

Women and the Criminal Code Chapter 1

THE BIG PICTURE

PART 1: INTRODUCTION

The fundamental principle of human rights may be expressed as the improvement of conditions in society that protect the dignity and humanity of all people. The starting point for criminal justice reform is to ensure the opportunity for the least advantaged woman within our communities to access the criminal justice system, and the recognition and enforcement of her human rights. This means a system that is equitable and accessible for all women, children and men. The commitment to the protection of human rights and to the principle of equality of access has been an underlying position of the Taskforce in all of our work.

As Dorothy Thomas, the Founding Executive Director of Women's Rights Division of Human Rights Watch, USA stated:

The struggle to secure fundamental human rights recognised under international law is ultimately a local struggle, and no amount of international outcry can substitute for domestic activism.

Adopting a human rights framework to explore the impact of the Queensland Criminal Code on women has ensured we have had a comprehensive perspective from diverse communities. We recognise the need for minimum standards for human dignity, which must be delivered by all those working in the criminal justice system. We also believe that there must be appropriate, quality services available to respond to the needs of those accessing this system as either victims or offenders.

In consultations and written submissions women across Queensland raised instances of perceived violations of their human rights when accessing the criminal justice system. These included: not being believed; not being given sufficient information to understand the legal process; and the lack of free services to respond, support or counsel them. Women were also concerned about not being able to physically access support services; being treated inhumanely; and being subject to unfair cross-examination.

The United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW) states that "discrimination against women violates the principles of equality of rights and respect for human dignity."

As Australia is a signatory to this Convention, it is essential that the Queensland criminal justice system give effect to this article in its protocols and best practice guidelines, and in those of ancillary services.

Justice Mathews observes that access to the law means more than being able to get legal assistance or physical access to the courts. Physical access is meaningless, and can be counter-productive, if the individual cannot obtain a fair and just result before the law. So, women's access to the law, and access to justice (they are the same) involves issues of physical access to the law, and of fairness and justice both within and under the law.

Access to justice, and particularly women's access to justice, has been the focus of considerable attention over recent years. It is now recognised that the mere fact of being a woman can have significant adverse effects upon a person's ability both to gain entry to the legal system and to secure a just outcome from it.

The final report of the Australian Law Reform Commission (ALRC) noted that women's inequality before the law is fundamentally related to women's social inequality. The report observed that there had been little significant improvement in the position of women in society over recent years.

The report's findings on women's inequality focused on women's social position, women as targets of violence, their more limited access to financial resources, employment and equal pay; and the small number of women in positions of influence in political and legal institutions. All of these factors adversely affect the ability of women to use and receive justice from the legal system. If women's access to the law is to be improved and the law is to apply equally and to deliver equality, these broader issues must be addressed.

In Queensland, an understanding of these broader issues emphasises the role of the Report of this Taskforce and its recommendations, as only the first part of a review of the impact of the Criminal Code on women.

Changes in the law will not necessarily change women's actual experience. While the government and the community have an obligation to facilitate equality under the law, this is only one element to women's access to the criminal justice system. As Submission 29 to the Taskforce reminds us:

...UN General Assembly Resolution No. 40/108 requires that Governments take responsibility for preventing and eliminating violence against women (para 288) by: informing women about their legal rights and sources of help; ensuring that legal services, the judicial system and support services are available and operate speedily, effectively, and where possible, without cost for women who have suffered from violence; ensuring the provision of assistance to leave the place where violence occurs and in particular, promoting the provision of refuges and safe houses for women who are victims of domestic violence, and for their children.

It is appropriate then that we have considered international human rights instruments and international treaties and their applicability, in our consultations, report development and deliberation.

In consultations on 10 and 16 June women stressed the need for ongoing monitoring of the reforms proposed in this Report. In particular, women from non-English speaking backgrounds expressed their frustration at being consulted on similar issues over and over by different organisations and seeing little improvement or change.

Those consultations also supported the notion of the benchmark for access to the criminal justice system being justice before the law for the least advantaged woman in our community. As Submission 73 indicates:

...the law does take difference into account but: in a negative way; directly and indirectly; and denies that it does so.

The Taskforce was frequently invited to comment on the media's representation and portrayal of women, and to condemn those who condone violence or support stereotypical representations of women that perpetuate women's experience of inequality. At the same time we must commend those within the media who proactively profile public awareness of human rights abuses of women.

The women of Queensland form part of the Asia-Pacific Region of the United Nations. This represents sixty percent of the world's women who have declared their determination to ensure that an understanding of our differing realities replaces an abstract, universal concept of women, and that this understanding is reflected in legislation, policies and interventions and in the articulation of human rights issues .

We must acknowledge that the criminal law has negative impacts in terms of race and class as well as gender. It fails to deal with issues of disability. It has only recently decriminalised sex between consenting males. Some women are not only disadvantaged in terms of their gender, but suffer further disadvantage because of these other issues. However, attempts to acknowledge the compounding effect of disadvantage and to ensure that the law provides justice for all members of the community are too often met with the cry of 'political correctness'.

We believe that this response has the effect of silencing those who seek justice for all. The criminal justice system must provide justice for all, and not worsen the position of those already disadvantaged in our society. If there is a view, for instance, that it is too hard to prosecute cases where the victim/survivor has an intellectual disability, this removes sanctions against violence or sexual abuse of women with intellectual disabilities. Thus the criminal justice system fails to assist them, it also contributes to the perpetuation of the criminal assaults they have to endure.

In documenting the impact of the Criminal Code on women, we must also acknowledge the diversity of our circumstances as women and communities; and the necessary partnerships that have developed between community organisations working for women's empowerment and other actors in civil society, governments and the United Nations.

PART 2: THE DIVERSITY OF WOMEN

The Taskforce is of the view that the failure of the criminal justice system to respond to the life experiences and needs of women is one of structural inadequacy - inadequacy arising from the fact that the system was created by, and to a large extent remains controlled by, men.

However, the Taskforce recognises that this systemic inequality is not a product solely of gender, but rather the interrelationship of gender with other dynamic social pressures: race, ethnicity, sexuality, class, economic power, levels of education, and geographic location. The issue then is not so much that the architects and administrators of the criminal justice system were men per se - rather, that they were highly educated, socially and economically empowered men, who belonged to the dominant culture.

Many analyses centre around gender as the primary tool of analysis. Issues of race, class, sexuality etc, have all too often been ignored.... Gender issues are not separate, or parallel to, but closely intertwined with race and class issues... If we are to begin to encompass the diversity and complexity of all women and

their lives then we must cease insisting on the primacy of gender as THE issue in all our lives...

The Taskforce is mindful, nonetheless, that women are not a homogenous group. Within this diversity, however, the Taskforce believes there must be equality: all women form part of the community; all women share the same entitlements and rights as others in the community; and systems and agencies designed to serve the community must serve all of the community.

Thus, where women experience barriers in exercising their rights and using those agencies, the barriers are not the women's "problems" - they result from structural deficiencies and it is the structures that must change to become truly inclusive. Nor should the needs of particular women be categorised as "special needs" - a term which marginalises many women and sets their issues apart from those of the rest of the community.

Despite the diversity, however, there are many experiences and issues of commonality, which unite women, and particular sub-groups of women. But it is the universality of the issues that define the groups; individual women do not have static or exclusive membership of one group.

Women's diversity is a recurrent theme throughout this Report. Some of the unique issues that affect the experience of different groups of women in the criminal justice system are summarised below.

Indigenous women

The failure of the legal system to respond to the needs of Aboriginal and Torres Strait Islander women virtually screams from the pages of every criminal justice statistic collected.

There are 178 Indigenous women compared to nine non-Indigenous women per 100,000 people imprisoned in Australia. The level of violence experienced by Aboriginal and Torres Strait Islander women is generally higher than that experienced by other women. The number of Indigenous women killed by their partners and male relatives is far greater than the number of Indigenous deaths in custody.

Throughout its work, the Taskforce has been acutely aware of the need and responsibility to address issues relevant to Indigenous women. We have, however, also been conscious and respectful of the parallel review currently taking place - the Aboriginal and Torres Strait Islander Women's Taskforce (ATSIWT). We are mindful that the role of ATSIWT is to examine, and make recommendations in relation to, the high incidence of violence against Indigenous women, and that the composition of ATSIWT is drawn exclusively from Indigenous communities.

Unfortunately, we were unable to have the benefit of that Report before we completed our work. However, as ATSIWT is to present work carried out by Indigenous women for Indigenous women, it is appropriate and necessary for its views to be heard prior to any recommendations in this Report being implemented.

Women from diverse linguistic and cultural backgrounds

Throughout this Report, the Taskforce has adopted the terminology of "non-English speaking background" (NESB) to refer to women who do not share the dominant language or culture. The decision to do this was one of pragmatism not

preference, based largely on the fact that the term "NESB" is already well known within both government and non-government sectors.

Our reservations with the term are, however, important and should be stated:

- it masks the diversity of these women and suggests that all women of non-dominant cultural and/or linguistic backgrounds form a homogenous group;
- it suggests that language is the dominant barrier, rather than being one of many, and diminishes the equally important issues of culture, racism, and socio-economic dislocation caused by both voluntary and involuntary migration.

Indeed, language may not even be the issue once women are long-term or second generation migrants; and

- it presents the barriers faced as being brought about by a deficiency on the part of the women, namely an inability to speak and understand English, rather than the structural inability of our systems to deal with non-English speakers.

Nonetheless some of the factors that can impede NESB women's access to the criminal justice system include:

- lack of access to professional interpreting services;
- lack of access to multi-lingual and culturally appropriate information;
- separation from family and support networks as a result of migration;
- changing gender roles within the family as a result of migration;
- poverty, reduced employment status and increased welfare dependency as a result of migration, and consequent vulnerability to exploitation;
- acceptance of wife abuse within the culture of origin;
- a belief in family privacy;
- geographic and/or social isolation;
- risk of complete isolation if ostracised by their ethnic community;
- the woman's immigration status and consequent vulnerability to exploitation by her spouse/partner, particularly where there are children;
- stereotypes about her culture, religion, and race;
- past experiences of torture and trauma for refugee women;
- racism within the mainstream community and service providers.

These forces can work against a victim seeking help. They can also be the factors that create the need for help. The Taskforce has, for example, highlighted later in this Report the extraordinarily higher risk of homicide faced by women of South-East Asian origin as compared to non-Indigenous women in Australia.

Issues relating to the use and availability of interpreters and the impact of culture on communication processes are also explored in this Report - we must ask, how

can any individual be accorded justice within the criminal law process if they are unable to speak or be heard?

Women with disabilities

Violence and abuse are the reality for many women with disabilities. Women with disabilities are at much greater risk of physical, sexual and emotional abuse and are vulnerable to more insidious forms of violence such as institutionalised abuse, chemical restraint, drug use, enforced sterilisations, humiliation, ridicule and harassment. While violence appears to be an inescapable reality for many women with disabilities, it is a reality that continues, largely, to be hidden, unspoken and unaddressed despite the frequent official inquiries into abuse in Australia.

Women with disabilities have reported rates of sexual assault far higher than women generally. Studies have indicated that more than 90% of perpetrators are men and are known to the woman. In South Australia, Wilson and Brewer found that women with an intellectual disability in their study were more than ten times as likely to be assaulted as other women are. Women with mild intellectual disability are significantly over represented as victims.

Some of the factors contributing to this situation are:

- high risk of abuse from care givers;
- increased vulnerability of living in closed settings;
- subtle forms of sexual exploitation and abuse of many women with disabilities by male residents in institutions; and
- increased risk of exploitation and abuse because of lack of education about potentially dangerous situations and protective behaviours.

Many women with intellectual disability who have been abused are simply not able to report that abuse has happened. Some cannot speak while others may not know that sexual abuse is a criminal offence or that they have a choice in the matter. A recent study found that people with an intellectual disability are less likely to know the meanings of the terms 'rape' and 'incest' and less able to say 'no' or know how to say 'no' to unwanted touching. Thirty-six percent of people with an intellectual disability in this study thought that someone else should decide if they should have sex. This increases the likelihood of a sexual abuser persuading a person with an intellectual disability to engage in sexual contact with them.

Where the perpetrator is also the carer there are obvious risks for the victim in reporting the abuse. A woman will be reluctant to report against someone on whom she is dependent especially if there are few alternatives for that support.

Staff, family members and carers may also fail to act on reports of abuse by the person or even on observed incidents. In the University of Alberta Abuse & Disability Project sample, it is reported that 39.1% of offenders were never reported and a further 37.2% were reported but not charged. Less than 8% were convicted. Similar patterns were reported in a United Kingdom study which found that only 4.7% of offenders were convicted with a disturbing 48.2% having no consequences. A recent Australian survey of family members and staff about abuse in residential settings found that while the most frequent outcome of

sexual abuse was attending to the effects of abuse on the victim/survivor, the second most frequent outcome was that nothing was done.

In situations where a person is unable to speak or use signs, the detection of sexual abuse is extremely difficult. There are no clear-cut signs or signals that indicate sexual abuse has happened that family members or carers can readily identify. While there is general agreement that signs such as sudden changes in behaviour (withdrawal, depression, or distress), physical symptoms or new sexual behaviours should be taken seriously, there is no prescriptive list of indicators that abuse has happened.

Lesbians

It is only recently that issues relating to anti-lesbian violence and domestic violence within lesbian relationships have emerged to form part of the discourse on violence against women. While lesbians are a known social minority within Australian society, they are not recognised as such on a policy and program level, or even in relation to data collection and compilation.

Some of the factors which have been identified as contributing to lesbian women's vulnerability to violence, and lack of access to criminal justice responses, are:

- relative invisibility of the violence perpetrated against them;
- perceptions that they have transgressed women's assigned sex role;
- widespread discrimination by government, police, community services and employers;
- fear of making public their sexuality;
- pressure from within lesbian communities;
- fear of isolation from lesbian communities;
- lack of access to lesbian specific services; and
- lack of access to mainstream services with sensitivity to, and understanding of, lesbian issues.

Recognition that a lesbian's every day reality may consist of harassment, verbal abuse, intimidation and physical assaults, perpetrated by outsiders or her own partner, and that this reality is attributable largely to her sexuality, command attention by any Taskforce examining the impact of the criminal law upon women. Statistics such as those produced by the New South Wales Police Survey Out of The Blue (1995) which show lesbian respondents of crime are six times more likely than heterosexual women to experience assault highlight the gravity of this issue.

Women living in rural and remote areas of Queensland

The rural and remote culture has quite distinct implications for women. Cultural issues can be as significant as geographical isolation to women in rural and remote areas, and are in many ways a product of it. Women's experiences in rural and remote areas of Queensland can give rise to the following issues:

- geographical isolation and limited human contact, information and personal support as a consequence;

- a lack of access to emergency relief monies to support crisis intervention, for example for relocating, food purchases, transport and other necessities;
- a lack of specific support services, for example sexual assault and domestic violence services, refuges or alternative safe accommodation;
- a lack of access to appropriate information, referral and support;
- high transport costs to access long term support or counselling;
- a lack of telephone services or other means of communication to establish support or get information on legal rights or options for safety;
- a lack of anonymity in small towns for women who are victims/survivors of violent crimes;
- a lack of access to media and newspapers, even personal mail, and therefore a lack of connection with, or awareness of, the experiences of other women.

Other barriers

The categories of issues described above are by no means exhaustive. For example, women who have primary or sole responsibility for the care of children may share common experiences; young women may have common concerns about freedom of choice issues; and older women may share concerns about their particular vulnerability to certain crimes.

Clearly, these "categories" are fluid, and many women will identify with issues raised in some or even all of them, for example: lesbians from linguistically diverse backgrounds; Aboriginal women with disabilities; women living in remote areas who do not share the dominant culture of their community.

Ultimately the woman herself must decide how she identifies with the external world - she should not, and cannot, be "allocated" a social identity by policy makers and program planners.

What is more apparent than differences, however, is the recurrence of themes across the groups. The fear of isolation from their own communities is shared by lesbians, NESB women and women in remote communities. The fear of not being understood and not being able to make themselves understood is common to non-English speakers and to women with hearing or speaking disabilities.

The challenge for the criminal justice system is to be responsive to, and inclusive of, this diversity.

PART 3: THE CRIMINAL JUSTICE SYSTEM

What is the purpose of the criminal justice system?

This question is so fundamental that it is rarely asked. It is assumed that the answer is obvious. It is assumed that the criminal justice system, in its current form, has been around forever and that we need it to deal with crime. However when we start to examine the issue more closely, the picture is less clear.

Is the purpose to control crime?

It appears not since crime has not diminished over time, yet there is no move to abolish or fundamentally change the criminal justice system.

Is the purpose to punish criminals?

This appears to be the case, but it is not the full picture.

Recently, the victims' rights movement has challenged the criminal justice system, arguing that it is not punitive enough, and that defendants have too many procedural protections - a view also held by many in the general community. Other victim advocates believe that the whole system should be redesigned.

Ultimately, the goal of the criminal justice system may be to protect the community from harm, and to protect victims from further harm, but it is easy to lose sight of this in the pursuit of victory for one of the parties.

Clearly, the adversarial system in presenting crimes as a contest between the accused and the state, does not adequately take into account the interests of witnesses, and in particular, the complainant.

As discussed in Chapter 8 of this Report, the adversarial system of justice is regularly criticised for its treatment of witnesses during cross-examination. Witnesses are often subjected to intimidation and attacks on their character. Strategies employed by the defence appear to be aimed at inhibiting the ability of the witness to communicate effectively during the trial, rather than in revealing the truth.

Critics point out that the criminal justice system has overlooked victims; their role has been reduced to that of witness against the defendant. The state prosecutes crimes on behalf of the state - the victim is not a party to the proceedings and is not entitled to legal representation. Until the passage of the Criminal Offence Victims Act 1995 there was not even a requirement that victims be informed about the progress of their case.

Some advocates argue for structural changes to the criminal justice system to better accommodate the needs of victims, perhaps even the adoption of elements of the inquisitorial system of many of the continental countries. Accordingly, it is appropriate to examine the fundamental aspects of the adversarial system.

The adversarial system of justice

The system of criminal justice in Australia is based on the common law of England, as imported at the date of conquest, ignorant of or ignoring Indigenous customary laws.

Fundamental to this system is the "presumption of innocence", that is, that an accused is considered innocent until proven guilty by trial. This principle reflects the respect for the inherent dignity of the individual, liberty and the right to freedom from State interference. The adversarial system is based on the principle that it is a greater wrong to punish the innocent than to let the guilty go free.

A criminal trial involves the exercise of the power of the State against an individual; accordingly, there are strict rules regarding the admissibility of and weight given to evidence. These rules are designed to balance the inequity of power between the parties by ensuring "procedural justice". Arguably, the adversarial system is aimed at making the State prove its case rather than the search for the truth.

In an adversarial system, the parties define the scope of the contest and the evidence, and the power of the court to call witnesses is used sparingly. It is

essentially a two-sided contest between the prosecutor and the defendant with the judge as an impartial moderator. The judge has little or no initiative in relation to the collection of evidence which is chiefly in the hands of the prosecution. Evidence is mainly tendered through the direct oral examination of witnesses with the other party having a right to cross-examination.

These characteristics of our criminal justice system appear well established although it is not so well known that they are of relatively recent origin. Before the 19th century, the system we inherited provided little procedural justice for defendants, who, for example, were denied even the right to call evidence on their own behalf. Police and prisons also date from this time.

The inquisitorial system of justice

The inquisitorial systems of countries like France, Germany, Italy and the Netherlands have evolved from political systems that are essentially very different from that of our own. In particular, there has been less significance given to the doctrine of the separation of powers in the Continental systems.

There are many differences among the inquisitorial legal systems, and the following discussion is not intended as a detailed analysis of any of these, but as an introduction to the typical features found in many of them.

In an inquisitorial system, specialist judicial police with extensive powers of interrogation and preliminary detention carry out the criminal investigation and are responsible to the prosecutors. Prosecutors supervise investigations, authorise more intrusive and coercive action by judicial police during investigations, make decisions about committal for trial, represent the state at trial, propose punishments, and bring appeals against sentences on the State's behalf.

The judiciary controls the trial process, which is essentially the formal confirmation of the results of the investigation as recorded in the "dossier" prepared by the prosecutor. The presiding judge is familiar with the dossier before the trial begins, and refers to it throughout the trial process. The judge interrogates the accused and decides which witnesses are to be called on the basis of depositions recorded in the dossier. Witnesses are able to give their evidence with little or no interruption and there is no right to cross-examination. The prosecutor and the defence may suggest supplementary questions but the examination is completely within the discretion of the judge.

Jurors or lay judges deliberate with the professional judges, but do not have access to the dossier. They are likely to be influenced by the professional judges, particularly in relation to matters of law but in some jurisdictions outnumber the professional judges, and can even outvote them.

The accused is regarded as a valuable source of information in the search for the truth about the crime. While the accused technically has the right to remain silent, adverse inferences are likely to be drawn if the accused refuses to answer questions.

The life, background and personality of the accused, including any previous convictions, are investigated and recorded in the dossier and are taken into account in passing judgement - in effect, there is no presumption of innocence.

The defence counsel's major contribution is made before the trial - he or she generally has access to the dossier during the investigation and may suggest lines of investigation that will benefit the accused. The defence counsel's role at trial is limited to addressing the court on liability and sentence, and requesting that the accused or witnesses be asked supplementary questions.

The victim is generally represented at trial to pursue a claim for damages, to prepare for civil proceedings, or to put forward his or her feelings about the crime.

Major distinctions

There are three components of the adversarial criminal justice system - the investigation, the trial, and sentencing; with the trial being the most important part. Issues of guilt and punishment are considered separately.

The inquisitorial system is more continuous, and questions of guilt and punishment are considered together from the start of the investigation. The investigation is the most important part of the process. It is also quite usual for criminal matters to proceed to review, with the trial decision being regarded almost as provisional. Generally, both the prosecutor and the accused have a right to appeal.

Examination of witnesses and evidence

In an adversarial system the examination of witnesses is principally conducted by the parties (through their legal representatives), although the judge does have some ability to put supplementary questions to the witnesses, and can call witnesses in special circumstances. The judge has responsibility for protecting members of the jury from wrongfully gained impressions and in fact may strongly influence the jury in the summing up on the facts. There are strict rules to exclude evidence, which though relevant, may be unfair or misleading.

On the other hand, we have noted that Judges in the inquisitorial system have a much more active role during the trial and carry the main burden of interrogating the accused and witnesses. There are also few rules for excluding evidence and any relevant material will generally be admitted, including "hearsay" evidence. The judge determines the weight to be given to the evidence taking into account its source.

Investigation

In an inquisitorial process most of the investigation is undertaken by professional investigators employed by the State, for example, police and forensic psychiatrists who are expected to act in an impartial way. The prosecutors, who are more closely related to the judiciary, generally oversee the investigation and the professional investigators employed by the State. The defence refers matters in the interests of the defendant to the prosecutor for investigation and it would be a breach of the prosecutor's professional ethics if matters in the interests of the defendant were not taken into account.

In the adversarial process, each party is responsible for finding and tendering evidence to support its arguments. Investigation is motivated in that party's interest rather than in the public interest. Prosecutors do not bear a positive responsibility for the investigation of matters in the interests of the defence.

Judiciary

Unlike the adversarial system, in the inquisitorial systems judges are career officers of the state rather than lawyers from private practice. They are specially trained for their work and attend specialised training schools after graduation as lawyers. Promotion in the service is based on merit.

Adopting elements of the inquisitorial system

Criticisms of the treatment of witnesses in the adversarial system have been noted above. An element of the inquisitorial system which therefore appeals to many is the power of the judiciary to more actively regulate the way in which witnesses are treated, to protect them from intimidation and unfair cross-examination. This type of judicial intervention in the examination of witnesses, however, does not sit well with the adversarial system. There is a risk that such judicial interference would unduly affect the presentation of the case for the accused and could lead to a perception of bias in favour of the prosecution, or at the least, unduly influence the jury's perception of the witness.

This example highlights the inherent risks in transplanting strategies and safeguards intrinsic to the inquisitorial system into the adversarial system. The practice in question must be considered in the context of the surrounding assumptions, values, processes and procedures of that system. For example, the inquisitorial systems are based on a historical belief in the commitment of state institutions to act in the interests of justice. By contrast, the adversarial system is founded on the belief in the need for the direct participation of the people in truth-finding through the role of the jury and the right to establish one's own version of the truth directly.

Nonetheless, some common law jurisdictions have implemented and promoted reforms. Most of these have reflected concern about the adversarial system's capacity to reveal the truth without more direct truth-finding. An example is requiring the parties to cooperate by disclosing evidence.

PART 4: RESPONDING TO WOMEN IN THE CRIMINAL JUSTICE SYSTEM

The right of women victims/survivors to their own legal representative

The issue of whether victims/survivors of violence should be entitled to their own legal representative in court was raised in community consultations and submissions to the Taskforce. In some parts of Europe and Canada this practice has been adopted. To adopt this practice in Queensland, however, would represent a fundamental shift in the structural dynamics of our adversarial system. Significant research, analysis, and informed consultation would be necessary before such a change could be adopted. This Taskforce had neither the time nor the resources to carry out this task, and we are, consequently, not able to make recommendations in relation to it.

Prosecutors - meeting the needs of women victims/survivors

In the criminal justice system, the complainant is not a party to the proceedings. The role of the prosecutor is to represent the State's interest in pursuing perpetrators of crime, for the benefit and safety of the whole community. In instances of violence against women, while it is the woman's physical integrity

which has been violated, the prosecutor does not pursue the case for her benefit or vindication - she is, formally at least, no more than a witness for the prosecutor's case. She has no power to direct the conduct of the case. She does not stand in a lawyer-client relationship with the prosecutor and thus the duty of care inherent in such a relationship does not exist.

The potential for tension in such circumstances is obvious.

The Taskforce has identified a series of questions in relation to the prosecutor's role that should be explored:

- Are women's concerns with the prosecutorial function really about the rules of evidence which exclude what they consider to be relevant evidence, and allow in what they consider to be irrelevant? Does the solution lie in changes to the rules of evidence (if appropriate) rather than changes to the prosecutor's role?
- Do these concerns relate to what women considered to be unfair and inappropriate, though permissible, cross-examination, from which they feel they should have been protected? Would a separate legal representative have improved the experience for these women given that he/she would be subject to the same procedural rules?
- To what extent are women's views about separate legal representation influenced by the outcome of their case, or other cases of which they are aware?
- Do these views relate to what women perceive to be unjust power differences in legal representation? That is, the accused (who perpetrated violence against her) is entitled to a lawyer who works exclusively in the accused's interests, yet she is not;
- Can women's concerns be articulated on a deeper, more systemic level? Namely, when women have been subjected to fundamental breaches of their human rights (and rape is such a violation), their individual interests should take precedence over, or at least be equal to, that of the general community;
- Does women's dissatisfaction with the prosecutorial function stem from inadequate resourcing of the DPP rather than a problem with its role?

The qualitative research needed to answer such questions was beyond the scope of this Taskforce. We do however comment on some of these issues in the Report.

In relation to the last point, a significant problem reported by women is that they do not meet the prosecutor until the day before (and sometimes the day of) the trial. This appears to happen because prosecutors do not conduct the committal hearings, and cases are often not allocated to prosecutors until the day before trial. While this is certainly caused in some part by inadequate resources, it also relates to problems with the court listing system in Brisbane - a running list over which the DPP has no control - and the number of courts sitting at the same time. It appears that cases are better managed in regional areas where there is only one court functioning and the DPP runs the court list.

If cases were allocated to prosecutors early in the process and they had more involvement in case preparation, women's experiences may be better. We are

unable to comment on the adequacy of existing resources to enable this to happen or on whether it would be an efficient use of resources.

The legal profession

A review of the impact of the Criminal Code on women would be incomplete without consideration of the role of the legal profession.

Unlike some other jurisdictions, the legal profession in Queensland has not pushed actively for law reform in areas such as equality before the law, and has done little to address issues of equality for women lawyers. There is for instance, minimal representation of women on the executives of the Queensland Law Society or the Bar Association.

More than 50% of law school students are women, yet few women become partners or hold other influential positions in the private profession. Female law students still report being asked in selection exercises by some legal firms in 1999 whether they intend to get married and what they will do with the children while they are at work. At the least, this indicates that these firms are ignorant of sex discrimination legislation. In some jurisdictions, we note, law societies have begun to define professional behaviour and misbehaviour by reference to sex discrimination and sexual harassment.

Anecdotal evidence suggests that women are leaving the private legal profession because they find its male culture alienating and not "family-friendly". Given that women still do the bulk of child-rearing and house-keeping in our society, it is they who have to make the choice between their family and their job, or between their family and sitting on the committee of the Law Society or the Bar Association. Women lawyers will keep leaving the profession until they are not forced to make such untenable choices. Women lawyers will not achieve equity in their profession until meetings of influential bodies are held at family-friendly times. It would be optimistic to expect justice for women who are not lawyers when women lawyers cannot find it.

Justice for women will not automatically be achieved by having formal equality for women in the legal profession - some women lawyers are unaware of the problems suffered by black/poor/disabled/lesbian women, or even by white, middle-class women. However, providing justice for women in the legal profession is likely to improve the position for women generally. The Canadian Bar Association's Report on Gender Equality in the Legal Profession points out that

There is no such thing as a neutral perspective...a white view of the world is not neutral. A masculine view of the world is not neutral. A heterosexual view of the world is not neutral. Women of colour, Aboriginal women, disabled women, lesbians have all had experiences of life that differ profoundly from those of the dominant ... culture and each group brings a unique and different perspective to our understanding of life and the law.

Where to from here?

The criminal law's lack of inclusiveness of women's interests is not limited to Queensland. The same issue has arisen in other jurisdictions, although Queensland has tended to lag behind some other Australian states in introducing law reform in this area. However, we note that no other Australian State has

commissioned a review of the criminal law's impact on women; or made as many recent appointments of women to the bench.

The efforts that other jurisdictions have made to address issues of equality for women are nonetheless instructive.

In March 1999 the South African Department of Justice released a Gender Policy. In South Africa the criminal law is matter for the national government so issues relating to women and the criminal justice system are encompassed. The development of such a policy is, in itself, a remarkable achievement and testament to the determination of that nation to strive for equity for its citizens. In describing the purpose of the document the Introduction notes:

As a Department of Justice, we have come to realise that policies and practices that treat men and women identically, regardless of difference or disadvantage, tend either to result in injustice and inequity or to exacerbate existing inequality. The policy will attempt to eradicate sexist or gender discriminatory attitudes and practices within the Department of Justice and amongst all its members of staff, including those involved in policy making, management and service delivery.

We note that the mission statement in the policy reflects many of the issues that have been exposed by this Taskforce. In particular, these are: the need for research and information about women and the justice system; the diversity of women; the extent to which change must occur both within the culture of those working in the justice system; and in the way services are delivered.

The Department of Justice will take all steps necessary to:

eradicate all obstacles to women's access to justice through researching, acknowledging and addressing the needs of women, including race and class differences and disadvantages in the administration of justice, in order to achieve substantive equality for women. To this end we will address both our internal policies as an employer, and our external policies as a service provider to the community.⁵³

The development of the document involved a lengthy consultation process within the Department, in the general community and throughout community-based agencies that work with women. Violence against women, and victim support and empowerment are two of the five critical areas of concern in the policy. The document represents an innovative framework for approaching issues of gender equality and the law at government level.

We must learn from the experience of other jurisdictions - and from their mistakes. For example, the 1982 amendments to the Canadian Criminal Code were based on the treatment of violence against women as a formal equality issue, and made offences such as rape gender-neutral. This has had the effect of hiding the gendered nature of sexual assault. For example the Supreme Court of Canada, on appeal, had to decide whether touching a woman's breast was a sexual assault. It over-turned the decision of the lower court which, in adopting a gender-neutral approach, reasoned that women's breasts were secondary sex characteristics like men's beards. Given that touching a man's beard was not a sexual assault, it found, neither was touching a woman's breast.

Elizabeth Sheehy argues that gender-neutral offences and policies in Canada have in fact furthered the criminalisation of women. Women who resist the

violence of men, or who fight back, are often charged by police, while some prosecutors and judges have proceeded with contempt charges against women who are too frightened to testify against their violent partners.

It is tempting to provide simple answers to complex problems, particularly given that the public is now used to the two minute "take" on issues presented by the media. However, the Taskforce believes that complex issues will require more than easy answers, and that the public understands that justice is not something for the select few.