are in receipt of, or eligible to be in receipt of, services from the following entities:

- all NSW Government Departments and agencies;
- all agencies, organisations and groups partially or wholly funded by NSW Government;
- all schools registered under the *Education Reform Act 1990*;
- all agencies approved or licensed by any Minister, Government Department or agency; and
- all community groups, agencies or organisations organised for the purpose of providing services to children.

'Services' in this respect would include:

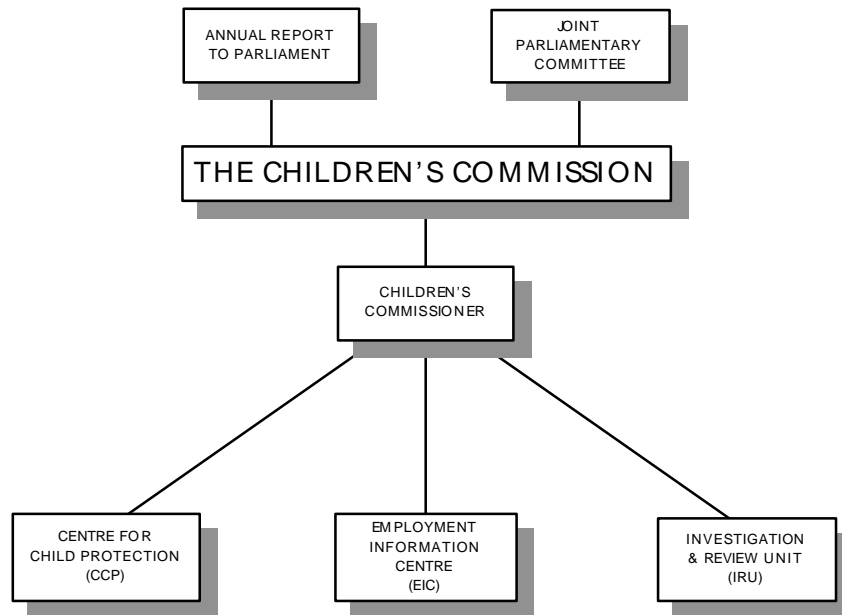
- school and pre-school education;
- day care;
- health care;
- foster care;
- residential and welfare care;
- tuition and training in recreational, sporting and leisure activities;
- juvenile detention and supervision within the Justice system;
- church and youth groups; and
- all similar activities or services provided to children on any organised basis.

20.21 The Commission should be required to report to Parliament annually and to be subject to oversight by a joint parliamentary committee.

20.22 It is proposed that the Commission would have three divisions:

- the Centre for Child Protection (CCP);
- the Employment Information Centre (EIC); and
- the Investigation and Review Unit (IRU).

20.23 The proposed structure can be diagrammatically represented as follows:



20.24 It is proposed that the Children's Commission should be the pivotal point of contact upon issues relating to the protection of children. It should have at least the following features:

- the powers of the present Community Services Commission as they relate to children in care, including investigation and conciliation of serious complaints about services provided to children and review of such services of its own motion;¹¹⁸⁹
- the powers to obtain (with immunity both for itself and for its informants) information across all agencies in respect of:
 - the background and career history of persons applying for employment or voluntary work (including foster carers), or already working, in the care or supervision of children; and
 - the background of families of children in care and detail of the child's placement.
- an information data bank, within the Employment Information Centre (EIC) upon which the Children's Commissioner can rely to discharge the functions vested in that office of:
 - responding to inquiries by government departments, agencies and approved organisations for the purpose of pre employment vetting; and
 - considering whether a particular person should be certified as an unacceptable risk to occupy any position (paid or voluntary) involving the care or supervision of children;
- a Community Visitors Scheme to include the agencies referred to above with the aim of reviewing the suitability of the environment in which children are cared for or supervised by such agencies;
- co-ordination of the Area Protection Committees to ensure their efficient operation within the community;

¹¹⁸⁹ Community Services (Complaints, Appeals and Monitoring) Act 1993 .

- a research and training capacity within the Centre for Child Protection (CCP) to permit agency participation in multi-disciplinary courses and to provide continuing education;
- modules to develop and enhance public awareness of issues involving the protection of children;
- the review of children in care with standing to bring matters before the Children's Court;
- the capacity to act as a central point for coordination of the activities of children's advocacy groups; and
- the authority to report to Government in the event of concern arising that the Police Service commitment to child protection is flagging, or that the CPEA or JITs are under-resourced, or that interagency co-operation is lacking.

20.25 The existing expertise within the Child Protection Council and the Community Services Commission should not be lost. It would be appropriate for:

- the Secretariat of the Child Protection Council to provide the infrastructure of the Centre for Child Protection; and for
- the Community Services Commission to provide the infrastructure of the Employment Information Centre (EIC), and the Investigation and Review Unit of the Children's Commission (IRU).

In each case it is contemplated that there would be a transfer of budget entitlements to the Children's Commission.

20.26 If it is judged that a transfer of child protection functions of the Community Services Commission to the Children's Commission would leave it with insufficient residual responsibility to justify its retention, then consideration could be given to moving those remaining functions (and budget) to the Office of the Ombudsman.

CHILDREN 'S COMMISSIONER

20.27 The Children's Commissioner should have the responsibility for the overall functioning of the Children's Commission.

20.28 A Commissioner of calibre will be necessary to:

- ensure that the Children's Commission is able to attract appropriate staff;
- develop professional and balanced protocols for investigations and review;
- control the very sensitive material received by the Employment Information Centre;
- make judgments in relation to whether individuals are an unacceptable risk to be employed in the care or supervision of children;
- exercise the powers needed to enable the Commission to function successfully;
- co-ordinate the operations of the Children's Commission in a manner which will give it the capacity to open up the child protection system to scrutiny;
- gain the respect of the community and government agencies that will utilise its services, and encourage their mutual co-operation;
- create a professional forum for the development of best practices in the prevention of child abuse in a multi-disciplinary setting; and to

- review the position of children in foster or substitute care.

CENTRE FOR CHILD PROTECTION

20.29 This arm of the Children's Commission should inherit the present functions of the CPC¹¹⁹⁰ and also have power to:

- conduct research into trends in child protection both in Australia and overseas, to identify practices that may be appropriate for adoption for the prevention of child abuse or for the care or rehabilitation of children in need;
- act as the co-ordinating body for the Children's Advocacy Network recommended in the Report of the Inquiry into Children's Advocacy;
- receive information and feedback from the community by appropriate mechanisms to assist in the development of proper practices;
- co-ordinate the activities of the Area Protection Committees throughout the State;
- liaise with and assist in monitoring the practices and effectiveness of the investigative work of the police and DCS in relation to child sexual abuse;
- liaise with and assist the New Children's Hospital at Westmead in establishing an Expert Children's Centre and consider and report on its possible extension to other locations within the State;
- develop an interagency/multi-disciplinary training capacity to assist government and non-government agencies with staff development and continuing education;
- promote public education and child protection awareness campaigns;
- convene an annual conference in child protection work; and to
- monitor developments arising out of this Royal Commission's recommendations.

20.30 It is important that the Commission be prepared to consult with experts in relevant areas including paediatrics, child development, forensic psychiatry, criminology, sociology, law, policing and behavioural sciences. For this purpose it would be highly desirable for it to establish an Advisory Committee including a range of persons of similar experience and background to those presently constituting the Child Protection Council.

EMPLOYMENT INFORMATION CENTRE (EIC)

20.31 The proposed role of the EIC would be to collect and collate information relevant to the suitability of persons working, or desiring to work (whether as paid employees or volunteers) in the care or supervision of children. It will be this information upon which the Children's Commissioner would rely in considering:

- the reply to be given to pre-employment inquiries made to it; and
- whether or not a certificate should issue that such person is an unacceptable risk in the area mentioned.

The EIC would from time to time, as appropriate, be assisted by the IRU in relation to the gathering of information and any further inquiries that are required.

¹¹⁹⁰ See Volume IV, Chapter 2 of this Report.

20.32 It would be necessary for considerable care to be exercised in establishing appropriate standards, procedures and safeguards in relation to the reception, storage and use of information concerning persons who may be convicted or reasonably suspected of child sexual abuse. It would be appropriate to consult the Privacy Committee in the preparation of suitable protocols and procedures.

20.33 It would also be necessary for statutory immunity from action to arise (both for the Commission and its staff) in relation to the bona fide discharge of the functions of the Children's Commission in relation to these aspects of its work.

INVESTIGATION AND REVIEW UNIT (IRU)

20.34 The role of the IRU would be to assist the Children's Commission in providing the services currently provided by the Community Services Commission under the Community Services (Complaints, Appeals and Monitoring) Act 1993 as they relate to children. These services include:

- monitoring systemic issues affecting government and non-government organisations involved in the care or supervision of children;
- investigating complaints received directly from the public in respect of systemic issues affecting those organisations;
- receiving complaints from the public in relation to individual cases and either:
 - referring those complaints to the appropriate agency for investigation;
 - facilitating local resolution;
 - providing advice; or
 - investigating or conciliating those complaints; and
- reviewing children in foster and substitute care either upon complaint or of its own motion.

20.35 In addition to these services the IRU would be expected to:

- assist with any investigations requested by the EIC;
- liaise closely with the CPEA and DCS to ensure that Children's Commission investigations do not compromise any police investigation; and to
- have the authority to inspect files and to request information and documents from government departments and agencies including disciplinary bodies set up to receive complaints, and to request information from employees of those departments and agencies.

20.36 Statutory immunity from action in respect of communications made bona fide in the discharge of these functions should also attach (both to the Commission and its staff).

20.37 The Royal Commission is of the view that a positive effort is needed to improve the lot of children in care, to see that their needs are properly addressed, and to ensure that they are protected from all forms of abuse, including child sexual abuse. It is considered appropriate that the Children's Commissioner should perform the role of a Special Guardian in this regard.

20.38 In that role the IRU would assist the Commissioner in the exercise of an authority vested in him to:

- review the child's placement at any time;
- request and/or receive reports from DCS officers, foster carers or substitute carers in respect of the placement of the child;
- visit the foster placement or substitute care placement; and to
- bring matters before the Children's Court for review.

20.39 It should be understood that this proposal would not impinge upon the Minister's obligations in respect of children in care but should be regarded as an adjunct to them, and as a means by which the serious problems relating to these children can be appropriately and independently addressed.

CHILDREN'S COMMISSION STAFF

20.40 The integrity of the staff chosen to be employed in the Children's Commission should be subject to a checking process outside the Commission. It is recommended that this be carried out by the ICAC. The staff should be subject to a statutory secrecy obligation.

C. UNACCEPTABLE RISK

THE CONCEPT

20.41 The concept of 'unacceptable risk' is a family law concept developed in relation to residence and contact issues by the High Court in *M v M*,¹¹⁹¹ where it was said:

the courts have endeavoured, in their efforts to protect the child's paramount interests to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.¹¹⁹²

20.42 The Royal Commission considers the same approach to be appropriate in dealing with the question whether particular persons are, by reason of prior convictions for sexual offences, or by reason of suspicion reasonably entertained that they have been involved in the sexual abuse of children, unfit to work in any position or to provide services, as an employee or volunteer, or in any other capacity, which would involve them having children in their care or under their supervision.

20.43 Where in accordance with the test in *M v M*, and by reference to the circumstances identified, the Commissioner considers that the involvement of any person in any such work or services would expose a child or children to an unacceptable risk of sexual abuse, then it would be appropriate for the holder of that office or delegate to have a power to issue a certificate to that effect.

20.44 It is recognised that this is an exceptional power and one that might have significant ramifications for the person who is the subject of an unacceptable risk certification. However, in the light of the evidence received which demonstrates the tenacity and duplicity of paedophiles, the repetitive and obsessive nature of their offending, the low detection and conviction rates and the inability of the system in the past to remove paedophiles from positions in which they have direct access to children, special measures are required.

¹¹⁹¹ *M v M* [1988] 166 CLR 69.

¹¹⁹² *M v M* [1988] 166 CLR 69 and 78.

20.45 In coming to this conclusion the Commission has paid particular regard to the problem in dealing with employees who have been involved in a series of incidents (involving the sexual abuse of children), none of which has reached a criminal court or resulted in a finding of breach of discipline. Factors such as:

- the guile of the perpetrator;
- the desire of the employer to shield itself from scandal;
- inefficiencies in record keeping;
- a tendency to transfer the problem with the person; and
- a readiness to allow staff faced with such an allegation to resign with a favourable reference;

have operated to create a situation in which paedophiles can continue to work in close contact with children. In many such cases, assuming that the overall position was recorded and known, a reasonable person would conclude that the person in question constituted an unacceptable risk to be employed in the care or supervision of children.

20.46 It is important to understand that the exercise of this power by the Children's Commissioner would not involve a finding of guilt or innocence in respect of any specific allegation or complaint. Rather it is intended that the Children's Commissioner would review the overall circumstances of the person in question to determine whether there is an unacceptable risk for that person to be employed in the care or supervision of children.

20.47 The issue of a certificate to this effect would not be a matter for whim or vague suspicion. Although an administrative decision, it would be necessary for the Children's Commissioner to be satisfied, after hearing the applicant, that there was reasonable cause for the exercise of the relevant power.

20.48 The issue of a certificate would be an administrative act, confined to restricting employment in areas where the person has direct contact with children. For example, a person the subject of a certificate who is a teacher could be removed from a position of teaching in the classroom, but placed in some other position not placing children under his direct care or supervision. Similarly with other categories of employment.

20.49 Disciplinary inquiries in respect of each of the departments and agencies concerned should continue to be conducted in the usual way and the Royal Commission does not wish to disturb those procedures save as earlier outlined, namely:

- the CMU should continue to carry out any disciplinary investigations in respect of allegations of child sexual abuse made against a teacher, but as an independent unit, either within the Ombudsman's Office or within the Teacher Registration Authority under consideration;
- the HCCC should carry out any disciplinary investigations in respect of allegations of child sexual abuse against a health worker; and
- the Ombudsman should carry out disciplinary investigations in respect of allegations of child sexual abuse made against employees of DCS, DJJ and DSR.

20.50 The Children's Commission should have the power to monitor these investigations, the progress of which should be reported to it. Further, it should have the power to initiate the procedure for the issue of an unacceptable risk certificate at any time it thinks fit.

Exercise of the Power

20.51 It would be appropriate in this regard for the Children's Commission to have statutory authority to issue an unacceptable risk certificate automatically in all cases in which a person is:

- convicted of a criminal charge involving child sexual abuse; or
- found guilty of a breach of discipline involving child sexual abuse; and

otherwise, where satisfied, after due inquiry, that the person poses an unacceptable risk as outlined.

20.52 The process could be initiated by the Children's Commission at two stages:

- upon the Commissioner becoming aware at the time of an inquiry by an employer, that a person known or reasonably suspected to have been involved in child sexual abuse was seeking a paid or voluntary position involving the care or supervision of children; and
- upon complaint made, or information received, that a person already in such a position has been involved in child sexual abuse, or was reasonably suspected of such conduct.

Potential Employees

20.53 It is proposed that in relation to activities or positions prescribed by Regulation for this purpose (extending to paid and voluntary work and also to foster or substitute care), an employing authority should be required to:

- notify the EIC, that it proposes to offer a prescribed position to a person, which will require him or her to work in the care or supervision of children; and to
- provide details of that position and its duties, as well as such background and identifying information as it has in relation to that person.

20.54 It would be expected that the employing authority would, before such notification, have carried out appropriate checks as outlined elsewhere in this Report, and would make such notification to the EIC as the final step in a selection and appointment process, that is, in relation to the preferred applicant for the relevant position, and not in relation to all applicants. Otherwise an unnecessary demand would be made on the resources of the EIC.

20.55 Thereafter, the procedure envisaged would be as follows:

- the EIC would have authority to access information available to the other agencies, to communicate with the Police Service if the employing authority had not already made a criminal record check, and to refer to its own intelligence data base in respect of the person nominated;
- the Children's Commission would then on the basis of the material, either:
 - advise the employing authority that there is no current unacceptable risk certificate or action pending concerning the nominated person (a 'nil certificate'); or
 - call upon the person in question to show cause why an unacceptable risk certificate should not issue in relation to him or her;
- at this time the Children's Commissioner should be able to require that person to answer any questions and/or to produce any documents deemed appropriate for the purpose of assessing the matter (that is, unless the application for the position is withdrawn), subject to the protection that anything said or provided in reply that may be incriminatory, would not be capable of use in any criminal proceedings concerning that person, but might be used in disciplinary proceedings;

- if the potential employee refuses to answer the questions the Children's Commissioner should be entitled to draw an adverse inference from that refusal;
- once the Children's Commissioner has heard from the applicant then the holder of that office, or delegate, would advise that person of the intention to:
 - issue a certificate that the person in question constitutes an unacceptable risk to be employed in the care and or supervision of children; or to
 - issue a 'nil certificate';
- if the application for employment is thereafter withdrawn, the Children's Commission should not notify the prospective employer of the decision, but should retain the material gathered in case the person in question seeks a similar position, or is found to be working with children in the future;
- if the person named pursues the application for employment the Children's Commission should notify the prospective employer of the outcome;
- the person named should have a right of appeal, the nature of which is discussed later, preferably to the Administrative Decisions Tribunal (ADT) or alternatively to the Industrial Relations Commission in respect of any unacceptable risk certificate issued; and
- the person, the subject of such a certificate should have a right to make a subsequent application to the Children's Commission to cancel the certificate with a right of appeal from any refusal to do so.

In relation to Current Employees

20.56 A parallel procedure should apply in relation to persons already holding positions prescribed by regulation, whether paid or unpaid, in which they have the supervision or care of children.

20.57 In this case the procedure proposed would allow for the following:

- once an allegation of inappropriate sexual conduct involving a child is made against, or reasonable suspicion to that effect arises in relation to, a person in a prescribed position, the employing authority or relevant complaints/disciplinary body should immediately notify the Children's Commission and provide it with all relevant information in its possession;
- if the allegation or information is received directly by the Children's Commission from a source other than the employer, the Children's Commission should notify the employer and/or complaints body of its receipt;
- the employer and/or the body investigating the matter¹¹⁹³ should liaise closely with the Children's Commission in respect of any investigation which is being undertaken;
- if the Children's Commissioner at any time during its own investigation or during any other investigation, forms the view that the employee poses an unacceptable risk to be employed in the care or supervision of children, the holder of that office or delegate should call upon the employee to show cause why an unacceptable risk certificate should not issue;
- the Children's Commissioner should be able to require the employee to answer any questions and/or to produce any documents that the Commissioner requires, subject to the protection that anything the employee says or produces that may be incriminatory would not be capable of use in criminal proceedings, but might be used in disciplinary proceedings;

¹¹⁹³ In the case of DCS, DSR and DJJ - the Ombudsman; in the case of DSE - the independent CMU or the Ombudsman; in the case of police - the Ombudsman and/or the PIC; in the case of Health the HCCC.

- if the employee refuses to answer the questions the Children's Commissioner should be entitled to draw an adverse inference from that refusal;
- once the Children's Commissioner has heard the employee, the holder of that office or delegate should either:
 - issue a certificate that the employee constitutes an unacceptable risk to be employed in the care or supervision of children; or
 - advise that no certificate will issue;
- the employee should have a right of appeal in respect of such certificate preferably to the Administrative Decisions Tribunal or otherwise to the Industrial Relations Commission; and
- a person the subject of a certificate should have a right to make a subsequent application to the Children's Commission to cancel the certificate, with a right of appeal from any refusal to do so.

APPEAL IN RELATION TO UNACCEPTABLE RISK CERTIFICATES

20.58 The nature of the appeal should be such as to recognise that the matter the subject of review is the appropriateness of the certificate that the person is an unacceptable risk, and not a finding that a criminal act or disciplinary breach was committed.

20.59 It would be inappropriate in this area of administrative decision-making to transpose terms and concepts applicable to adversarial litigation or to the exigencies of legal proof.¹¹⁹⁴ Rather the exercise involves a balancing of the need to protect children, against the interest of the employee who might be adversely affected by the procedure.

20.60 It would be similarly inappropriate to introduce a *de novo* appeal process which simply substitutes the decision of the Appellate Tribunal for the decision of the Children's Commissioner. Rather the appeal should be determined in accordance with administrative law principles. For this reason the Royal Commission favours the provision of a right of appeal to the Administrative Decisions Tribunal.

D. THE SUPPLY OF INFORMATION

20.61 As outlined above, the Children's Commission would have an important role to play in the model proposed, in:

- assisting prospective employers and other agencies in the vetting of potential employees and volunteers for prescribed positions involving the care or supervision of children; and in
- responding to complaints, or intelligence received concerning persons already in such positions who may be accused or suspected of child sexual abuse.

20.62 It is recognised that there are very many government departments and agencies, government funded bodies, and private organisations, of varying size and organisational structure, involved in the provision of care or supervision of children, or whose activities place their employees, members and volunteers in direct contact with children. It is probably impracticable by reason of their numbers for the planned functions of the Children's Commission to be exercised in relation to each of them.

¹¹⁹⁴ See *Minister for Immigration and Ethnic Affairs v Wu Shang Liang & Ors* (1996) 185CLR259 at 282.

20.63 It is for this reason that the proposals refer to organisations, activities or positions prescribed by regulation, to allow a structured regime to be established, focusing initially on those organisations, activities and positions where the need for a system such as that proposed is most pressing. This will permit progressive expansion as occasion permits or justifies. Advice to the government by the Children's Commission and by the Office of Children and Young People would be important in this respect.

20.64 For those organisations, activities and positions which are not prescribed by regulation to be subject to the scheme, it would be desirable for a model code of practice to be developed for screening and monitoring.

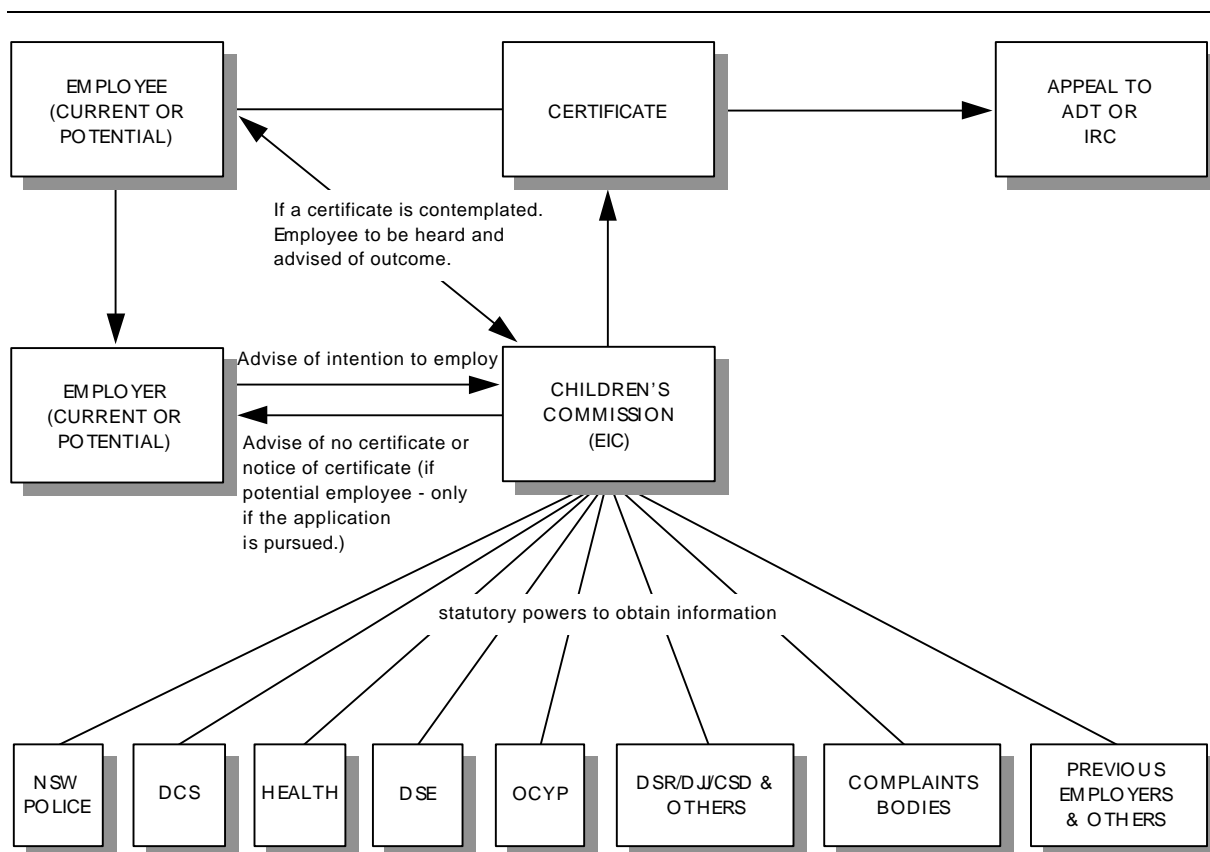
20.65 For those organisations which do come within the system, it would similarly be desirable for a code of practice to be established, to which they would subscribe, regulating matters such as confidentiality of information.

20.66 Furthermore, as a matter of practical necessity, it could be expected that pre-employment notification would only apply to future applications for appointment, thereby keeping the demands on the EIC within reasonable bounds.

20.67 It is important to understand that the process recommended by the Royal Commission in respect of applicants for employment is not a probity clearance system that involves positive vetting. The recommended system envisages information being provided to, or obtained by, the Children's Commission which will assist the prospective employer in determining whether a person seeking a relevant position constitutes an unacceptable risk and as such should not be offered that position. A 'nil certificate' means no more than that the EIC is not aware of any information that would cause the Commissioner to issue an unacceptable risk certificate.

20.68 Accordingly, this does not mean that the employer can relax its own monitoring and vetting processes. It should develop a consultative relationship with the Children's Commission founded upon openness and trust, so that each can work towards the same goal - the protection of children. It should also assume direct responsibility for employing appropriate staff, and for monitoring their behaviour in the course of any paid or voluntary work they perform.

20.69 The role the EIC may be diagrammatically represented as follows:



20.70 The information databank which the Children's Commission would need to keep is not dissimilar from the list of barred persons ('list 99'), kept by the Department of Education and Employment in the United Kingdom.¹¹⁹⁵ The Secretary of State for Education and Employment in the UK has the power to bar a person for a variety of reasons, from employment by a local education authority school or further education establishment. List 99 is not a list of sex offenders nor is everyone on the list perceived to be a danger to children. However anyone convicted after 31 October 1995, of a sexual offence against a child under 16 is barred automatically.

20.71 The data bank should be established in conjunction with each of the agencies providing services in child protection. There also should be consultation with those agencies and the Privacy Committee in respect of any privacy issues or principles that need to be addressed.

20.72 The statute establishing the Commission should contain a statutory prohibition on the release of information contained on the data bank or relevant to the exercise of the functions outlined, without a certificate authorising dissemination, in the public interest, from the Children's Commissioner or delegate.

¹¹⁹⁵ M. Swain, *Registration of Paedophiles*, Briefing paper no. 12/97, NSW Parliamentary Library, Sydney, 1997, RCPS Exhibit 3283, pp. 25-26; *Sex Offenders: A Ban on Working with Children: A Consultation Paper*, HMSO, London, 1997, RCPS Exhibit 3200.

E. LEGISLATIVE SANCTION AGAINST WORKING WITH CHILDREN

20.73 The English Home Office and Scottish Office have recommended a new offence in respect of convicted sex offenders. The proposal is that it should be an offence for anyone convicted of a relevant sexual offence against children to:¹¹⁹⁶

- seek work or training involving unsupervised contact with children;
- accept an offer of work or training involving unsupervised contact with children;
- offer services or agree to provide services involving unsupervised contact with children; or to
- enrol in a training course which would involve having unsupervised contact with children.

20.74 It is proposed that the offence be triable summarily and be punishable by a fine or 6 months imprisonment.¹¹⁹⁷

20.75 It would be appropriate for consideration to be given to the creation of a similar offence for NSW. Such an offence would not however provide a complete answer, since as has been seen, there remains a category of offenders in respect of whom convictions have not been recorded, but who nevertheless would be assessed, in accordance with the principles earlier outlined, as constituting an unacceptable risk to children.

20.76 Accordingly it is recommended that if such an offence is considered appropriate for New South Wales that it include not only convicted child sex offenders but those persons who are the subject of a current unacceptable risk certificate issued by the Children's Commissioner.

F. OFFICE OF CHILDREN AND YOUNG PEOPLE (OCYP); THE CABINET OFFICE

20.77 The Office of Children and Young People was established in April 1997 and is located within the Cabinet Office. It has a small staff led by a director who reports to the Director-General of the Cabinet Office. Its aim is to focus upon major issues requiring a co-ordinated policy response across government, and to provide expert policy advice on issues relevant to children and young people.¹¹⁹⁸

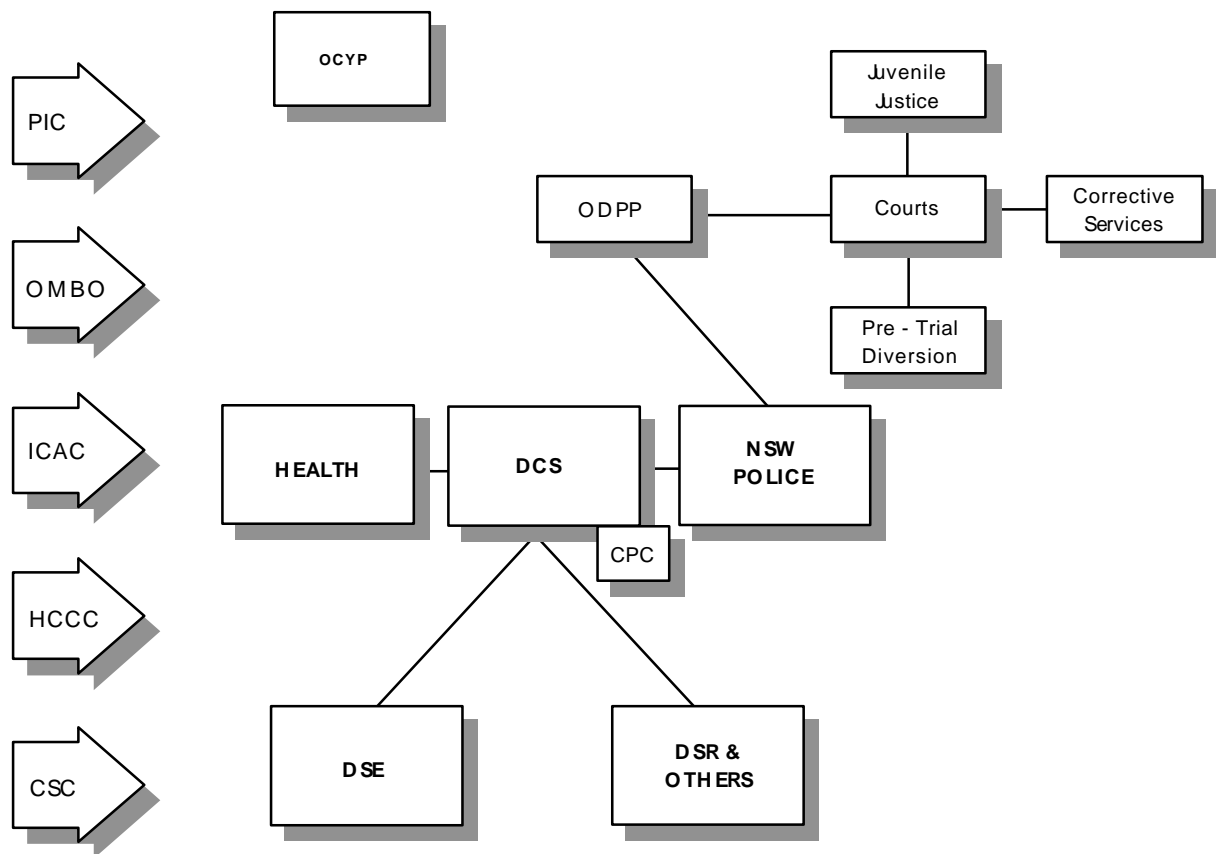
20.78 The creation of this office is in the Royal Commission's view a welcome step which will facilitate expeditious advice to the Premier on issues concerning children and young people. It would not, however, have the resources or independence needed to fulfil the charter proposed for the Children's Commission, or the capacity to engage in the investigative, and ongoing education training and complaint resolution functions contemplated for that body. Its role as an adviser to the Premier would be better performed by leaving it free of those responsibilities, and using it as a means of ensuring the implementation of policy and necessary legislative change in the wake of this Royal Commission, and current developments.

20.79 Upon this basis, a diagrammatic overview of the existing and proposed supervisory structure for child protection would be as follows:

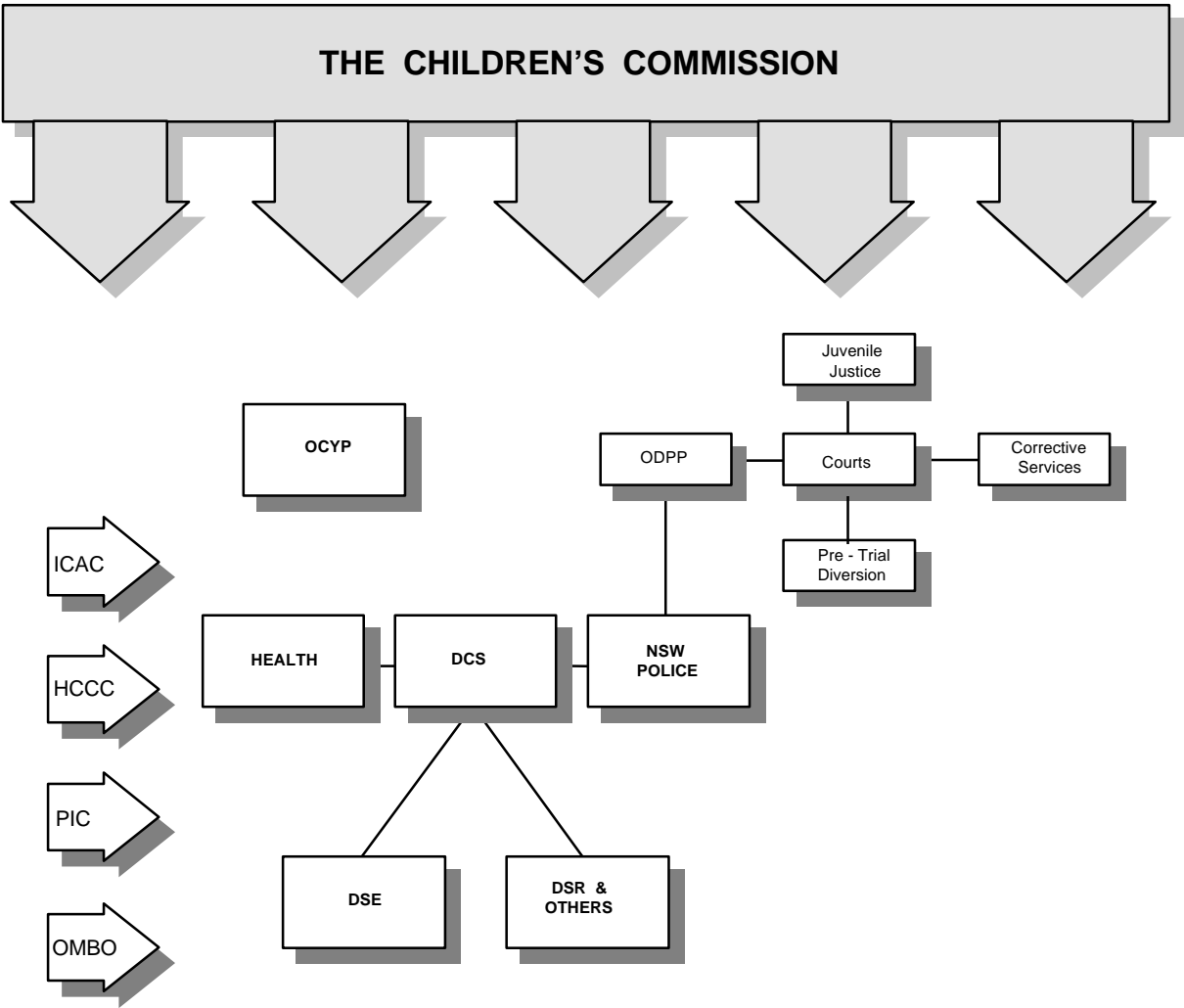
¹¹⁹⁶ *Sex Offenders: A Ban on Working With Children: A Consultation Paper*, HMSO, London, 1997, RCPS Exhibit 3200, pp. 11-12.

¹¹⁹⁷ *ibid*, pp. 3, 6, & 11-12.

¹¹⁹⁸ Letter from the Premier to the editor of *The Daily Telegraph*, 30/5/97, p. 12, RCPS Exhibit 3285.

PRESENT STRUCTURE

PROPOSED STRUCTURE



20.80 The Royal Commission is of the view that with the reform recommended throughout this Report, and the establishment of the Children's Commission, New South Wales will provide a safer environment for children.

RECOMMENDATIONS

The Royal Commission recommends the following:

- ◆ Creation of a Children's Commission to take over the responsibilities in relation to children currently vested in the Child Protection Council and the Community Services Commission, with three divisions, the Centre for Child Protection (CCP), the Employment Information Centre (EIC), and the Investigation and Review Unit (IRU), each with the functions and powers outlined in this chapter (paras. 20.4 - 20.7 & 20.20 - 20.26).
- ◆ Foundation of an Advisory Committee for the Children's Commission including experts drawn from relevant disciplines (para. 20. 30).
- ◆ The Centre for Child Protection (CCP) to have responsibility for matters such as research, education and training, community awareness, and co-ordination of the activities of the various departments and agencies involved in child protection, and for acting as a child's advocate in relation to matters of policy and planning (para. 20.29).
- ◆ The Employment Information Centre (EIC) to have the responsibility of administering the scheme outlined in Volume V, Chapter 20, for the issue of unacceptable risk certificates in relation to persons seeking paid or voluntary work in positions prescribed by regulation, or already occupying such positions, in each case involving the care or supervision of children (paras. 20.31 - 20.33).
- ◆ The Investigation and Review Unit (IRU) to have responsibility for monitoring systemic issues and complaints concerning the care and protection of children, as well as reviewing the position of children in foster or substitute care and providing assistance to the EIC with investigations (paras. 20.34 - 20.39).
- ◆ The Children's Commissioner to have authority to perform the role of a Special Guardian in relation to children in care to ensure that their needs are properly addressed and to have standing to appear in the Children's Court in relation to any applications made concerning them, as well as the right to seek a review of any orders made (paras. 20.37 - 20.38).
- ◆ The staff of the Children's Commission to be subject to vetting by the ICAC, and also to be subject to secrecy obligations; dissemination of information to be permitted only for lawful purposes and subject to a certificate of the Commissioner or delegate (paras. 20. 40 & 20.72).
- ◆ Statutory immunity from civil liability to be provided for the Commission, the Commissioner and all staff in respect of activities undertaken by them, bona fide, in the course of Commission business (paras. 20.24, 20.33 & 20.36).

- ◆ Consideration be given to the creation of a summary offence where a person convicted of child sexual abuse, or the subject of a current unacceptable risk certificate, seeks or obtains work, or offers or provides services, which in any such case involves that person having children in his care or under his supervision (paras. 20.73 - 20.76).
- ◆ Departmental investigation into allegations of child sexual abuse in relation to DCS, DJJ, and DSR employees, as well as DSE employees (unless a Teacher Registration Authority with disciplinary investigative powers is created) be transferred to the Office of the Ombudsman (para. 20.49).

SUMMARY OF RECOMMENDATIONS

The Commission's recommendations as found in the body of this Final Report are set out below:

CHAPTER 6

The New South Wales Police Service

1. Development of an in-service course to screen and prepare officers potentially interested in child protection work before they make any commitment to it (para. 6.151).
2. Development of a specialist child protection investigation course within a multi-disciplinary setting, accompanied by suitable specialist accreditation and opportunity for career advancement, for those who wish to work in the child protection area (paras. 6.151 & 6.164).
3. Adoption of strategies to deal with the special skills needed and the stresses arising for staff involved in child protection work, including:
 - stress, time and conflict management instruction, and welfare and counselling support;
 - the opportunity for temporary transfers to combat the possibility of burn-out without prejudice to promotion prospects;
 - flexible procedures for rotation, including rotation through the Child Protection Enforcement Agency (CPEA) and Joint Investigation Teams (JITs);
 - suitable recognition of expertise in child protection as a matter for career advancement;
 - consistency in case management;
 - the provision of quality supervision and leadership through a Senior Commander;
 - adequate staff resourcing to meet the workloads;
 - continuing education and peer review (paras. 6.151 & 6.183).
4. Retention of the CPEA as a permanent and separate agency, provided with adequate resources and expert staff including an effective covert and surveillance capacity of its own (paras. 6.166 - 6.167).
5. The NSW Crime Commission be given a reference to investigate matters relating to paedophile activity so that its coercive powers can be utilised where that might assist the CPEA in relation to the investigation of organised and serious criminality or networking in this area (paras. 6.168 - 6.169).
6. Establishment of the CPEA as the umbrella agency in relation to the investigation of child sexual abuse, and structured so that:
 - all officers working in child protection would be categorised as CPEA officers, including those officers who are allocated to work at JIT sites;
 - at locations at which JITs are established, officers with Child Protection Investigation Team (CPIT) or similar experience would be accredited and recognised, to ensure that there is a backup capacity to handle those cases of child abuse in which a JIT response or CPEA central office response is not necessary;

- provision would be made for CPEA officers to rotate through the Agency and in the co-located JIT sites, and separately located sites;
 - provision would be made for all officers to take part in the continuing education program;
 - provision would be made for clearance of all officers to ensure that they are suitable to work in child protection (para. 6.179).
 - the CPITs in the rural areas which are not disestablished because of the creation of a JIT, would be retained and renamed as rural JITs and, although not co-located, they should so far as practicable conduct joint investigations with Department of Community Services District Officers, following the procedures outlined in the new Interagency Guidelines and the memorandum of understanding (para. 6.180);
 - for effective intelligence gathering purposes all allegations or intelligence in respect of child sexual abuse whether made by a child, or by an adult who is complaining of assault as a child, received by the JITs would be passed to the CPEA (para. 6.181);
 - there would be a protected child protection budget that is realistic and ensures appropriate response by the Service throughout the State to child sexual abuse (para. 6.182); and
 - the role of the Child Protection Interagency Operational Committee would be confirmed (para. 6.188).
7. Establishment of liaison arrangements with the Children's Commission to permit implementation of proposals developed in Volume V, Chapter 20 of this Report, and also to assist the CPEA in keeping abreast of current developments in the field of child protection and in providing continuing education (paras. 6.190-6.191).
 8. The establishment by the Police Service of a comprehensive database and information system that will support officers working in the CPEA, permit a link through the Australian Bureau of Criminal Intelligence to intelligence available on a national basis (para. 6.134), facilitate modern investigative techniques based on intelligence matching, and provide appropriate security for sensitive information (so as to avoid the existence of enclaves of hidden intelligence) (para. 6.135).

CHAPTER 8

The Department of Community Services

9. Creation of a separate Children's Division to deal with all child protection issues (para. 8.307).
10. Development of a mission statement for that Division and the preparation of an implementation plan for its establishment, in which suitable staffing and resource levels are established (para. 8.307).
11. Guarantee to that Division of a specific share of the Department of Community Services (DCS) budget, sufficient to ensure that it can meet its commitment to children (para. 8.307).
12. Development of service standards and a code of conduct for District Officers and child protection specialists (para. 8.307).
13. Establishment of liaison with the universities and other relevant training institutes to enhance the recruitment of staff (para. 8.307).
14. Recruitment of further staff to work as specialist officers with the Joint Investigation Teams (para. 8.307).

15. Expansion of the initial training of all DCS officers working in the child protection area in conjunction with the Centre for Child Protection within the Children's Commission (para. 8.307).
16. Establishment of a mentor system to ensure that more experienced and trained staff work in conjunction with new staff for an appropriate period (para. 8.232).
17. Implementation of a mandatory continuing Child Protection Education program for all child protection workers in consultation with the Children's Commission, such program to be based on a minimum number of CPE points per year to be achieved by attendance at appropriate courses (para. 8.235).
18. Establishment of close liaison with the Children's Commission in respect of the development of training modules and the establishment of a resource library (para. 8.232).
19. Introduction of a system of peer review in respect of case management with regular case meetings in respect of the work being carried out by child protection workers.
20. Implementation of a system of promotion that would allow field workers to stay within the area of face to face work but retain the capacity for career development.
21. Convening of conferences in conjunction with the Children's Commission to enhance the relationship between managers, District Officers/child protection workers.
22. Standardisation of the intake system across the State (para. 8.315).
23. Introduction of training at local Community Service Centres in accordance with guidelines designed to ensure an effective response to all notifications (para. 8.315).
24. Establishment within each Community Service Centre of an intake team to receive information relating to child sexual abuse, physical abuse, emotional abuse and neglect (para. 8.315).
25. Staffing of intake teams with experienced and trained officers, subject to appropriate supervision (para. 8.319).
26. Recording of information received in a standard protocol for assessment and reference to the appropriate JIT or other agency according to the needs of the case (para. 8.319).
27. Requirement that all agencies report back to the intake team on completion of the investigation for record completion (para. 8.319).
28. Monitoring, in conjunction with the Children's Commission, of the South Australian centralised intake system with a view to adopting it should it appear appropriate for NSW (para. 8.315).
29. Overhaul of the Client Information System and other information management systems to enable the appropriate searches and cross referencing to occur (para. 8.318).
30. Preparation of guidelines in consultation with NSW Health, the Police Service and the Children's Commission to standardise record keeping (para. 8.237).
31. Training of all DCS staff in standardised record keeping (para. 8.237).
32. institution of a system for audit and monitoring of all files to ensure that they are properly kept and suitably followed up (para. 8.237).
33. Adoption of the system of pre-employment checking outlined in Volume IV, Chapter 8 of this Report to be developed in conjunction with the establishment of the Children's Commission (para. 8.242).
34. Implementation of the system outlined in Chapter 8 of this Report whereby certificates of unacceptable risk might be made by the Children's Commissioner in relation to DCS workers, subject to suitable appeal rights (para. 8.263).

35. Empowerment of the Office of the Ombudsman to conduct investigations in respect of allegations of sexual misconduct with or towards a child made against any DCS employee as outlined in Chapter 8 of this Report (paras. 8.262 - 8.265).
36. Amendment of clause 28 of the Public Sector Management (General) Regulation to permit the retention of information concerning allegations of sexual misconduct with or towards a child and any consequent investigation, whether or not a charge is brought and substantiated, and to allow the DCS officer concerned to have a statement in response to the matter placed on the file (para. 8.258).
37. Preparation of guidelines in respect of access to and subsequent use of the files by the DCS, the Children's Commission, the Police Service and other permitted agencies (para. 8.258).
38. Provision of statutory protection for the communication bona fide between all agencies and the Children's Commission of information, relevant to the suitability of employees and volunteers, to obtain or to continue in DCS employment or to occupy positions involving the care or protection of children (para. 8.258).
39. Statutory recognition of interagency co-operation in the delivery of child protection services (para. 8.327).
40. Extension of mandatory notification obligations to full-time, part-time and casual employees of all government departments and agencies, and government funded or licensed non-government agencies working with children, as well as volunteers and all other groups or organisations, which have a responsibility for care or supervision of children as further developed in Volume V, Chapter 18 of this Report (para. 8.327).
41. Recognition of the Children's Commission to fulfil the general oversight role proposed in Volume V, Chapter 20 of this Report (para. 8.327).
42. Expansion of the jurisdiction of the Children's Court to:
 - hear care applications from parents and/or guardians in which a position of irretrievable breakdown has not been reached;
 - bind parents and carers as well as children to orders;
 - permit care and protection and associated orders to be made in relation to adolescent abusers of children as well as to children who are victims of such abuse;
 - give standing to the Children's Commissioner to apply to the Children's Court for review of foster and substitute care arrangements (para. 8.327).
43. Requirement of government departments and agencies to use their best endeavours to provide services to children in care including prompt provision of psychological services, housing and the like (para. 8.327).

CHAPTER 9

The NSW Health Department

44. In conjunction with the Department of Corrective Services and Department of Juvenile Justice, exploration of the means by which Health can contribute in providing an effective and co-ordinated community-based program or programs for the treatment of child sexual abuse offenders (both adult and adolescent) in accordance with the matters outlined in Volume V, Chapter 19 of this Report (para. 9.18).
45. Adoption of detailed pre-employment screening checks as outlined in Volume V, Chapter 19 of this Report, applicable to all Health employees, along with notification to the Children's Commission in accordance with the recommendations in Volume V, Chapter 20 (para. 9.64).
46. Adoption of a system to deal with allegations of child sexual abuse against a health worker under which:
 - the Health Care Complaints Commission would be responsible to conduct an investigation into the complaint in consultation with the Children's Commission;
 - the Children's Commissioner would be able to exercise the power to issue a certificate that an employee is an unacceptable risk to occupy a position involving the care or supervision of children as outlined in Volume V, Chapter 20 of this Report (para. 9.65).
47. Introduction of specialist training for health service providers working in the area of child sexual abuse so that they are able to deal with children in ways that will minimise the risk of system abuse, and avoid the contamination of any criminal investigation, as outlined in this Report (paras. 9.77 - 9.79 & 9.93).
48. Introduction of a continuing Child Protection Education program (para. 9.94).
49. Specialist training on an interagency approach, with provision for short-term transfer of health workers to other agencies, in the course of that training (para. 9.95).
50. Training for generalist health service providers in the recognition and notification of suspected cases of child abuse, and in the procedures to be followed in such cases (para. 9.93).
51. Introduction of undergraduate and postgraduate training in the treatment and management of child sexual abuse into all courses qualifying graduates to work in the care or supervision of children (paras. 9.99 - 9.100).
52. Clear guidance as to the proper roles of health service providers in child sexual abuse cases, and as to the need for investigative interviewing to be conducted by police or DCS workers specially trained in such techniques (paras. 9.77 - 9.83).
53. Development, in conjunction with the Australian Medical Association and relevant colleges, of a system for accreditation of those who carry on a practice of counselling the victims of child sexual abuse (paras. 9.84 - 9.87).
54. Consideration be given to amendment of the *Crimes Act 1900*, s. 405D-E, to permit expert evidence to be taken by video link, and to the issue of Practice Directions to facilitate the reception of expert evidence in trials involving the sexual assault of children (para. 9.90).
55. Encouragement be given to the trialing of an Expert Children's Centre, and of tele-medicine, in order to secure expert and peer evaluation of sexual assault examination by practitioners from outside the Child Protection Units (para. 9.98).

CHAPTER 10

The Education System

56. An urgent review of Department of School Education (DSE) practices concerning the keeping of teacher files with a view to ensuring that:
- standardised practices of file management and record keeping are adopted throughout the State; and that
 - information concerning suspicions or allegations of child sexual abuse in relation to DSE teachers is centralised and available for disciplinary investigation, and for notification to the Children's Commission (para. 10.128).

Teacher Registration and Discipline

57. Careful consideration be given to the introduction of a system of teacher registration and disciplinary investigation, applicable to both DSE and non-government school employees, following appropriate consultation with the schools and unions, along the lines proposed in the discussion paper identified in Volume IV, Chapter 10 of this Report (para. 10.152).
58. In the event of a Teacher Registration Authority scheme not proceeding, transfer of the DSE Case Management Unit to the Office of the Ombudsman, to be charged with the responsibility of investigating all allegations of misconduct made against DSE teachers, including those of child sexual abuse (para. 10.155).
59. Application of the system proposed in Volume V, Chapter 20 of this Report, in relation to pre-employment inquiry of the Children's Commission, and in relation to the issue of a certificate that a particular teacher is an unacceptable risk to be employed in any position involving the care or supervision of children, both to DSE and non-government school teachers (paras. 10.154 - 10.155).
60. In the case of non-government schools, continued registration of a school under the *Education Reform Act 1990* be conditional upon that school complying with the scheme proposed in Volume V, Chapter 20 of this Report.
61. Extension of statutory immunity to the provision of information supplied in connection with the scheme proposed in Volume V, Chapter 20 of this Report or otherwise in relation to information supplied to any relevant authority, in good faith, concerning suspected or alleged child sexual abuse on the part of a teacher, whether employed by a DSE school or by a non-government school (para. 10.154).
62. Amendment of s. 22(4) of the *Children (Care and Protection) Act 1987* to remove any ambiguity or inconsistency with s. 22(3) of the Act (para. 10.29).
63. Support be given to the proposed scheme for a national register of persons deemed unsuitable for teaching because of criminal convictions or dismissal for sexual misconduct, to which the Children's Commission would have access (paras. 10.43-10.44).
64. Exercise of greater care to ensure accuracy and honesty in relation to the issue of certificates of service and references in relation to teachers who have resigned or been dismissed in the face of allegations of child sexual abuse, and to ensure that allegations or suspicions of sexual abuse are not answered by a transfer alone (paras. 10.115 & 10.154).
65. Exercise of care to ensure that internal DSE informants are given the full protection contemplated under the *Protected Disclosures Act 1994*, and that steps are taken to ensure that such teachers are not victimised, or otherwise disadvantaged when reporting suspected child sexual abuse or other serious misconduct by other teachers (para. 10.112).

CHAPTER 12

The Department of Juvenile Justice

66. Extension of the Juvenile Justice Sex Offenders Program to provide post-release support and monitoring of juvenile offenders (paras. 12.30 & 12.43).
67. Establishment of close interagency co-operation to provide for more effective support and housing of juvenile offenders as part of the Post Release Support Program, to discourage welfare drift and resort to prostitution (paras. 12.30 & 12.43).
68. Inclusion of Department of Juvenile Justice (DJJ) staff, and of teachers working in Department of Juvenile Justice facilities, as mandatory notifiers under the *Children (Care and Protection) Act 1987* (para. 12.26).
69. Application of the various procedures outlined in Volume IV, Chapter 8 and Volume V, Chapter 20 respectively of this Report, concerning complaints management and disciplinary proceedings, to all DJJ employees (para. 12.57).
70. The development of appropriate screening procedures for all DJJ employees (para. 12.50).
71. Application of the system outlined in Volume V, Chapter 20 to DJJ employees, concerning pre-employment notification to the Children's Commission, and concerning the issue of unacceptable risk certificates (para. 12.50).
72. Repeal of so much of the Regulations under the *Public Sector Management Act 1988* as requires the removal and destruction of information concerning allegations of child sexual assault made against DJJ staff, in the event of dismissal of any disciplinary charge (para. 12.62).
73. Introduction of continuing education of DJJ staff in child protection issues, in conjunction with other agencies on a multi-disciplinary basis (para. 12.65).
74. Introduction of counselling and treatment programs for juvenile offenders who have themselves been the subject of sexual abuse (para. 12.29).
75. Extension of statutory immunity from liability in relation to information provided bona fide by DJJ staff to relevant authorities concerning those suspected of child sexual abuse (para. 12.60).

CHAPTER 13

The Department of Sport and Recreation and other Community Groups and Carers

76. Pre-employment screening in relation to Department of Sport and Recreation (DSR) employees and volunteers.
77. Ongoing training for DSR staff in child sexual abuse prevention strategies and notification requirements (paras. 13.12 & 13.36).
78. Application of the system proposed in Volume V, Chapter 20 of this Report concerning pre-employment notification to the Children's Commission, and the issue of unacceptable risk certificates, to DSR staff, as well as to those who work for community organisations or activities to be prescribed by regulation (para. 13.9).
79. Development of guidelines in conjunction with the Children's Commission, for screening and monitoring of employees and volunteers of agencies funded by the DSR and for protective and preventative training of their staff in relation to child sexual abuse issues and notification requirements (paras. 13.9, 13.12 & 13.36).

80. Statutory immunity from liability where information is provided, bona fide, in relation to the suspected sexual abuse of children by persons engaged in sporting and recreational activities (paras. 13.43 & 13.47).

CHAPTER 14

Removal of Gender Discrimination in Existing Laws

81. Consideration be given, with appropriate community consultation, to the introduction of legislation under which:
- a gender neutral approach is taken, and in which the existing distinctions between heterosexual and male homosexual activity involving children, including the defences and maximum penalties available, is removed (para. 14.32);
 - the common age of consent is set at 16 years, subject to exceptions in relation to child prostitution and to adults standing in special relationships, in each of which cases it is set at 18 years (paras. 14.33 & 14.43);
 - the defence of mistaken but reasonable belief of consent is made equally applicable to heterosexual and male homosexual activity involving children aged 14 years or upwards (para. 14.40);
 - an additional defence of consent is created, applicable where the child is 14 years of age or above and the age differential with the other person involved is not more than two years, or they are married (para. 14.39).

Additional Offences

82. Creation of additional offences concerning:
- persistent sexual abuse in relation to children under the age of 16 years, in accordance with the draft Model Criminal Code (clause 34.6) (paras. 14.44 - 14.48);
 - permitting or suffering a child under the age of 16 years to engage in an act of indecency, or sexual intercourse, in the presence of the person charged, or exposing a child to such conduct on the part of another, in either case with the intention of deriving sexual satisfaction from the presence of the child during that activity (para. 14.57);
 - loitering by a convicted child sexual offender, without reasonable excuse, in or near defined premises regularly frequented by children and in which children are present at the time of loitering (paras. 14.52 - 14.55).
83. Additionally:
- if s. 78Q of the *Crimes Act 1900* is retained, an exception to the Yeoman's Amendment to exempt counselling and medical advice provided to children under the age of consent bona fide by qualified health professionals in the course of their profession (para. 14.49);
 - provision for the making of a paedophile restraining order along the lines of the provision contained in the *Summary Procedure Act 1921* (SA), s. 99A (paras. 14.53 - 14.55).

CHAPTER 15

The Justice System

84. Amendment of the *Crimes Act 1900* to introduce into that part dealing with the evidence of children provision for the evidence of child witnesses in personal assault cases to be taken in the following ways in addition to those provided by ss. 405D to 405FA, namely:
 - by the admission of an audio or videotape out-of-court statement as part or whole of the witness's evidence in chief (para. 15.40); or
 - by the admission of the videotape of the evidence, examination, cross-examination and evidence in chief, of the child recorded at a pre-trial hearing (para. 15.81).
85. Adoption of a time standard for sexual assault trials involving young children (aged under 12 years at the date of hearing) to be finalised within six months of the date of charge. In cases where it appears that this limit will not be met, consideration be given to taking the evidence of the child at a pre-trial hearing (para. 15.81).
86. Specialised training for judicial officers and lawyers involved in both the prosecution and defence of child sexual assault cases relating to the cognitive and emotional development of children to enable them to deal with child witnesses more effectively, and in particular to exclude inappropriate questioning of such witnesses (paras. 15.99 - 15.101).
87. Removal of the requirement for robes by judges and barristers during the examination of child witnesses in sexual assault trials, and adoption of measures to otherwise reduce unnecessary formality in such proceedings (para. 15.103).
88. Availability of the Witness Assistance Service of the Office of the Director of Public Prosecutions (ODPP) in all child sexual assault cases (para. 15.107).
89. Amendment of the Crimes Act to allow expert evidence to be admitted in child sexual assault cases as to matters of child development and the behavioural characteristics of sexually abused children (paras. 15.129 - 15.131).
90. Consideration be given to an amendment to the *Evidence Act 1995* consistent with draft recommendation 5.8 of the report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission relating to the warnings to be given by judges in jury trials involving the evidence of child witnesses (para. 15.142).
91. Amendment to s. 405B(2) *Crimes Act 1900* in relation to the directions to be given in sexual assault trials where the complainant is a child within the meaning of s. 405C of that Act (paras. 15.150 - 15.151).
92. Consideration be given to permitting judges to take into account, as a relevant circumstance, in any application to sever counts in a trial, involving more than one complainant, any adverse impact that may have on complainants aged under the age of 16 years (para. 15.158).

CHAPTER 16

93. Creation of indictable criminal offences with respect to the following activities (paras. 16.63 - 16.67):
- the publication of child pornography, including the transmission of the same by means of an on-line service (para. 16.81);
 - the use of an on-line service to encourage a person under the age of 16 years to engage in sexual activity (para. 16.82); and
 - the use of a child for pornographic purposes, whether 'employed' for that purpose or not (para. 16.35).
94. Amendment of the definition of 'listening device' pursuant to the *Listening Devices Act 1984* to incorporate the definition of 'listening device' used in the *Australian Security Intelligence Organisation Act 1979* (Cth) (paras. 16.87 - 16.89).
95. Provision be made under Listening Devices Regulation 1994, to enable a listening device warrant to be obtained in connection with the investigation of offences relating to the possession of child pornography (para. 16.90).
96. Any scheme for regulation of the Internet industry make provision for Internet Service Providers to disclose information (the identity of account holders, dates and times of access to on-line services and the sites accessed) to a law enforcement agency when an authorised officer, employed by the agency, certifies that the disclosure is reasonably necessary for the enforcement of the criminal law (para. 16.91).
97. The grant of legislative authority where a police officer has reasonable cause to suspect that a person has used computer encrypted information in connection with the commission of a criminal offence to require the user to supply the decryption key. Failure to supply the key, in the absence of a lawful excuse, should be made an offence (para. 16.92).
98. Consideration be given by the Commonwealth to the amendment of the following Acts:
- the *Telecommunications (Interception) Act 1979* (Cth) to include offences relating to the possession, distribution and production of child pornography and offences relating to the sexual assault or exploitation of children as 'Class 2' offences (para. 16.93);
 - the *Crimes Act 1914* (Cth), s. 85ZE to clarify the applicability of that provision to the transmission by means of an on-line service of material which would be regarded by reasonable persons as being, in all the circumstances, offensive (para. 16.63).
99. Support be given to the development of a Website hotline, similar to those developed in Holland and the UK, to which offensive material can be reported, backed by industry, government and law enforcement agencies, with a requirement that the operator of the hotline report paedophile material immediately to a law enforcement agency without first giving any warning or opportunity for removal of the material (paras. 16.36 - 16.38).
100. Support be given to the development of labelling technology, like the Platform for Internet Content Selection (PICS), which can be combined with appropriate software to limit the material which can be accessed by minors; and the development of reliable and practicable age verification procedures (para 16.77).

101. Action, by way of funding, training and inter-Service co-operation, to enhance the capacity of law enforcement in relative to child sexual abuse, including promotion of the Computer Investigation Techniques program of the National Police Research Unit, the deployment within the Service of computer investigative specialists and the provision of current technology in the form of software and hardware in aid of investigation (para. 16.94).
102. The offence of possession of child pornography (both for personal use and for sale) be made indictable and the maximum penalties increased (paras. 16.97 & 16.99).
103. Development by the proposed Children's Commission of a program to educate parents as to what is on the Internet in terms of child pornography and the filter and blocking technology available to them (para. 16.104).

CHAPTER 17

104. An immediate review of the present support and protection services for victims of child sexual abuse with a view to ensuring more effective co-ordination, equitable distribution and accessibility (paras. 17.54 & 17.103).
105. Increased funding and government support to refuges and other institutions which house, support and attempt to rehabilitate homeless and runaway children, including adolescents (para. 17.66).
106. Development by the Bureau of Crime Statistics and Research and the Children's Commission of a strategy and procedures for effective collection and analysis of information on child sexual abuse (para. 17.7).
107. Introduction of a systematic program for research, co-ordinated by the Children's Commission, into areas where there are significant gaps in knowledge or support services in relation to the victims of child sexual abuse (paras. 17.74 & 17.85).

CHAPTER 18

108. An ongoing public awareness campaign co-ordinated in conjunction with the Centre for Child Protection within the Children's Commission, designed to reach both city and rural communities, focused on preventative and protective education and directed to children, their families and those who deal with children on a regular basis (paras. 18.57 & - 18.59).
109. Consideration be given to a permanent phone-in program to be set up by the Police Service, DSE and Health in conjunction with the Children's Commission, along the lines of Operation Paradox, both to collect information and also to provide preventative and protective advice (paras. 18.61 & 18.62).
110. Encouragement be given to continuing education in relation to child sexual abuse issues and protective behaviours provided through government and non-government schools, which is regularly updated (paras. 18.63 & 18.64).
111. Consideration be given to the introduction of a system for the compulsory registration with the Police Service of all convicted child sexual offenders, to be accompanied by requirements for:
 - the notification of changes of name and address; and for
 - verification of the register;
 following consultation with the Police Service, ODPP, Corrective Services, the Privacy Committee and other interested parties.
112. The extension (by Regulations) of the mandatory reporting obligations under the *Children (Care and Protection) Act 1987* to a wider category of prescribed persons, to include, in addition to those already named:

- chief executives of bodies conducting schools;
 - persons in charge of child care centres;
 - chief executives or persons in charge of bodies providing welfare, social and sporting activities involving children;
 - persons in charge of residential care centres and refuges for children;
 - social workers, welfare workers and youth workers outside schools; and
 - health workers generally (para. 18.103).
- 113.** Consideration be given to dealing with non-notification as a disciplinary offence, rather than as a criminal offence (para. 18.109):
- alternatively, confining the consequence of non-disclosure by a mandatory notifier, as defined under the *Children (Care and Protection) Act 1987*, to a summary offence under that Act, and amending the *Crimes Act 1900* s. 316(1) accordingly to exempt such categories of notifier from its reach, in relation to information received in the course of their official duties (para. 18.111); and
 - extending the time for prosecution of such an offence to 3 years (para. 18.111).
- 114.** A review of the legislation under which the Police Service and the other departments and agencies charged with the care and protection of children operate, and of their current practices, with the assistance of the Children's Commission and the Privacy Committee to ensure that a comprehensive and acceptable system exists to permit the exchange, bona fide, between those agencies of information concerning the sexual abuse of children, and of persons suspected of such abuse (para. 18.120).
- 115.** Removal of any time restriction as to the supply of information upon a Criminal Names Index (CNI) check concerning past convictions for sexual offences against children, where the information is sought for the purpose of employee screening (paras. 18.122 & 18.123).
- 116.** Amendment of clause 28 of the Public Sector Management (General) Regulations 1996 under the *Public Sector Management Act 1988* to permit the retention of information concerning disciplinary charges which are not established, where it relates to the alleged sexual abuse of children, subject to a requirement that:
- such information be kept in a separate and secure file; and that
 - the employee be permitted to place on the file a statement in reply to the allegation (para. 18.133).
- 117.** Encouragement be given to the establishment of a National Index of Intelligence concerning paedophile offenders for use by law enforcement agencies, through the agency of the Australian Bureau of Criminal Intelligence (paras. 18.141 & 18.147).
- 118.** Empowerment of the Police Service to give a warning to relevant government departments, agencies and community groups relating to the presence of a person convicted or seriously suspected of child sexual assault offences, subject to guidelines to be established in consultation with the Privacy Committee, where reasonable grounds exist for the fear that such person may place a child or children in the immediate neighbourhood of the offender in serious risk of sexual abuse (paras. 18.141 & 18.153).
- 119.** Amendment of clause 26(3) of the Public Sector Management (General) Regulations 1996 under the *Public Sector Management Act 1988* to permit information obtained during disciplinary inquiries to be released to the Police Service and to the Children's Commission, where it concerns child sexual abuse (para. 18.154).

CHAPTER 19

120. Establishment of a prison-based program which can deliver:
 - specialist assessment of offenders for the purpose of sentencing, and also for the purpose of selecting inmates suitable for treatment;
 - an intensive residential treatment program for suitable prisoners based on relapse prevention;
 - post-release support and supervision (para. 19.68).
121. Continuation of the Psychosexual Education Program for offenders serving short sentences or with community-based orders (para. 19.60).
122. Establishment of accredited community-based programs, which can supplement the prison-based program in delivering:
 - specialist residential and outpatient treatment of the relapse prevention type to assist offenders who are the subject of diversion programs, or who are otherwise dealt with by non-custodial orders requiring submission to treatment as a condition of probation;
 - similar treatment to those persons who voluntarily seek treatment but who have not come to the notice of the justice system (paras. 19.137 - 19.140).
123. In the event of a suitable external treatment program being established, which has a residential and follow-up capacity, the use of a range of sentencing options including:
 - deferred sentence conditional upon the offender's admission into such program, and compliance with it;
 - Griffiths type remand under which sentencing is postponed until the offender has completed the treatment program;
 - a substantial discount on sentence for an offender prepared to enter such a program, subject to a right of appeal by the DPP, in similar form to that provided under s. 5DA *Criminal Appeal Act 1912*, where the offender fails wholly or partly to comply with the program.
124. Removal of Community Service Orders as an available sentencing option for this type of offence, and their replacement, in cases not requiring a custodial sentence, by supervised recognisance with conditions for submission to an approved treatment program, and supervision, residence, reporting and the like.
125. Monitoring of the national program established by the Catholic Church, to determine its efficacy, cost effectiveness and suitability for extension of community-based resources.
126. Review and co-ordination of such services as are currently available and publicly funded, with a first priority being given to post-release support.
127. Development of specialist accredited services to deal with the adolescent offender, as well as the intellectually disadvantaged and brain damaged offenders, including:
 - in the case of adolescent offenders, extension of the Juvenile Justice Program to permit treatment being provided not only to adolescents convicted of sex offences, but also to those children who disclose a tendency to this form of behaviour but who are either too young to be charged, or who are detained for other reasons;

- in the case of intellectually disadvantaged and brain damaged offenders, establishment of suitable residential programs where their additional intellectual, health or psychological problems can be investigated and managed in conjunction with treatment for their sexual offending;
- 128.** Amendment of the *Children (Care and Protection) Act 1987* to extend the definition of children in need of care and protection to include children, particularly those aged under 10 years, but not necessarily confined to them, who are found to be engaged in inappropriate sexual behaviour towards other children, and to permit the making of suitable orders including orders for their treatment either under the Adolescent Offenders Program or other appropriate program.
- 129.** Encouragement of training and research to address the following areas:
- the establishment of postgraduate training in partnership with a selected university for psychiatrists and psychologists, social workers, probation and parole officers, and prison officers in the field of sex offending;
 - the co-ordination and initiation of research, with a view to acquiring greater knowledge as to the effectiveness of treatment for child sexual abuse offenders and of the individual therapies with differential groups of offenders in the immediate, short and long term;
 - the preparation of reliable forensic assessments; and
 - the provision of information to judicial officers concerning the treatment potential, and resources available, so that they can make better informed decisions when considering the options for sentencing currently available.
- 130.** The establishment of an accreditation system for all services and therapists working in this area.

CHAPTER 20

- 131.** Creation of a Children's Commission to take over the responsibilities in relation to children currently vested in the Child Protection Council and the Community Services Commission, with three divisions: the Centre for Child Protection, the Employment Information Centre, and the Investigation and Review Unit, each with the functions and powers outlined in Volume V, Chapter 20 of this Report (paras. 20.4-20.7 & 20.20 - 20.26).
- 132.** Foundation of an Advisory Committee for the Children's Commission including experts drawn from relevant disciplines (para. 20. 30).
- 133.** The Centre for Child Protection (CCP) to have responsibility for matters such as research, education and training, community awareness, and co-ordination of the activities of the various departments and agencies involved in child protection, and for acting as a child's advocate in relation to matters of policy and planning (para. 20.29).
- 134.** The Employment Information Centre (EIC) to have the responsibility of administering the scheme outlined in Volume V, Chapter 20 of this Report, for the issue of unacceptable risk certificates in relation to persons seeking paid or voluntary work in positions prescribed by regulation, or already occupying such positions, in each case involving the care or supervision of children (paras. 20.31 - 20.33).
- 135.** The Investigation and Review Unit (IRU) to have responsibility for monitoring systemic issues and complaints concerning the care and protection of children, as well as reviewing the position of children in foster or substitute care and providing assistance to the EIC with investigations (paras. 20.34 - 20.39).

136. The Children's Commissioner to have authority to perform the role of a Special Guardian in relation to children in care to ensure that their needs are properly addressed and to have standing to appear in the Children's Court in relation to any applications made concerning them, as well as the right to seek a review of any orders made (paras. 20.37 - 20.38).
137. The staff of the Children's Commission to be subject to vetting by the Independent Commission Against Corruption, and also to be subject to secrecy obligations; dissemination of information to be permitted only for lawful purposes and subject to a certificate of the Commissioner or delegate (paras. 20.40 & 20.72).
138. Statutory immunity from civil liability to be provided for the Commission, the Commissioner and all staff in respect of activities undertaken by them, bona fide, in the course of Commission business (paras. 20.24, 20.33 & 20.36).
139. Consideration be given to the creation of a summary offence where a person convicted of child sexual abuse, or the subject of a current unacceptable risk certificate, seeks or obtains work, or offers or provides services, which in any such case involves that person having children in his care or under his supervision (paras. 20.73 - 20.76).
140. Departmental investigation into allegations of child sexual abuse in relation to DCS, DJJ, and DSR employees, as well as DSE employees (unless a Teacher Registration Authority with disciplinary investigative powers is created) be transferred to the Office of the Ombudsman (para. 20.49).