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Law Reform Commission

Report

93

Review of section 316 of the Crimes Act 1900 (NSW)

December 1999

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New South Wales
Law Reform Commission

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

Review of section 316 of the Crimes Act 1900 (NSW)

We make this final Report pursuant to the reference to this Commission dated 1 August 1997.

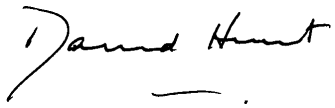
The Hon Justice Michael Adams
Chairperson

His Hon Judge Bellear
Commissioner

The Hon Justice Dowd AO
Commissioner

His Honour Judge Goldring
Commissioner

Professor Regina Graycar
Commissioner



The Hon David Hunt QC
Commissioner

Her Honour Judge Karpin
Commissioner

December 1999

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Terms of reference

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

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairman of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Mr Michael Adams QC (Commissioner-in-Charge)
His Honour Judge Bellear
The Hon Justice Dowd AO
His Honour Judge Goldring
Professor Regina Graycar
The Hon David Hunt QC*
Her Honour Judge Karpin

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* The Honourable David Hunt QC was formerly Chief Judge at Common Law of the Supreme Court of New South Wales and became a Judge of the International Criminal Tribunal for the Former Yugoslavia on 16 November 1998. His term as a Commissioner expired in July 1999. He has continued to participate in settling the recommendations in this Report.

LIST OF RECOMMENDATIONS

Recommendation 1 (page 40)

The Commission recommends that subsection (1) of s 316 be repealed.[†]

Recommendation 2 (page 45)

The Commission recommends that the compounding offence contained in s 316(2) and (3) be retained. However, the offence should be amended as follows:

- **The expression "benefit" should be repealed and replaced with the term "advantage".**
- **The offence should be extended to cover persons who offer or promise to provide or provide an advantage to another person in consideration for the concealment of information about a serious offence.**
- **The consent of the Attorney-General or Director of Public Prosecutions should be required for all prosecutions.**

[†] This is a majority recommendation.

1. Introduction

- Overview
- The course of the reference
- Structure of this Report

OVERVIEW

1.1 This Report reviews s 316 of the *Crimes Act 1900* (NSW). Section 316 contains two offences. Where a person has committed a "serious offence", it is an offence under s 316(1) for another person who knows or believes that the offence has been committed, and that he or she has information material to the possible apprehension of the offender, to fail to report the information to the police or other appropriate authority, unless the person has a reasonable excuse. "Serious offence" is defined in s 311(1) of the *Crimes Act* as any offence punishable by penal servitude or imprisonment for five years or more. The maximum penalty for the offence of concealing a serious offence is imprisonment for two years.

1.2 It is also an offence under s 316(2) to solicit, accept or agree to accept a "benefit" in return for committing an offence under s 316(1). The expression "benefit" is clarified in s 316(3). This offence attracts a maximum penalty of imprisonment for five years.

1.3 This Report considers the arguments for retaining or repealing s 316. The Commission recommends that s 316(1) be repealed and that s 316(2) be amended.

THE CONDUCT OF THE REFERENCE TO DATE

1.4 On 1 August 1997 the Commission received a reference from the Attorney General, the Hon Jeff Shaw QC MLC, to inquire into and report on whether the offences in s 316 should be abolished or amended.

1.5 During September and October 1997, the Commission circulated the terms of reference and invited initial submissions. The Commission published a Discussion Paper on s 316 in December 1997.[1] The Discussion Paper set out a number of options for reform, and invited further submissions.

1.6 In May 1998, the Commission consulted legal practitioners and judges with practical experience of s 316 on their views on the operation of the section and the need for reform. This Report sets out arguments put forward

1. NSW Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW)* (Discussion Paper 39, 1997)

in the submissions and during the consultation process for consideration, but the Commission does not necessarily accept all of these arguments. A list of submissions appears as Appendix "A" to this Report. A list of consultations appears as Appendix "B".

Legislative action since the Discussion Paper was published

1.7 When the Discussion Paper was published in December 1997, the *Crimes Legislation Amendment Act 1997* (NSW), which amended s 316, had received the royal assent and was awaiting proclamation. This Act was proclaimed on 30 March 1998.[2] It amended s 316 to provide that the approval of the Attorney General is required for the prosecution of people who acquire information or beliefs about the commission of serious offences in the course of a prescribed profession or vocation.[3] Regulations passed when this Act was proclaimed prescribe legal and medical practitioners, nurses, psychologists, social workers and counsellors, clergy and professional or academic researchers for the purpose of this amendment.[4]

2. New South Wales, *Government Gazette* No 62 of 27 March 1998 at 1823.
3. *Crimes Legislation Amendment Act 1997* (NSW) s 3, Sch 1.
4. *Crimes (General) Amendment (Concealment of Offences) Regulation 1998* (NSW) cl 2, Sch 1.

STRUCTURE OF THIS REPORT

1.8 This Report adopts the following structure:

- Chapter 1 gives an overview of s 316 and the course of the reference.
- Chapter 2 sets out s 316, including the amendments to the section which came into force after the Discussion Paper was published in December 1997, and summarises the available statistical information on prosecutions under s 316.
- Chapter 3 considers the arguments for and against further reform and contains the Commission's recommendations.

2. The offence of concealment of a serious offence

- Background to section 316
- The provision
- Prosecutions under section 316

BACKGROUND TO SECTION 316

2.1 Section 316 is part of a package of public justice offences which was inserted into the *Crimes Act 1900* (NSW) in 1990.[1] The purpose of the package 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".[2]

2.2 Section 316 replaced the common law misdemeanours of misprision of felony and compounding a felony.[3] Misprision of felony 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 to do so. Compounding a felony was constituted by agreement for consideration not to prosecute or to impede prosecution for a felony.[4]

THE PROVISION

2.3 Section 316 provides:

> (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

1. *Crimes Act 1900* (NSW) Part 7, inserted by the *Crimes (Public Justice) Amendment Act 1990* (NSW) s 3, Sch 1.
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. J Smith and S Hogan, *Criminal Law* (7th ed, Butterworths, London, 1992) at 165.

> 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.
>
> (4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.
>
> (5) The Governor may make regulations, not inconsistent with this Act, prescribing a profession, calling or vocation as referred to in subsection (4).

2.4 "Serious offence" means any offence that is punishable by penal servitude or imprisonment for five years or more.[5] The prosecution does not have to prove that the defendant knew that the offence was a serious offence.[6]

2.5 Defendants charged with indictable offences are normally tried by a jury in the higher courts.[7] However, certain indictable offences are triable summarily by a magistrate in the Local Courts.[8] The maximum penalty which magistrates are empowered to impose is imprisonment for two years.[9] Where a defendant charged with an indictable offence punishable by imprisonment for five years or more is tried summarily, the offence is still considered a "serious offence" for the purpose of s 316, although the lower maximum penalty applies.[10]

2.6 Sections 316(4) and (5) are recent amendments which came into force on 30 March 1998.[11] These subsections were introduced following a review of s 316 by a Working Party of the Criminal Law Review Division of the

5. *Crimes Act 1900* (NSW) s 311(1).
6. *Crimes Act 1900* (NSW) s 313.
7. *Criminal Procedure Act 1986* (NSW) s 4.
8. *Criminal Procedure Act 1986* (NSW) s 33C.
9. *Criminal Procedure Act 1986* (NSW) s 33J.
10. *DPP v Sinclair* (New South Wales, Supreme Court, No BC9701549, Sperling J, 1 April 1997, unreported) at 2.
11. New South Wales, *Government Gazette* No 62 of 27 March 1998 at 1823.

Attorney General's Department in 1996. The Working Party recommended that the Director of Public Prosecutions be required to consent to s 316 prosecutions of prescribed categories of people.[12] However, s 316(4) provides that the Attorney General must approve prosecutions of people in the prescribed categories.

2.7 The following professions and vocations have been prescribed under s 316(5):[13]

- legal practitioners;
- medical practitioners;
- psychologists;
- nurses;
- social workers, including victim support workers and counsellors;
- clergy; and
- academic and professional researchers.

2.8 It is also an offence for a person to fail or refuse to comply with a request by a police officer to state his or her name and address, if the police officer has reasonable grounds for believing that the person may be able to assist in the investigation of an alleged indictable offence because the person was in the vicinity when the alleged offence occurred.[14] This offence was introduced following the publication of the Commission's Discussion Paper on s 316. Consideration of this offence falls outside the scope of this reference.

12. Working Party of the Criminal Law Review Division on Section 316 of the Crimes Act, *Minutes of Meeting, 14 March 1996* at 2.
13. *Crimes (General) Amendment (Concealment of Offences) Regulation 1998* (NSW) cl 2, Sch 1.
14. *Crimes Act 1900* (NSW) s 563, inserted by the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998 s 4, Sch 2. This provision commenced on 1 July 1998: New South Wales, *Government Gazette* No 97 of 26 June 1998 at 4422.

PROSECUTIONS UNDER SECTION 316[15]

2.9 There were 112 prosecutions under s 316 in the Local Courts in the five year period from September 1994 to August 1999. In a longer reporting period from November 1990 (when s 316 came into force) to December 1998, there were 50 prosecutions in the higher courts.

Local Courts

2.10 There were 109 prosecutions under s 316(1) in the Local Courts between September 1994 and August 1999. The defendant pleaded guilty in 91 cases. Sixty-eight offenders had at least one prior conviction of some type, although the available statistical information does not indicate the type of prior offences. Only seven offenders were charged with multiple counts. The penalty imposed in most cases in the Local Courts was either a bond or a fine, most commonly $500.00. Fourteen prison sentences were imposed on offenders. The minimum prison sentences imposed ranged from two months to 12 months, although most minimum sentences were for six months or less. A more detailed breakdown of the penalties imposed is set out in Table 1.

Table 1: Penalties for conviction under s 316(1) in the Local Courts from September 1994 to August 1999[16]

Outcome	Number of cases
Bond under s 556A or 558	35
Fine ($100.00 - $2,000.00)	25
Community service order (100 - 300 hours)	15
Prison sentence	14
Bond under s 558 and fine	8
Periodic detention	6
Dismissal under s 556A	4
Home detention	1

15. Data referred to in para 2.9 to 2.13 obtained from the Judicial Commission of NSW *Judicial Information Research System Sentencing Statistics Database.*
16. Section numbers refer to the *Crimes Act 1900* (NSW).

Rise of court	1

2.11 There were three prosecutions under s 316(2) in the Local Courts from September 1994 to August 1999. The accused pleaded guilty in two cases. Two offenders had at least one prior conviction of some type, although again, the available statistical information does not indicate the type of prior offences. No offenders were charged with multiple counts. A fine of $300.00 was imposed in one case. One offender received a bond under s 558 of the *Crimes Act 1900* (NSW) and in the other case a compound penalty of a bond and a fine was imposed.

Higher courts

2.12 There were 50 cases under s 316(1) in the higher courts between November 1990 and December 1998. The accused pleaded guilty in all but one case. Eighteen offenders had at least one prior conviction, although none was for the same offence. Six offenders were charged with multiple counts. The most common penalty imposed on offenders in the higher courts was a bond. Six prison sentences were imposed, with minimum terms ranging from six to 18 months. A more detailed breakdown of penalties imposed is set out in Table 2.

Table 2: Penalties for conviction under s 316(1) in the higher courts from November 1990 to December 1998[17]

Outcome	Number of cases
Bond under s 556A or s 558	29
Community service order (50 - 500 hours)	10
Prison	6
Bond under s 558 and fine	3
Periodic detention	1
Dismissal under s 556A	1

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

2.13 There have been no prosecutions under s 316(2) in the higher courts since November 1990 when the section came into force.

3. Reform of section 316

- The Commission's view
- Analysis of the case for retaining the status quo
- Analysis of the case for reforming s 316

THE COMMISSION'S VIEW

3.1 In Discussion Paper 39, the Commission expressed the view that s 316, as it was then drafted, was unsatisfactory.[1] The Commission has concluded that the amendments to s 316 which came into force in March 1998 do not adequately address the problems with the section identified in the Discussion Paper. The Commission recommends that s 316(1) should be repealed. This is a unanimous recommendation. A minority of Commissioners[2] favours the substitution of a new provision, somewhat analogous, but, in the minority's view, adequate to overcome the grave problems created by the present subsection. The Commission also considers that the compounding offence contained in s 316(2) should be slightly amended.

ANALYSIS OF THE CASE FOR RETAINING THE STATUS QUO

3.2 The principal argument for retaining s 316 is that the offences in the section serve the important policy function of encouraging people to report information and beliefs about serious offences to the police, facilitating the detection and investigation of offences and the apprehension, prosecution and conviction of offenders. It is argued that, by punishing the suppression of relevant information, s 316 operates as a deterrent to people who would otherwise withhold information from the police. The minority Commissioners are persuaded that the importance of this policy function justifies the retention of an offence of concealing a serious offence, although in a significantly different form to the present s 316.

3.3 It is also argued that s 316 is a useful coercive tool which is employed legitimately by the police to achieve co-operation from potential witnesses and suspects. The police can warn potential witnesses that withholding relevant information may be an offence. Where police know that a suspect is

1. New South Wales Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW)* (Discussion Paper 39, 1997) at para 4.41.
2. The minority consists of the Chairperson, the Honourable Justice Adams, the Deputy Chairperson, the Honourable Justice Dowd, and Her Honour Judge Karpin.

involved in a criminal act, but cannot initially prove the nature of the involvement, they are able to charge the suspect under s 316(1), undertake further investigations, then lay alternative charges.

3.4 However, the Commission's view is that it is improper for investigating police officers to threaten to charge a witness with an offence under s 316 in order to force the person to co-operate with a police investigation. It also considers that the use of holding charges under s 316 is unacceptable. A later decision by the Director of Public Prosecutions not to continue with such a prosecution is no answer to the abuse which has already taken place. In the Commission's view, evidence obtained as a result of such abuses of s 316 may well be rendered inadmissible by s 138 and s 139 of the *Evidence Act 1995* (NSW).[3]

3.5 The Commission received two submissions which supported retention of s 316 as it was before 30 March 1998.[4] Seven further submissions supported the policy rationale for s 316, while arguing that the section required amendment to address particular problems.[5] This view was also strongly expressed by Crown prosecutors during consultation with the Commission.[6]

3.6 The *Children (Care and Protection) Act 1987* (NSW) creates a regime of compulsory reporting of suspected child abuse in New South Wales.[7] The Commission received several submissions which argued that adults with disabilities living in residential care facilities are especially vulnerable to being victims of offences, particularly sexual and physical assaults.[8] It was

3. Section 138 of the *Evidence Act 1995* (NSW) provides that illegally or improperly obtained evidence is not admissible, subject to the discretion of the trial judge. Section 139 of the *Evidence Act 1995* (NSW) sets out the circumstances in which evidence is taken to have been improperly obtained for the purpose of s 138.
4. NSW Police Service, *Submission 1* at 1; Tamworth City Council, *Submission* at 1.
5. R O Blanch, *Submission* at 1; Community Services Commission, *Submission 1* at 1; ICAC, *Submission 2* at 2; Kingsford Legal Centre, *Submission* at 1; D Landa, *Submission 2* at 1; People With Disabilities (NSW), *Submission* at 1; M Tedeschi, *Submission* at 1.
6. Office of the DPP, 6 May 1998, *Consultation*.
7. *Childrens (Care and Protection) Act 1987* (NSW) s 22.
8. Ageing and Disability Department, *Submission* at 1; Intellectual Disability Rights Service, *Submission 1* at 2; *Submission 2* at 1; People With Disabilities (NSW), *Submission* at 1.

also argued that abuse of adults with disabilities is much less likely to be reported than suspected child abuse.[9] For this reason, two submissions argued that consideration should be given to the implementation of a similar specific regime of compulsory reporting of suspected abuse of people with disabilities.[10] The Ageing and Disability Department disagreed with this view, arguing that the problem is best dealt with by the development and implementation of a policy concerning assaults which occur within residential care facilities which it funds or authorises.[11]

3.7 The Commission is not in favour of the introduction of mandatory reporting of offences committed against adults with disabilities living in residential care facilities, although the proposals of the minority would cover most serious offences committed in this context. We acknowledge that people in this situation are at risk of physical and sexual assaults, but the Commission agrees with the Ageing and Disability Department that this problem should be addressed by way of policies adopted by individual government departments and service providers, rather than by the criminal law.

3.8 Many submissions and practitioners consulted by the Commission argued that s 316 does not achieve its policy function.[12] Several submissions relied on the infrequency of prosecutions under the section as evidence of this.[13] The Commission's view is that the number of prosecutions for an offence does not necessarily reflect the actual number of offences committed and is not an appropriate measure of the need for the offence. Other

9. Community Services Commission, *Submission 1* at 2.
10. Community Services Commission, *Submission 1* at 2; People With Disabilities (NSW), *Submission* at 2.
11. Ageing and Disability Department, *Submission* at 1. See also Ageing and Disability Department, *The Positive Approach to Challenging Behaviour, Policy and Guidelines* (1997) and Spastic Centre of NSW, *Policy Manual: Policy BA:2 – Allegations of Sexual, Physical or Emotional Assault of Adults* (6th revision, 4 May 1998).
12. Legal Aid, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; North and North West Community Legal Service, *Submission* at 1; J Stubbs, *Submission* at 4; G Zdenkowski, *Submission* at 2. See also *R v Cotterell* (New South Wales, Supreme Court, No 70020/91, Hunt CJ at CL, 27 October 1992, unreported) at 2.
13. Legal Aid NSW, *Submission* at 1; P Berman, *Submission* at 1 and 2; D Dixon, *Submission* at 4; Manning District Emergency Accommodation Youth Services, *Submission* at 2; University of NSW, *Submission* at 1. Para 2.9-2.13 set out statistics on the number of prosecutions under s 316.

submissions argued that the low penalties imposed for convictions under s 316 reflect the fact that the judiciary, like the general community, does not consider that the section plays an important role in crime detection.[14] Submissions from the New South Wales Bureau of Crime Statistics and Research, and from several academics conducting research into criminal behaviours, argued that s 316 actually impedes crime control, by interfering with research which is used to inform the development of criminal justice strategies.[15]

3.9 The Commission also received a number of submissions which argued that there are a number of legitimate reasons for not reporting information about serious offences to the police. These include fear of the offender and a wide range of formal and informal confidential relationships. These reasons are discussed at paragraphs 3.23-3.48.

3.10 Many submissions argued that in the context of these reasons, the possibility of prosecution under s 316 is unlikely to operate as a deterrent against concealment.[16] The Commission's view is that many members of the community are not aware of the existence of s 316 and do not appreciate that they are under any legal duty to report information or beliefs about serious offences to police. Even where people are conscious of their legal duty, it is not clear how this could operate as a deterrent against concealment in light of the strong personal reasons which most people would have for deciding not to report relevant information.

3.11 Many practitioners consulted argued that, in practice, s 316 actually deters witnesses from co-operating with authorities.[17] The Independent Commission Against Corruption ("ICAC") stated that s 316 undermines the conduct of its investigations and hearings. When an ICAC investigator cautions a potential witness about s 316, the person often refuses

14. P Berman, *Submission* at 1; Law Society of NSW, *Submission 2* at 1; T Nyman, *Submission* at 1. Para 2.10-2.12 set out a summary of the penalties imposed for offences under s 316.
15. This argument is discussed in detail at para 3.40-3.43. See also para 3.54-3.55.
16. Forbes Chambers, 11 May 1998, *Consultation*; Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; R Taylor, *Oral Submission*. See also D Dixon, *Submission* at 3.
17. Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*.

further co-operation. This problem also affects witnesses at ICAC hearings.[18] ICAC emphasised that, although it is unlikely that a witness would be prosecuted under s 316 in this situation, the technical possibility of prosecution is a strong disincentive to potential witnesses.[19]

3.12 Similarly, a defence lawyer gave the example of a client who voluntarily provided information about a serious offence to police and was immediately charged under s 316. He argued that this prosecution had, contrary to its policy function, deterred his client from reporting relevant information to the police in the future.[20]

3.13 A person who believes on reasonable grounds that he or she is suspected of having committed a criminal offence is entitled to remain silent when questioned about the offence.[21] In reporting information or beliefs about a serious offence committed by another person, a person may incriminate themselves about an offence they themselves have committed. Several submissions argued that s 316 is inconsistent with the right to silence.[22] But, as we point out below, we do not think this view is correct.

3.14 Several authorities, including the High Court decision of *Petty v The Queen*,[23] make it clear that a person who concealed information about a serious offence by failing to answer police questions about his or her involvement in the offence, or a related offence, did not commit the common law offence of misprision of felony. These authorities held that reliance on the right to silence constituted a reasonable excuse for committing the common law offence.[24] However, other authority suggests that self-incrimination would not always excuse concealment of an offence at common law, particularly where there is a gross discrepancy between the magnitude of the concealed offence and the apprehended prosecution or

18. ICAC, *Submission 1* at 10-11; *Submission 2* at 1. Contra Office of the DPP, 6 May 1998, *Consultation*; NSW Police Service, *Submission 1* at 1; M Tedeschi, *Submission* at 1.
19. ICAC, *Submission 1* at 10-11.
20. Legal Aid NSW, 7 May 1998, *Consultation*.
21. *Petty v The Queen* (1991) 173 CLR 95; *Evidence Act 1995* (NSW) s 89.
22. Law Society of NSW, *Submission 2* at 2; National Children's and Youth Law Centre, *Submission* at 1; J Nicholson, *Submission* at 3.
23. *Petty v The Queen* (1991) 173 CLR 95.
24. *Petty v The Queen* (1991) 173 CLR 95 at 99. See also *R v Jeffers and Stephens* (New South Wales Supreme Court, Yeldham J, 2 May 1975, unreported) at 5-6; *R v James* (1983) SASR 215 at 224; *R v Lovegrove* (1983) 33 SASR 332 at 343; *R v King* (1965) 49 Cr App R 140 at 145-146.

where the offence in respect of which the privilege against self-incrimination is claimed is completely unrelated to the concealed offence.[25] There is no case law on the relationship between the right to silence and s 316, although the Commission considers that the comments of the High Court in *Petty v The Queen* would be followed.

3.15 Many defence lawyers with whom the Commission consulted argued that, in practice, a police warning to a witness that the concealment of relevant information is an offence amounts to a threat to charge the witness under s 316 if the witness does not co-operate with police investigations. This was criticised as an improper investigative technique.[26] It was argued that proper police practice should involve a thorough investigation of all the circumstances of an alleged offence, rather than reliance on threats to charge potential witnesses under s 316 in order to obtain evidence.[27] Evidence obtained after threats of this kind may be unreliable. The use of s 316 holding charges was also criticised as a misuse of police prosecutorial discretion, on similar grounds.[28]

3.16 The Commission appreciates that the police necessarily rely on witnesses and informants to obtain information in order to perform their investigative function. The right of all citizens to remain silent when questioned by police is qualified by the terms of s 316 itself (except where the privilege against self-incrimination applies), but it is improper practice to use it as a threat.

3.17 The Commission is currently reviewing the law relating to the right to silence. In May 1998, the Commission published a Discussion Paper on the right to silence, which expressed the preliminary view that the right to silence is a necessary protection for suspects questioned by police and which should

25. *R v Lovegrove* (1983) 33 SASR 332 at 342.
26. Forbes Chambers, 11 May 1998, *Consultation*; Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; Law Society of NSW, *Submission 2* at 2.
27. Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*. See also D Dixon, *Submission* at 2; R Taylor, *Oral Submission*.
28. Forbes Chambers, 11 May 1998, *Consultation*; Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; North and North West Community Legal Service, *Submission* at 1; R Taylor, *Oral Submission*. See also Law Society of NSW, *Submission 2* at 2; Legal Aid NSW, *Submission* at 2-3.

not be modified.[29] The Commission expects to publish its final report on the right to silence early in 2000.

ANALYSIS OF THE CASE FOR REFORMING S 316

3.18 There are many strong arguments for reforming s 316. These arguments include philosophical objections to the policy rationale of the section and the criticism that the offences under s 316 can be committed by people with legitimate reasons for failure to report information about serious offences. In particular, the propriety of the reporting obligation imposed by s 316 on the family and close friends of offenders is questioned. There are indications that s 316 interferes with valuable medical and criminological research. The formulation of the offences in s 316 is also open to criticism.

3.19 The Commission received 31 submissions which criticised s 316.[30] The need for reform was also universally expressed during the consultation process engaged in by the Commission.[31] However, the recent amendments to

29. NSW Law Reform Commission, *The Right to Silence* (Discussion Paper 41, 1998) at para 3.80.

30. Australian Institute of Criminology, *Submission* at 1; P Berman, *Submission* at 1-2; J Coombs, *Submission* at 1; J Cooper, *Submission* at 1; D Dixon, *Submission* at 1-4; The Hon A M Gleeson AC, *Submission* at 1-2; ICAC, *Submission 1* at 1-4, 10-11; *Submission 2* at 1-2; Kingsford Legal Centre, *Submission* at 1-2; D Landa, *Submission 2* at 1-2; Law Society of NSW, *Submission 1* at 1-2; *Submission 2* at 1-3; Legal Aid NSW, *Submission* at 1-3; L Maher, *Submission* at 2-3; Manning District Emergency Accommodation Youth Services, *Submission* at 1-2; National Children's and Youth Law Centre, *Submission* at 1-3; NSW Bar Association, *Submission* at 1-3; NSW Bureau of Crime Statistics and Research, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1; NSW Police Service, *Submission 2* at 1; NSW Young Lawyers, *Submission* at 3; J Nicholson, *Submission* at 1-4; North and North West Community Legal Service, *Submission* at 1; T Nyman, *Submission* at 1-2; J Saffin, *Submission* at 1; J Stubbs, *Submission* at 1-5; R Taylor, *Oral Submission*; University of Newcastle, *Submission* at 1; University of NSW, *Submission* at 1; D Weatherburn, *Oral Submission;* G Zdenkowski, *Submission* at 1-2.

31. Forbes Chambers, 11 May 1998, *Consultation*; Legal Aid NSW, 7 May 1998, *Consultation*; Office of the DPP, 6 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*.

s 316 were not considered generally to provide an adequate solution to the problems associated with the section.[32]

Philosophical objections to section 316

3.20 Several submissions argued that, although there may be a moral duty actively to assist the police in their investigations, there should not be any legal duty to do so. These submissions distinguished the failure to report relevant information to police from actively impeding the law enforcement process in some way, arguing that punishing people for mere knowledge accompanied by inaction is excessive interference by the state in individual autonomy.[33] This view was also expressed by many practitioners during the consultation process.[34] The distinction drawn between the offences contained in s 316 generally reflects this view, in that the positive act of soliciting, accepting or agreeing to accept a benefit in return for concealing information about a serious offence attracts a higher penalty than merely failing to report information.[35]

3.21 Part 7 of the *Crimes Act 1900* (NSW) contains numerous public justice offences which relate to hindering investigations, suppressing, destroying or

32. Forbes Chambers, 11 May 1998, *Consultation*; Legal Aid, 7 May 1998, *Consultation*; Office of the DPP, 6 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; D Dixon, *Submission* at 3; Manning District Emergency Accommodation Youth Services, *Submission* at 1; NSW Bar Association, *Submission* at 3; NSW Young Lawyers, *Submission* at 2; J Stubbs, *Submission* at 4; University of NSW, *Submission* at 1; G Zdenkowski, *Submission* at 2. See also Australian Institute of Criminology, *Submission* at 1; R O Blanch, *Submission* at 1; J Cooper, *Submission* at 1; D Landa, *Submission 1* at 2; *Submission 2* at 1-2; Kingsford Legal Centre, *Submission* at 1-2; NSW Police Service, *Submission 1* at 1. Contra Office of the DPP, *Submission* at 3.
33. D Dixon, *Submission* at 2; The Hon AM Gleeson AC, *Submission* at 2; Law Society of NSW, *Submission 1* at 1; National Children's and Youth Law Centre, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1; NSW Young Lawyers, *Submission* at 1.
34. Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*.
35. P Berman, *Submission* at 2; Legal Aid NSW, *Submission* at 2; NSW Young Lawyers, *Submission* at 1; J Nicholson, *Submission* at 4. Contra D Landa, *Submission 2* at 1.

fabricating evidence, perverting the course of justice and interfering with judicial officers, witnesses and jurors.[36] The *Crimes Act* also includes offences relating to assaulting, resisting, hindering and wilfully obstructing police officers in the execution of their duties and making false reports to the police.[37] Part 9 of the *Crimes Act* contains aiding and abetting provisions and accessory offences which involve assisting or encouraging the commission of an offence, or assisting the offender to avoid detection, prosecution or punishment or dispose of the proceeds of the offence.[38] It was widely argued that these offences, which address active interference with the criminal justice system, adequately cover the field of blameworthy activity in this context.[39]

3.22 Several submissions and practitioners consulted by the Commission disagreed with the principle which underpins s 316 that people should be legally compelled to "dob in" or inform on each other.[40] It was argued that individual citizens should have the freedom to decide whether to participate in the legal framework of society.[41] The section was criticised for its "1984

36. *Crimes Act 1900* (NSW) s 315 and s 317 - 326.
37. *Crimes Act 1900* (NSW) s 58, 546C, 547B.
38. *Crimes Act 1900* (NSW) s 345-351; *R v Clarkson* [1971] 3 All ER 344; *R v Allan* [1965] 1 QB 130; *R v Taylor* (1875) LR 2 CCR 147; *R v Lee* (1834) 6 Carr & P 536. There are also aiding and abetting offences in relation to specific offences, for example aiding or abetting suicide or attempted suicide (*Crimes Act 1900* (NSW) s 31C).
39. Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; P Berman, *Submission* at 1; D Dixon, *Submission* at 2-4; The Hon A M Gleeson AC, *Submission* at 2; Law Society of NSW, *Submission 1* at 1; Law Society of NSW, *Submission 2* at 1; Legal Aid NSW, *Submission* at 3; National Children's and Youth Law Centre, *Submission* at 1; NSW Bar Association, *Submission* at 2; NSW Council for Civil Liberties, *Submission* at 1; NSW Young Lawyers, *Submission* at 1; North and North West Community Legal Service, *Submission* at 1; T Nyman, *Submission* at 2; J Stubbs, *Submission* at 4; University of Newcastle, *Submission* at 1; University of NSW, *Submission* at 1. Contra M Tedeschi, *Submission* at 1.
40. Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; National Children's and Youth Law Centre, *Submission* at 2; J Nicholson, *Submission* at 3. See also Criminal Law Review Division, *Reform of Offences Involving Public Justice* (Discussion Paper, 1989) at 10. See also the evidence given by the defendant in *R v Wozniak* (1989) 16 NSWLR 185 at 191-192.
41. NSW Council for Civil Liberties, *Submission* at 1.

overtones".[42] The Commission rejects this view, but it does accept that it is fundamental that the circumstances in which legal duties are imposed, especially where the sanction for non-compliance is a criminal one, must be unambiguously described and apply only where the public interest plainly requires interference with the liberty of the citizen.

Legitimate reasons for concealing serious offences

3.23 Numerous submissions argued that there are many legitimate reasons for not reporting suspicions or knowledge about serious offences to police. It was widely argued that it is not appropriate to punish people whose motive for concealment does not involve any dishonesty or any intention to impede police.[43]

3.24 One submission in favour of s 316 countered that there is no evidence of any actual misuse of s 316.[44] Several Crown prosecutors consulted by the Commission commented that the fact that the Director of Public Prosecutions is responsible for the conduct of prosecutions under s 316 is a safeguard against inappropriate prosecutions.[45] The Crown prosecutors stated that the offence is prosecuted in relation to the concealment of extremely serious crimes, such as murder.[46]

3.25 However, other submissions strongly disagreed with this view.[47] Two submissions expressed concern that police disposed to exercising their

42. National Children's and Youth Law Centre, *Submission* at 2.
43. Forbes Chambers, 11 May 1998, *Consultation*; Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; The Hon AM Gleeson AC, *Submission* at 1; Law Society of NSW, *Submission 2* at 1; Manning District Emergency Accommodation Youth Services, *Submission* at 1; National Children's and Youth Law Centre, *Submission* at 1, 2; J Nicholson, *Submission* at 3; T Nyman, *Submission* at 1; J Saffin, *Submission* at 1.
44. D Landa, *Submission 2* at 1. See also "Crime: Time to be Serious", *Central Western Daily* (29 April 1998) at 8.
45. Office of the DPP, 6 May 1998, *Consultation*.
46. Office of the DPP, 6 May 1998, *Consultation*. See for example G Zdenkowski, "The Right Time to Report a Crime" *Sydney Morning Herald* (3 April 1998) at 17.
47. Law Society of NSW, *Submission 2* at 1; NSW Bar Association, *Submission* at 2; T Nyman, *Submission* at 1.

powers in an abusive manner could use charges under s 316 as a means of retribution.[48] For example, researchers whose work is critical of police have raised their concern that they may be vulnerable to police retribution by being charged under the section.[49] There have been no reported cases where researchers have been prosecuted under s 316. The Commission is aware of one instance where an academic researcher was threatened by police with being charged under s 316(1). Evidence in such a situation may in some cases be rendered inadmissible by virtue of the judicial discretion to exclude improperly and illegally obtained evidence under s 138 and 139 of the *Evidence Act 1995* (NSW).[50]

3.26 It was also argued that, although various innocent motives for concealment of offences may well provide obvious defences to charges under the section, considerable time is lost in courts while these defences are dealt with.[51] The New South Wales Police Service acknowledged the uncertainty of the scope of s 316 before the recent amendments.[52] There is very little case law on whether an innocent motive for concealment would provide a reasonable excuse under s 316, and the available statistical data on prosecutions under s 316 does not indicate the motives of offenders.

Fear

3.27 It was argued that a person who withholds information about a serious offence out of fear of retribution by the offender should not be guilty of an offence.[53] For example, women and children quite often conceal assaults against them by their partners or fathers because of threats of further violence.[54] People with disabilities living in residential care who are victims of offences or witness offences committed against other residents by workers could be intimidated into not reporting the offence.[55] Although there is no relevant case law on s 316, there is authority that fear of retribution

48. D Dixon, *Submission* at 1; North and North West Community Legal Service, *Submission* at 1.
49. D Dixon, *Submission* at 1.
50. See also para 3.4, 3.15 and 3.16.
51. T Nyman, *Submission* at 1.
52. NSW Police Service, *Submission 2* at 1.
53. National Children's and Youth Law Centre, *Submission* at 1, 2; J Saffin, *Submission* at 1. See C Wockner, "Teenagers Plead Guilty to Charges in Forsyth Case" *Daily Telegraph* (20 August 1998) at 7.
54. See also J Saffin, *Submission* at 1.
55. See also Intellectual Disability Rights Service, *Submission 1* at 2; *Submission 2* at 1.

constituted a reasonable excuse for committing the common law offence of misprision of felony which preceded s 316.[56] The Commission expects that a similar attitude would be taken to charges under s 316. This consideration, therefore, does not provide a ground for repeal.

Victims

3.28 There has been one reported case where a victim was convicted of the common law offence of misprision of felony.[57] However, the New South Wales Court of Criminal Appeal has questioned whether s 316 should apply to the victim of a crime.[58]

3.29 It is generally accepted that one of the traumatic effects on victims of violent offences against the person is a feeling of disempowerment. One submission pointed out that being able to make a decision about whether to report the attack is an important step in the recovery process for many victims. It was submitted that the obligation to report offences imposed by s 316 may be seen as depriving victims of the right to choose whether to report the offence.[59] Several submissions emphasised that the autonomy of victims with disabilities living in residential care facilities should also be respected.[60]

3.30 It was also argued that victims may have many valid reasons for not reporting serious offences.[61] A domestic violence victim may threaten to report the offender to the police out of fear of further abuse, or as a way of leaving the violent relationship and keeping the offender away from him or her in the future, but not do so for fear of retribution.[62] These reasons would usually be valid grounds for the concealment of serious offences. An employer may agree not to report offences committed by an employee on condition that the employee repays the employer, in order to avoid unwanted

56. *Sykes v DPP* [1962] AC 528 at 564; *R v Lovegrove* (1983) 33 SASR 332 at 343.
57. *R v Crimmins* [1959] VR 270.
58. *R v Crofts* (New South Wales Court of Criminal Appeal, No 60706/94, 10 March 1995, unreported) at 1.
59. Manning District Emergency Accommodation Youth Services, *Submission* at 1.
60. Ageing and Disability Department, *Submission* at 2; Intellectual Disability Rights Service, *Submission 1* at 1-2; *Submission 2* at 1; People With Disabilities (NSW), *Submission* at 1-2.
61. Office of the DPP, 6 May 1998, *Consultation*; The Hon AM Gleeson AC, *Submission* at 1.
62. See also National Children's and Youth Law Centre, *Submission* at 2.

publicity.[63] This would not constitute a valid reason for the concealment of a serious offence. The validity of reasons for concealing serious offences in other cases, particularly in situations where the offender and the victim belong to the same family, will obviously depend on a wide range of possible circumstances.

Residential care facilities

3.31 In relation to offences committed against people with disabilities living in residential care facilities, several submissions drew a distinction between offences committed by workers at the facility and other residents. It was argued that there should be an obligation to report information or beliefs about offences committed by workers, but not by residents.[64] Two submissions also pointed out that people with certain disabilities are not always capable of reporting offence committed against them, or which they have witnessed.[65]

Confidential relationships

3.32 Section 316 imposes an obligation to report information about serious offences disclosed in the course of many confidential relationships, including relationships between legal and health practitioners and clients, researchers and research subjects and family and friends. The majority of Commissioners on the Division hold the view that the social value of these relationships outweighs the policy value of the offence in s 316. This view was supported by the majority of submissions.[66]

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63. Forbes Chambers, 11 May 1998, *Consultation*.
64. Ageing and Disability Department, *Submission* at 1-3; Intellectual Disability Rights Service, *Submission* 1 at 2; People With Disabilities (NSW), *Submission* at 2. See also New South Wales Law Reform Commission, *People With an Intellectual Disability and the Criminal Justice System* (Report 80, 1996). See also para 3.6 and 3.7.
65. Intellectual Disability Rights Service, *Submission 2* at 1; People With Disabilities, *Submission* at 2.
66. Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; Australian Institute of Criminology, *Submission* at 1; P Berman, *Submission* at 1; The Hon AM Gleeson AC, *Submission* at 1; Kingsford Legal Centre, *Submission* at 1-2; Law Society of NSW, *Submission 2* at 1-2; Manning District Emergency Accommodation Youth Services, *Submission* at 1; National Children's and Youth Law Centre, *Submission* at 2; NSW Bureau of Crime Statistics and Research, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1; NSW Young Lawyers, *Submission* at 1; J Nicholson, *Submission* at 3; North and North West Community Legal Service,

3.33 ***Legal practitioners and clients.*** Information about serious offences is likely to be communicated to lawyers by clients in the course of obtaining legal advice and representation. Many submissions argued that the confidentiality of the lawyer-client relationship should be protected from the reporting obligation imposed by s 316.[67] Case law suggests that legal professional privilege was a reasonable excuse for misprision of felony.[68] There is no relevant case law in relation to prosecutions under s 316.[69] The Commission considers that communications protected by legal professional privilege would not expose a legal practitioner to prosecution under s 316. It is a well established principle of statutory interpretation that fundamental common law privileges will not be taken to have been removed by statute unless the intention to do so is expressly manifest.[70]

3.34 As a result of the recent amendments to s 316, the approval of the Attorney General is required for prosecutions of legal practitioners whose knowledge or belief that a serious offence has been committed was acquired in the course of professional practice.[71] The recent amendments to the section make the prosecution of legal practitioners unlikely, but do not remove the technical possibility of prosecution in very limited circumstances, outside the existence of legal professional privilege. In our view, legal practitioners should not be at any risk of prosecution for the concealment of relevant information disclosed by clients in the course of their practice, unless the circumstances are such that legal professional privilege would be removed in accordance with the general law.

3.35 ***Health practitioners and clients.*** Information about serious offences may also be disclosed by clients in the course of relationships with various health practitioners, including medical practitioners, nurses, social workers,

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Submission at 1; T Nyman, *Submission* at 1-2; J Stubbs, *Submission* at 3; M Tedeschi, *Submission* at 1-2; University of NSW, *Submission* at 1; D Weatherburn, *Oral Submission*. See also R O Blanch, *Submission* at 1.

67. Kingsford Legal Centre, *Submission* at 1-2; Law Society of NSW, *Submission 2* at 2; North and North West Community Legal Service, *Submission* at 1; T Nyman, *Submission* at 1-2.
68. *Sykes v DPP* [1962] AC 528 at 564.
69. See also NSW Council for Civil Liberties, *Submission* at 1.
70. See for example, in relation to the privilege against self incrimination, *Sorby v Commonwealth* (1983) 152 CLR 281 at 309 per Mason, Wilson and Dawson JJ.
71. See para 2.3, 2.6 and 2.7. The current position was supported by Crown prosecutors: Office of the DPP, 6 May 1998, *Consultation.*

counsellors and health care educators. Several submissions argued that the concealment of information about serious offences by health practitioners protecting client confidentiality should not be an offence.[72]

3.36 Clients may reveal information about drug offences, sexual offences or offences against the person committed by or against themselves or members of their family in the course of obtaining medical treatment. For example, engaging in sexual activity while under the age of consent is a "serious offence" for the purpose of s 316.[73] Such information would frequently be disclosed to health practitioners by clients in the course of consultations about contraception or sexually transmitted diseases.

3.37 If health care professionals inform clients of their obligation to report information about serious offences to police, clients are likely to withhold such information. Thus, even if the prosecution of a health care practitioner under s 316 is unlikely, the technical possibility of prosecution can cause problems with the provision of health care services.[74]

72. Kingsford Legal Centre, *Submission* at 2; Law Society of NSW, *Submission 2* at 2; Manning District Emergency Accommodation Youth Services, *Submission* at 1; National Children's and Youth Law Centre, *Submission* at 2; NSW Council for Civil Liberties, *Submission* at 1; North and North West Community Legal Service, *Submission* at 1; T Nyman, *Submission* at 2; M Tedeschi, *Submission* at 1-2.
73. *Crimes Act 1900* (NSW) s 66C, s 77.
74. NSW Anti-Discrimination Board, *Discrimination-The Other Epidemic: Report of the Inquiry into HIV and AIDS Related Discrimination* (April 1992) at 47-48.

3.38 Doctor-patient confidentiality may have provided a reasonable excuse for non-disclosure for the purpose of misprision of felony at common law.[75] There is no relevant case law in relation to prosecutions under s 316. The approval of the Attorney General is now required for prosecutions against medical practitioners, psychologists, nurses and social workers, including victim support workers and counsellors, whose knowledge or belief that a serious offence has been committed was acquired during the course of their jobs.[76]

3.39 The Commission's view is that the benefits derived from people obtaining medical advice, treatment and counselling outweigh the policy function of s 316. The recent amendments to s 316 do not remove the technical possibility of prosecution, which may hamper the provision of health services. In our view, health practitioners should not be at risk of prosecution for concealment of relevant information disclosed to them in the course of treating clients.

3.40 ***Researchers and research subjects.*** Information about serious offences is frequently disclosed by research subjects to academic and professional researchers engaged in criminological and other research. Such research may involve interviews with witnesses, particularly victims, or self-reporting by offenders. Field observation of and interaction with offenders in the course of ethnographic research may also reveal information about serious offences. Other types of research may also incidentally disclose such information. For example, health research into euthanasia, alcohol and drug use may reveal information about homicide, drug offences and domestic violence.[77] The Commission received many submissions which argued that researchers should be exempted from s 316.[78]

75. *Sykes v DPP* [1962] AC 528 at 564.
76. See para 2.3, 2.6 and 2.7.
77. J Stubbs, *Submission* at 2.
78. Australian Institute of Criminology, *Submission* at 1; Kingsford Legal Centre, *Submission* at 2; NSW Bureau of Crime Statistics and Research, *Submission* at 1; NSW Young Lawyers, *Submission* at 1; J Stubbs, *Submission* at 3; M Tedeschi, *Submission* at 1-2; University of NSW, *Submission* at 1; D Weatherburn, *Oral Submission*. See also J Cooper, *Submission* at 1; D Dixon, *Submission* at 4, University of Newcastle, *Submission* at 1. These submissions supported abolition of s 316(1). See also L Maher, *Submission* at 3. Contra D Landa, *Submission 2* at 2.

3.41 Institutional ethics committees, which are required to approve research proposals, generally require researchers to obtain the consent of research subjects. This involves outlining the risks of participation, including the risk that the researcher will report serious offences observed in the course of the research, or information about serious offences disclosed to the researcher, to police. Several researchers stated that warning potential research subjects about s 316 was likely to be a significant impediment to participation in research.[79]

3.42 The Commission received numerous submissions which stated that s 316 presents a problem for institutional ethics committees. The criteria which ethics committees use to determine whether to approve proposed research projects includes whether the proposal would involve any illegal conduct by the researcher. It appears that, in many cases, ethics committees adopt a technical interpretation of the legal position, disregarding the fact that there is no precedent in New South Wales for prosecutions of researchers under s 316.[80] In some cases university ethics committees have suspended research projects and in at least one case approval has been declined due to the risk of breach of s 316.[81]

3.43 There is no case law dealing with researchers either in relation to s 316 or misprision of felony. Under the recent amendments to the section, the Attorney General is required to approve prosecutions against researchers whose knowledge or belief that a serious offence has been committed was acquired during their research projects.[82] However, the recent amendments to s 316 do not specify the types of research protected by this requirement. The technical possibility of prosecution of researchers still exists, either where the

79. Australian Institute of Criminology, *Submission* at 1; NSW Bureau of Crime Statistics and Research, *Submission* at 1; J Stubbs, *Submission* at 3; D Weatherburn, *Oral Submission*.

80. J Cooper, *Submission* at 1; D Dixon, *Submission* at 1-4; L Maher, *Submission* at 2-3; NSW Bureau of Crime Statistics and Research, *Submission* at 1; J Stubbs, *Submission* at 1-5; University of Newcastle, *Submission* at 1; University of NSW, *Submission* at 1; D Weatherburn, *Oral Submission*; G Zdenkowski, *Submission* at 1-2; New South Wales Vice-Chancellors' Conference, *Letter to the Hon J Shaw, MLC*, Attorney General, 14 April 1997.

81. J Stubbs, *Submission* at 1.

82. See para 2.3, 2.6 and 2.7. The current position was supported by Crown prosecutors: Office of the DPP, 6 May 1998, *Consultation*.

Attorney General approves such a prosecution under s 316(1) or under s 316(2).[83] Therefore, participation in research theoretically may still be jeopardised by the section. In our view, the confidentiality of researchers engaged in appropriate research and research subjects should not be undermined by a reporting obligation of the nature of s 316.

3.44 ***Family and other close relationships with offender.*** Several submissions argued that the concealment of information about serious offences by the immediate family of the offender should not be an offence, because requiring family members to inform on each other is likely to harm and even destroy these relationships.[84] This view was also expressed during the consultation process.[85] It was also argued that close friends of the principal offender should be protected from prosecution,[86] although Crown prosecutors consulted by the Commission disagreed with this argument.[87] Anecdotal evidence suggests that family members and close friends of the principal offender are the groups most commonly prosecuted under s 316.[88] It may well be that children in particular would not necessarily know what to do with information about serious offences committed by family members or friends.[89]

3.45 In November 1998, a man was sentenced to 9 months imprisonment after pleading guilty to concealing information about the abduction and murder of 2 people in 1997. One of the principal offenders was the man's brother.[90] There is some authority that a family relationship did not

83. See para 3.54 and 3.55.
84. Manning District Emergency Accommodation Youth Services, *Submission* at 1; J Nicholson, *Submission* at 3. See also The Hon A M Gleeson AC, *Submission* at 1.
85. Legal Aid (NSW), 7 May 1998, *Consultation*; Office of the DPP, 6 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*.
86. NSW Bar Association, *Submission* at 2; J Nicholson, *Submission* at 3. See also The Hon A M Gleeson AC, *Submission* at 1.
87. Office of the DPP, 6 May 1998, *Consultation*.
88. Legal Aid (NSW), 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*; Law Society of NSW, *Submission 2* at 1; T Nyman, *Submission* at 1. Contra D Landa, *Submission 2* at 1.
89. Legal Aid NSW, 7 May 1998, *Consultation*.
90. "Father Pleads Guilty", *The Macarthur Chronicle* (11 November 1998) at 1-2.

necessarily provide a reasonable excuse for misprision of felony, particularly in relation to extremely serious offences.[91]

3.46 The majority of Commissioners consider that it is not appropriate for the law to impose an obligation on people to report information about serious offences which they know or believe their family members or close friends may have committed. However, the minority view is that in certain situations, the legal obligation to report information or beliefs about the commission of serious offences should extend to family members of the principal offender. It is also necessary to accept the reality of the strength of these relationships and thus the difficulty of enforcing a duty of disclosure in this context.

3.47 ***Informal confidential relationships.*** Information about serious offences is also disclosed in the context of a wide range of informal confidential relationships which do not fall within any identifiable category. For example, students may confide in teachers, lecturers and sports coaches about offences which they have committed, such as drug offences, or offences which have been committed against them, such as sexual assaults, in the context of consultations about the student's performance.[92] Employees may also disclose relevant information in confidence to employers in the context of discussions about work performance or requests for leave.[93] People with disabilities living in residential facilities are most likely to confide in a worker at the facility.[94]

3.48 It is difficult to exempt informal relationships from the operation of s 316 by the prescription of categories of people who can only be prosecuted under special conditions, because by their nature, these relationships do not fall within any formal category. Confidentiality by teachers and employers may have been a reasonable excuse for misprision of felony.[95] In the Commission's view, the value of these confidential relationships, together with the other confidential relationships discussed above, is an additional

91. *Sykes v DPP* [1962] AC 528 at 564 and 569; Criminal Law Review Division, *Reform of Offences Involving Public Justice* at 15.
92. J Nicholson, *Submission* at 3; J Stubbs, *Submission* at 3. Teacher/student confidentiality may have been a reasonable excuse for the common law offence of misprision of felony: *Sykes v DPP* [1962] AC 528 at 564.
93 Employer/employee confidentiality may have been a reasonable excuse for the common law offence of misprision of felony: *Sykes v DPP* [1962] AC 528 at 564.
94. Intellectual Disability Rights Service, *Submission 2* at 1.
95. *Sykes v DPP* [1962] AC 528 at 564.

reason for repealing s 316(1), at least where the victim desires confidentiality.

Terms of section 316

3.49 The formulation of s 316 was also criticised during the consultation process. The aspects which attracted criticism included the definition of "serious offence", the requirement that beliefs about serious offences be reported, the subjective mens rea of the offences and the term "benefit" in s 316(2).

"Serious offence"

3.50 The most common criticism of s 316 relates to the definition of a "serious offence". "Serious offence" is defined as any offence punishable by penal servitude or imprisonment for five years or more.[96] The purpose of restricting the obligation to report offences to "serious offences" was to exclude information about trivial offences from the reporting obligation imposed by the section.[97] The Commission is unaware of any empirical data identifying the types of offences concealed in prosecutions under s 316.[98]

3.51 It is clear that the definition of "serious offence" technically encompasses a wide range of trivial offences. For example, stealing a chocolate bar or a bicycle are offences which fall within the definition of "serious offence".[99] In the Commission's view, the community would not expect citizens to report such offences to police, and the reporting obligation is an absurdity which brings the criminal law into disrepute with the community in this respect.[100]

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96. See para 2.4.
97. Criminal Law Review Division, *Reform of Offences Involving Public Justice* at 16.
98. But see para 3.24.
99. *Crimes Act 1900* (NSW) s 117.
100. See also Office of the DPP, 6 May 1998, *Consultation*; Ageing and Disability Department, *Submission* at 3; Law Society of NSW, *Submission 1* at 1-2; Manning District Emergency Accommodation Youth Services, *Submission* at 1-2; National Children's and Youth Law Centre, *Submission* at 1; *NSW Bar Association*, *Submission* at 2; J Nicholson, *Submission* at 2, 4. See also Criminal Law Revision Committee (Eng), *Felonies and Misdemeanours* (Report 7, 1965) at 97. Note

Information or beliefs which must be reported

3.52 Under s 316(1), the obligation to report information extends to situations where a person believes that an offence has been committed and believes that he or she has information which might materially assist the authorities. The Commission notes that, in this respect, s 316(1) would appear to be broader than the common law offence of misprision of felony, which only required knowledge of offences which went beyond mere suspicion to be reported.[101] Under s 316(1), even beliefs which are substantially speculative, unjustified or paranoid must nevertheless be reported.[102] There is no requirement that such beliefs be reasonably held. The Commission's view is that this requirement is unacceptably broad. Furthermore, the information not provided may relate either to the apprehension of the offender or his or her prosecution. The width of the possible utility of this information renders the application of the provision inappropriately uncertain. The Commission also considers that the requirement that any information which might materially assist the police must be reported, whether or not the information has any evidentiary value, is unacceptably wide.

Mens rea

3.53 The mens rea for s 316 offences is subjective; the prosecution must establish that the defendant subjectively knew or believed that a particular offence had been committed, even if it was not known or believed that the offence was a serious one as defined. The National Children's and Youth Law Centre argued that this operates unfairly at trial. It was argued that vulnerable or inexperienced witnesses, such as children, are unlikely to be able to maintain a consistent denial of the relevant subjective state of mind in the face of persistent and hostile cross-examination, while defendants with experience as witnesses would be able to do so.[103] Although no statistics for prosecutions under s 316 in the Children's Court are available, lawyers from

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that the Supreme Court of NSW has held that indictable offences tried summarily where the maximum penalty is less than imprisonment for five years are still "serious offences" for the purpose of s 316: see para 2.5.

101. *R v Lovegrove* (1983) 33 SASR 332 at 338; *R v Wozniak* (1989) 16 NSWLR 185 at 188, 192, 194.
102. See also J Nicholson, *Submission* at 2.
103. National Children's and Youth Law Centre, *Submission* at 1-2. See also Law Society of NSW, *Submission 2* at 2. In Australia, the subjective knowledge of the defendant was an element of the common law offence of misprision of felony: *R v Wozniak* (1989) 16 NSWLR 185 at 187-188. Contra *Sykes v DPP* [1962] AC 528 at 563.

both Public Defenders and Legal Aid consulted by the Commission stated that their experience was that children were often charged under the section.[104]

"Benefit"

3.54 Several submissions also pointed out potential difficulties with the expression "benefit" in s 316(2). [105] There is no case law interpreting the expression. Concern was expressed that public policy or scientific benefits resulting from criminological or medical research may fall within the definition of "benefit" in s 316(2).[106] The Commission's view is that the courts may hold that information or data provided to a researcher by a research subject amounts to a "benefit" received in return for the researcher promising not to disclose information about serious offences to police.[107]

3.55 It was also argued that professional salaries, research funds and non-financial professional benefits such as career advancement may constitute "benefits" from the concealment of offences by professionals such as legal and health practitioners and researchers. Section 316(2) refers to benefits received
in consideration for concealing an offence. The Commission's view is that professionals are paid and receive promotions in return for the performance of professional services rather than for the concealment of offences. The courts would be unlikely to interpret "benefit" in any other way.

3.56 The Intellectual Disability Rights Service questioned whether the mutual protection received where offenders agree not to report each others' offences would constitute a "benefit" for the purpose of s 316(2), arguing that it may be necessary to clarify s 316 to ensure that this situation is treated as receipt of a "benefit".[108] The Commission's view is that s 316(2) is not

104. Legal Aid NSW, 7 May 1998, *Consultation*; Public Defenders, 4 May 1998, *Consultation*.
105. D Dixon, *Submission* at 4; NSW Young Lawyers, *Submission* at 1; University of Newcastle, *Submission* at 1. See also Law Society of NSW, *Submission 1* at 2; *Submission 2* at 1.
106. D Weatherburn, *Oral Submission*.
107. See para 3.56.
108. Intellectual Disability Rights Service, *Submission 1* at 2; *Submission 2* at 2. See also People With Disabilities, *Submission* at 1. Another criticism is that the expression "benefit" may wrongly cover situations where the offender and victim enter a private agreement for the offender to repay the victim in some way: Manning District Emergency Accommodation Youth Services, *Submission* at 1. Such agreements are common between employers and employees and family members: see para

restricted to financial benefits. In our view, the courts could treat this situation as the receipt of a "benefit". The Supreme Court of New South Wales has held that the concept of "advantage", which is an element of the offence of kidnapping,[109] includes non-financial advantages such as sexual intercourse, [110] psychological satisfaction,[111] raising a child,[112] preventing a victim of crime from reporting the offences to the police,[113] and using the victim to entice a third person to meet with the offender.[114] The expression "benefit" in s 316 is clearly analogous to the term "advantage" in the context of kidnap. We recommend that the expression "advantage" be used in s 316. This consistency of language would reflect that the same concepts are involved for both offences and facilitate the use of the case law on kidnap discussed above in interpreting s 316.

Approval of Attorney General

3.57 Finally, the Office of the Director of Public Prosecutions argued that the requirement that the Attorney General approve certain prosecutions under s 316 should be amended so that the Director of Public Prosecutions can also approve these prosecutions. Under the present system, the Attorney General delegates this power to the Director. However, under administrative law principles, the Director cannot further delegate this power to Deputy Directors, which causes practical difficulties as Deputy Directors perform the Director's functions in his absence.[115] The Commission has recommended that all prosecutions under s 316(2) should be commenced only with the consent of either the Attorney General or the Director of Public Prosecutions. If the Commission's recommendation that s 316(1) be repealed is not accepted, then the Commission recommends that all prosecutions under

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3.30 and 3.44-3.46. However, this interpretation of "benefit" is precluded by s 316(3).

109. *Crimes Act 1900* (NSW) s 90A.
110. *Rowe v The Queen* (1996) 89 A Crim R 467 at 469-470, per Hunt CJ at CL.
111. *Rowe v The Queen* (1996) 89 A Crim R 467 at 469-470, per Hunt CJ at CL; *R v Stuart* (unreported, NSW District Court, Melville DCJ, 20 May 1976).
112. *R v Stuart* (unreported, NSW District Court, Melville DCJ, 20 May 1976).
113. *R v Robson* [1978] 1 NSWLR 73 at 77 (approved on appeal in *R v Collett* (unreported, NSW Court of Criminal Appeal, 7 June 1979).
114. *R v Robson* [1978] 1 NSWLR 73 at 76-77 (approved on appeal in *R v Collett* (unreported, NSW Court of Criminal Appeal, 7 June 1979).
115. Office of the DPP, 6 May 1998, *Consultation*. This is consistent with the original recommendation for amendment of s 316 made by a Working Party of the Criminal Law Review Division of the Attorney General's Department: See para 2.6.

s 316(1) be subject to the consent of either the Attorney General or the Director of Public Prosecutions.

CONCLUSION

Concealing a serious offence

Recommendation 1

The Commission recommends that subsection (1) of s 316 be repealed.

3.58 The Commission disapproves of substituting a legal duty which is enforced by a criminal sanction for a moral one unless there are overall substantial benefits to society in doing so. No such overall benefits have been demonstrated in relation to s 316(1). The policy behind its introduction was to encourage people to report information about serious offences to the police, but the Commission is not convinced that the section has in practice fulfilled that policy function. The Commission's view is that, in so far as the section may partially do so, its benefits are greatly outweighed by the difficulties in its application and by the abuses committed by the police in enforcing it. In particular, the Commission strongly disapproves of the use of this offence by the police as a coercive tool or as the basis for a holding charge. The majority does not accept that it is possible to draft a provision such as is proposed by the minority which will eradicate such abuse.

3.59 It is doubtful whether many members of the community are aware that the law imposes a duty on them to report such information. The strong personal reasons which generally motivate people to conceal relevant information are unlikely to be outweighed by the possibility of prosecution under s 316(1), particularly since the courts rarely impose custodial sentences for offences under the section. The relatively small number of prosecutions under s 316(1) (on average, 20 offences per year in the Local Courts, and six per year in the higher courts) suggest that this offence does not play a significant role in the detection of crime or the apprehension or prosecution of offenders.

3.60 The Commission's view is that a person may, in certain circumstances, have valid reasons for concealing information about serious offences from police. These include the confidential nature of a wide range of professional and personal relationships. Anecdotal evidence suggests that people who conceal information about serious offences which they know or believe have been committed by members of their family or by close friends are charged under s 316(1) from time to time. There does not appear to be any precedent for prosecuting professionals who acquire relevant information in the course of their work, and we accept that such prosecutions are unlikely to occur, particularly in relation to the professions now prescribed under s 316(5). Nevertheless, the offence has the potential to jeopardise valuable criminological and medical research, because the risk of prosecution for concealing a serious offence may lead institutional ethics committees to reject research proposals.

3.61 The Commission also accepts that this offence has the potential to interfere in the activities of law enforcement agencies which rely on the co-operation of witnesses, such as ICAC. The reporting obligation imposed by this offence undermines confidential relationships between health practitioners and clients and researchers and research subjects.

3.62 The types of offences required to be reported include many minor offences. Whether or not prosecutions for the concealment of trivial offences have occurred, the technical scope of the offence of concealing a serious offence is inconsistent with community expectations, and this alone brings the criminal law into disrepute.

3.63 The Commission considers that the provisions of s 316 are unacceptably ambiguous. The majority of Commissioners on the Division consider that it is not possible to identify in the section the types of offences required to be reported without including trivial or otherwise inappropriate offences. Nor is it possible to describe with satisfactory specificity the nature of information or beliefs required to be reported. Accordingly, the Commission recommends that **s** 316(1) should be repealed.

3.64 The Commission received a number of submissions which supported the amendment of this offence to provide exemptions from prosecution for specific categories of professionals.[116]

116. Australian Institute of Criminology, *Submission* at 1; Kingsford Legal Centre, *Submission* at 1-2; D Landa, *Submission 2* at 1-2; L Maher, *Submission* at 3; ; NSW Bureau of Crime Statistics and Research,

This view was also expressed by Crown prosecutors consulted by the Commission.[117] However, the Commission considers that this approach is problematic. It would not be possible to provide for the full range of professionals, institutions, agencies, commercial organisations, independent consultants and community based groups who have a legitimate therapeutic or confidential relationship justifying the concealment of relevant information. Further, this approach does not protect victims, the family or friends of offenders, or the wide range of informal relationships which, by their nature, can not be categorised. The Commission has concluded that it is not possible to amend this offence in a way which provides for the widely varying confidential and personal relationships, and other circumstances where concealment should not attract a criminal sanction. The minority considers, however, that these unsatisfactory features of the provision can be overcome by appropriate redrafting. The minority view is set out at paragraphs 3.65-3.71 below.

Minority view

3.65 A minority of Commissioners[118] dissents from Recommendation 1. The minority considers that the criticisms of s 316 in its present form are compelling and agree that reform is necessary. However, the minority considers that the notion underlying the section, which is, essentially, the idea that assistance to the authorities in the detection and proof of serious crimes is a civic duty, indeed, it is an essential part of the maintenance of law is a valid one. Of course it does not follow that its performance should be compelled by a criminal sanction. It must be accepted, as the Report demonstrates, that the present provision is seriously flawed; to be brutal about it, it is in several crucial respects virtually meaningless. In our view, the essential problem is not that the section's underlying philosophy is mistaken but that it breaches the fundamental rule that the criminal law be unambiguous. Uncertainty of application cannot always be completely excluded but the section in its present form is completely inappropriate. Amongst other results, it leads to an unacceptable level of unexaminable prosecutorial discretion by police at the investigative stage (even if well-intentioned), not to speak of the risk of corruption.

Submission at 1; Victims Advisory Board, Victims Services, *Submission* at 1; D Weatherburn, *Oral Submission.* See also R O Blanch, *Submission* at 1.

117. Office of the DPP, 6 May 1998, *Consultation.*

118. Justices Adams and Dowd and Judge Karpin.

3.66 Accordingly, the minority see the basic problem here as one of language rather than conception. We consider that it is impossible to sufficiently clarify the language to arrive at a provision which provides an adequate justiciable basis for criminal punishment with respect to the crimes that are currently the subject of the sanction and the intention and knowledge constituting the elements of the present offence. However, the minority consider that it should be possible to draft a provision of appropriate clarity which covers particular offences and specific circumstances and which avoids (though as a matter of reasonable practicability rather than drafting perfection) the problems identified in the Report.

3.67 For good reason, the imposition of duties (as distinct from standards) enforced by criminal sanctions on failure to conform is not part of the apparatus of the criminal justice system. The wisdom of this notion as a generality is not in question here. However, it seems to us that, for example, a witness to a murder or a rape does have a civic duty to assist the State (ie the community) to identify the perpetrator(s) and bring him, her or them to justice even though it would be going too far to insist on a duty to prevent commission of those crimes. In a very real sense, to maintain silence is to be complicit in the crime, at least in the absence of a threat to personal safety or, perhaps, of violation of a close familial relationship.

3.68 The minority proposes, in substance, that the section create an offence of failure to inform in respect of significant enumerated crimes of violence (including sexual abuse of children) where the person witnesses the commission of one of more of the relevant, specified physical acts or has personal knowledge of relevant, specified facts and, on reasonable grounds, believes or suspects that, more probably than not, a serious offence involving violence has been committed. To satisfy the requirement of certainty, it will be necessary to specify the particular crimes and the matters that need to be witnessed or the facts of which personal knowledge is possessed (for example, in respect of murder or manslaughter, the discovery of a body combined with the relevant suspicion or reasonable belief of unlawful killing), and a time frame (perhaps reasonable in all the circumstances would be practicably sufficient). The material that must be disclosed is what is known or witnessed. We consider that a confession, except in specified confidential circumstances, should be treated as personal knowledge. It will be observed that the kind of material known will almost invariably be of a kind admissible in evidence on a trial of the relevant offence. For clarity, the proposal focuses on the character of the relevant information that must be

disclosed rather that the purpose, such as apprehension or conviction, to which it might be put.

3.69 The section should make provision for lawful excuse not to inform, perhaps by using the common term "without reasonable excuse" together with specification of excuses, such as a genuine belief or suspicion of a substantial risk of personal danger to oneself or others. Having regard to the seriousness of the offences to which the section should apply, we consider that prejudice to the familial relationship would not be sufficient to constitute a defence. The privilege against self incrimination will also need to be protected.

3.70 The offences we have in mind are all homicides, all sexual assaults involving force or penetration, all robberies involving weapons or actual (as distinct from threatened) violence and all assaults involving the infliction of grievous bodily harm. Because this view is a minority one, we have not attempted to draft a provision.

3.71 We do not think that drug offences should fall within the scope of this provision. They are so various and the factual circumstances, including the numbers of persons involved in the more serious type of offence and the complex character of possible complicity, so uncertain, that the application of the section would be inappropriately vague.

Compounding a serious offence

Recommendation 2

The Commission recommends that the compounding offence contained in s 316(2) and (3) be retained. However, the offence should be amended as follows:

- **The expression "benefit" should be repealed and replaced with the term "advantage".**
- **The offence should be extended to cover persons who offer or promise to provide or provide an advantage to another person in consideration for the concealment of information about a serious offence.**

- **The consent of the Attorney-General or Director of Public Prosecutions should be required for all prosecutions.**

3.72 The Commission recommends that the compounding offence should be retained. The positive act of soliciting, accepting or agreeing to accept a benefit in consideration for concealing information about a serious offence is more serious than merely failing to report relevant information, and should be penalised by the criminal law in accordance with community expectations. The thrust of such an offence is its tendency to corrupt the investigation of crime and deflect the due administration of justice. Accordingly, the criticisms set out above as to the width of the offence of concealment of a serious offence do not apply, although some of the mischief remains.

3.73 Most other Australian jurisdictions[119] and England[120] retain a compounding offence without an offence equivalent to the concealment offence set out in s 316(1). This is also the approach taken by the Model Criminal Code Officers Committee[121] and the United States Model Code.[122] The Commission's view is that this offence, together with the wide range of other public justice offences, offences relating to the obstruction of police, aiding and abetting and accessory offences, adequately covers the range of situations where a person actively impedes the detection of crime or the apprehension, prosecution or conviction of an offender.

3.74 However, the Commission recommends that the compounding offence be amended. First, the term "benefit" in s 316(2) should be removed and replaced with the expression "advantage", to clarify that the range of non-financial gains which have been held to constitute an advantage in relation to the offence of kidnapping, would also satisfy this element of the compounding offence.

119. *Crimes Act 1958* (Vic) s 326; *Criminal Code* (Qld) s 133; *Criminal Code* (WA) s 136; *Criminal Code* (NT) s 104; *Criminal Code* (Tas) s 102; *Crimes Act 1914* (Cth) s 44. See also *Criminal Law Consolidation Act 1935* (SA) s 241.
120. *Criminal Law Act 1967* (Eng) s 5.
121. Model Criminal Code Officers Committee, *Chapter 7 Administration of Justice Offences* (Report, 1998) at para 7.5.4.
122. *US Model Code*, s 242.5.

3.75 Secondly, the offence should be extended to cover the actions of a person who offers or promises to provide or provides an advantage to another person in consideration for the concealment of information about a serious offence. The Commission considers that such behaviour should also attract a criminal sanction.

3.76 Finally, the consent of the Attorney General or the Director of Public Prosecutions should be required for every prosecution for compounding a serious offence. Clearly, public policy questions may arise in relation to prosecutions for this offence, because the circumstances in which it may be committed are so varied. This requirement would ensure that any relevant policy considerations were considered, providing a safeguard against inappropriate prosecutions. The Commission notes that there have been no prosecutions for compounding a serious offence in the higher courts and less than one per year in the Local Courts. Given the small number of prosecutions, it is not unrealistically onerous to require that the Attorney General or the Director of Public Prosecutions consent to every prosecution for compounding a serious offence.

3.77 The minority view is that if the minority proposal for the reformulation of the concealment offence is accepted, the approach they recommend in relation to s 316(1) should also be applied to the compounding offence.

APPENDIX A: SUBMISSIONS RECEIVED

Ageing and Disability Department (15 June 1998)

Australian Institute of Criminology (29 September 1997)

Berman, Mr P (17 September 1997)

Blanch, The Hon Justice R O (13 October 1997)

Community Services Commission (31 March 1998) ("Submission 1")

Community Services Commission (16 July 1998) ("Submission 2")

Coombs, Mr J (22 October 1997)

Cooper, Ms J (24 March 1998)

Dixon, Dr D (25 September 1997)

Gleeson AC, The Hon Justice AM (8 September 1997)

Independent Commission Against Corruption (7 October 1997) ("Submission 1")

Independent Commission Against Corruption (17 March 1998) ("Submission 2")

Intellectual Disability Rights Service (23 October 1997) ("Submission 1")

Intellectual Disability Rights Service (16 April 1998) ("Submission 2")

Kingsford Legal Centre (1 October 1997)

Landa, Chief Magistrate D (6 January 1998) ("Submission 1")

Landa, Chief Magistrate D (6 April 1998) ("Submission 2")

Law Society of New South Wales (3 November 1997) ("Submission 1")

Law Society of New South Wales (23 April 1998) ("Submission 2")

Legal Aid Commission of New South Wales (22 October 1997)

Manning District Emergency Accommodation Youth Services (27 March 1998)

Maher, Dr L (24 September 1997)

National Childrens and Youth Law Centre (23 October 1997)

New South Wales Bar Association (23 March 1998)

New South Wales Bureau of Crime Statistics and Research (26 September 1997)

New South Wales Council for Civil Liberties (12 September 1997)

New South Wales Police Service (2 October 1997) ("Submission 1")

New South Wales Police Service (27 October 1997) ("Submission 2")

New South Wales Young Lawyers (31 March 1998)

Nicholson SC, Mr J (23 September 1997)

North and North West Community Legal Service (27 October 1997)

Nyman, Mr T (9 September 1997)

Office of the Director of Public Prosecutions (5 September 1997)

People With Disabilities (New South Wales) (30 June 1998)

Saffin MLC, Ms J (13 March 1998)

Shannon, Ms T (23 April 1998) (Oral Submission)

Stubbs, Ms J (1 October 1997)

Tamworth City Council (11 June 1998)

Taylor, Ms R (10 February 1998) (Oral Submission)

Tedeschi QC, Mr M (28 October 1997)

University of Newcastle (13 October 1997)

University of New South Wales (24 October 1997)

Victims Services, Victims Advisory Board (14 April 1998)

Weatherburn, Dr D (19 September 1997) (Oral Submission)

Zdenkowski, Mr G (10 October 1997)

APPENDIX B: LIST OF CONSULTATIONS

Forbes Chambers (11 May 1998)

Legal Aid New South Wales (7 May 1998)

New South Wales District Court Judges (18 May 1998)

Office of the Director of Public Prosecutions (6 May 1998)

Public Defenders (4 May 1998)

BIBLIOGRAPHY

BROWN, D, NEAL, D FARRIER, D AND WEISBROT, D, *Criminal Laws* (2nd ed, Federation Press, Annandale, 1996)

ENGLAND, Criminal Law Revision Committee, *Felonies and Misdemeanours* (Report 7, 1965)

GILLIES, P, *Criminal Law* 4th ed, Law Book Company, Sydney, 1997)

MODEL CRIMINAL CODE OFFICERS COMMITTEE, *Administration of Justice Offences* (Discussion Paper, 1997)

MODEL CRIMINAL CODE OFFICERS COMMITTEE, *Administration of Justice Offences* (Report, 1998)

NEW SOUTH WALES, Ageing and Disability Department, *The Positive Approach to Challenging Behaviour, Policy and Guidelines* (1997)

NEW SOUTH WALES ANTI DISCRIMINATION BOARD, *Discrimination - The Other Epidemic: Report of the Inquiry Into HIV and AIDS Related Discrimination* (April 1992)

NEW SOUTH WALES, Criminal Law Review Division of the Attorney General's Department, *Reform of Offences Involving Public Justice* (Discussion Paper, 1989)

NEW SOUTH WALES LAW REFORM COMMISSION, *Review of Section 316 of the Crimes Act 1900 (NSW)* (Discussion Paper 39, 1997)

NEW SOUTH WALES LAW REFORM COMMISSION, *The Right to Silence*(Discussion Paper 41, 1998)

SMITH, J AND HOGAN, S, *Criminal Law* (7th ed, Butterworths, London, 1992)

SOUTH AUSTRALIA, Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law* (Report 4, 1977)

SPASTIC CENTRE OF NEW SOUTH WALES, *Policy Manual: Policy BA:2 - Allegations of Sexual, Physical or Emotional Assault of Adults* (6th revision, 4 May 1998).

WILLIAMS, G, *Criminal Law* (Stevens, London, 1961)