

“Sexual Offences - Has the Pendulum Swung too Far?”

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Introduction

When a person faces a prosecution by the State with all its might and resources they are extremely vulnerable. To offset this serious power imbalance there are certain fundamental protections in the criminal trial process including the presumption of innocence, the right to silence and a fair trial.

Sexual assault trials have always been a point of significant contention where law reform seeks to balance the rights of a complainant with the rights of a defendant.

There has been reform to the practice of excessive cross-examination in sex trials. Long overdue changes in the way children were treated in the courtroom in sexual assault trials bring to mind the unacceptable position that once prevailed where bewigged male barristers cross-examined children in the witness box in the presence of the jury and without the audio-visual separate room procedure that is now available.

Miscarriages of Justice

The notable Canadian academic Professor Kent Roach Professor of Law at the University of Toronto observed in his book “Wrongfully Convicted”¹:

- Sexual assault reforms may be justified but we should also be attentive and responsive to any increased risk of wrongful convictions.²

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¹ See “Wrongfully convicted – Guilty pleas, Imagined crimes and what Canada must do to safeguard justice” by Kent Roach [Simon & Schuster 2023].

² Ibid see Ch 10 “Preventing wrongful convictions” (page 7 of 76 in Ch 10).

- Parliament has attempted to respond to the danger of wrongful acquittals based on misogynistic rape myths by requiring Judges to be educated about sexual assault and violence in consultation with sexual assault survivors and groups and organisations that support them...(such attempts by Parliament to provide education) make no reference to education about the possibility of wrongful conviction.³
- “It is a valid question to ask whether given restrictions on access to the Complainant’s private records wrongful convictions would (even) be discovered”⁴

The fundamental thesis of this paper is that by denying access in sexual assault trials to all relevant information pertaining to a complainant’s credibility because of the deficiencies of the disclosure regime and the restrictions of the PCC regime the pendulum has swung too far against the rights of the accused and increases the risk of wrongful convictions.

The relatively recent changes introduced in Queensland into sexual assault trials including the new mandated directions are not addressed in this paper because insufficient time has passed to assess how those changes are working in practice.

Significant problems with the disclosure regime and the protected counselling communication scheme in Queensland has the combined result that relevant information and facts are withheld from Defence lawyers thereby causing miscarriages of justice.

The Importance of Proper Disclosure in Sexual Assault Trials

Police can cast a very wide net for material (warrants, access/assistance orders, inter-agency holdings) while the Defence is largely confined to whatever is disclosed by police or judicially compelled as a result of Subpoenas or Direction Hearing rulings.

³ Ibid see Ch 5 “Drugs? Sexual Crime?” (page 23 and 24 of Ch 5).

⁴ Ibid see page 24 and 25 of Ch 5.

In relation to disclosure in criminal matters in Queensland especially in sexual assault trials it is argued that the system is broken and in urgent need of reform.⁵

Queensland law in relation to disclosure provides that:

- “The obligation cast upon the Prosecution (by the Disclosure provisions of the Criminal Code) means that at a practical level the particular question for assessment by the Prosecution in each case is whether the statement is something that would tend to help the case for the accused person or is otherwise required in the interests of fairness and establishing the truth.⁶

Serious shortcomings and failures in the operation of the disclosure scheme exist in the Magistrates Court and flow on to the District Court especially in sexual assault cases. The District Court is where the overwhelming number of sexual assault trials are conducted.

In preparing this Seminar I have spoken to a number of Solicitors and Barristers who do high volume sexual assault cases. The prevailing view is that there is too much game playing by Arresting Officers and a lack of independent supervision of investigating police by both Police Prosecutors and Legal Officers and Prosecutors within the DPP to ensure there is compliance with disclosure obligations.

Some examples concerning how disclosure is not working, follow.

In an historical case the arresting officer failed to disclose an email from a preliminary complaint witness who said the complainant initially identified the accused’s father as the perpetrator. It was

⁵ See “Criminal Disclosure: A broken system in urgent need of reform” by Terry O’Gorman. Queensland Law Society “Proctor” Magazine Annual 2025 at page 9-11.

⁶ See R v Rollason & Jenkins Ex parte A-G (Qld) 2008 1QD R[85]. Emphasis added.

only when the accused's lawyer asked for all emails between the arresting officer and the complainant and various preliminary complaint witnesses that this critical information which the arresting officer had been 'sitting on' came to light. Without the Defence lawyer's insistence on being provided with these emails this highly relevant document which should have been disclosed would never have been revealed by the investigating officer.

This case is not a one off. It is representative of a widespread problem where requests for disclosure are passed on by police prosecutors and DPP Legal Officers to investigating police who then supply only part of the materials sought necessitating further ongoing requests by the Defence. This whole process contributes to delay and unnecessary incursion of extra costs by the Defence and reflects an attitude by many investigating officers that the disclosure process is a game.

Defence lawyers conducting committals on Legal Aid are presented with an institutional disincentive in pursuing disclosure properly because it is uneconomic. In this regard see "LAQ rates remain an issue: Annual Report" where the 2024-25 Legal Aid Annual Report noted that there is a diminishing pool of private lawyers prepared to undertake Legal Aid work at the very substantially reduced rates on offer.⁷

A further problem with disclosure is that investigating officers deliberately make complainant's statements as brief and detail free as possible knowing that many Magistrates will refuse permission to allow Defence cross-examination of the complainant at a committal hearing and that results in the Defence at Trial in the District Court being significantly disadvantaged because of the brevity of the complainant's statement.

Allied to the short statement police investigation strategy is the failure of police to properly investigate various issues arising from a complainant's statement or preliminary complaint

⁷ See Queensland Law Society "Proctor" magazine 31/10/2025

statements either because of laziness or a concern that further investigation may uncover evidence that would be helpful to the Defence.

The importance of police fulfilling their disclosure duties impartially and thoroughly was emphasised (if it needed any emphasis) in the 2020 Queensland Court of Appeal case of R v Ernst.⁸

Ernst was accused of sexual offences by the complainant both when she was under 16 and after she had turned 16.

The complainant admitted she had falsely told people her father had raped her when she was a child. She also admitted she had made a false complaint against another sexual partner.⁹

A friend of the complainant, Ms V, contacted the arresting officer before Trial and informed him that the complainant had “described various sexual exploits she engaged in with the Appellant. She made no complaint about any of his conduct but, rather, described her affair with him “in positive terms”.¹⁰

The Arresting Officer barely noted any of these observations and communicated nothing about them to the prosecution or the defence.

The investigating officer’s evidence lead in the Court of Appeal highlighted his attention was only upon facts that might assist the prosecution case. He was only interested to find out if Ms V might be able to give evidence to strengthen the credit of the complainant. He was uninterested in learning that there may be issues about the reliability of the complainant and so he ignored what Ms

⁸ R v Ernst [2020] QCA 150

⁹ Ibid at [5]

¹⁰ Ibid at [21]

V had to say. The Court of Appeal observed that he made some “desultory, sparce and useless notes...(of the) important things she told him”.¹¹

The Court of Appeal noted:

- “The administration of justice depends heavily on the work of police. In this sphere the investigative work of police culminates in the evidence lead at a criminal trial because it is the function of police not the DPP to investigate an alleged offence and to collate and assemble relevant evidence. Judges and Juries depend utterly upon the (police) investigative process. To a great degree the integrity (of a criminal trial) depends on the assumption¹² that police investigators have been objective and have attempted to uncover all¹³ relevant evidence that can reasonably be assembled whether it is inculpatory or exculpatory.¹⁴

It is not known whether the officer in Ernst was disciplined for his appalling misbehaviour.

My former firm Robertson O’Gorman had a District Court trial where a contrary taped version of the complainant’s evidence was revealed to the Prosecution by the investigating police officer after the complainant had given her evidence before the Jury. This egregious example of the failure to disclose was the subject of a complaint to the Crime & Corruption Commission who referred it where for investigation? Back to the head of the CIB at the very station the errant police officer worked.

The result? Managerial guidance, that is a ‘talking to’. When a further complaint was made to the CCC about this laughable so-called penalty the CCC declined to intervene.

It is therefore unsurprising that a significant number of Queensland Police fail to comply with their statutory duty of disclosure pursuant to the specific duties imposed on them by the Queensland

¹¹ Ibid at [36]

¹² Emphasis added

¹³ Emphasis in Judgment

¹⁴ Ibid at [35]

Criminal Code because, as this case shows, they suffer no penalty for their wrongdoing. And wrongdoing it clearly is. As noted in Ernst these duties are not optional. They are obligatory.

It is now time to push for police officers who fail to comply with their statutory duty of disclosure to be charged with the offence under Section 204 of the Criminal Code namely disobedience to statute law.

This provides that “any person who, without lawful excuse the proof of which lies on the person...omits to do any act which the person is, by the provisions of any such statute, required to do is guilty of a misdemeanour...(and) the officer is liable to imprisonment for one year.

There are three categories of police who do not carry out the statutory duty of disclosure. One type is those police who simply do not know what their disclosure obligations are.

Another category is the police officer who knows their disclosure obligations but are too lazy to carry them out.

A third category is the police officer who full well knows their disclosure obligations but fails to carry out their statutory duty because to disclose evidence that might help the accused will lessen the chances of a conviction. The latter category should be prosecuted for breach of statutory duty.

The first and second categories would benefit from a recommendation made by Her Honour Judge Richards in the Commission of Inquiry she chaired and ran into the Queensland Police Service response to domestic and family violence namely that “the Operational Procedures Manual which provides guidance to officers about their legislative and procedural obligations is not clear,

accessible or fit for purpose”,¹⁵ and that the Manual should be reviewed. This task was completed in October 2025.

In the context of the Prosecution of sexual assault cases the Manual should be reviewed to give police prescriptive and detailed advice as to how to properly carry out their duty of disclosure. The October 2025 version of the Operational Procedures Manual fails significantly in this regard.

Section 590AJ of the Criminal Code provides for disclosure that must be made on request in respect of anything in the possession of the Prosecution that may reasonably be considered to be adverse to the reliability or credibility of a proposed witness for the prosecution.

In R v Rollason & Jenkins¹⁶ the Queensland Court of Appeal in 2008 rejected an argument by the Attorney-General that the provisions of Section 590AJ implicitly require the demonstration by an accused that a statement in the possession of the Prosecution is sought for a legitimate forensic purpose. It noted that the relevant disclosure provision in the Criminal Code spoke of a statement relevant to the proceeding rather than a statement “directly relevant to the issues” in the proceeding.

The Court of Appeal said “the fundamental problem with the submission for the Attorney-General on this point is that it looks at the question of relevance from the perspective of the Prosecutor seeking to prove a case. No narrow, technical or prosecution-centric view should be taken of the language used (in the disclosure provisions of the Criminal Code) bearing in mind the clearly stated overarching legislative intention to ensure that an accused person be provided with “all things in the possession of the prosecution...that would tend to help the case for the accused person”. This broad statement of legislative intent confirms that material which may serve no purpose other than

¹⁵ See Executive Summary of the Commission of Inquiry page 16

¹⁶ See footnote 6.

to provide an accused with as full an appreciation of the provenance¹⁷ (origin) of the charge which he or she is required to meet is consistent with the public interest and must be disclosed upon request by the accused.”¹⁸

The Court of Appeal in Rollason further observed that disclosure is not to be confined in scope to statements tending directly to prove or disprove the material elements of the charge or a relevant defence...(the disclosure provisions of the Criminal Code) provide for mandatory disclosure of any material that would tend to help the case¹⁹ for the accused person...which not infrequently consists entirely of a challenge to the credibility of the witness for the prosecution...it is significant that (the relevant section) speaks broadly of “things in the possession of the Prosecution that would tend to help the case for the accused person” rather than more narrowly and technically of “things that would tend either to disprove the prosecution case or to establish a defence”.

It is also pertinent to observe that there is long established authority that the rule proscribing cross-examination on collateral issues going only to credit is to be flexibly applied in sexual assault cases particularly ‘word on word’ cases. It is wrong for police or the Prosecution to omit to disclose evidence of other events that rationally impugn the credit of the complainant on the basis that that evidence is not relevant to the charged conduct. Nor ought committal cross-examination be opposed on this basis.

I have referred earlier in this paper to the three categories of police who do not properly carry out their statutory duty of disclosure especially in relation to disclosure made upon request.

¹⁷ See Macquarie Encyclopaedic Dictionary the Signatory Edition 2011 at page 1003

¹⁸ Ibid at [27]

¹⁹ Emphasis added

In relation to the categories of police who do not know how to effect disclosure or who know but are too lazy to do their job, it is relevant to observe that the Operational Procedures Manual (the police officer's day to day guide as to how to do their job) has been updated as recently as October 2025.

But, incredibly, in this 1450 page document the only reference to addressing disclosure on request is at 3.14.5 where it is observed that investigating police must when met with a Defence disclosure request provide anything in the possession of the Prosecution that may reasonably be considered to be adverse to the reliability and credibility²⁰ of a proposed witness for the Prosecution. This is clearly much narrower and more prosecution centric than the test in Rollason.

This revised Operational Procedures Manual is highly prescriptive in many areas of operational policing.

But the October 2025 Operational Procedures Manual does not even extract the passages from Rollason I have referred to. No guidance whatsoever is provided to operational investigative police to assist in dealing with a Defence disclosure request based on the important criterion of credibility.

This inadequate training and the deficiencies of the Operational Procedures Manual perpetuates a culture in which police feel empowered to ignore their obligations and make tactical, prosecution-centric decisions in relation to their disclosure.

There is no supervisory element in the October 2025 Operational Procedures Manual imposed on the investigating officer's superior to ensure disclosure is properly undertaken. This needs to be fixed.

²⁰ Emphasis added

The prosecution-centric approach to disclosure is reflected in the observations in the Operational Procedures Manual that 3.16 Case Conferencing that “generally the public interest is in the conviction of he guilty”.²¹

There is no reference at all in the OPM to the important principle of avoiding miscarriages of justice.

Part of the solution to fix the problem of poor disclosure in the prosecution of sexual offences is contained in the recommendations of the Richards Inquiry.

One of the four priority areas for reform listed was to strengthen the understanding and skills of QPS members through robust and regular training.²²

This reform which has been implemented into training of police to improve their domestic violence investigative skills should be imported into a regime of retraining of police in relation to how to comply with the disclosure regime both generally but particularly in sexual assault matters.

The Role of Police Prosecutors and the DPP in Disclosure

Some Police Prosecutors and DPP Legal Officers and Crown Prosecutors adopt a combative and near obstructionist attitude to Defence disclosure requests.

One of the lawyers I consulted for this paper said they had to continually ask a police prosecutor for a period of nearly four months at committal for further disclosure and had to list the matter for a Directions Hearing before the disclosure was attended to on the eve of that hearing.

²¹ See QPS Operational Procedures Manual October 2025 page 457.

²² See Domestic & Family Violence Reform: A pathway forward for change: Commission of Inquiry into the Queensland Police Service responses to domestic & family violence: a call for change, Annual Report and Implementation program 2023 at page 7.

Some changes should be pushed to occur in relation to QPS and DPP disclosure practices as a result of the Memorandum of Understanding signed in March 2025 between the Queensland DPP (T Fuller KC) and the QPS (Acting Commissioner Chelepy) headed “Communication and Collaboration between the ODPP and the QPS in Sexual Offence Prosecutions”.

This 13 page document deals with a number of topics including “Exchange of investigative and prosecutor information” but does not even touch on the topic of how disclosure is to be carried out between the two agencies. This heading deals primarily with the issue of police conducting further investigations for a matter at the DPP request. This Memo of Understanding should be reworked to outline a detailed protocol to improve the current disclosure regime both by Police and the DPP especially in sexual assault cases.

Having regard to what is contended in this paper is a widespread failure to disclose by police investigators there is a strong case for arguing that prosecutors should be given the entire police file particularly in sexual assault prosecutions to ensure that statutory disclosure obligations under the Criminal Code to disclose all relevant information is complied with.

The entire police file would mean, for example, that all communications between the investigating officer and the complainant would be known to the DPP prosecutor who could then ensure that any inconsistencies in those communications are brought to the attention of the Defence.

This is the position taken by the Canadian miscarriage of justice academic, Professor Kent Roach.²³

In this regard Roach’s observation that “of all the actors in the Criminal Justice System prosecutors have the most power to prevent wrongful convictions²⁴ is critically important. As things now operate

²³ See FN1 at Ch 9 “Tunnell Vision” at page 37 of 60.

²⁴ Ibid Ch 9 (as above) page 41 of 60

with the Queensland DPP while the majority (but certainly not all) prosecutors would hopefully alert the Defence to material in their possession that would 'tend to help the case for the accused' an unacceptable number of DPP Legal Officers and Prosecutors adopt an unhelpful and on occasions quite combative stance on disclosure.

The Prosecutor or Legal Officer is in a better position than the investigating officer to put into effect the various limbs of the disclosure test if the entire police file was obligated to be provided to the Prosecution.

In an observation relevant to both disclosure and protected counselling communication Roach observes:

- "It is a valid question to ask whether given restrictions on access to the complainants private records...wrongful convictions would (ever) be discovered"²⁵.

Mobile Phones

Section 154 of the PPRA allows police to obtain a warrant from a Magistrate or Judge to order a 'specified person' to give a police officer access to a device. 'Specified person' includes the owner or person in possession of the device.

Police should first seek the consent from a Complainant owner of the mobile phone or iPad or personal computer but if that consent is not immediately forthcoming police should obtain a search warrant for these devices.

It is trite to observe that allowing a complainant to pick and chose what contents of a mobile phone will be provided to police is productive of miscarriages of justice.

²⁵ See Section 154 of the Police Powers & Responsibilities Act (Qld)

Protected Counselling Communication

This regime introduced in Queensland in 2017 robs the Defence of relevant evidence the unavailability of which can lead to miscarriages of justice.

The Criminal Law Committee of the Queensland Law Society has expressed a view²⁶ that the Sexual Assault counselling framework is “not operating effectively in Queensland and that it should be the subject of comprehensive independent review” noting that PCC records may contain evidence relevant and probative to a Defendant’s criminal responsibility including prior inconsistent statements by a complainant, evidence of mental illness on the part of the complainant that may affect a complainant’s credibility or reliability or evidence of animus or bias held by the complainant towards the Defendant.

This call for an independent review of PCC has been supported by the Australian Law Reform Commission in its report delivered to the Federal Attorney-General in January 2025. The report notes “significant concerns have also been raised about how confidential communications and sexual assault communication privilege operates in practice”.²⁷

Recommendation 43 provides that the Standing Council of Attorneys-General should commission and ensure appropriate funding for the Australian Institute of Criminology to conduct research on how confidential communication and sexual assault counselling privacy provisions are operating in practice and to identify areas for improvement.²⁸

This recommendation should be implemented. But if it is not Queensland should conduct its own Review through the Queensland Law Reform Commission as the PCC regime in Queensland is

²⁶ See QLS Submission to Women’s Safety & Justice Taskforce Discussion Paper 3 (April 2022)

²⁷ See ALRC 22 January 2025 Report titled “Review of Justice Response to Sexual Violence” page 374

²⁸ Ibid page 373

almost 10 years old and there is significant dissatisfaction among defence lawyers as to the varying approaches adopted by individual District Court Judges in relation to the scheme's operation.

The recent Supreme Court case of SWN v GJA & Ors [2025] QSC 218 (published in September 2025) provides useful guidance as to the operation of the scheme.

This case noted recent changes to the PCC regime by the introduction of Section 14H(2A) of the *Evidence Act*. However on the issue of any requirement for the court to consider the actual contents of the PCC Justice Crowley in that Judgment said "...the purpose of introducing Section 14H(2A) was to put beyond doubt that ...the court had an implied power to do. The Explanatory Note said nothing that would gainsay...observations that the court would use the power sparingly and would not inspect documents containing PCC as a matter of routine.²⁹

There has not been a wholesale review of the scheme since its inception in 2017. A review of the scheme should examine whether it has become too skewed in favour of complainants and therefore to the detriment of Defendants thereby contributing to miscarriages of justice is appropriate.

The proposed review should examine the concept argued for by many defence lawyers namely that a District Court Judge must look at the actual contents of the PCC to determine their significance. This is necessary to address the Roach observation that "it is a valid question to ask whether given restrictions on access to the complainant's private records wrongful convictions would (even) be discovered".

The ALRC notes "it is questionable whether the balance has been appropriately struck by leave requirements...despite the fact that such schemes have been operating for decades, complainants

²⁹ Ibid (126). Emphasis added.

remain concerned³⁰ about the possibility³¹ that applications can be made to access sexual assault counselling communications”.³²

It is surprising, indeed quite worrying, that the ALRC Report does not consider the miscarriages of justice considerations that arise from the PCC scheme namely the denial of potentially relevant evidence to the Defence in a ‘word against word’ sexual assault case.

The report does however refer to a Victorian Court of Appeal case in 2024 where the court on an interlocutory appeal overturned the Trial Judge’s refusal to allow defence access to PCC counselling notes in a recovered memory case.³³

This case highlights the importance of a thorough review of the PCC scheme particularly as it operates in Queensland as it is argued that an interlocutory appeal against refused access rather than refused access only being able to be a ground of appeal against conviction is a change that should be introduced into the Queensland PCC scheme.

Nevertheless the Terms of Reference enjoins the ALRC to “take a trauma informed holistic, whole-of-systems and transformative approach”.³⁴

Yet the report does not even examine the disclosure problems that exist across the country nor is there even a heading dealing with miscarriages of justice in a crime type such as sexual assault charges which are frequently ‘word on word’ and which are highly productive of miscarriages of justice.

³⁰ Emphasis added

³¹ Emphasis added

³² See ALRC Report at page 377

³³ See *Duncan (a pseudonym) v The King* [2024] VSCA27 (31-25)

³⁴ Ibid page 8.

The ALRC report notes that as of January 2025 the Australian Institute of Criminology is currently funding research into the protection of sensitive third-party evidence including sexual assault counselling communication. There is no indication this research will examine the miscarriage of justice consequences of the PCC scheme.

Conclusion

If information relevant to the credibility of a complainant in sexual assault cases is denied to an accused whether by way of a Disclosure scheme that is significantly flawed or a PCC regime it follows that there will be a risk of wrongful convictions.

Proposals outlined in this paper to move the pendulum in sexual assault trials towards a sensible middle ground are, in relation to PCC:

- Change Queensland law on PCC to the Victorian position which allows interlocutory appeals against a trial Judge's refusal to allow PCC access.
- Conduct a Review of PCC and how it has operated in Queensland for almost 10 years by either having Queensland participate in the ALRC national review proposal of PCC or if that national review does not go ahead Queensland should conduct its own review.
- Change Queensland law to require Judges to examine all subpoenaed material in PCC applications.

Fix the current decrepit disclosure scheme by:

- (a) Introducing the certification scheme as exists in the ACT;
- (b) Allow cross examination as of right in the Magistrates Court of the investigating officer as to the extent to which disclosure has been complied with.
- (c) Oblige investigating police to give their entire file to the prosecution at committal and any updated material to the DPP after committal and up to the beginning of trial.

- (d) Expand both the Operational Procedures Manual of the QPS and the DPP Prosecution Guidelines so as to outline detailed and prescriptive criteria that have to be applied by both Offices to comply with disclosure.
- (e) Institute criminal prosecution for police who deliberately fail to comply with their statutory duty of disclosure and enhance the QPS discipline process to ensure that police who fail to comply with their disclosure duties are subject to disciplinary action.
- (f) Institute a Costs regime similar to New South Wales so that an unmeritorious Prosecution run by the DPP can result in Costs Orders. This procedure works reasonably well in New South Wales where recently a number of pending sexual assault trials were discontinued as a result of highly critical comments by various District Court Judges in Costs cases that some sexual assault prosecutions should never have been run.
- (g) If a complainant is to have a right to review a DPP decision not to run a case an accused should be able to appeal to a DPP Inspectorate such as exists in the UK in respect of bad behaviour by DPP lawyers towards an accused especially in a sexual assault case.

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