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**New South Wales  
Law Reform Commission**

**Discussion Paper**

**39**

**REVIEW OF SECTION 316  
OF THE  
CRIMES ACT 1900 (NSW)**

**December 1997**

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## Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Hon Jeff Shaw QC, referred the following matter to the Law Reform Commission by letter on 1 August 1997:

- to inquire into and report on whether the offences contained in section 316 of the *Crimes Act 1900* pertaining to concealing a serious offence should be abolished or amended.

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## Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967* (NSW). For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

Mr Michael Adams QC  
Judge Robert Bellear  
Justice John Dowd AO  
Professor Jack Goldring\*  
Justice David Hunt  
Judge Angela Karpin

(\* denotes Commissioner-in-Charge)

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## Submissions

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this *Discussion Paper*.

All submissions and inquiries should be directed to:

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NSW Law Reform Commission  
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There is no special form required for submissions. If it is inconvenient or impractical to make a written submission you may telephone the Commission and either direct your comments to a Legal Officer over the telephone, or else arrange to make your submission in person.

### **Closing date for submissions**

The closing date for submissions is *27 March 1997*. No final decisions will be made by the Commission until after the deadline for submissions has passed.

### **Use of submissions and confidentiality**

If you would like your submission to be treated as confidential, please indicate this in your submission. Submissions made to the Commission may be used in two ways:

- 
- Since the Commission's process of law reform is essentially public, copies of submissions made to the Commission will normally be made available on request to the person or organisation. However, if you would like all or part of your submission to be treated as confidential, please indicate this in your submission. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act 1989* (NSW).
  - In preparing the final Report, the Commission may also find it useful to refer to and make mention of comments submitted in response to the *Discussion Paper*. However, if a request for confidentiality is made, it will be respected by the Commission in relation to the publication of such submissions in a Report.

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## Summary of options for reform

### **OPTION 1 - ABOLISH S 316 (page 43)**

Section 316 should be abolished. The terms of the section are so wide that it intrudes into a range of confidential relationships. The social utility of the section is outweighed by the potential for harm to these valuable relationships.

### **OPTION 2 - BENEFIT ONLY OFFENCE (page 43)**

Section 316 should be amended so that the offence is only made out when the defendant accepts or agrees to accept a benefit in money or money's worth in return for failing to disclose an offence.

### **OPTION 3 - SPECIFIC EXEMPTIONS (page 44)**

Section 316 should be amended to provide that legal practitioners, medical practitioners / counsellors / psychologists / social workers and priests who acquire information about serious offences in the course of their profession or vocation are not guilty of an offence for failing to disclose it, in accordance with the doctrine of privilege. The section should also be amended to provide that engaging in genuine research constitutes a reasonable excuse for concealment of information about serious offences from the police.



# 1.

## Introduction

- The issues
- The Commission's reference
- The structure of this paper

## THE ISSUES

1.1 Section 316(1) of the *Crimes Act 1900* (NSW) provides that where a person has committed a "serious offence", it is an offence in certain circumstances for another person who knows or believes that the offence has been committed to fail to report the information to the police or an appropriate authority.<sup>1</sup> The maximum penalty for an offence under s 316(1) is imprisonment for two years. "Serious offence" is defined in s 311(1) of the *Crimes Act 1900* (NSW) as an offence punishable by imprisonment for five years or more or life.

1.2 Sections 316(2) and 316(3) of the *Crimes Act 1900* (NSW) provide that it is an offence to accept or agree to accept certain benefits in consideration for committing an offence under s 316(1).<sup>2</sup> The maximum penalty for this offence is imprisonment for five years.

1.3 This Discussion Paper considers whether the offences contained in s 316 of the *Crimes Act 1900* (NSW) should be amended or abolished.

## THE COMMISSION'S REFERENCE

1.4 On 1 August 1997 the Attorney General, the Hon Jeff Shaw QC MLC, referred to the Commission the question whether the offences contained in s 316 should be abolished or amended.

1.5 In 1994 the Criminal Law Review Division of the Attorney General's Department commenced a review of s 316.<sup>3</sup> In October

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1. See para 2.2.

2. See para 2.2.

3. The review was prompted by criticisms of s 316. See New South Wales Anti-Discrimination Board, "*Discrimination - The Other Epidemic*" *Report of the Inquiry into HIV and AIDS Related Discrimination*, (April 1992) at 47-48. Concerns about the scope of the section were also raised with the New South Wales Attorney

1995, a Working Party of the Criminal Law Review Division of the Attorney General's Department was convened to examine the use of s 316 and to consider whether it was necessary to develop guidelines to clarify the meaning of "reasonable excuse" in the section. In 1996, the Working Party proposed that s 316 be amended so that the consent of the Director of Public Prosecutions be required in relation to the continuance of prosecutions under s 316 of certain classes of persons, which were to be prescribed by regulation.<sup>4</sup>

1.6 This proposal was adopted in a 1997 bill to amend s 316.<sup>5</sup> The Bill was assented to on 30 September 1997, but has not yet been proclaimed.<sup>6</sup> It is expected that the Act will come into operation by the end of 1997. Parliamentary Counsel have commenced drafting regulations under the Act which it is expected will come into operation simultaneously with the Act.

## THE STRUCTURE OF THIS PAPER

1.7 This Discussion Paper adopts the following structure:

- Chapter 1 states the issue and sets out the Commission's terms of reference.
- Chapter 2 outlines the law in New South Wales.
- Chapter 3 analyses the law in other Australian jurisdictions and in overseas jurisdictions with similar offences.

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General by the Minister for Health on 2 November 1992 and by the Law Society of New South Wales on 21 September 1993. The New South Wales Sexual Assault Committee raised concerns about the operation of s 316 at a meeting of the Committee on 13 August 1993.

4. Minutes of meeting of Working Party on s 316 of the *Crimes Act 1900* (NSW), 14 March 1996.
5. *Crimes Legislation Amendment Bill 1997* (NSW) cl 3. See para 4.31.
6. *Crimes Legislation Amendment Act 1997* (NSW) s 3.

- Chapter 4 addresses the issues whether the law of New South Wales should be amended or whether all or part of s 316 of the *Crimes Act 1900* (NSW) should be abolished, and contains the Commission's preliminary proposals.

# 2.

## The law in New South Wales

- History of section 316
- Section 316
- Basis of rule
- Convictions under section 316
- Related offences

## HISTORY OF SECTION 316

2.1 Section 316 was inserted into the *Crimes Act 1900* (NSW) in 1990 as part of a package of amendments to the *Crimes Act*.<sup>1</sup> The purpose of the amendments was to create a comprehensive statement of the law relating to public justice offences which, until the enactment of the amendments, was “fragmented and confusing, consisting of various common law and statutory provisions, with many gaps, anomalies and uncertainties”.<sup>2</sup> The section replaced the common law misdemeanour of misprision of felony.<sup>3</sup> The common law offence consisted of knowing that a felony had been committed and failing to disclose that knowledge to those responsible for the preservation of the peace within a reasonable time and having had a reasonable opportunity for doing so.<sup>4</sup> In England, the common law offence was replaced with a statutory offence in 1967, following the abolition of the distinction between felonies and misdemeanours in that jurisdiction.<sup>5</sup> However, the distinction between felonies and misdemeanours still exists in New South Wales.<sup>6</sup>

- 
1. Section 316 was inserted into the *Crimes Act 1900* (NSW) by the *Crimes (Public Justice) Amendment Act (1990)* NSW, which was proclaimed on 25 November 1990: New South Wales Government Gazette No 141 of 9 November 1990 at 9816.
  2. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 17 May 1990, the Hon JRA Dowd, Attorney General, Second Reading Speech at 3692.
  3. *Crimes Act 1900* (NSW) s 341.
  4. *Sykes v Director of Public Prosecutions* [1962] AC 528 at 560, 563-564; 45 Cr App R 230; *R v Wozniak* (1989) 16 NSWLR 185 (NSW Ct of Cr App).
  5. See para 3.3.
  6. The Commission has previously recommended that all distinctions between felonies and misdemeanours be abolished: New South Wales Law Reform Commission, *Sentencing*, (Report 79, 1996) at para 14.26.

## SECTION 316

2.2 Section 316 of the *Crimes Act 1900* (NSW) provides that:

### Concealing serious offences

316(1) If a person has committed a serious offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

(2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making or reasonable compensation for that loss or injury.

The meaning of "serious offence" in s 316(1) is:

An offence punishable by imprisonment or penal servitude for 5 years or more or for life.<sup>7</sup>

Murder, sexual assault and theft are serious offences under s 316. Growing small amounts of marijuana and prostitution are offences which are not serious under the section.

2.3 Although s 316 requires that the concealed offence be a "serious offence", it is not necessary for the prosecution to

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7. *Crimes Act 1900* (NSW) s 311(1).

establish that the defendant knew that the offence was a serious offence.<sup>8</sup>

2.4 Section 316 applies whenever a person who knows or believes that an offence has been committed "has information which might be of material assistance" in the apprehension, prosecution or conviction of the offender. The section clearly applies to a person where the offender has confessed to that person. However, the section also applies where a person has information (other than admissions or confessions) about other real or circumstantial evidence of an offence. The term "information" includes information in the nature of hearsay, as well as information which would be admissible in court as evidence.

## **BASIS OF RULE**

2.5 The policy rationale of s 316 is that it serves the public interest by encouraging citizens to provide information about serious offences to law enforcement authorities.<sup>9</sup>

## **CONVICTIONS UNDER SECTION 316<sup>10</sup>**

2.6 In the Local Courts, 85 cases under s 316 were documented in the period June 1992 to May 1997. Thirty four cases under s 316 were recorded in the higher courts in a slightly longer reporting period, from the commencement of the operation of s 316 in 1990 to December 1996.

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8. *Crimes Act 1900* (NSW) s 313.

9. See paras 4.1 and 4.2.

10. Data referred to in paras 2.6 to 2.11 taken from the Judicial Commission of NSW Judicial Information Research System Sentencing Statistics database.

## Local Courts

2.7 81 cases under s 316(1) are recorded during the reporting period.<sup>11</sup> The accused pleaded guilty in 71 cases. Forty seven offenders had prior convictions of some type, although the statistical information available does not indicate the type of prior offences. Four offenders were charged with multiple counts. The penalty imposed in most cases in the Local Courts was either a fine, ranging between \$100.00 and \$500.00, or a bond under s 558 of the *Crimes Act 1900* (NSW). Custodial sentences were rare; only seven prison sentences, ranging from two months to seven months, were imposed on offenders during the period. A full breakdown of penalties imposed is set out at 2.8 below.

2.8 Penalties for conviction under s 316(1) in the Local Courts, June 1992 to May 1997<sup>12</sup>

Outcome	Number of cases
Fine	18
Bond under s 558	18
Community service orders (100 - 200 hours)	11
Bond under s 556A	10
Combination of bond under s 558 and fine	8
Prison	7
Dismissal under s 556A	4
Periodic detention	4
Rise of Court	1

2.9 Four cases under s 316(2) are recorded during the reporting period. The accused pleaded guilty in every case. Two offenders had prior convictions of some type, although the statistical information available does not indicate the type of prior offences. No offenders were charged with multiple counts. Fines of \$300.00

11. There were also four cases under s 316(2) during the reporting period. See para 2.9.

12. Section numbers refer to the *Crimes Act 1900* (NSW).

and \$4,000.00 were imposed in two cases. In one case, the offender received a bond under s 558 of the *Crimes Act 1900* (NSW) and in the other case a compound penalty of a bond under s 558 and a fine was imposed.

## Higher courts

2.10 34 cases under s 316(1) are recorded in the higher courts during the reporting period. The accused pleaded guilty in every case. Nine offenders had prior convictions, although none were for the same or similar offences.<sup>13</sup> Two offenders were charged with multiple counts. The penalty imposed in most cases in the higher courts was either a bond under s 558 of the *Crimes Act 1900* (NSW) or a community service order. Community service orders required between 50 hours and 500 hours of community service work, with the majority requiring between 250 hours and 300 hours of community service. Custodial sentences were also rare in the higher courts. Only two prison sentences, both of six months, were imposed during the period. A full breakdown of penalties imposed is set out at 2.11 below.

2.11 Penalties for conviction under s 316(1) in the higher courts, January 1990 to December 1996<sup>14</sup>

Outcome	Number of cases
Bond under s 558	18
Community service order	8
Combination of bond under s 558 and fine	3
Prison	2
Bond under s 556A	2
Dismissal under s 556A	1

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13. See paras 2.13 to 2.15.

14. Section numbers refer to the *Crimes Act 1900* (NSW).

2.12 No cases under s 316(2) are recorded in the higher courts during the period.

## RELATED OFFENCES

2.13 The *Crimes Act 1900* (NSW) contains several other offences relating to the concealment of offences.

### Hindering investigations

2.14 Section 315 of the *Crimes Act 1900* (NSW) provides that:

315(1) A person who does anything intending in any way to hinder:

- (a) the investigation of a serious offence committed by another person; or
- (b) the discovery of evidence concerning a serious offence committed by another person; or
- (c) the apprehension of another person who has committed a serious offence;

is liable to penal servitude for 7 years.

“Serious offence” has the same meaning for these offences as it does for s 316.<sup>15</sup> There is also a specific offence of tampering with or fabricating evidence or knowingly making use of fabricated evidence with the intention of misleading a court, which carries a penalty of imprisonment for ten years.<sup>16</sup> These offences, which cover situations where the accused does a positive act to prevent the investigation of the offence or tamper with evidence, can be

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15. See para 2.2.

16. *Crimes Act 1900* (NSW) s 317.

contrasted with s 316, which makes it an offence merely to have knowledge of a serious offence in certain circumstances.<sup>17</sup>

## **Interference with judicial officers, witnesses, jurors and police**

2.15 The *Crimes Act 1900* (NSW) also contains a series of offences which relate to interference with judicial officers, witnesses and jurors by corruption, threats, intimidation, and preventing a witness or juror from attending court. The penalties for committing these offences are imprisonment for periods ranging between five years and fourteen years.<sup>18</sup> It is an offence to wilfully obstruct a police officer executing his or her duties. The penalty for this offence is five years' imprisonment.<sup>19</sup> It is also an offence to resist or hinder or incite another person to resist or hinder a police officer. The penalty for this offence is imprisonment for one year or a \$1000.00 fine.<sup>20</sup>

## **Aiding and abetting, accessories**

2.16 The *Crimes Act 1900* (NSW) contains a series of aiding and abetting provisions and accessory offences,<sup>21</sup> as well as aiding and abetting provisions in relation to specific offences.<sup>22</sup>

2.17 A person is guilty of aiding and abetting an offence if he or she is present when the offence is committed and the person assists or encourages the offender to commit the offence, or is

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17. See *Crimes Act 1900* (NSW) s 315(3) which expressly states that it is not an offence under s 315 merely to refuse to or fail to divulge information or produce evidence.

18. *Crimes Act 1900* (NSW) Part 7, chapter 3 ss 320-326.

19. *Crimes Act 1900* (NSW) s 58.

20. *Crimes Act 1900* (NSW) s 546C.

21. *Crimes Act 1900* (NSW) Part 9.

22. For example *Crimes Act 1900* (NSW) s 31C, which makes it an offence to aid another person to commit suicide.

ready and willing to assist or encourage the offender to commit the offence. If there is no common purpose between the two, there must be actual encouragement in some form or other.<sup>23</sup> In contrast, s 316 makes it an offence merely to have knowledge of a serious offence in certain circumstances, without assisting or encouraging the offender in any way or being prepared to do so if required.

2.18 A person is guilty of being an accessory before the fact of an offence if, although not present at the time of the offence, the person intentionally procures, incites or encourages the offence in some way.<sup>24</sup> A person is guilty of being an accessory after the fact of an offence if, although not present at the time of the offence, the person assists the offender in any way to dispose of the proceeds of the crime or to avoid apprehension, trial or punishment.<sup>25</sup> Again, the distinction between s 316 and the accessory offences is that mere knowledge that a person intends to or has committed a crime is not enough for liability as an accessory.

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23. *R v Clarkson* [1971] 3 All ER 344; *R v Allan* [1965] 1 QB 130; (1963) 47 Cr App R 243.

24. *R v Taylor* (1875) LR 2 CCR 147.

25. *R v Lee* (1834) 6 Carr & P 536.



# 3. Comparison with other jurisdictions

- England
- South Australia
- Victoria
- Queensland, Western Australia and Northern Territory
- Tasmania

3.1 Most other Australian jurisdictions have provisions which make failure to disclose knowledge of an offence to the police an offence in certain circumstances. England has also replaced the common law offence of misprision of felony with a modified statutory offence. It did so at the same time as it abolished the distinction between felonies and misdemeanours. That distinction still exists in New South Wales. The elements of the offences and the penalties for committing the offence of concealing an offence differ from jurisdiction to jurisdiction. In England and all Australian jurisdictions except New South Wales, the offence of concealment of an offence is only committed when the offender obtains or attempts to obtain a benefit of some kind in return for not disclosing the offence to the police.

3.2 The Australian Capital Territory is the only Australian jurisdiction with no offence equivalent to s 316. However, the Australian Capital Territory does have provisions dealing with aiding and abetting an offence and with accessories.<sup>1</sup>

## ENGLAND

3.3 Section 5 of the *Criminal Law Act 1967* (Eng) provides:

**Penalties for concealing offences or giving false information**

5(1) Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other offence has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be liable on conviction on indictment to imprisonment for not more than two years.

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1. *Crimes Act 1900* (ACT) ss 345 and 346.

....

(3) No proceedings shall be instituted for an offence under this section except with the consent of the Director of Public Prosecutions.

3.4 The English provision applies to the concealment of "arrestable offence(s)". "(A)rrestable offence" includes all offences for which the sentence is fixed by law; offences carrying a sentence of five years' imprisonment for a first conviction; and numerous offences under a wide variety of prescribed legislation, including customs and excise offences, offences under England's official secrets legislation, and offences relating to the publication of obscene material and carrying offensive weapons.<sup>2</sup> The scope of s 5 of the *Criminal Law Act 1967* (Eng) is much broader than the obligation to disclose information about "serious offences" imposed by s 316.

3.5 In England, the offence of concealing an offence is only committed when the defendant accepts or agrees to accept consideration for not disclosing information about the offence. Section 316 contains a similar offence<sup>3</sup>, but also creates an offence where a crime is concealed without any benefit accruing.<sup>4</sup>

3.6 Section 5 of the *Criminal Law Act 1967* (Eng) provides guidance as to the meaning of "consideration" in the section. Making good the loss or injury caused by the offence or compensation for that loss or injury does not constitute consideration. This also applies in New South Wales.<sup>5</sup>

3.7 There is no equivalent in s 316 to the prerequisite in s 5 of the *Criminal Law Act 1967* (Eng) that the Director of Public Prosecutions consent to all prosecutions under s 5 of the *Criminal Law Act 1967* (Eng).

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2. *Criminal Law Act 1967* (Eng) s 41A.

3. *Crimes Act 1900* (NSW) s 316(2).

4. *Crimes Act 1900* (NSW) s 316(1).

5. *Crimes Act 1900* (NSW) s 316(3).

3.8 Unlike s 316, s 5 of the *Criminal Law Act 1967* (Eng) does not contain an exception where the defendant has a reasonable excuse for failure to disclose an offence to the police.

3.9 The penalty for committing an offence under the English provision is imprisonment for a maximum of two years. This is identical to the penalty imposed by s 316(1), but considerably less than the penalty imposed by s 316(2), which is actually equivalent to s 5 of the *Criminal Law Act 1967* (Eng) in that it only applies where the defendant accepts or agrees to accept a benefit for concealing an offence. The penalty imposed by s 316(2) is imprisonment for five years.

## SOUTH AUSTRALIA

3.10 There appears to be no offence of concealment of an offence in South Australia. Section 241 of the *Criminal Law Consolidation Act 1935* (SA) provides:

### **Impeding investigation of offences or assisting offenders**

241(1) Subject to subsection (2), a person ("the accessory") who, knowing or believing that another person ("the principal offender") has committed an offence, does an act with the intention of -

- (a) impeding investigation of the offence; or
- (b) assisting the principal offender to escape apprehension or prosecution or to dispose of proceeds of the offence,

is guilty of an offence.

(2) An accessory is not guilty of an offence against subsection (1) -

(a) unless it is established that the principal offender committed -

(i) the offence that the accessory knew or believed the principal offender to have committed; or

(ii) some other offence committed in the same, or partly the same, circumstances; or

(b) if there is lawful authority or reasonable excuse for the accessory's action.

....

This is a true accessory after the fact offence.<sup>6</sup>

3.11 Section 241 of the *Criminal Law Consolidation Act 1935* (SA) applies to the concealment of all types of offences, unlike s 316 which is restricted to the concealment of serious offences.

3.12 The language used in s 241 of the *Criminal Law Consolidation Act 1935* (SA) is different to the language of s 316. Section 316(1) focuses on the defendant's state of mind. It refers to the defendant knowing or believing that a serious offence has been committed, but failing to bring information about the offence to the authorities. Section 241 of the *Criminal Law Consolidation Act 1935* (SA) emphasises the steps taken by the defendant to conceal the offence. It requires that the defendant "does an act" with the intention of impeding the investigation of the offence or the apprehension or prosecution of the offender. This element is required by the South Australian provision in addition to the requirement that the defendant knew or believed that an offence had occurred.

3.13 Section 241 of the *Criminal Law Consolidation Act 1935* (SA) specifically provides that where a person is found not guilty of the principal offence but the court is satisfied that another person was guilty of the principal offence, the court may still find the

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6. See also *Criminal Law Consolidation Act 1935* (SA) s 267.

accessory guilty of an offence under s 214.<sup>7</sup> The South Australian provision also provides that a defendant may be convicted of an accessory offence committed outside South Australia if the court has jurisdiction to deal with the principal offence.<sup>8</sup> Section 316 does not deal with these issues.

3.14 The penalties for committing an offence under s 241 of the *Criminal Law Consolidation Act 1935* (SA) are staggered between two years' and ten years' imprisonment, depending on the sentence committed for the principal offence.<sup>9</sup> The penalties under s 316 are not linked to the concealed offence in this way. Instead, in s 316, the penalty is increased from imprisonment for two years to imprisonment for five years where the defendant accepts or agrees to accept any benefit in consideration for concealing the offence. This reflects the fact that it is considered to be a more serious offence to receive a benefit in return for concealing an offence. Section 241 of the *Criminal Law Consolidation Act 1935* (SA) does not refer to the situation where a defendant receives a benefit in return for concealing the principal offence.

3.15 In 1992 there were two prosecutions in the Local Courts under s 241 of the *Criminal Law Consolidation Act 1935* (SA). There were no prosecutions in the higher courts in 1992. Between 1993 and 1996 in the Local Courts there was an average of 29 convictions per year. In 43% of cases between 1992 and 1996, no penalty was imposed on the convicted offender. Fines were imposed in almost 15% of cases. Suspended prison sentences were imposed in a further 15% of cases. Community service orders were imposed in almost 13% of cases. Imprisonment was imposed in less than 10% of cases. In the higher courts in the same period there was an average of 9 convictions per year. In over 28% of these cases, no penalty was imposed on the convicted offender. Imprisonment accounted for over 28% of penalties and suspended

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7. *Criminal Law Consolidation Act 1935* (SA) s 241(5).

8. *Criminal Law Consolidation Act 1935* (SA) s 241(6).

9. *Criminal Law Consolidation Act 1935* (SA) s 241(3) and (4).

prison sentences accounted for 22% of penalties. Bonds were imposed in over 16% of cases.<sup>10</sup>

## VICTORIA

3.16 Section 326(1) of the *Crimes Act 1958* (Vic) provides:

### **Concealing offences for benefit**

326(1) where a person has committed a serious indictable offence, any other person who, knowing or believing that the offence, or some other serious indictable offence, has been committed and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts any benefit for not disclosing that information shall be guilty of an indictable offence and liable to level 8 imprisonment.<sup>11</sup>

3.17 "Serious indictable offence" is defined as an indictable offence which is punishable on first conviction with imprisonment of five years or more or life.<sup>12</sup> This is similar to the definition of "serious offence" for the purposes of s 316.

3.18 In Victoria, the offence of concealing an offence is only committed when the defendant accepts a benefit for not disclosing information about a serious indictable offence which the defendant knows or believes has been committed. Section 316 contains a similar offence, but also creates an offence where a crime is concealed without any benefit accruing.<sup>13</sup>

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10. Letter dated 28 October 1997 to the Commission from the Director of Public Prosecutions, South Australia.

11. The level of imprisonment prescribed for an offence against s 326 was amended by the *Sentencing and Other Acts (Amendment) Act 1997* (Vic) s 60. "Level 8 imprisonment" is imprisonment for one year: *Sentencing Act 1991* (Vic) s 109.

12. *Crimes Act 1958* (Vic) s 326(6).

13. See para 3.5.

3.19 Section 326 of the *Crimes Act 1958* (Vic) provides guidance as to the meaning of the term "accepts any benefit". It provides that in relation to thefts, criminal damage to property, similar and associated offences, no offence is committed if the only benefit accepted in return for failing to disclose the offence is the making good of any loss or injury caused by the offence, or the provision of reasonable compensation for the loss or injury.<sup>14</sup> In New South Wales, the provision that soliciting, accepting or agreeing to accept the making good of the loss or injury caused by an offence or the making of reasonable compensation does not constitute a benefit, is not restricted to a particular group of offences.<sup>15</sup>

3.20 Section 326 of the *Crimes Act 1958* (Vic) also deems that a person accepts a benefit by accepting or agreeing to accept:

any benefit or advantage, or the promise of any benefit or advantage, either to himself or to another, whether or not the benefit or advantage is in money or money's worth.<sup>16</sup>

There is no equivalent provision defining the term "benefit" in s 316.

3.21 Section 326 also states that "benefit" for the purposes of s 326 can accrue to the defendant or to any other person.<sup>17</sup> This is also the position in New South Wales.<sup>18</sup>

3.22 Unlike s 316, s 326 of the *Crimes Act 1958* (Vic) does not contain an exception where the defendant has a reasonable excuse for concealing information about an offence from the police.

3.23 The penalty for committing an offence under s 326 of the *Crimes Act 1958* (Vic), one year's imprisonment, is considerably

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14. *Crimes Act 1958* (Vic) s 326(2).

15. *Crimes Act 1900* (NSW) s 316(3).

16. *Crimes Act 1958* (Vic) s 326(3).

17. *Crimes Act 1958* (Vic) s 326(3).

18. *Crimes Act 1900* (NSW) s 316(2).

lower than the penalty of five years' imprisonment prescribed for the offence of concealing an offence for a benefit under s 316(2).

## **QUEENSLAND, WESTERN AUSTRALIA AND NORTHERN TERRITORY**

3.24 Queensland, Western Australia and the Northern Territory have all adopted a similar formulation for the offence of compounding or concealing crimes. The offence is contained in the *Criminal Code Act 1899* (Qld) s 133; the *Criminal Code Compilation Act 1913* (WA) s 136 and the *Criminal Code Act 1983* (NT) s 104.

3.25 The offence in these jurisdictions provides:

Any person who asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person, upon any agreement or understanding that the person will compound or conceal a crime, or will abstain from, discontinue, or delay, a prosecution for a crime, or will withhold any evidence thereof, is guilty of an indictable offence.

3.26 This section applies to the concealment of all types of crimes, compared to s 316 which is restricted to the concealment of serious offences.

3.27 In Queensland, Western Australia and the Northern Territory the offence of concealing an offence is only committed when the defendant asks for, receives, or agrees or attempts to receive property or a benefit for not concealing the crime. Section 316 contains a similar offence, but also creates an offence when a crime is concealed without any benefit accruing.<sup>19</sup>

3.28 The definition of benefit in these jurisdictions includes property and states that the property or benefit can accrue to the

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19. See para 3.5.

defendant or to any other person. Section 316 also states that "benefit" for the purpose of s316(2) can accrue to the defendant or to any other person.<sup>20</sup>

3.29 Unlike s 316, the offence in these jurisdictions does not contain an exception where the defendant has a reasonable excuse for concealing information about an offence from the police.

3.30 The penalties for committing an offence in these jurisdictions are staggered between three years' and seven years' imprisonment, depending on the sentence for the concealed offence.<sup>21</sup> This is also the approach taken in the South Australian provision.<sup>22</sup> The penalties under s 316 are not linked to the concealed offence in this way.

3.31 In Queensland, the offender can not be arrested without a warrant.<sup>23</sup>

3.32 There have been no prosecutions under the Queensland provision in the last ten years and there is no record of any prosecution under the Northern Territory provision. There have been two convictions under the Western Australian provision. In both cases, the offender pleaded guilty and was fined \$2000.00.<sup>24</sup>

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20. See para 3.21.

21. *Criminal Code Act 1899* (Qld) s 133(2) and (3); *Criminal Code Compilation Act 1913* (WA) s 136; *Criminal Code Act 1983* (NT) s 104.

22. See para 3.14.

23. *Criminal Code Act 1899* (Qld) s133(4).

24. Letter dated 2 October 1997 to the Commission from the Acting Director of Public Prosecutions, Queensland; letter dated 20 October 1997 to the Commission from the Director of Public Prosecutions, Northern Territory; letter dated 5 November 1997 to the Commission from the Director of Public Prosecutions, Western Australia.

## TASMANIA

3.33 Section 58 of the *Criminal Code Act 1924* (Tas) contains a concealment offence which is limited to the concealment of treason.



# 4.

## Reform of section 316

- Arguments for retaining section 316
- Arguments for reform of section 316
- Options for reform
- Conclusion
- Proposals

## ARGUMENTS FOR RETAINING SECTION 316

4.1 There are clear arguments for retaining s 316 in its current form. These arguments focus on the social utility of the section.

4.2 It is argued that the section serves a valid social purpose, which is to encourage members of the public to report information about serious crimes to the police and other appropriate authorities and to assist in the administration of justice.<sup>1</sup>

4.3 It has also been suggested that the offence serves a useful purpose by facilitating plea bargaining.<sup>2</sup> However, the data on prosecutions under s 316 does not support this argument. Of 85 cases under s 316 in the Local Courts in the period June 1992 to May 1997, four defendants were charged with multiple counts. Of 34 cases under s 316 in the higher courts in the period January 1990 to December 1996, no defendants were charged with multiple counts.<sup>3</sup> The section may also be used by the police as a plea bargaining tool in the sense that it is presented to suspects as a lesser offence than the alternative charges the police can choose from.

## ARGUMENTS FOR REFORM OF SECTION 316

4.4 There are strong arguments for the reform of s 316. These arguments focus on the scope of offences covered by the section, civil libertarian concerns, the impact of the section on professional

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1. Criminal Law Revision Committee (Eng) *Felonies and Misdemeanours* (Report 7, 1965) at 97-99; New South Wales Anti-Discrimination Board *Discrimination - The Other Epidemic Report of the Inquiry into HIV and AIDS related Discrimination* (April 1992) at 47-48; Kingsford Legal Centre, *Submission*; Director of Public Prosecutions, *Submission*; Justice Blanch, Chief Judge of the District Court of New South Wales, *Submission*.
  2. Attorney General's Department Briefing Note (13 June 1997) para 46.
  3. See paras 2.6-2.11.

and personal confidential relationships and the relationship of s 316 and the law relating to the right to silence and privilege against self incrimination.

### Scope of s 316

4.5 It is argued that the unreasonably wide scope of s 316 has the potential to bring the criminal law into disrepute. The section makes it an offence to fail to disclose a "serious offence", which is defined as an offence punishable by at least five years' imprisonment.<sup>4</sup> However, many submissions suggested that the community would consider that it was absurd to require disclosure of many offences which technically fall within this definition. For example, a boy who gives his mate a "leg up" in an attempt to climb a brick wall into enclosed lands with intent to steal a horse commits a "serious offence".<sup>5</sup>

### Civil libertarian concerns

4.6 One submission characterised the offence created by s 316 as nonfeasance, distinguishing it from misfeasance, such as the active suppression of information, or active assistance of an offender to escape detection.<sup>6</sup> Civil libertarians argue that it is oppressive to make it a crime for a person to hold a particular state of mind, even where the person has not done any act to

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4. See para 2.2.

5. Public Defenders, *Submission*; Hon A M Gleeson AC, Chief Justice of the Supreme Court of New South Wales, *Submission*; Criminal Law Review Division *Reform of Offences Involving Public Justice*, (Discussion Paper, February 1990) at 16; Criminal Law Revision Committee (Eng), *Felonies and Misdemeanours*, (Report 7, 1965) at 97; Law Society of New South Wales Criminal Law Committee, *Submission*.

6. T Nyman, *Submission*.

conceal an offence. It is argued that this extends criminal liability too far from the criminal act itself.<sup>7</sup>

4.7 A related civil libertarian argument is that the obligation to disclose information about the commission of serious offences to the police imposed by s 316 makes everyone in the community agents of "big brother" - an unreasonable interference by the state into the freedom of individuals to decide whether or not to participate in the legal framework of society.<sup>8</sup> Levels of cooperation with the police cease to be a measure of whether particular laws really reflect what the community wants in the context of an obligation to report "serious offences" to the police.<sup>9</sup>

### Effect on confidential relationships

4.8 Section 316 has been criticised because it imposes an obligation to report serious offences disclosed in the course of confidential relationships. This obligation is inconsistent with the widely accepted principle, which is based on the religious concept of confession, that offenders should be able to discuss their woes with another without fear of betrayal of confidence.<sup>10</sup> Many submissions argued that the obligation imposed by s 316 undermines these relationships by destroying confidentiality between the parties.

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7. Hon A M Gleeson AM, Chief Justice of the Supreme Court of New South Wales, *Submission*; New South Wales Council for Civil Liberties Inc, *Submission*; T Nyman, *Submission*; D Dixon, *Submission*; Public Defenders, *Submission*; New South Wales, *Parliamentary Debates (Hansard) Legislative Assembly*, 17 May 1990 the Hon J Dowd, Attorney General, at 3694, Second Reading Speech of the *Crimes (Public Justice) Amendment Bill 1990* (NSW).
  8. New South Wales Council for Civil Liberties Inc, *Submission*; Public Defenders, *Submission*.
  9. National Children's and Youth Law Centre, *Submission*.
  10. T Nyman, *Submission*.

**Lawyer/client relationship**

4.9 This argument has been raised in relation to the relationship between lawyers and their clients. It has been suggested that the doctrine of legal professional privilege may not be sufficient to protect a legal practitioner who is charged under s 316.<sup>11</sup> Case law on the scope of the common law offence of misprision of felony suggests that legal professional privilege may be a reasonable excuse for the purpose of s 316.<sup>12</sup> However there is no case law on the relationship of s 316 and the doctrine of legal professional privilege, although a similar attitude would be expected to be taken.

**Law enforcement agencies/informers**

4.10 A similar argument has been raised in by law enforcement agencies, which obtain information about the commission of offences from informers. It is argued that although a potential witness is unlikely to be prosecuted under s 316, the possibility alone is a disincentive to informers to cooperate with law enforcement agencies.<sup>13</sup> The problem is exacerbated for investigators and interviewers who consider that they are compelled to caution potential witnesses about the section.<sup>14</sup> This problem can only exist in relation to informers who are potential witnesses. It must be recognised that many informers merely acquire knowledge of offences through others and are not witnesses to offences.

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11. Letter dated 21 September 1993 to the Attorney General from the Law Society of New South Wales; Kingsford Legal Centre, *Submission*; Trevor Nyman, *Submission*.
  12. *Sykes v Director of Public Prosecutions* [1962] AC 528 at 564; 45 Cr App R 230.
  13. Independent Commission Against Corruption, *Submission*. However, this argument was opposed in two submissions, which argued that s 316 actually operated as an incentive to potential witnesses to provide information relating to offences and corrupt activities to law enforcement agencies: New South Wales Police Service, *Submission*; M Tedeschi QC, *Submission*.
  14. Independent Commission Against Corruption, *Submission*.

***Health care professionals, counsellors/patients***

4.11 Relationships between health care professionals, including medical practitioners, nurses, counsellors and educators and their patients are also based on confidentiality. It is argued that the existence of s 316 will deter patients from approaching such professionals for medical advice or counselling when doing so will necessitate revealing the commission of a serious offence by or against the patient.<sup>15</sup> Similar considerations may apply to some youth workers and social workers.

4.12 This problem can arise in many situations. For example, a person may approach a medical practitioner seeking advice on safe sexual practices, revealing that the client or the client's sexual partner is under the age of consent. A person may approach a drugs counsellor seeking information on safer injecting drug use or information about drug addiction and reveal that he or she or another person possesses a quantity of a prohibited drug. A person may approach a medical practitioner for treatment of injuries and reveal that they have been a victim of an assault. The same person may reveal the commission of the assault against them to a school counsellor. As with law enforcement agencies, the problem is exacerbated for health care professionals and counsellors who consider that they are compelled to caution clients in advance that if they disclose information about serious offences, it will be reported.<sup>16</sup>

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15. T Nyman, *Submission*; Kingsford Legal Centre, *Submission*; National Children's and Youth Law Centre, *Submission*; New South Wales Council for Civil Liberties Inc, *Submission*; New South Wales Anti-Discrimination Board, *Discrimination - The Other Epidemic. Report of the Inquiry into HIV and AIDS Related Discrimination* (April 1992) at 47-48.
  16. New South Wales Anti-Discrimination Board, *Discrimination - The Other Epidemic. Report of the Inquiry into HIV and AIDS Related Discrimination* (April 1992) at 47-48.

4.13 A related issue is the potential application of s 316 to people in “quasi-counselling” positions such as sports coaches and teachers.<sup>17</sup>

#### **Researchers/subjects**

4.14 This issue has also been raised by researchers who argue that compliance with the obligation to report serious offences imposed by s 316 would inhibit legal, medical and social research.<sup>18</sup> Again, this can arise in many contexts.

4.15 Legal research into criminal activity may involve interviewing offenders, witnesses and victims of crime as well as observing people involved in criminal activity. Illegal behaviour which may include serious offences may also come to light indirectly in medical and social studies where it is not the primary focus.<sup>19</sup> There are clear problems with the potential legal liability of researchers in relation to information about serious offences acquired during the course of research. University and other institutional ethics committees who approve research projects generally require consent from research subjects after proper explanation. Informing research subjects that the information which they provide may be reported to authorities is likely to be a significant impediment to participation in research and is also likely to undermine trust between the researcher and the research subject.<sup>20</sup>

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17. Public Defenders, *Submission*; J Stubbs, *Submission*.
  18. D Dixon, *Submission*; J Stubbs, *Submission*; L Maher, *Submission*; Australian Institute of Criminology, *Submission*; NSW Bureau of Crime Statistics and Research, *Submission*; R MacDonald, Deputy Vice-Chancellor (Research) University of Newcastle, *Submission*; G Zdenkowski, *Submission*; C Fell, Deputy Vice Chancellor, Research and International, University of New South Wales, *Submission*.
  19. L Maher, *Submission*; J Stubbs, *Submission*.
  20. J Stubbs, *Submission*; Australian Institute of Criminology, *Submission*; NSW Bureau of Crime Statistics and Research, *Submission*.

4.16 Although the exercise of prosecutorial discretion may ensure that researchers are not charged under s 316, the potential legal liability of the researcher, the university and its officers, and the fact that this will undermine the institution's insurance coverage means that approval may be withheld.<sup>21</sup> Medical and social research and research into criminal behaviour and its control, which is of considerable social utility in developing public strategies to reduce the harms associated with crime, is threatened by the existence of s 316.<sup>22</sup>

### ***Family and friends***

4.17 Section 316 imposes an obligation to report serious offences on the offender's family. Such an obligation is in conflict with their role within the family and may harm the relationship of family members.<sup>23</sup> For example, parents who know or believe that their child has committed a serious offence are required by s 316 to inform the police of any information which might assist in securing the apprehension or conviction of their child. This would also apply to spouses. Complying with the disclosure obligation imposed by s 316 would severely strain, and may well destroy, these relationships. One submission queried whether, if there are multiple witnesses in one family to a "serious offence", the obligation to report continues once one family member reports the offence to the police.<sup>24</sup> In this context, family can have many

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21. D Dixon, *Submission*; J Stubbs, *Submission*; L Maher, *Submission*; NSW Bureau of Crime Statistics and Research, *Submission*; R MacDonald, Deputy Vice-Chancellor (Research) University of Newcastle, *Submission*; G Zdenkowski, *Submission*; C Fell, Deputy Vice Chancellor, Research and International, University of New South Wales, *Submission*.
  22. D Dixon, *Submission*; J Stubbs, *Submission*; L Maher, *Submission*; NSW Bureau of Crime Statistics and Research, *Submission*; NSW Council for Civil Liberties Inc, *Submission*; R MacDonald, Deputy Vice-Chancellor (Research) University of Newcastle, *Submission*; G Zdenkowski, *Submission*.
  23. Public Defenders, *Submission*.
  24. National Children's and Youth Law Centre, *Submission*.

different meanings. Similar objections to the scope of s 316 apply in relation to close friends of the offender.<sup>25</sup>

4.18 However, it is also arguable that in the case of serious offences such as domestic violence and sexual assault occurring within the family, it is appropriate that the obligation to report offences should outweigh protection of the family relationship.

### ***Residential care facilities***

4.19 One submission also noted the possibility that people with intellectual disability living in residential facilities could be charged for not reporting an offence they witnessed against another resident.<sup>26</sup>

### ***Victims***

4.20 Finally, s 316 may be wide enough to impose an obligation to report serious offences on victims of crime. It is argued that this is unacceptable because victims should be entitled to exercise their own judgment in deciding not to report offences committed against them and may have many valid reasons for choosing not to inform the authorities.<sup>27</sup> One submission also argued that the section deprives victims of offences such as domestic violence of the capacity to use the threat of reporting the offender as a way of negotiating escape from a violent relationship.<sup>28</sup>

### **Silence**

4.21 The relationship between s 316, the pre trial right of silence and the privilege against self incrimination is not clear. In

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25. Public Defenders, *Submission*.
  26. Intellectual Disability Rights Service, *Submission*.
  27. Hon A M Gleeson AC, Chief Justice of the Supreme Court of New South Wales, *Submission*; J Stubbs, *Submission*; Intellectual Disability Rights Service, *Submission*.
  28. National Children's and Youth Law Centre, *Submission*.

disclosing information about an offence committed by a third person, a person may incriminate themselves about an offence they have committed. For example, a person may acquire information about illegal drug trafficking in the course of purchasing and using illegal drugs. Is the person entitled to rely on the privilege against self incrimination in this situation to avoid the obligation to report information in relation to the offence committed by the third person? There is authority that at common law the pre trial right of silence prevailed over the offence of misprision of felony.<sup>29</sup> This position has been criticised on the basis that it may lead to injustice where there is a gross discrepancy between the magnitude of the concealed offence and the insignificance of the apprehended prosecution. For example, where disclosing information about a murder would incriminate the informant as having been driving without a licence, it is argued that giving ascendancy to the right to silence produces injustice.<sup>30</sup>

4.22 However, there is no case law on the relationship between s 316 and the right to silence. One submission suggested that an accomplice or accessory would be guilty of an offence under s 316 when exercising the right not to answer police questions which may lead to his or her own conviction.<sup>31</sup>

4.23 A technical problem related to the operation of the privilege against self incrimination is that where an accused has had knowledge or a belief about the commission of a serious offence for some time, the disclosure of that information will incriminate the accused in respect of the concealment itself.

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29. *King v R* [1965] 1 WLR 706, 49 Cr App R 140 at 145-146.

30. *R v Lovegrove & Kennedy* (1983) 33 SASR 332 at 334.

31. National Children's and Youth Law Centre, *Submission*.

## OPTIONS FOR REFORM

### Abolition

4.24 A number of submissions argued that the solution to the problems with s 316 discussed at paras 4.4 to 4.23 was abolition of the section.<sup>32</sup> This position is justified on the basis that the offence is rarely used<sup>33</sup> and that courts have rarely imposed significant penalties on offenders.<sup>34</sup> Related to this argument is the suggestion that s 316 is, or could be, used oppressively where prosecuting authorities know that a person was involved in an offence but are unable to prove the nature of the person's involvement, and to "target" families of offenders known to the police.<sup>35</sup>

4.25 It is also argued that the section has minimal deterrent value,<sup>36</sup> and that there are other offences which adequately cover blameworthy activity of this type.<sup>37</sup>

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32. D Dixon, *Submission*; J Stubbs, *Submission*; Hon A M Gleeson AC, Chief Justice of the Supreme Court of New South Wales, *Submission*; T Nyman, *Submission*; New South Wales Council for Civil Liberties Inc, *Submission*; Law Society of New South Wales Criminal Law Committee, *Submission*; J Coombs, *Submission*; C Fell, Deputy Vice Chancellor, Research and International, University of New South Wales, *Submission*.
33. D Dixon, *Submission*. See further paras 2.6 to 2.11 for statistics on prosecutions under s 316.
34. P Berman, *Submission*; T Nyman, *Submission*. See paras 2.6 to 2.11 for statistics on penalties.
35. Hon A M Gleeson AC, Chief Justice of the Supreme Court of New South Wales, *Submission*; Law Society of New South Wales Criminal Law Committee, *Submission*; T Nyman, *Submission*; North & North West Community Legal Service, *Submission*; National Children's and Youth Law Centre, *Submission*; J Coombs, *Submission*. One submission also suggested that there was a potential that s 316 could be selectively used by police as retribution against researchers whose work was critical of the police: D Dixon, *Submission*.
36. D Dixon, *Submission*.

### Define "reasonable excuse"

4.26 One submission observed that uncertainty as to the meaning of "reasonable excuse" in s 316 is a major fault with the current provision.<sup>38</sup> Arguably, the exception where the accused had a "reasonable excuse" for not disclosing information about a serious offence to the police protects the groups of people referred to at paras 4.8 to 4.20.<sup>39</sup> However, there is no case law on this point. In relation to research work, concern has been expressed that the criteria used to determine what is reasonable from a research ethics perspective may be different from the criteria used in the exercise of a discretion to prosecute or in determining the outcome of a prosecution under s 316.<sup>40</sup> This concern could also apply to relatives of offenders and victims of offences.

4.27 To remove doubt, it has been suggested that the term "reasonable excuse" be defined to provide that people in particular professional relationships have a "reasonable excuse" for concealing information about serious offences acquired in the course of those relationships.<sup>41</sup> Alternatively, one submission suggested that the section should be amended to clearly separate "reasonable excuse" as a statutory defence, to be made out on the balance of probabilities.<sup>42</sup>

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37. D Dixon, *Submission*; P Berman, *Submission*; J Stubbs, *Submission*. See further paras 2.13-2.15 for a discussion of other relevant offences.

38. Kingsford Legal Centre, *Submission*. See also Public Defenders, *Submission*; A Gleeson, Chief Justice of the Supreme Court of New South Wales, *Submission*; J Stubbs, *Submission*.

39. M Tedeschi QC, *Submission*. *Current Law Statutes Annotations 1967* argues that the English version of the offence, which does not contain a "reasonable excuse" exemption, nevertheless extends only to concealment that is essentially unfair and improper whether or not a confidential relationship of this type exists.

40. J Stubbs, *Submission*.

41. Kingsford Legal Centre, *Submission*; M Tedeschi QC, *Submission*.

42. Legal Aid New South Wales, *Submission*.

4.28 This approach does not protect family and friends of offenders or victims of offences from committing an offence under s 316 if they fail to disclose their knowledge of serious offences.

4.29 Another disadvantage of this approach is that the process of prescribing particular professions is complex and inflexible mechanism for protecting confidential relationships from the operation of s 316. It is not possible to predict the range of institutions, students, agencies, commercial organisations, community based groups and independent consultants likely to acquire information about serious offences in the course of confidential relationships.<sup>43</sup>

### **Requiring the consent of the Director of Public Prosecutions or Attorney General**

4.30 In England no proceedings can be instituted under s 5 of the *Criminal Law Act 1967* (Eng) without the consent of the Director of Public Prosecutions.<sup>44</sup>

4.31 The *Crimes Legislation Amendment Act 1997* (NSW) adopts a narrower version of this requirement. It requires the Attorney General's consent to prosecutions under s 316 of persons who acquire knowledge of a serious offence in the course of practising or following a profession, calling or vocation to be prescribed by regulation.<sup>45</sup> Although this approach would reduce the number of prosecutions under s 316 which require the Attorney General's consent, there are difficulties with relying on a prescribed list of exempted relationships.<sup>46</sup> Submissions by academics argued that incorporating a high level discretion is not adequate to protect their interests because the problem faced by researchers is the

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43. J Stubbs, *Submission*.

44. *Criminal Law Act 1967* (Eng) s 5(3).

45. *Crimes Legislation Amendment Act 1997* (NSW) s 3.

46. See para 4.29.

theoretical possibility of prosecution which is taken into consideration by ethics committees.<sup>47</sup>

### **Restricting offence to benefit situations**

4.32 Restricting the operation of s 316 to situations where the accused accepts or agrees to accept a benefit in return for not disclosing information to the police or other authorities would exempt the groups of people identified at 4.8 to 4.20 above from the operation of the section. This approach was suggested by a number of submissions.<sup>48</sup>

4.33 A number of submissions also argued that while there are strong arguments for the abolition of s 316(1), the behaviour criminalised by s 316(2) is much more serious, which warrants retaining this arm of the offence.<sup>49</sup>

4.34 Comparable offences in England, Victoria, Queensland, Western Australia and the Northern Territory restrict the offence of concealing an offence to situations where the accused obtains a benefit in return for not disclosing the offence.<sup>50</sup> This was the

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47. D Dixon, *Submission*; C Fell, Deputy Vice Chancellor, Research and International, University of New South Wales, *Submission*.

48. D Dixon, *Submission*; Criminal Law Review Division "Reform of Offences Involving Public Justice" (Discussion Paper, February 1989) at 14-17; Criminal Law Revision Committee (Eng) Report 7 Felonies and Misdemeanours (Report 7, 1965) at paras 37-43; Independent Commission Against Corruption, *Submission*; Legal Aid New South Wales, *Submission*.

49. P Berman, *Submission*; Public Defenders, *Submission*; Criminal Law Revision Committee (Eng) *Felonies and Misdemeanours* (Report 7, 1965) at para 37-43; Criminal Law Revision Division "Reform of Offences Involving Public Justice" (Discussion Paper, February 1989) at 14-17.

50. See paras 3.3 (England), 3.15 (Victoria) and 3.23 and 3.24 (Queensland, Western Australia and the Northern Territory).

offence initially recommended for New South Wales.<sup>51</sup> However, following lobbying from the Police Service and Police Association, s 316 was enacted in its current form.<sup>52</sup>

4.35 Care needs to be taken in relation to the form of words used to describe an offence which is restricted in this way. Concern has been expressed that the expression currently used in s 316(2), "(a) person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration" for committing an offence under s 316(1), is too broad. It has been suggested that the social utility of research referred to in para 4.16 may fall within the scope of s316(2).<sup>53</sup> Similarly, it has been suggested that it is necessary to make clear that earning an academic or other professional salary does not constitute a relevant benefit.<sup>54</sup> One submission suggested that "benefit" to a person for the purposes of s 316 should include avoiding an investigation into an incident involving that person.<sup>55</sup>

### **Amend definition of "serious offence"**

4.36 One submission suggested that s 316 should only apply to the concealment of serious offences which can only be dealt with on indictment.<sup>56</sup> Another alternative would be to redefine "serious offence" so that only offences carrying a penalty of, say, seven years or more constituted "serious offences" for the purposes of s 316.

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51. Criminal Law Review Division *Reform of Offences Involving Public Justice* (Discussion Paper, February 1989) at 17.
  52. Director of Public Prosecutions, *Submission*.
  53. NSW Bureau of Crime Statistics and Research, *Oral Submission*.
  54. D Dixon, *Submission*.
  55. Intellectual Disability Rights Service, *Submission*.
  56. Law Society of New South Wales Criminal Law Committee, *Submission*.

## Require intent

4.37 One submission argued that s 316 should only criminalise wilful or intentional concealment of information when called upon to reveal it by the police.<sup>57</sup> However, the offence of wilfully obstructing a police officer executing his or her duties already exists in this situation.<sup>58</sup>

## Penalty

4.38 There are considerable discrepancies between the penalty for breach of s 316(1), which is imprisonment for two years, and the penalties under the equivalent provisions in other jurisdictions, which vary from imprisonment for one year to imprisonment for 10 years.<sup>59</sup>

4.39 In fact, the imposition of prison sentences on offenders under s 316 is rare.<sup>60</sup> It has been suggested the reluctance of magistrates and judges to impose prison sentences on offenders relates to the selective use of s 316 by prosecuting authorities.<sup>61</sup> It has also been suggested that the imposition of a custodial sentence for the commission of an offence under s316(1) is inappropriate.<sup>62</sup>

## CONCLUSION

4.40 Section 316 has a valid social purpose of encouraging members of the public who have information about serious crimes to report that information to the police and other appropriate

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57. North & North West Community Legal Service, *Submission*.

58. See para 2.15.

59. See Chapter 3.

60. See paras 2.6 to 2.11.

61. T Nyman, *Submission*.

62. Public Defenders, *Submission*; North & North West Community Legal Service, *Submission*.

authorities. However, the technical application of s 316(1) to information acquired in the course of confidential relationships, including relationships between law enforcement agencies and informants, health care professionals and patients and researchers and research subjects inhibits participation in these relationships. This problem outweighs the social utility of s 316(1).

## **PROPOSALS**

4.41 The Commission is satisfied that s 316 in its present form is unsatisfactory. If its retention at all can be justified in the face of the arguments stated above, some amendments are required at least to clarify problems arising from the present wording and to preserve the interests of lawyers, medical practitioners and others whose services are considered socially valuable. The Commission therefore makes alternative proposals and seeks comment upon them:

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### **OPTION 1 - ABOLISH S 316**

**Section 316 should be abolished. The terms of the section are so wide that it intrudes into a range of confidential relationships. The social utility of the section is outweighed by the potential for harm to these valuable relationships.**

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### **OPTION 2 - BENEFIT ONLY OFFENCE**

**Section 316 should be amended so that the offence is only made out when the defendant accepts or agrees to accept a benefit in money or money's worth in return for failing to disclose an offence.**

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### **OPTION 3 - SPECIFIC EXEMPTIONS**

**Section 316 should be amended to provide that legal practitioners, medical practitioners / counsellors / psychologists / social workers and priests who acquire information about "serious offences" in the course of their profession or vocation are not guilty of an offence for failing to disclose it, in accordance with the doctrine of privilege. The section should also be amended to provide that engaging in genuine research constitutes a reasonable excuse for concealment of information about serious offences from the police.**

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