TRANSCRIPT OF PROCEEDINGS

COMMISSION OF INQUIRY INTO THE TASMANIAN GOVERNMENT'S RESPONSES TO CHILD SEXUAL ABUSE IN INSTITUTIONAL SETTINGS

At Clarendon Room, Country Club Tasmania,
Country Club Avenue, Prospect Vale, Launceston

BEFORE:

The Honourable M. Neave AO (President and Commissioner)
Professor L. Bromfield (Commissioner)
The Honourable R. Benjamin AM (Commissioner)

On 7 July 2022 at 10.04am

(Day 23)

PRESIDENT NEAVE: Thank you, Ms Rhodes.

MS RHODES: Thank you, President. I call our first witness today, Associate Professor Terese Henning, if she could be sworn in.

<TERESE HENNING, affirmed: [10.04am]

<EXAMINATION BY MS RHODES:

MS RHODES: Q. Thank you. Associate Professor, could you please state your full name for the transcript and your occupation?
A. Terese Henning, and my occupation is retired academic in law.

Q. Thank you. You kindly prepared a statement for the purposes of the Commission; do you have that statement before you?
A. Yes.

Q. Have you had an opportunity to read through it before today?
A. I have.

Q. Are the contents of that statement true and correct?
A. They are.

Q. Associate Professor, you have provided us with your CV which gives a good outline of your extensive experience in academia, could you please give a brief summary of the positions that you've held for the Commission, please?
A. Yes. So, I'm the immediate past Director of the Tasmanian Law Reform Institute, and I lectured and researched in law between 1989 and 2019, when I retired. I was appointed an Associate Professor in 2016.

Q. Thank you. You were also a member of the Tasmanian Sentencing Advisory Council; is that correct?
A. Yes.

Q. In your statement that you've provided you talk about the Witness Intermediary Scheme Pilot Program, I'd just like to ask you some questions in relation to that scheme. It's the Commission's understanding that that scheme currently doesn't apply to police, in that, police are not required under the legislation to have a witness

intermediary when interviewing witnesses. I understand that that's against the recommendation of the Institute; could you explain to the Commission why that recommendation was made and why it would be important for police to be legislated to have the witness intermediary Scheme?
A. So, the Institute recommended that the Witness Intermediary Scheme apply at all stages of the criminal justice process, and that it apply it to victims, suspects, accused people and complainants, and we were concerned that it applied at the police interview stage, at the stage when witnesses or whomever was being interviewed by legal counsel, and that it also apply at the hearing for trial stage when evidence was being taken. We made that recommendation based on experience of these schemes elsewhere in the world, particularly in the United Kingdom.

What had happened in the United Kingdom was that they had started this scheme that applied only to victims and complainants, in particular to complainants of sexual offences, and the courts regarded that scheme as unfair because it didn't apply to suspects and defendants. It was delivering a system of differential justice, and so, the courts used their inherent jurisdiction in the United Kingdom to order that witness intermediaries be available to suspects and to defendants. But what you had then was two schemes running at the same time and they weren't necessarily equal in the kind of service that they provided, and eventually the government passed legislation to apply the scheme to suspects and defendants as well.

And so, rather than going through a piecemeal process of implementing the scheme cross the board, we recommended that from the start it applied to people with communication needs involved in the criminal justice process, whether they were suspects, defendants or complainants, victims, witnesses because we agreed with the curial approach in the United Kingdom because, if you don't have that, then you aren't delivering a system of differential justice, and that that was unfair and we also thought that there was more likely to be buy-in from across the system, in particular across the legal profession, if it did apply equally to defendants, suspects and victims and complainants.

Q. For those not legally trained, could you explain what you mean by differential justice?
A. Well, it meant that the approach to delivering justice

to fair trials applied in a discriminatory fashion so that it applied to one class of person involved or one or two categories of people involved in the criminal justice process but not to others who were critically involved in the criminal justice process.

PRESIDENT NEAVE: Q. So, you could theoretically, under the original scheme in England, have a situation where a person with some cognitive impairment who was charged with an offence would not have any assistance in terms of their communication needs?
A. Yes.

Q. Whereas the complainant would have such assistance?
A. Yes, exactly.

MS RHODES: Q. Thank you. Just going back to the importance of having it through all levels of the Criminal Justice Scheme, why is it important to have it available to the police? We've heard evidence from a police officer yesterday from the Tasmanian Police who said that he does use the scheme but it's not legislated for. What would be the benefit of actually having it actually in the legislation to make it a requirement that police use the scheme?
A. Because if it is in the legislation, which we recommended, then it mandates the police to use the scheme, whereas at the moment it's not mandatory; provision is made for using witness intermediaries in the Police Manual, but they're administrative guidelines, they don't have the force of law. And so, if you have it mandated in legislation, that makes it unlawful for the police not to use witness intermediaries where it is appropriate to do so. It also provides a basis on which such a scheme at the police level can be financed, can be supported in financial ways because there is a commitment by government to the scheme at that level.

Also, if it is mandated by legislation, you can have certain requirements in the legislation about how the scheme is to operate at that level, whereas you don't have that kind of control if it is just in the Tasmanian Police Manual. They're probably the main reasons why we would like to see it legislated rather than just in police guidelines.

And also, the other thing about the Tasmanian Police

Manual, it's very hard to get hold of. While it is up on the police website, so there's a level of transparency there that you want, but it is not currently available. So, while it is on the police website, it's really difficult to find. It took me a good hour to find it, and I knew where it was, I knew what I was looking for, and I was still - I still had trouble actually locating it.

Q. If it's not at the police level, can that then affect the quality of the evidence that's collected at that level and then presented at trial?
A. Oh, most definitely. The police are going to be in most situations the first point of contact for people with the Criminal Justice System and they're going to be the first point at which evidence is taken from people at which people are interviewed, and if you don't have a witness intermediary available for someone with communication needs at that point, you are not going to be collecting the best evidence from that person, and it may be that the deficiencies in the collection of the evidence process is so great that they affect any subsequent decision-making about prosecution, proceeding to trial or whether or not what happens, what kind of evidence is given at trial.

Q. Thank you. It's my understanding that the scheme applies for recognised experts, and you talk about this in your statement at paragraphs 29 and 30. Do you think there is scope to expand that group of people from being recognised experts and, if so, why would expanding the scheme to other people help the victims and the witnesses?
A. At the moment under the scheme you have a panel of experts who serve as witness intermediaries, that's good, but there may be some circumstances where you have somebody whose expertise is based on knowledge and experience of the particular witness so they know how to communicate with this particular witness probably even better than a member of the witness intermediary panel; and, where that is the case, then you really want the court to be able to recognise them as communication assistants in order to obtain the best evidence from that person. There is the possibility for doing that under the South Australian scheme, for example.

Q. You also comment in your statement, at paragraphs 25 to 28, about the recommendation that the intermediaries have more of an interventionist role?
A. Right.

Q. Could you explain what you mean by more of an interventionist role and why it would be beneficial to have that?
A. Well, in the TLRI report we recognised that witness intermediaries can serve three principal purposes, have three principal roles: the first is advisory to police, for example, and to the court and to counsel about the style of questioning and the types of questions that are best suited to a particular witness and to obtaining the best evidence from them.

The second is to provide, it's almost a quasi-translation responsibility, where they may translate for the witness questions that are being asked of them where they are beyond their understanding and where the witness is giving answers that may not be fully comprehensible to the questioner or to whoever is listening to the answers, then they translate the answers as well. It's not a role that's used very often; more often the advisory role is used.

The other role is a very important role and that's the interventionist role and that's where questions that are inappropriate are being asked of a witness, that are perhaps confusing for the witness or that they cannot comprehend, then the witness intermediary has the power to intervene in the questioning at that point and to either advise the person how to rephrase their questions or to advise, if it's in a trial situation, the judge on how the questions should be rephrased.

And again, while under the UK scheme, for example, witness intermediaries have that power, it's not one that's used terribly often because the pre-trial directions hearing often irons out any difficulties around what style of questioning can be used and what particular questions can and cannot be asked, and so, they're all identified and specified. Nevertheless, even with that facility available, it's important to have the interventionist role because, if the questionnaire strays beyond that line or style of questioning, then the witness intermediary should be able to intervene and notify the questioner and the court that this is going beyond what was agreed.

Q. We had evidence from Professor Cashmore in week 1 in relation to the Witness Intermediary Scheme in New South

Wales and, if my recollection's correct, she made comments about how the interventionist role actually helped educate the judiciary on how the system worked, and that the judiciary started to intervene themselves once they understood the scheme. Do you think that education of the judiciary and the legal profession at large is important for this scheme to work?
A. Well, "education" isn't a term that the judiciary particularly likes; they prefer the term "information", but it was a recommendation of the concomitant recommendation of the TLRI to the establishment of the scheme that information sessions for the judiciary and education and training of the legal profession and the police be undertaken in the operation of the scheme, and also that that be extended to education about questioning witnesses with communication needs.

PRESIDENT NEAVE: Q. I have a question about that. You've commented that the judiciary prefers the notion of provision of information to the notion of education. There may be areas where there's a lack of understanding of certain aspects of, for example, child sexual assault, and I'm familiar with the programs that have been offered for some time now in Victoria by the Victorian Judicial College; that certainly has gone beyond simple provision of information and has certainly made, I think, judges more aware of some of the complexities and difficulties that arise in the area of child sexual assault.

Do you feel that that would be useful if we could persuade the judiciary to be involved in those sorts of sessions, would that be a useful process, do you think?
A. Well, yes; yes, of course, and the local judiciary, while they don't - as I say, we've been instructed by them to be wary of using the term "education". We all know that intervention extends to education programs such as the one that you're talking about, and the local judiciary do take part and often set up their own programs to obtain information.

For example, my own involvement in this area began with a request from the Tasmanian Supreme Court judges and magistrates to talk to them about the best means of obtaining evidence from vulnerable witnesses, and in particular from children at that stage and from people with cognitive impairments. And so, that's how I actually became involved many years ago in this area of the law, and

based on that early research and the publications that came out of that, the TLRI took up a project in this area at the same time as the Royal Commission's Institutional Responses to Child Sexual Abuse was being conducted.

So, yes, absolutely, there's not a resistance on the part of the judiciary to obtaining information to inform themselves in areas of expertise and specialisation where they feel they need to have a great deal more information, and questioning of witnesses with communication needs is obviously one such area. With the establishment of the Witness Intermediary Scheme here, that if it was in conformity with our recommendations, there would be such information sessions right across the board, right across the legal system for people who are going to come into contact with these witnesses.

How that is actually happening, I don't know, so that's not something that I have any personal information or expert information on, but it would be - that kind of information would be available from the police themselves and those who teach the police, and it would be available from the DPP and then the legal professional what programs have or are being conducted in that regard.

PRESIDENT NEAVE: Thank you.

COMMISSIONER BENJAMIN: Q. If I can buy in as well. Surely, the judiciary are rightly careful and fiercely defend their independence, but it's the role of the legislature to set frameworks within which the judiciary works. You'd agree with that as a basic concept, would you not?
A. Yes.

Q. The changes, particularly with regard to the myths and misconceptions in respect of child sexual abuse and the changes in science, social science over the last few years and the changes to laws, must by necessity mean that there's a broader way to educate the judiciary rather than through barristers or expert witnesses; the judiciary need to know the underlying rationale for the changes in the law, and the best way to do that is through some form of judicial training, would you not agree, or judicial education?
A. Yes.

MS RHODES: Q. In the Institute's report it also, following on from that --
A. Sorry, counsel, if I can just qualify my answer to that a bit? I'm not saying it doesn't happen; what I'm saying is that that was a concomitant recommendation in the TLRI's report that training programs, education and information programs be provided. All I can say is that I don't know to what extent that is happening now; it may well be happening, it may well have happened, there may be very comprehensive programs in operation, I just don't have information about them at the moment. Since my retirement I haven't pursued a great deal of further information in this arena.

Q. Thank you.

COMMISSIONER BENJAMIN: Q. I think, just for the benefit of the witness and perhaps more broadly, there are some really good systems for judicial education through the National Judicial College, through the Victorian Judicial College, the New South Wales Judicial College which provides extensive options for judges to learn about these changes and make themselves familiar with them in terms of their overarching work, isn't there? Are you aware of those?
A. I was when I was still working as an academic, very much aware of them.

Q. And I guess at times when there is significant change it's worthwhile making that education available in one form or another to ensure that judges are best able to perform their duties, exercising that broad --
A. Oh, yes, that's correct, but the people to ask about the extent to which they are participating in that is a member of the judiciary here, and as far as the DPP and the legal profession is concerned, the proper people to ask about that are the legal profession and the DPP.

COMMISSIONER BENJAMIN: Thank you.

MS RHODES: Q. Thank you, Associate Professor, I take it that it's safe to say that education is an important part of this entire system and that was the recommendation of the Institute?
A. Correct.

Q. Thank you. One of the other recommendations following

on from that education recommendation was the availability of resources, and it talks in the report about having bench books and a gateway, an advocate gateway; could you explain why that is an important part and why it was recommended by the Institute to have those resources available?
A. At the time that the TLRI recommendations were made Tasmania did not have a judges' bench book. There were moves afoot at that time to prepare one: again, I don't know to what extent since 2019 that has been acted upon.

The Advocate's Gateway idea comes from the United Kingdom where an Advocate's Gateway has been established which contains a huge amount of information for both judges and for particularly counsel in dealing with witnesses with communication needs; it's a very sophisticated platform and it contains a lot of really detailed information, it's really, really useful. And the TLRI thought at the time that it would be a very good idea to establish a similar platform in Tasmania, and probably right across Australia if possible, because of its level of detail and really useful information.

In the United Kingdom one of the questions that judges ask of counsel at directions hearings is whether or not they have accessed the Advocate's Gateway and relevant material on the Advocate's Gateway in appropriate questioning of witnesses with communication needs, so it's more or less a requirement before counsel act in these cases that they have had access to such material and that they are familiar with it.

Q. Thank you. That sort of leads into another recommendation that was made in terms of specialisation, and we heard from Detective Inspector Yeomans from the New South Wales Police who gave evidence that in New South Wales there's specialised courts both in Sydney and in Newcastle, I understand, and they've been very helpful in terms of prosecuting these cases because the people involved are specialised and understand the nature of children giving evidence. Is that the basis of that recommendation that the Institute made in terms of specialisation and the need for it in this space?
A. So, when you talk about specialisation, are you talking about one of the final recommendations in the report which was based on the - I believe it was the Norwegian (indistinct) scheme, where a very specialised facility has been established to take evidence from people

with communication needs; it's quite a separate facility, people who operate in that space have expert skills in these areas. Is that what you are thinking of?

Q. I'm thinking more generally in Recommendation 9, paragraph (c), where you talk about specialist training in appropriate questioning for legal practitioners.
A. Well, I mean, that's different from a specialised court. That just relates to the previous question that we were talking about; whether or not people who are going to be questioning witnesses with communication needs need to have had education in how to appropriately question them. So, that comes from training programs and it also does come from the use of the witness intermediaries themselves, from obtaining their expert advice and conforming to their recommendations in relation to questioning. Because there can be a bit of an imperative to slip back into traditional modes of questioning in the heat of the moment, as it were - perhaps not the best term to use - so people can lapse, and so, witness intermediaries can help people stay on course in the type of questioning that they ask, the type of questions they ask.

Q. In your statement at paragraph 34 and onwards you talk about barriers to prosecution of sexual abuse matters, and you talk about deeply held views community-wide in terms of genuine victims; could you expand on that for the Commission, please, what you mean and why that's a barrier to these cases being prosecuted?
A. Prosecution of sexual offences, as I say in that paragraph, is uniquely difficult and that's because we're battling - counsel for the prosecution are battling, and so are victims and complainants, all kinds of stereotypes that are very deeply entrenched socially about what the behaviour of a genuine victim is and also about the reliability of the evidence of complainants in sexual offences cases, and particularly certain kinds of complainants; particularly children, particularly people with cognitive impairments, they come to the court at a disadvantage, and that disadvantage was actually reflected in the common law across the western world until relatively recently.

So, for example, trial judges would give corroboration warnings to juries that said that complainants in sexual offences cases were inherently unreliable and that it was unsafe to convict on their evidence unless their evidence

was corroborated in some material particular; that was the form of words or close to that was used.

The same kind of warning used to be given in relation to children's testimony; that they are inherently unreliable witnesses, that both these categories of witness are inclined to fabricate to make up their accounts, they're inclined to fantasise, for example, so they're regarded as inherently unreliable.

There are also a number of tropes that defence counsel still rely on regardless of changes in the law that play to stereotypes about the way that genuine victims of sexual assault behave. So, for example, there is a stereotype that, if you have been raped or sexually assaulted that you will complain at the first available opportunity about what has happened to you and, if you don't complain, that means that you have fabricated the story; and you can see how that would work to the disadvantage of children in particular who may not actually make complaints until many years after it has happened, and that can be for various reasons, not least that they may have been threatened into silence, they might be fearful, they might be worried about being disbelieved, they might be shameful.

So, there are all kinds of reasons why people don't complain straight away; in fact, it's probably more often than not that complainants don't complain at the first available opportunity. So, based on contemporary research we now have that understanding and trial judges are required to direct juries that absence of recent complaint or delayed complaint or delayed prosecution is not necessarily evidence of fabrication.

But that word "necessarily" is in there, and so, it is not something that is prohibitive, for example, that counsel play on that particular stereotype - defence counsel, I'm talking about - in trying to paint the - or undermine the credibility of complainants and victims of sexual offences.

So, there are many stereotypes, they still linger about the way that complainants should behave, generally complainants. Like, for example, they shouldn't drink; if they have a drink or something that undermines their credibility in relation to issues around consent or mistaken belief in consent.

Q. Those stereotypes, as you say, extend to children and the unreliability of children, and the Commission has heard a lot of evidence about the ways that children disclose, and they don't disclose everything, and they don't disclose the whole story at once, and all the various reasons that they don't disclose, as you say, in particular we've heard evidence about grooming and how grooming really prevents a child from being able to disclose and all of the confusion that comes for the victim in relation to that.

And so, with that unreliability of child witnesses being a stereotype, is that stereotype still existing at the minute in Tasmania?
A. Well, I don't have any empirical evidence around juries' particular beliefs, but we do have legislation on our books in the Evidence Act that tries to overcome these problems in relation to children - I'm just trying to find it in my statement where I mention that particular provision. Do you know where it is?

Q. You talk about the barriers at paragraphs 34 to 38.
A. Yeah. It's around 165 of the Evidence Act, 60 --

Q. 108C, at paragraph 38, for juries, you talk about juries educated by experts as a mechanism?
A. Yeah, there's provision for a jury to be educated under that section about children's behaviour which they - juries might intuitively believe that children are going to behave in a particular way, for example, that they would complain if something nasty happens to them, or that educates juries about why children may fail to respond to abuse in particular ways and why that is a normal response.

No, there's another provision in the Evidence Act, it's in relation to judicial warnings, and it prevents judges from directing juries that they should be wary, that they can regard children as a class of unreliable witnesses. It's 165A of the Evidence Act. So, under that provision, if the judge wants to alert the jury to any unreliability in a child witness's evidence, then they have to be able to point to a particular area of unreliability that is specific to this particular witness. They can't rely upon the possibility that children as a class; they are now prevented from telling juries that children as a class are unreliable and that they should approach their evidence with care before acting upon it, and preferably

find corroboration for it before acting upon it. Now, that approach is prohibited now by the Evidence Act, section 165A. It's a relatively recent amendment but it's a really important one.

PRESIDENT NEAVE: Q. Professor Henning, I had a couple of questions about some of that. One approach has been in the past to allow witnesses to be called in order to dispel myths and stereotypes, and you've referred to that in paragraph 38. Another approach has been to prevent the giving of judicial warnings in the form that they were given in the past, and a third approach which has been adopted in Victoria pretty recently has been actually to require judges to - this is in the jury directions legislation, and it may have been after you retired, but it's legislation which requires judges to actually affirmatively say a number of things; for example, "There are many reasons why people may delay in reporting a sexual offence which are", so and so and so and so, I don't have the section with me, or "there are things that you need to know about the behaviour of children".

Of those three approaches, that is the prosecution calling expert evidence, having a provision prohibiting the sorts of warnings that were given in the past, or having provision for the judges to provide affirmative information to the jury, do you think any of those are useful and which ones would you favour? Do you have any views about that?
A. Well, we've got the first one in section 108C, the provision of expert evidence to fact-finders. In relation to the second one, we have that in section 165A of the Evidence Act, that's prohibiting certain kinds of directions being provided to juries. In relation to the third one, we've got some provision in relation to that, in that, trial judges must warn or direct juries that - "warn", there's probably a better term - that absence of recent complaint is not necessarily evidence of capacity. I'm not aware of an affirmative approach in relation to, apart from the provision of expert evidence, in relation to judicial directions in relation to children, but I might be wrong.

Q. Thank you, and do you have a view about the usefulness of all of those in affecting the attitudes of juries?
A. I'd like to see a PhD project on the extent of maybe how those warnings or directions are given or not given to the extent to which how they are complied with, and it

would be really nice to conduct a jury study in relation to that as well. Jury studies are quite difficult to set up and gain ethics approval for and a lot of other approvals as well, but nevertheless they have been conducted in some arenas, so it would be very useful to know, to have that kind of information, to see the extent that they are changing attitudes or how they're actually operating; yeah, I agree.

PRESIDENT NEAVE: Thank you very much.

MS RHODES: Q. You say at paragraph 37, you talk about the advancements and reforms in relation to consent and mistaken belief in consent, and that there's powerful traditional notions about what constitutes consent. Then you go on to say that reforms are getting to the point where they perhaps are not overcoming those very strong traditional notions, and you provide your view on what you think the next step would be, and you refer to it as "a root and branch reform is necessary".

There's quite a bit in that paragraph that I want to explore with you. What are the traditional notions that you're talking about in relation to consent, and particularly in relation to consent for children?
A. Well, traditional notions of consent, this is generally, are that, if you are not consenting, then you make it abundantly clear by almost fighting to the death, as it were, to reject the assailant and anything less can be the subject of - and we see this in cross-examination. So, for that reason the government enacted reforms that came into operation in about 2004 establishing an affirmative consent model, so that the Crown had to prove absence of affirmative consent rather than absence of vigorous and conclusive rejection. It's a subtle but it's an important shift.

At that same time they reformed the mistake laws as well to set out more clearly what would ground a reasonable belief in consent, so we have too in Tasmania. The Crown has to negative an honest and reasonable belief in consent. And so, prior to those reforms it was quite legitimate to have quite broad notions of what might be taken as a mistaken belief; for example, if the complainant was passive in his or her response to the sexual predation, then that could either ground consent itself or it could ground a mistaken belief in consent.

Instead what you've got is submission, you haven't got consent in those circumstances, you have submission, and so, the Tasmanian Criminal Code, for example, now specifically provides that passivity in response to sexual predation is not a basis for finding consent, it has to be an affirmative consent. That's particularly important where children are concerned because often their response is one of passivity and withdrawal rather than objecting forcefully or at all.

Q. So those notions that you've described in the more general sense become more problematic when the victim is a child; would that be correct?
A. Yeah. Definitely, not all of them, because when you've got sort of this generalised miasma around what is consent where adults are concerned, for example, the way a complainant dresses, for example, or what can be regarded as sexually provocative behaviour, for example, they may not play so strongly where children are concerned. But what juries see as counter-intuitive behaviour of children, children who just lie completely doggo, don't make a noise or don't immediately complain, for example, they can claim more forcefully around consent where children are concerned, or mistaken belief in consent where children are concerned. I suppose if you've got a slightly older complainant, one in their teens, those same tropes can play around dress and around, you know, sexually provocative behaviour might be taken to indicate a greater understanding of what is happening than the child actually has.

PRESIDENT NEAVE: Q. Why is consent, why does it play any role in the case of sexual offences or penetrative sexual offences against children, indeed any offences against children, when they can be charged with, at least in the case of penetration, the alleged offender can be charged with sexual penetration of a child where consent is irrelevant?
A. Well, yes, indeed they can be, but they might not be, they might still be charged with rape. The discretion to charge is something that you would need to ask the DPP about, and how often they are charged with rape? I don't know, but they may be, but I was asked a question about consent and about the --

Q. Yes, of course.

A. -- and about the general stereotypes and pernicious views that surround that issue generally, so I was addressing that.

Q. I understand that. Perhaps I should ask the question in a different way. Do you think it would be desirable to have the same maximum sentence for rape and sexual penetration of a child and for DPP practice to be to charge in the cases involving children with the sexual penetration offence rather than with rape? That would have been a better way of my expressing the question.
A. Well, this is a maximum sentence for both of those offences and it's 21 years.

Q. Is it the same for both offences?
A. Yeah, under the Criminal Code the maximum sentence is 21 years.

PRESIDENT NEAVE: I'm sorry, I wasn't aware of that. Thank you.

COMMISSIONER BENJAMIN. Q. Professor, Robert Benjamin here. I, as you know, am not a criminal lawyer, I come from a Family Court background. I can't understand how the notion of consent can apply to a child where the offender is charged with rape; can you assist me in terms of that, understanding the law in Tasmania in respect of that?
A. Well, it doesn't apply in relation to some offences, for example --

Q. I'm talking about the offence of rape?
A. Well, it applies because there is a view, I don't know how commonly it is held, but there is still a view that children understand what is happening and may be able to give a valid consent to what is happening. It's a view that was expressed to me when I was still working as an academic by one then retired judge and, as I say, I don't know how widespread it is, but it is an offence that is still available to be charged against an accused who has had sexual intercourse without consent with a child, and that offence is on the books and available.

Now, lack of understanding of what is happening will vitiate consent and that is also provided in the Criminal Code. So, where somebody is too young or incapable of understanding what is happening to them, then consent would be vitiated in those circumstances, and that's provided for

in the definition of consent, so that goes some way to answering your question.

But it's not impossible to encounter the view that children may have a sufficient understanding - not what I agree with, obviously not what you agree with - but some people do maintain this view, and the way it was expressed to me was, "Oh, the child has seen the mother and the father or the mother and serial numbers of boyfriends having sex on the living room couch or floor or wherever and understands what is happening". Well, I don't agree with that but the person who was talking to me at the time clearly held that view quite sincerely.

Q. I struggle with the notion that a child, any child, whether the child is 3, 15 or 16, can give consent. But what you're saying is that it's still available, so does that need a statutory change to make it absolutely clear that a child under the age of 17 cannot give consent?
A. Well, we do have provisions in the Criminal Code, there are existing provisions in the Criminal Code creating offences that vitiate consent but there is no age limit, as it were, on the crime of rape, or no aspect of the definition of consent at the moment which says that a child - that a person under 17 cannot give a valid consent. And the way that's been dealt with is, and possibly one of the reasons behind that is, because some accused people may be young themselves, for example.

So there are specific age ranges that are set out in unlawful sexual intercourse with a young person which vitiate consent where the complainant is of a particular age and the accused is of a particular age, and there are certain situations where consent can still be an issue where the accused is very close in age, for example, to the complainant, say where the complainant is 14 and the accused is 15. So, where you've got that closeness of age, then consent may still be in issue, but then these age ranges are established to recognise that there might be good reason to have a more lenient approach where quite young accused are concerned if there was genuine consent in those circumstances so that it's not automatically vitiated and you're not automatically criminalising someone in circumstances where there was genuine consent.

But I generally agree with you that children - I find it hard to understand how children can be regarded as

giving a valid consent, and that is particularly young children, and that is particularly where adult accused are concerned. But the definition of consent in the Criminal Code goes some way to dealing with that, by vitiating consent where the will of the child has been overborne by the position of the accused, or where the complainant does not understand the nature of the act.

Q. Isn't the age of the alleged offender more of a matter to be dealt with in sentencing rather than in the commission of the crime itself?
A. Quite possibly.

COMMISSIONER BENJAMIN: Thank you for that, I was asking the question genuinely because I really wanted to know the answer, so thank you.

MS RHODES: Q. Thank you, Associate Professor Henning. Just a clarification point: there is a section in the Criminal Code, section 335, which is the rape provision, rape alternative offences, so that if a person is charged with rape they can be found guilty in the alternative?
A. Yes.

Q. Going back to paragraph 37 with these powerful notions of consent and the issues that still are held by some people, can I take from your statement, with your statement of your radical view of root and branch reform, that the reforms that are currently in place or the law as it is now is not necessarily sufficient and that there is room for reform?
A. Yeah, if you have a look at paragraph 36, I refer to a work by Dr Helen Cockburn, this was her PhD thesis and I co-supervised her PhD thesis and it was completed in 2012. "The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials", and I've given a web location for that thesis, and more leniently in 2017 the Australian Women Against Violence Alliance published some information about reforms to consent laws and what they are achieving.

But Dr Cockburn's work in particular showed that the affirmative consent model hadn't made the inroads into the way we deal with consent and mistaken belief in consent to quite the extent that we had hoped. So, I don't know whether it's a flippant response of mine or not, but I don't imagine it would be one that's taken seriously

amongst the legal profession.

But I do think that there needs to be some kind of really profound reform to really move stereotypes and change the success rate in these cases, and really shake things up, I suppose I'm saying. And so, as I say, I don't know whether it's a flippant idea or not, but my covert view is that the kind of root and branch reform we need is to change the burden of proof in relation to both the issues of consent and mistaken belief in consent. It's not an entirely outrageous view because we place the burden of proof on the defence to the balance of probabilities.

Because, in relation to the defence of mistake in Tasmania, until 1990 the burden lay with the defence in relation to the defence mistake, and then the courts changed that approach and placed the burden on the Crown in 1990. It was to bring the defence of mistake into conformity with the law more generally where the burden of proof lay, but prior to 1990 defence of mistake had to be established on the balance of probabilities by the defendant.

Q. Just to clarify a point that Commissioner Benjamin made or some confusion as to the sentencing of rape and the alternative: it's our understanding that that difference arises in the proposed changes to mandatory minimum sentencing for those different offences. I just ask for your personal opinion as to the effectiveness or otherwise of mandatory minimums in relation to sexual offences?
A. Okay. Well, I don't - this is my personal view - I don't support mandatory minimum sentences, full stop, and that's in relation to any offence including sexual offences. I don't like taking the discretion away from the judiciary in the sentencing process; I think that affects our trust and our regard for the judiciary, but I also think it has a more profound effect: it actually displaces the responsibility for sentencing in a way because what it does is it can affect pleas of guilty if there's a mandatory minimum sentence, and that means it can also affect charges. And so, if there are plea negotiations, for example, or if the prosecution believes that the accused may plead guilty to a lesser offence that doesn't have that level of mandatory minimum sentence or doesn't have any mandatory minimum sentence at all, they may charge with the lesser offence; and in that way you're displacing the sentencing process, effectively, from the judiciary and

placing it with the prosecution.

Q. When you say it affects pleas of guilty, would I be correct in thinking that, if someone is faced with a mandatory minimum, they may be more likely to challenge the charge and take a matter to trial as opposed to agreeing to plead guilty early for any benefit?
A. Yeah. If they think that they are going to have to serve a mandatory minimum sentence on a plea of guilty, then they may well be less likely to plead guilty and to plead not guilty and go to trial.

Q. And, therefore, having the victim go through the trial process in order for the matter to be resolved through that way?
A. Yes, exactly.

Q. I'm just conscious of the time, and I'm sure our Commissioners have a number of questions, so I'll just finish on one last question. We haven't spoken about it but it is in your statement in terms of the three-pronged approach to getting best evidence: one being the Witness Intermediary Scheme, the directions hearing and pre-recording of evidence, and we have heard evidence from our police witnesses in terms of the benefits of pre-recording.

This question was posed to Professor Cashmore who's from New South Wales and has a very extensive career in academics. I apologise to Professor Cashmore, I can't remember her precise credentials but she's well credentialed. The question was put to her whether she would be in favour of making witness intermediaries available to adult complainants of child sexual abuse were they to desire to have them.

So, I'd like to pose that question to you but expand it further and say, do you have a view or do you believe that the three approaches to directions hearings, pre-recordings and witness intermediaries should be available to adults who were child victims of sexual abuse?
A. The three-pronged approach is necessary for witnesses with communication needs because what you want to achieve in relation to these particular witnesses is control of cross-examination in particular, and you can only really achieve that where you have pre-trial directions hearings and where you have pre-recorded evidence so that trial

judges are more likely to intervene because their intervention can be edited out and that may also encourage witness intermediaries to intervene as well, because knowing it can be edited out and not go to the jury and potentially prejudice the jury against the accused, and the witness intermediaries for all the reasons that we have talked about and that are in my statement and in the TLRI report, they really go together, all of those three mechanisms in order to obtain the best evidence, most reliable evidence, if you like, from people with communication needs.

As to expanding it more generally, I would probably have to think a lot more deeply than I have had the opportunity to and discuss that option a lot more widely than I have had the opportunity to do before coming to a conclusion. I can see merits and I can see demerits just on that, you know, without having had that more deep thought about that particular issue.

Q. I'll just read to you Professor Cashmore's answer and perhaps if you feel able to comment as to perhaps whether this is a consideration that should be made before extension to adult survivors.

So, her answer to that question was:

I think there might need to be some sort of assessment. I don't know, I mean one of the issues is around availability of people to do this, so you don't want to open the door so wide that you can't cater for demand. I think it does need to be a bit triaged and targeted, so I'd be a bit more careful about how that happened.

Would you agree that they're some of the considerations that need to be thought about before extending the approach to child witnesses to adult victim-survivors of child sexual abuse?
A. I would say it's sensible, but when we're talking about assessment, what are we talking about? Are we talking about the particular assessment of the capacities of the witness or the level of vulnerability of the witness? What are we actually assessing before we open up these processes more generally? I'd need to think about what - to whom are we opening up these possibilities, these

procedures, and why?

I think, if we know the why of it, then we may open up the possibility of different approaches if what we're trying to do again is to control cross-examination in some way. Maybe we need to look at our traditions of cross-examination, maybe we need to look at the kinds of questions we ask in cross-examination that can be confusing or misleading or something like that.

Now, I know trial judges have a mandate to prevent such questions under section 41 of the Evidence Act, but that section is really difficult to operate and also hasn't proved to be particularly successful in encouraging judicial intervention in inappropriate cross-examination.

So, I'd want to know: okay, why, and who are we particularly thinking of here, and then thinking about solutions to whatever the problem is that we are focusing on.

Q. So, could I put it this way: going back to your root and branch reforms, is it that we really need to look at the whole system to make sure that the process of going through the Criminal Justice System is as less brutal as it currently is for victims?
A. Yeah, and we have tried, and we have tried, and we have tried, and it looks as though, even though we think the reforms that we have achieved, for example, reforms around sexual experience and sexual reputation, even though we think they are quite profound, we are still - our system is still situated in a society which is a patriarchal society; it is a male-dominated society and it is imbued with traditional stereotypes and with views that are really hard to dislodge.

It takes a lot more than we have currently achieved, and how we achieve that now is, I say, root and branch reform, and how we achieve root and branch reform giving the social context in which our system operates is really, really, difficult to determine.

MS RHODES: Thank you, Associate Professor. That completes my questions, if there's anything that the Commissioners would like to say?

COMMISSIONER BROMFIELD: Associate Professor Henning, I

don't have any further questions of you but I did want to extend my gratitude as the academic rather than the judiciary member of the Commission, I found your evidence incredibly informative and helpful, thank you.
A. Thank you.

PRESIDENT NEAVE: Q. I just had one question apropos of the last issue that we've been discussing. Are any of the mechanisms to make it easier for people to give evidence appropriate should any of them apply automatically to adult survivors of child sexual abuse? And I mean things like, for example, remote witness facilities.
A. Yes, and in fact under the Evidence (Children and Special Witnesses) Act those provisions can apply on the order of the court.

Q. Why do we need the order of the court for that particular measure, for example?
A. I suppose because special witnesses are not automatically seen as - well, victims of sexual offences, adult victims of sexual offences, for example, are not automatically seen as witnesses who require those kinds of supports, but in very, very many cases they are seen as people who do, and so, an application can - it's a relatively easy process to be made to the court setting out why you would apply those special measures to these witnesses.

It might be better to have a knocked out way of approaching it, that might help to achieve some of the root and branch reform that I've been looking for, and so what you say in sexual offences cases, or you might nominate some other cases as well, like murder for example, then victims - obviously not in a murder case - but victims of sexual offences, whether they're children or adult, just all of them would automatically have all of these measures available to them but they may opt out of them if they so choose. That might just make the operation of the law a lot easier, it might ameliorate a lot of the problems that we currently encounter in cases where no application is made.

PRESIDENT NEAVE: Thank you very much. And thank you very, very much for your evidence, it was very helpful.
A. Thank you.

PRESIDENT NEAVE: And for the work that you've done at the

Tasmanian Law Reform Institute as well. Thank you?
A. Thank you for that as well.

MS RHODES: Thank you, Commissioners, I believe we will rise for a break.

SHORT ADJOURNMENT

MS ELLYARD: Thank you, Commissioners, the next witness is Elena Campbell of the RMIT Centre for Innovative Justice, and I ask that she be sworn in this morning.

<ELENA EVE CAMPBELL, affirmed: [11.35am]

<EXAMINATION BY MS ELLYARD:

MS ELLYARD: Q. Thank you, Ms Campbell, can you tell the Commission, please, your full name?
A. My name is Elena Eve Campbell.

Q. And your professional address and current occupation?
A. I'm currently Associate Director of the Centre for Innovative Justice at RMIT University. We're in Pelham Street, Carlton, Melbourne.

Q. You've made a statement to assist the work of the Commission, do you have a copy of that statement in front of you?
A. Yes, I do.

Q. Are the contents of that statement true and correct?
A. Yes, they are.

Q. Thank you. You're being called to give evidence, Ms Campbell, arising from your expertise in two separate areas of interest to the Commission, the first relating to the matters touching on Youth Justice and the experiences of young people who come into contact with the Justice System, and secondly and separately some comments that you've made about restorative justice.

I wanted to begin my questioning by reference to paragraph 15 and following of your statement. You make some observations in those paragraphs about what can be said from the evidence base about the cohort of young people who find themselves coming into contact with the Criminal Justice System; could you tell us a bit about

that, please?
A. Certainly the evidence base is completely unequivocal about the extent of the experiences of trauma or what in some disciplines is referred to as adverse childhood experiences of young people who have come into contact with the Youth Justice System. So, the evidence base kind of varies in terms of the statistics, but overwhelmingly two-thirds to three-quarters of children in Youth Detention or Youth Justice, in contrary to the Criminal Justice System more broadly, have histories of child sexual abuse, neglect, and in fact what we refer to in Victoria as family violence; but that is rarely addressed by their contact with the Youth Justice System. We recognise that we understand that there is very much a neglect and abuse to home care to custody pipeline, but none of the interventions that stop - that occur along the way actually tend to address those experiences of trauma.

The other thing that I think the evidence points to very clearly is that these experiences are not isolated, they don't just occur in a vacuum. Many children who come into contact with the Youth Justice System live in environments where there has been crime experience with the adults around them as well. So, intergenerational contact with the Youth Criminal Justice System, intergenerational contact with the out-of-home care system, and intergenerational experiences of disability and particularly high mental ill-health; that's not necessarily diagnosed or recognised in the parents, but it certainly means that a chaotic environment in which children - which the children know is their only reality presents them with absolutely no map for them being able to respond to the expectations of the Justice System or any other kind of structure which they encounter, but then they're penalised for that rather than their support needs recognised.

Q. One of the points that you make at paragraph 18 of your statement is the way in which it can be understood now that trauma influences development so that there may be a severe impact on young children that perhaps means that they're operating developmentally well short of their biological age with limitations on how they can control their behaviours.
A. Yes, I don't think we've done enough to really engage with concepts of developmental trauma disorder and, you know, we do know in the scientific realm we understand that the impact of trauma including trauma experience in utero

can have really, really significant ongoing effects on children's neurodevelopment and their development of language, the development of their ability to regulate their emotions and their behaviour. But we haven't quite taken that scientific evidence that is very, very clear and applied it in either the social services sector context or particularly in the legal system context.

So, we have become a lot better in the social services context of being trauma-informed and that means kind of recognising that children who have had these experiences, we're not necessarily getting there in terms of understanding what that might mean for the way they experience the world in every possible manner, and particularly I think impacts on language development are particularly relevant for the Justice System because the Justice System is all about language, it's all about instructions and expectations to comply with those instructions.

COMMISSIONER BROMFIELD: Q. Ms Campbell, these are my words, but reading your statement I took that, rather than being trauma-informed, you would hope to see the Juvenile Justice system be trauma-designed; is that a fair summary? A. That is a very fair summary, that is a perfect summary, because there's been an interesting kind of shift in language or terminology, we're sort of moving from trauma-informed in the social services sector, now we're talking about trauma-based but actually think "designed" is a far more accurate description of what needs to occur because it needs to be built on the understanding of trauma from the ground up rather than sort of just coming in at that first floor level and say, oh, yes, we understand that everybody, most people here have experienced trauma and so we'd better take that into account; actually that's got to be in the foundations.

COMMISSIONER BROMFIELD: Thank you.

MS ELLYARD: Q. Ms Campbell, would it be right to say that really, because of what you've said and the various ways in which children who come into contact with the Justice System find their way there because of experiences of trauma and so forth, they're particularly ill-equipped to meet the standards that are being set for how the world expects them to behave so that in the end their childhood experiences have been criminalised and they become

criminals because they can't meet unrealistic standards?
A. Absolutely. I think we're already asking a lot of a child who has not had adverse childhood experiences to respond in the way that we might expect if they were to come into contact with the Criminal Justice System, but the irony, or the very terrible irony here is that it is the very children who are the least equipped who are going to come into contact with the expectations of the Criminal Justice System, and then we penalise them further for failing to meet those expectations when they were never equipped to do that in the first place.

Q. So you say, to that extent, the Justice System really sets up this cohort of children to fail?
A. Absolutely, from the get go.

Q. One of the other things you also said is that, once children are involved in the Justice System, what the Justice System then expects of them by way of trusting adults, compliance, following rules and so forth, those are also things that this cohort of children will, because of factors beyond their control, be potentially particularly unable to comply with?
A. Yes, absolutely. Certainly children who have had these kind of experiences of trauma and abuse and neglect, and really just a sense of not being able to rely on the adults in their lives and the protective function that we would otherwise expect, then have that sense of mistrust and lack of safety reinforced by a Justice System that further entrenches their lack of control in agency and further entrenches that sense that adults are there to punish, adults are there to disclose information about you, adults are not there to be trusted. So, we're just reinforcing over and over and over again with our interventions and then we get surprised when it doesn't work.

Q. One of the points that you make at paragraph 26 of your statement, and this was something that's been touched on in earlier evidence as well, is that in many cases these are children whose own experiences as a victim haven't been dealt with or acknowledged so that they're now in a system being punished when those who harmed them haven't ever been, from their perception, punished?
A. Yes, I'll have to be very careful not to talk about this at great length because this is a very big feature of my research, where young people who are identified for

their use of violence at home, for example, are using that in the context either replaying what they've seen from an adult, acting out and acting in ways that they see still behaviours across the family structure or are resisting harm that they're currently experiencing, but because of the way in which our system is designed, particularly in the context of family violence or any way it is, it's very binary, you need a victim-survivor here on the one hand and you need a perpetrator on the other, and the target of the system of intervention then becomes the young person and they're saying, "Well, you're telling me that what I'm doing is wrong, but everybody's been doing that to me my whole life", so again, what reason do young people have to comply with the expectations of the Justice System?

Q. Against that backdrop, what we then understand of course is that these children, for the reasons that you've described, find themselves in the Youth Justice pipeline and perhaps from that pipeline going into detention. At paragraph 30 of your statement you speak to the compounding nature or the compounding effect of Youth Detention on children who have already been harmed and traumatised; could you tell us about that?

A. Well, I think obviously there's a lot of sort of trauma along the way and betrayal, and we have these kind of system interventions which thinks it's better to step in and remove kids from those environments and, yes, we want to protect children's safety, but this perpetual system of intervention particularly in some communities is reinforcing that intergenerational harm and reinforcing the idea that, by the time they get into the Youth Justice System, you know, at a very young age, they've lost that opportunity to shape their lives in the way that they might hope and so that sort of essentially entrenches that idea of this is who I am, this is my identity. Because we've got to remember that this is happening to people at a point in their lives when they are forming their identity, and so, it's not a matter of sort of thinking, I'm going to do my time and then I'm going to return and be a member of civil society in the way that I had hoped; that's all that kids have known and that's what the system is telling them about. And then when they go into an environment where, as I said, they have a lack of autonomy over their liberty and time, over their physical safety and they're exposed potentially to young people who've committed even more serious offences than they have, then that is a very criminogenic environment and can completely compound the

harm and the behaviour, particularly the younger the children are when they enter that system.

Q. And so, does it follow then, and of course recognising this problem's not unique to any jurisdiction and you speak from your experience in Victoria, but what you're saying I think mirrors material that the Commission has heard about the experience in Tasmania, that although the idea of Youth Justice facilities and Youth Justice arrangements is that they should focus on rehabilitation, in practice if you find your way to Youth Detention rehabilitation is not very likely and, in fact, you're more likely to be pushed further along a pathway of future contact with the Criminal Justice System?
A. Well, I think there's a few points there. I think we make a mistake potentially when we talk about the concept of rehabilitation or re-integration for so many people where their memory isn't great in the first place, so their story of disadvantage and poverty and the harm and trauma is so entrenched that we have to do - it's not a matter of offering a program and saying, now you're rehabilitated, off you go. So, we sort of have to start from a very, very different point even with the interventions that we are delivering with the best of intentions.

But then we also have to recognise that those interventions are not going to achieve much if the overall environment and the overall experience and trajectory of young people has been so damaging that we're not just trying to rehabilitate for the offending and the thing that lead to the offending, we're trying to prevent the harm that our response actually causes.

Q. You make the particular point at paragraph 35, thinking about Youth Detention facilities, about the experiences of young women. The facility in Tasmania, as you may know, is a facility for both young men and young women and the Commission has received and is going to receive further evidence about the vulnerabilities that some young women have found themselves at in detention. What's the issue as you see it about the particular vulnerabilities that female young offenders might face in detention?
A. Well, obviously all - someone acknowledged - that all young people in detention are going to face some very serious vulnerabilities and have likely experienced particular forms of violence and trauma in their lives, but

we do know that the vast majority of young women, and certainly with the vast majority of anyone in an adult women's prison, have experienced child sexual abuse or family violence. But we also know that young people, young women who are also offenders have experienced disproportionate rates of particularly severe trauma, particularly severe child and sexual abuse, and so, when we're then taking them into and bringing them into environments where the risk of further sexual abuse is very, very real, then we're exposing them to just this perpetual re-traumatisation every day, and that's going to mean that it's incredibly difficult to stem that constant cycling in and out of the Criminal Justice System.

Q. One of the issues that the Commission's been made aware of in the context of the Ashley Youth Detention Centre is the use of strip searching, and you've made some comments about strip searching as well; can you tell us about that?
A. Well, look, it's just extraordinary that we think - in the context of what we know about what people in custody's experiences are, that we use those practices to do that, essentially what people might call "power over" because that's really what it is; it's, again, a constant re-enactment of the traumatisation and lack of bodily autonomy and agency that people have experienced. So, that is particularly the case for young people of any background, but also particularly the case for the majority of young women and then adult women, women who are in the Criminal Justice System.

Q. And so, having identified some of these very profound issues and difficulties associated with the way in which Youth Justice arrangements commonly work, you've said that it's important that a Youth Justice System take a person-centred approach to young people. When we say person-centred, it's obviously got to be a system that operates for potentially a large number of people, so what does it mean to be person-centred in the context of an institution of Youth Justice?
A. Well, if we are at the point of a young person coming into a detention facility, which ideally we want to avoid at all costs, but if we are at that point it is conceivable to take an approach where we identify that young person's experiences and therefore the particular needs and complexities that they have, and it's not making assumptions, not generalising on the basis of those

experiences, but really taking the time to understand the child's - not only their experiences but what that means for their developmental stage and age, which you acknowledged before is not going to necessarily equate with their chronological age; understand the particular nature of the trauma that they might have experienced, which leads to certain different, you know, different paths, because we know that experiences of particular forms of harm are more likely to contribute to a particular kind of offending, we know that through the evidence base.

We need to identify disabilities or learning delays without apologising, because that's certainly a concern - probably a person-centred approach includes finding that balance between recognising a disability in a young person, for example, as a means of getting them support without them making it that it's all about that and that that is the only lens through which they're seen. So, understanding the whole person, all of their experiences and therefore what kind of support and intervention is going to be effective if we're on our rehabilitation quest.

Q. You make the point at paragraph 39 and I think at other points in your statement, that this is work that's going to have to be done by staff who have been trained to be trauma experts, it's a very specialised skillset.
A. Incredibly, and yes, I think we, without wanting to generalise, you know, Corrections or Justice System interventions don't necessarily see staffing complements of their workforce is being about expertise in that area, it's obviously about the good order of the facility.

So, what we're looking for and what we need to do is develop a completely workforce, a completely different trauma designed - to use those words - workforce, where we're going to have a system that functions in the way the community expects that it does, and the community expects that it does have a rehabilitative function, that it works, but it doesn't.

Q. So again, looking ahead and foreshadowing evidence that the Commission is going to consider later in its hearings in relation to the Ashley Youth Detention Centre, the evidence as I understand it will be that, although of course in Ashley there have been and continue to be staff who have been trained with appropriate expertise, some of the cohort of youth workers who work with young people day

in and day out might have had no particular expertise and might have had Year 10 or Year 11 as their highest level of education; that presumably poses some difficulties whether or not those staff are going to be trained and equipped to do this very complicated work with traumatised young people.

A. Yes, it is incredibly complicated work and I think, you know, across all jurisdictions we have training made available to different workforces and the content, I'm sure, is really good but it's usually pretty short-lived, doesn't take account of workforce turnover, which is a big issue in terms of how many you lose and the gains that we've made - we have to start again. So, there sort of needs to be a multi-pronged approach in terms of getting sufficiently qualified people, but also reinforcing that and revisiting and understanding all the time so that the gains that we might have made on the one hand aren't lost on the other.

Q. And as I understand it, one of the things that you've observed from your research is that one of the things that makes a difference for young people when systems are intervening with them is young people having the opportunity to develop rapport and trust potentially over a longer period of time?

A. Absolutely. Again, because of their experiences of trauma there are, as we said, very little reason that young people in these situations have to trust an adult, but that is reinforced again by the fact that often there have been many services involved in these young people and family life, but it's just this kind of continuous cycle of people, adults in and out, "I'm the next worker, you've got to disclose all of your trauma to me. I've got six weeks to work with you but now I'm going to hand you on to someone else", and so, there are very few opportunities for young people who are likely to have attachment issues to develop a real relationship.

So, what we've seen in our research are the benefits of those long-term engagements where it's not about the talk therapy, it's not about the sitting opposite each other and "now tell me all about your experience even though I met you five minutes ago", it's about sitting beside them, not sitting in front, sitting beside them, doing things together, developing rapport where eventually disclosures occur, eventually conversations occur where young people can actually link their experiences with their

behaviour and start to understand ways to prevent themselves from doing that again.

Q. And, presumably, to start to have that confidence that there are adults who do mean well and who can be relied upon and whose advice they could perhaps trust and take?
A. Absolutely. Because the evidence is in the doing, and young people have heard it all before; they've heard about the good intentions, but then they're let down time and time again because people either withdraw or, you know, they close the case, they've reached their quota for hours in their caseload, that's a very, very common one, and so, without necessarily kind of an overt hostility, young people in this situation, their expectations are at rock bottom, so there has to be a lot of evidence of proof is in the pudding type of thing for an adult to show, "Actually I'm not going to dump you, I'm not going to just close the case, I'm here for the long-term and I'll work beside you".

Q. And presumably, part of that demonstration will be staying with the child even if the child's behaviour isn't immediately perfect?
A. Absolutely, yes, and I think we, again, set up our young people to fail because we have these kind of expectations or our measurements are wrong; our measurements are all around recidivism and very kind of blunt measurements of - and our expectations are not realistic in that regard at all, but a measure of success that particularly in a program I've been evaluating recently a measurement of success is whether or not young people will re-engage, whether they will make a call to that trusted practitioner or trusted worker, "Ah, something's gone wrong again I need a bit of advice". That's a big gain if you're looking in the context of that young person's life.

Q. One of the other distinct points that you make that's important for Youth Detention facilities is that they be culturally safe for the significantly over-represented number of young people who are from Aboriginal backgrounds?
A. It's incredibly important, and certainly, again, I think like the issue of trauma, I think in recent years many workforces, and particularly around the Justice System, have sort of taken steps to undergo training or there are isolated Aboriginal identified roles within the wider workforce, and we sort of assume that's done the job: that's not done the job by any stretch of the imagination

because there is only so much that an individual worker can do, that can have a big effect on that trusted relationship. But if you're functioning in an environment that in and of itself is currently culturally unsafe, then that's just too much of a mountain to climb for one person, particularly carrying that cultural load, so again, it has to be designed from the ground up to think about what that environment is going to be like for Aboriginal and Torres Strait Islander young people who carry with them intergenerational trauma and who understand and have been essentially known to fear the intervention of statutory authorities their whole lives because that's what the state does, it doesn't help, it steps in and takes kids away and it locks people up.

Q. One of the points you then go on to make, and perhaps it's clear from the discussion we've already had, is that, given the damaging effects of Youth Detention even if it could be designed better, really the ultimate goal should be to divert young people away from entering the Justice System at all, and certainly away from entering Youth Detention, and you make the point that really it's evidence of a failure in early intervention and support systems that there are any children finding their way into this very damaging path?

A. Oh, absolutely, I mean, it really is, there are so many opportunities to support families with all the needs to which I was referring at the outset to prevent that trajectory from getting to the point of a young person going into Youth Detention. And, it's not easy, because the issues that families have experienced and young people experience are often so complex and so profound and often intergenerational, but we know that diversion pathways and community-based responses are more effective; we know that a strengths-based approach which, for example, connects an Aboriginal young person with community, and particularly with Elders and the usual kind of leverages, the strength of community is far more effective than depriving somebody of their liberty and then getting surprised when it doesn't have a positive effect down the track. So, yes, divert, divert, divert at every possible opportunity.

Q. You draw attention to the, sticking with the idea of the particular needs perhaps of Aboriginal children, but you draw the Commission's attention to the Koori Court model in Victoria which involves the community even where a young person is at court, and I take it that's a model that

you would commend to the Commission?
A. Yes, absolutely, the Koori Court started in Victoria 20-odd years ago, and they're about leveraging the strength of community within the Criminal Justice System model. So, community Elders or respected persons sit alongside the judicial officer, and essentially enquire of the accused, sort of have a discussion or a yarn with the accused about their needs and their hopes for the future and who they want to be, and they provide advice to the magistrate around a sponsor or an intervention and that kind of conditions are an appropriate order that will be likely to be most effective.

That is a far more powerful experience for an Aboriginal or Torres Strait Islander young person in this case than it is to go through the standard, you know, stamping kind of churn of the mainstream Criminal Justice System, because the community has significance and if they're brought before Elders and respected persons that's going to be incredibly powerful, so we know that that has a really positive effect and we have gradually expanded it throughout Victoria in the last 20 years and it operates in the Children's Court jurisdiction as well.

The only issue there that I would highlight is that the Koori Court Children's Court is still attached to the adult Magistrates' Court jurisdiction, so the Children's Court division doesn't necessarily have the lens and the coordination function that I would suggest it should have, so that sort of still needs to bring in more of that child-focused lens.

Q. You've raised the issue of the Koori Courts and another model in New Zealand as well in the concept of therapeutic justice rather than what you describe as the very adversarial system that exists at present. Some might say that therapeutic justice is really a form of letting people off and not taking their behaviour seriously and it's a soft proposition; I don't think you'd agree with that proposition?
A. No, I most certainly would not agree. I think probably my entire work is around understanding - you know, therapeutic justice is often still strangely viewed as an alternative rather than the logical conclusion which is, it is about understanding the causes of offending so that they can be addressed so that the community can be safer, because the adversarial model that we adopt, that sort of

cookie cutter stamping through, doesn't make things better, it doesn't change behaviour, it entrenches harm, and so, it makes the community less safe.

So, therapeutic justice is about looking at the whole person, understanding what got them there, and then understanding what we can do as a system to kind of pivot that trajectory to direct people on another path so that the offending is not repeated. So, absolutely, I don't think it's a soft option. Often it's really experienced as sort far more onerous in a way, because people can't be anonymous, particularly through the Koori Court system. You're not just kind of going through and not engaging, and you're seeing for everything you are and all of your experiences, and so, that can be a big deal, and a lot of people's experiences are far more significant than the mainstream system.

Q. One of the pieces of information that the Commission's been made aware of, thinking about Youth Detention in Tasmania, is the value many detainees have placed on the school that operates inside Ashley, and you make some comments from the Victorian perspective about the significance of education for young people who are in detention; could you tell us about that?
A. Yes. So, we have in Victoria a model called Path To College, which is a government school which operates within a couple of Youth Detention facilities and then we did satellite work on the side, and the significance of that is that the staff are all educators, they're not - education is seen as a right, not a privilege, which it should be as seen under international law, and staff are trained in trauma-informed practice, although there's been kind of a few challenges over the last few years that they're sort of coming out the other side trying to address now. So, we're actually going to be doing some work with Parkville over the next couple of years to kind of map some of the longer-term trajectories for young people in engaging education.

This is an example of where children are taken into Youth Detention Centre, which we want to avoid; that experience can function as a positive intervention if it's facilitating access to something with which they just weren't engaged before, and there are all sorts of reasons why young people - all the reasons that we've explored already this morning - why young people in this situation

are not going to engage with school, or if they are going to school, it's not just going to be, you know, have a meaningful effect for them.

So, how is it that we can leverage their interaction with the Justice System to connect to them with a pathway out, because I think there are many quotes that I could put to you about the significance of education as - I think it's something about, "If you open a school, you close a prison"; but we know very, very clearly that education is a pathway out of disadvantage and out of the Criminal Justice System. So, there are some really interesting examples of good judicial practice where judicial officers in the Children's Court in particular will link a young person's sentence or the order to the completion of a certain level of school attainment, where they would likely not to have reached that without that intervention. So, that's a really significant and good example of how, if we do need to bring kids into contact with the Criminal Justice System, we can turn that into a positive intervention.

COMMISSIONER BENJAMIN: Q. Ms Campbell, in terms of indigenous juvenile justice in Victoria, and if I've got the pronunciation wrong, forgive me: the Wulgunggo Ngalu Learning Place in Yarram for young Aboriginal men is an example, is it, I'm asking you if you know about it, if it's an example of your trauma-designed centre?
A. Wulgunggo Ngalu, I do know about it; I'm actually going down there in a couple of weeks for one of the projects that I'm running. It's generally for adults who are on Corrections or --

Q. Yes, I know that.
A. Yes, and so your question was, is it a good example of something that --

Q. Is it a good example of a trauma-designed facility?
A. I think it's definitely trauma-based. I think, because it is still a Corrections facility and there are challenges around the fact that - some interesting challenges there in terms of the facility is on country which is seen to be a really positive strength because it connects men with culture and country and disconnects them from some of the less positive influences in their lives, but at the same time it can disconnect them from family, so it's difficult to see family members when men are residing there, and so there's sort of some challenges there that I

think are relevant to - we're also looking - we're involved in helping to look at designing an equivalent for women, Aboriginal women in Victoria at the moment. But there are certainly other programs that run already for young Aboriginal people in Victoria, like Bunjilwarra, which is about taking young people out on country, but it's community-based, it's not a residential program and not necessarily - it's not about being on a Corrections order before you can get there, but it's certainly about taking a strengths-based approach, I think is probably the more appropriate wording there, and a culturally safe approach to responses which can set young people up on a different path and give them a sense of who they want to be and who they want to connect with. But certainly Wulgunggo Ngalu is the best option that we have at the moment. I think it's limited, it's very limited, it's only got a small number of men able to reside there at the one time, so I think there are efforts at the moment across the appeal justice forum in Victoria to look at ways we can expand to have more options that are community-based programs as well. I'm not sure if that answers your question?

COMMISSIONER BENJAMIN: Thank you, it does.

MS ELLYARD: Q. Can I turn to a couple of different topics, Ms Campbell. You mentioned before your observation in Victoria that sometimes the Children's Court will frame orders that operate to help a child stay in school with all of the benefits that that follows. In quite a different context, which is the context of children who use harmful sexual behaviours, you've drawn the Commission's attention to the existence of Therapeutic Treatment Orders which can be made by the Children's Court to require a child to engage in treatment?
A. Yep. So - sorry, your question?

Q. So, I want to come and ask you some questions about restorative justice, and TTOs aren't restorative justice but they are a kind of a mechanism by which the Justice System is seeking to address the underlying concerns of offending by providing a child who's engaged in harmful sexual behaviours with treatment?
A. Yes, and I think this is an interesting example of a very therapeutic approach taken to a particular type of offending behaviour by young people that is not taken to other types of offending behaviour by young people, and there's an interesting contrast there between where a young

people might identify as a respondent in a family violence intervention order where there are forms of violence at home, the system takes an incredibly punitive response and there's no access to services kind of leveraged by the court. Whereas in this context responses that have been developed and designed from a very clinical perspective, like the response to sexual offending more broadly, that program response is quite well developed so the court requires the young person and family to engage with services.

But I think, as I might have said in any statement, one of the benefits of it is, it's also very much about requiring those services to engage with the family and young person, because we've got to remember that we often make all of these orders and send people off and make referrals and send people off and expect them to get it done, and sort of again set them up to fail if that referral doesn't stick, or the simple fact is that there's a massive waiting list for those services and so that children and young people can't engage, so it's about bringing those services to account for their capacity to provide that support for children and young people.

The main challenge with the TTOs is that the psychological assessments required for that are terribly expensive, and so, we've sort of - I think there's currently discussions about how to address that issue because sometimes that creates a bit of a bottleneck for that occurring in terms of then children and families then getting referred out to the necessary services.

Q. I think the Commission heard in evidence in an earlier week of the hearings about one of the benefits of the TTO model being that, because orders could be made, there had to be services in place ready to respond if an order was made, and I wonder whether you're reflecting on perhaps the potential role that orders of similar kind would play for young children displaying other kinds of offending behaviour. If the court had the power to compel a child using other forms of violence to undergo treatment there'd be a corresponding obligation on the state to have treatment available for them?
A. Absolutely, and that was the recommendation that we made in our PIPA project research looking at the use of violence at home by young people, because in the Victorian context, for example, where the predominant response is a

civil order, children and young people who responded to that intervention order, there's no levers pulled; and so, there might be a recommendation that a child be referred to a particular intervention, but they're not compelled in the same way and it doesn't even work in the same way as in that the statewide diversion scheme wants surety in the Criminal Justice System, so if we recommended that a similar approach be looked at and developed in the context of children using family violence.

Q. I now want to ask you some questions about restorative justice. The Commission, as you know, is focusing on Responses to Child Sexual Abuse in Institutional Settings, and that brings up restorative justice in a couple of ways. Firstly, the role that it might play in the case of young people who engage in offending behaviours as a diversion mechanism or as a rehabilitation option, but secondly and perhaps quite separately the way in which restorative justice might better meet the needs of victims, including relevantly victims of sexual harm.

Can I ask you for your reflections perhaps generally about the role that a restorative justice approach can play in meeting the interests of victims?

A. Certainly. Well, the Centre for Innovative Justice, you'll be aware that we not only run a program of research in relation to restorative justice, but we have a service delivery arm called Open Circle, and that was developed because we recognised that this is a gap; there's not a lot of work occurring in this area, but restorative justice is a particular approach that is more likely to meet a wider variety of victims' needs certainly than the adversarial system.

And those needs, I think there isn't a one size fits all; those needs are going to be very, very different in different circumstances, but we know certainly how wildly re-traumatising the adversarial prosecution process can be, particularly in the context of matters of child sexual abuse where it takes an incredibly long time; being victim-survivors are, to their surprise, simply a part, you know, a witness in their own matter rather than a party to the proceedings which nobody probably - very few people understand before they get to that point. We know that so few matters actually proceed through prosecution, let alone to conviction, and all those sorts of things. So, there's an opportunity there for people to tell their stories of

what they've experienced, have those stories validated and recognised and acknowledged, and potentially to ask questions and have them answered or receive some sort of apology.

But I think it's important to acknowledge that that doesn't mean that it's always appropriate, certainly not in the context of between the victim and the offender if we're talking about an adult offender with an abuse of power and a child victim-survivor. So, it's a very, very careful process and it's something that has to be approached with a great deal of caution and over a long period of time to prepare everybody.

So, we certainly don't recommend it as sort of this default alternative: oh well, the adversarial system is not working, off you go, here we go, we've got this better option, let's let the adversarial system off the hook. But there are real opportunities to acknowledge victims' needs in different ways and that includes particularly responses from institutions who can acknowledge not only the initial harm that a young person may have experienced while in that institution's care, but then address the further harm that may have been compounded by the institution's initial response, and that's a really, really, really important step.

PRESIDENT NEAVE: Q. I want to ask you a question about that. So, this is a situation where you could perhaps contemplate the head of an institution that has turned a blind eye or not dealt effectively with an incident or incidences of child sexual abuse, where there may not be any possibility of obtaining a conviction against the offender, this would be a means of the victim-survivor having an opportunity to discuss the impact on them with the head or heads of an institution and to get some satisfaction about what might be done in the future to prevent these sorts of events occurring? Is that what you're talking about?
A. Absolutely, yes.

Q. Have you seen it used in that context?
A. Yes. Yes, it's used in - we've seen it used at RMIT recently.

Q. Yes.
A. Where that's been really powerful in terms - because

so often the head of an institution is completely disconnected from these reports and experiences they might have heard about, so when they're hearing about it in the abstract they just see it as a bit of a problem, you know, oh no, what are we going to do to manage this, looking at damage control. Whereas when you have the head of an institution or senior people in an institution actually face many of the real life people who have experienced this harm, you can't see it in that light anymore, you have to personalise it, you have to acknowledge that things have to work differently.

I've actually seen or I've been involved in some work that occurred about 10 years ago in the context of the Australian Human Rights Commission's review of the Australian Defence Force, treatment of women in the Australian Defence Force, and then the Sex Discrimination Commissioner decided after hearing all of these accounts of, usually young women for the purposes of that review who experienced really horrendous things in the context of their time in the ADF, she brought them together with the heads of the ADF and they sat in rooms and heard about those young women's experiences, and they - interestingly, one of the most powerful things is they also met with those young women's families and their parents who were sort of sitting there saying, "I entrusted my daughter to your care and this is what's happened, what are you going to do about it?"

And it was after that that the ADF's response was unequivocal, that was when the message came, I don't know whether you remember that, the video of David Hurley who then went on to become Australian of the Year saying a message to all members of the Australian Defence Force, "We won't tolerate this treatment in our Defence Force. If you don't like it, then get out", and that was a really - that's where that came from; that sort of strength of, oh, we personalised this, we can never unhear that and now we have to do something about it. So, yes, I'm a very strong believer in that.

COMMISSIONER BROMFIELD: Q. Ms Campbell, one of the institutions that we are particularly looking at is out-of-home care, and in that context we have heard stories of children who experienced harmful sexual behaviours while in care, who have experienced abuse at the hands of people in authority who were meant to be caring for them, and also

children who experienced child sexual exploitation from people outside of the care facility but which was not disrupted or responded to. So, I guess a system in which, similar to the Defence Force, there are pervasive issues; in that context could you see a restorative justice system approach being utilised specifically in the out-of-home care context?
A. Oh, absolutely, I think there's opportunities in any kind of institutional context. I think some of those contexts have to be recognised and understood where there sort of has to be work done beforehand for the institution to see the value of it; you can't just kind of suddenly compel people to engage, particularly or potentially in out-of-home care where it's such a difficult environment to work in. So, I suspect there's quite a few kind of rules or ways of sort of separating yourself from the vicarious trauma of the environment in which you're constantly faced to say, "Because that's the norm", you know. So, they're not seeing it as, oh no, this is a terrible thing that's happened, that's the exception; the experiences of those children in their care, that's the norm, so how do you kind of work with institutions to say, actually, this is very - how do we support you to get to the point of actually engaging in this conversation because it's a really difficult conversation to have.

MS ELLYARD: Q. And I take it from the example that you've given of the Australian Defence Force, Ms Campbell, a significant component of what was possible was that the leadership of the army really did understand and take into themselves the seriousness and the wrongfulness of what had occurred?
A. Absolutely.

Q. And so, the restorative justice in that context was much more than, for example, the delivery of an apology from a senior bureaucrat; the young women involved would have experienced the processes having a deep and a more sincere kind of commitment by the leadership?
A. Yes, yes, I think you do have to see it - "personalised", I suppose, is the word I would use, that you can see that someone has actually understood and acknowledged, and not just in the words that they use to you then, but harking back from what we were saying before, that seeing it and doing it as well, seeing it and the subsequent actions and the change that is brought about.

Q. You make the comment in your statement that sometimes this kind of approach doesn't sit well with what might be the natural instinct of an institution to deflect or protect itself and to think in terms of legal liability. I take it that in the observations that you made in the Defence Force example the leaders in that case were able to operate without being constrained by those fears?
A. Yes, I think they found a constructive way forward where, because the acknowledgment is saying, you know, "We hear what your experiences are and we believe you, and we are going to do something about it", I think every institutional response is going to have their own particular criteria or their own particular consideration, so I wouldn't want to generalise that it's just really easy; I wouldn't want to suggest, oh, yeah, everybody can go off and do that tomorrow. But I do think there's a default or this automatic kind of pulling up the drawbridges of, quick, we've got a kind of threat to our institutional - usually it's financial, it's also seen as reputational, but I think there is a way of walking that line of managing that while still mitigating the harm that's been caused or preventing further harm being caused by, you know, a blind kind of dead bat response.

Q. If we come back to the idea of restorative justice as a form of justice for harm committed as opposed to a means by which a problem can be managed for an organisation, then I take it the measure of success of a restorative justice scheme would be the extent to which it does provide victims with an outcome that makes them feel heard and that makes them feel that they've been understood and their experiences were wrong and shouldn't have occurred?
A. Yes, and it may, again, depending on the particular person, it may mean that they come away with information about why something happened that they experienced as particularly upsetting, you know, in the context of an institutional response, but there's an explanation, "Oh, yes, we understand that you experienced that in that way but we had to do this because, or we thought we did because of this reason", so it's also a little bit about information sharing and a dialogue that makes people - victim-survivors feel less shut out because that's one of the predominant feelings of victim-survivors of sexual offences in the Criminal Justice System more broadly, of just being completely excluded, no information.

MS ELLYARD: Thank you, Ms Campbell. Thank you

Commissioners, those were my questions.

PRESIDENT NEAVE: Thank you very much indeed, Ms Campbell.
A. Thank you.

PRESIDENT NEAVE: And we'll now rise.

LUNCHEON ADJOURNMENT

PRESIDENT NEAVE: Thank you, Ms Rhodes.

MS RHODES: Thank you, Commissioners. If I could call our next witness, Ms Catherine Edwards, to the box.

<CATHERINE DEANNA EDWARDS, sworn: [1.35pm]

<EXAMINATION-IN-CHIEF BY MS RHODES:

MS RHODES: Q. Thank you, Ms Edwards. Ms Edwards, could you please state your full name and occupation for the transcript, please?
A. My name is Catherine Deanna Edwards and I'm the manager of Victim Support Services.

Q. What's your professional address?
A. 54 Victoria Street, Hobart.

Q. Thank you. You've prepared a statement in response to a notice for a statement for the purposes of this Commission. Have you had an opportunity to read through that statement?
A. Yes, I have.

Q. And is the contents of that statement true and correct?
A. Yes.

Q. Thank you. Ms Edwards, you are currently the manager of the Victim Support Services, but you are a qualified lawyer; is that correct?
A. Yes, that's correct.

Q. You've held positions at the Legal Aid Commission of Tasmania from 1995 to 2000?
A. That's correct.

Q. And the office of Anti-Discrimination Commissioner

from 2000 to 2014?
A. There is a detail I should mention: I did do a placement at the Office of the Ombudsman for 12 months. I'm sorry, it was referred to in my resumé.

Q. That's fine, thank you. Whilst you were at the office of the Anti-Discrimination Commissioner, you did act up in the Commissioner position at periods?
A. Yes.

Q. And currently, besides being the manager of Victim Support Services, you are also a sessional criminal injuries compensation --
A. That's correct.

Q. Could you please tell the Commissioners, just briefly, what services Victim Support Services provide?
A. Sure. So, Victim Support Services works across four areas: Victims Assistance Unit, the Eligible Persons Register, the Court Support and Liaison Service, and the Victims of Crime Service.

Q. Can you give a high level description of what the Victims of Crime Service provides?
A. Certainly. So, the Victims of Crime Service is a service that provides counselling support and referral to victims of violent crime and sexual offences. So core functions of the Victims of Crime Service include trauma-informed counselling and also assistance to victims in preparing applications for Victims of Crime assistance and preparing victim impact statements.

Q. I understand that the Court Support Liaison Service is in relation to Safe at Home which is a Family Violence Service?
A. Yes, so the Court Support Liaison Service is part of the Safe At Home Program which is the whole-of-government program providing support and assistance for victims of family violence. So, the court support and liaison officers assist victims of family violence as their matter progresses through the court, and that's before, during and after court.

Q. And the Eligible Persons Register, I understand is that victims can nominate to be put on that register?
A. Yes. So, the Eligible Persons Register is established in accordance with the requirements of the Corrections Act,

and essentially where a victim of a violent crime, sexual offence or family violence, where the offender has been sentenced to term of imprisonment the victim is entitled to join the register, and the victim is then provided with certain information about the offender while they're serving their custodial sentence so the victim can be notified of details such as eligible release dates, notification of applications for parole, notification of the outcome of parole and also notification of leave periods.

Q. And that service can also help the victim if they wanted to make a submission to the Parole Board; is that correct?
A. Yes, that's correct. So, victims can make a victim impact statement that talks about the impact of - the ongoing impacts of the crime on their lives, and that can cover of course, financial, social, emotional impacts and then that's forwarded to the Parole Board for consideration.

PRESIDENT NEAVE: Q. Can I just ask you a question about that?
A. Yes.

Q. So the Eligible Persons Register, there has to have been a conviction; is that correct?
A. Yes, that's right.

Q. So that doesn't involve notifying a victim about bail, about whether the alleged offender had been bailed, that information --
A. That's correct. So, it's a service that essentially is provided after sentence.

Q. Thank you.
A. I should mention that we do occasionally get enquiries from victims of child sexual abuse who provide an account to the Service that they have been abused, but because there was no conviction they don't have an entitlement to join the register.

MS RHODES: Q. Your Victims of Assistance Unit, they're mainly responsible for assessing applications for Victims of Crime Compensation?
A. Yes, that's correct. So, the Victims Assistance Unit is the unit that provides administrative support to the

Criminal Injuries Compensation Commissioners, and so they provide administrative support to the Commissioners in processing the application and finalising awards.

COMMISSIONER BENJAMIN: Q. Just going back to your earlier comment where you said you sometimes get enquiries in relation to the Eligible Persons Register by survivors of child sexual abuse, where somebody's in jail but they're not incarcerated for the purpose of that crime, they're incarcerated for the purpose of other crimes?
A. That's right.

Q. And you're not able to assist them?
A. No.

Q. Do you see that as a lacuna in the law at all?
A. Look, I think it's an issue that requires some further deliberation, because we do - there's a prohibition on publication of proceedings under the Act, but in general terms I can say that we have certainly dealt with a number of cases where there have been multiple victims of a perpetrator and, in a broad sense, there might have been a number of victims in respect of which a conviction was recorded but proceedings may not --

Q. Not all of them?
A. Not all of them, and so that can be very difficult of course for the victim, but also, it's a difficult situation for the staff as well, because we get calls from a victim who may be quite concerned to hear and wanting to know what's happening with the progress of an offender and, because there hasn't been a conviction in respect of that victim, they don't have an entitlement to join the register. So, I think that's an area that potentially needs some further consideration, because the entitlement to join the register is strictly tied to that conviction.

Q. And being the victim of that person and associated with the particular crime?
A. Yes.

Q. So, if somebody's charged with, say, 15 offences and they proceed on two or three, it's the two or three survivors who go on the register, but the other 12 or 13 may not be on the register?
A. Yes. I should mention just for the sake of completeness that there is a provision for "another person"

category, so that the Secretary or the delegate, and the delegate is - I'm the delegate of the Secretary - can approve a person in the "other person" category joining the register, and that applies when the delegate forms the view that a person's safety - or there are safety or welfare interests that justify that person going on the register. So that typically applies in circumstances where, for instance, you might have a secondary witness or there might be some other relevant facts that justify the person being included in the register. So, as the delegate I do interpret that provision beneficially and liberally, but there are limits to how far do you constrain the use of the language to enrol someone under that category.

COMMISSIONER BENJAMIN: Thank you.

MS RHODES: Q. You've got quite a lot of services available under the Victims Support Services banner?
A. Yes.

Q. But you have quite a limited staff; is that correct?
A. Yes. Yes, it certainly is. I would describe the service as a small output with a large public footprint in terms of the services provided to the community and to victims.

Q. In your statement you detail a number of resourcing issues, being lack of workforce, limited number of Commissioners in terms of the Compensation Commissioners, a lack of funding for training, and the lack of funding for the Commissioners means you're actually operating at a structural deficit?
A. That's right.

Q. Could you perhaps reflect on that and explain to the Commissioners what you would need to improve your service for victims?
A. Yes. If you bear with me, I'd like to just take it through step-by-step and there are four services.

The service that is most engaged with survivors, victim-survivors of child sexual abuse is the Victims of Crime Service, and that, in my view as manager, that is the service that is in most need of additional resourcing. There is a current complement of 2.4 counsellors for the state, and the need is most pressing on the North West coast, where we only have a counsellor two days a week.

And, the counsellor's a very hardworking team member, but the reality is with the existing resourcing we only have a counsellor available on Monday and Wednesday.

So that has the consequence that, if a victim presents for face-to-face counselling on Tuesday, Thursday or Friday, there is no-one in the office to attend to that person's needs. We do our best by referring counsellors to - referring the person to counsellors in the other region, but of course there's only one counsellor in Launceston and one counsellor in the south, so they're already bearing a heavy workload and that puts a real constraint.

So, in terms of the Victims of Crime Service, I would see an urgent pressing need, initially as a starting point to step up the counsellor from 0.4 to full-time. But ideally, because we do have a key person dependency in each region, to lift to, as a starting point, to two counsellors in each region.

PRESIDENT NEAVE: Q. And this isn't confined to child sexual abuse, it's a counsellor that applies support to somebody who was seriously injured by - intentionally seriously injured or a number of other offences against a person?
A. Yes, that's correct, President Neave. The VoC Team, they are providing a service to victims of crime across all categories, so that includes homicide cases, robberies, the whole gamut of offences. But even reflecting on that, there have been two key drivers for demand for services in recent years, particularly since the National Royal Commission, particularly around family violence, family violence and sexual violence and child sexual abuse. So, yes, it's a very heavy workload for the VoC team.

Q. And how do you interact with the specific Sexual Assault Services that provide counselling?
A. So, I would describe it as a collaborative relationship, and so, where for instance if there's a capacity constraint with our existing staffing, we would refer staff to Laurel House and SASS, and of course they're doing a lot of work in this field.

We do, however, we've had a number - and I'm choosing my words carefully here because I need to protect the confidentiality of clients - but we have a number of

long-standing clients who have been with the VoC Service for a good number of years and they wish to retain counselling services with VoCS, and of course we're very conscious not to re-traumatise them by putting them on a pathway they have to repeat their story.

So, I hope - does that answer your question in relation to?

COMMISSIONER BROMFIELD: Sorry, Ms Campbell, I should acknowledge that we have heard positive feedback about your Launceston-based counsellor from a couple of witnesses this week who are using the service.

MS RHODES: Q. Just to clarify, in terms of that Victim Support Service, there's no criteria for a person to come and use that service, is there, unlike your Victim Compensation Assistance Unit where there needs to be an offence; is there any eligibility criteria a person needs to satisfy before they get assistance from the Victims of Crime Service?
A. Yes. It's not tied to the entitlement to Victims of Crime Assistance, so it's a broader scope. So, it's essentially, a person needs to be the victim of a violent crime, a sexual offence; a secondary victim as well, so it includes witnesses of a crime and also related victims.

We do, however - our scope is very broad and I'm aware of a number of cases where the VoCS team have accepted referrals from Tasmania Police and other stakeholders that goes even broader than the categories I've outlined.

But I have to say in truth that, as a result of the resourcing constraints, the scope of the Service has at times been confined by the budget and, if that resourcing constraint wasn't there, we could be doing more in terms of, particularly around court support for victims.

And I should explain, I make a distinction between the court support that's provided for victims of family violence, because they're able to access court support through the Court Support and Liaison Service as part of the Safe at Home Program, but as a result of resourcing constraints there have been limits on the capacity of the VoC team to provide court support for people who are seeking assistance outside of the Safe at Home Program and I know that that has been a matter of deep concern to the

VoCS team.

Q. Is adopting a model similar to the court support liaison officers that you have for the family violence offending, is that model something that would be helpful to adopt in terms of child sexual abuse?
A. Yes. My view is that there's much to be gained and learned from the Safe at Home Program, and I'm just talking broad brush terms here. A clear advantage that I see for the Safe at Home Program is that you have a number of government stakeholders working in collaboration for a common purpose, and it really provides a really good system for sharing of knowledge and learning. To take an example with the Court Support Service, they have regular ICCM meetings which are Integrated Case Coordination Meetings where the Safe at Home partners meet to discuss and do risk assessments for new cases and also for active cases.

So, the difficulty that I see with VoC is absolutely one of resource constraints, but I would see clear benefits in adopting a whole-of-government working across department approach that you see with Safe at Home.

Q. And, when you say Safe at Home partners, that's police, Health, those --
A. Yes. So, Tasmania Police, Department of Education, Child Safety Services, and the Defendant Health Liaison Service that operates within the Department of Health. So, I see really clear benefits here and I've reflected on that deeply when I've been listening to accounts about service gaps and difficulties with record-keeping and so on, and the observation I'd make with Safe at Home is that, if a service is not picking up on a particular issue, it's likely to be something that another service will see, and through a structure like ICCM there can be sharing of knowledge and testing of ideas and robust exploration of issues.

Q. Whilst we're on the VoCS, one of their services is also to assist with victim impact statements; is that correct?
A. Yes.

Q. The Commission have had evidence that some victims who have used that have not found that very helpful to them and they've felt that their story was taken over by the person assisting them to make that statement. Could you explain

to the Commissioners how involved the VoC staff are in preparing those statements for court?
A. Well, my understanding of the process is that the counsellors work collaboratively with the victim to assist with the preparation of the statements; of course, I'm keen to hear feedback that's provided. I would make the observation though, that with victim impact statements there are a set of rules that need to be observed in the preparation of that statement. For example, there's the rule that victim impact statements are not to make comment about what sentence should be imposed or to use offensive or provocative language. So, without knowing the full circumstances, it's difficult for me to comment, but certainly it's important that victims have an opportunity to give voice to their concerns and experiences and interactions with the Justice System and that is very difficult particularly in cases of very serious crime where there can be some horrific impacts on victims.

PRESIDENT NEAVE: Q. Can I just ask a question about that which reflects my ignorance?
A. Yes.

Q. When a person has had a victim impact statement prepared or they've prepared it with the assistance of your Service, is that typically read out before the sentence is imposed? How is it actually handled in the court process and this may be beyond what you do?
A. Yes - no. My understanding is that there are a couple of options, in that, the counsellor will typically discuss that with the victim, there's an option to read the statement out or to have another person read it out for them.

Q. Yes.
A. Again, I'm talking in broad terms here: our experience has been there can be a range of responses. For some victims it's very important that they have an opportunity to read the statement out to give them as much agency as possible, but for other victims there can be circumstances where they're just so distressed that they would find reading out the statement re-traumatising, so in that circumstance we tend to see the option for someone else to read out or for the judge to read the statement.

PRESIDENT NEAVE: Thank you.

MS RHODES: Q. At paragraph 36 of your statement you talk about changes that have come about from the Royal Commission, changes in your service provision, and in particular you talk about a change in the case management system. The way you've described it, am I correct to assume that you were the instigator in changing this system? Was it you watching the evidence out of that Commission that made you think that this system needed to change.
A. The learnings from the National Royal Commission were certainly very critical and important. Also, when I commenced in the role - and again, I'm talking in broad brush terms - and reflecting on prior practice, I became concerned that there was a system gap, in that - and I'm talking in broad brush terms - that there was a substantial cohort of victims who really struggled to access medical records and counselling reports to support their applications. And there can be a number of reasons for that: again, I'm talking in broad brush, for some victims they simply can't afford to get a counselling report or a specialist report; for others, they're very distressed and need guidance through that process.

So, I was concerned that there were a cohort of cases that were simply not being progressed to hearing because the victim was not in a position where they could progress the application and they were needing further support and assistance. So, essentially, following a review of the processes, it was really about strengthening and enhancing processes and so the Victims Assistance Unit is now very actively engaged, with client consent, in obtaining reports from treating practitioners, counsellors and psychologists, again with client consent.

The benefit of that case management approach is that the VAU is then able to access the material to support the victim with their application, and it can also assist the victim in that they then don't have to go into too much detail about their experiences.

Q. With that getting information does the VAU get transcripts of proceedings to inform themselves as to the offending and the nature of the offending?
A. Yes. So, it's quite an involved process, but initially when the application comes in we have an established practice with Tasmania Police that we will - the VAU will initially do a request for information and

generally - well, Tasmania Police will provide the full police file at the conclusion of court proceedings, and of course that's critical to ensure that any processing of claims does not taint investigations or outcomes of proceedings before the court.

So, initially for a large number of claims, where matters are still before the court, the VAU will initially get the offence report, and that offence report is usually the first document that enables the VAU, and myself as Commissioner, to make an assessment of the initial jurisdictional requirements.

For matters that are before the court, there can be a process of waiting before we ultimately get the full police file, but when court proceedings have been finalised then we do get the police file, the comments on passing sentence. It's rare for us to ask for the transcript because usually the full police file and the comments on passing sentence will address the relevant matters.

Q. We've heard a lot of evidence about pre-recording, particularly in relation to child victims having their evidence pre-recorded for the purposes of trial. Is that a document that the VAU would look at or not?
A. Well, we get - with the full police file we get the statements that have been prepared within the file. If there was any recording of interviews, we would also call for that as well, yes.

Q. The VAU, as you said, is responsible for assisting the process of the application for compensation, so as a victim of child sexual abuse, if I came to your Service, what would I expect from your Service going through that process to get compensation?
A. So, if the - well, as a starting point there would be an opportunity to refer the victim, should they wish, to take up the opportunity of counselling with the Victims of Crime Service at that point, but that's a question of - a choice for the applicant. Some victims at the initial stage will already have a treating relationship with a counsellor, so there's no need for a referral at that point, but for some people who struggle to access resources we would raise the option of a referral to the Victims of Crime Service.

Q. And then what would be the next step after that?
A. So, the Victims of Crime counsellor would assist the victim to prepare the application for victims of crime assistance, and then it may also involve assisting the victim to apply for an extension of time, and then the application is lodged with the Victims Assistance Unit, and that then starts off a process of initial assessment which is done by the assessment officer who prepares an assessment summary, and the administration staff with the VAU commence the process of requesting the police file, if there is one.

Q. In that process I understand that there are some prerequisites for applying for victim assistance; is that correct? So, for example, there needs to be an eligible offence; not all offences are able to obtain assistance?
A. That's correct. So, broadly an offence of violence, which of course includes sexual offences which are inherently violent, and also - sorry, I've got to be precise here: offences of family violence that include a threat of violence or a physical act of violence.

Q. Then there's also a restriction in terms of a limitation period?
A. So, the Act provides currently that an application for a Victims of Crime Assistance must be made within three years of the date of the offence, but that time limit does not apply to victims who were a child at the time of the offending. So, child victims have three years from when they turn 18 to lodge an application.

Q. The Commission has heard a lot of evidence about the delays of disclosing, particularly in relation to children who have been victims of sexual abuse, and that can take years, decades, before they feel comfortable in reporting, if at all. I understand that there is an exception under the Act where they need to prove special circumstances for the Commissioner to say, yes, I'll accept your application out of time.

What's your view in relation to whether that requirement is truly trauma-informed when it comes to victims of child sexual abuse?
A. Yes. So, I've obviously read with great interest the reports from the National Commission that have talked about the reasons for delay in disclosure, it can take many years for a victim to disclose abuse; it can often be a staged

process of disclosing to a number of different people.

The VAU has received a substantial cohort of applications from victims of child sexual abuse that are out of time, and all of the literature around this issue that points to the barriers for victims of child sexual abuse in making disclosures and the significant psychological impacts that victims experience, they are all directly relevant to the special circumstances test.

So a Commissioner can grant an extension of time where they're satisfied that special circumstances exist. Sorry, the second part of the question, I've --

COMMISSIONER BROMFIELD: Q. Can I maybe ask it differently. I understood from your statement that you use the specialist circumstances in, you know, essentially it sounds like routinely accepted. I think the question is, would in your view it be optimal to just have a presumption that there is an extension, that there is no limitation for child sexual abuse?
A. Yes, I would strongly agree with that view. I have dealt with many applications for extensions of time, and I think that in some ways, having regard to what we've learnt from the National Commission, it's just a very incredibly onerous process and I don't think it's trauma-informed.

COMMISSIONER BENJAMIN: Q. So, that would then bring it into line with civil litigation, where there is no limitation period now?
A. Yes.

Q. And, given that, would that same approach by you apply to people who are victims of child sexual abuse from before 14 August 1976? Should they fall into that category as well?
A. That's a very difficult question because the Act commenced operation on 4 August 1976 --

Q. That was why I asked the question. In your state you said you can't --
A. Yes, it's very difficult, very difficult, because the Act does not have retrospective application, and I can tell you that we've had a number of calls from victims of child sexual abuse in community settings and in family settings, where the offending occurred prior to the commencement of the Act and we - the staff have to explain very gently and

with as much empathy as they can that, unfortunately, it's not something that's covered by the Act, and that invariably is a very distressing outcome for the victims.

Q. And presumably, the Act could be amended though, could it? I don't know?
A. Well --

PRESIDENT NEAVE: Q. And if it were amended, presumably you'd have to apply it to all crimes that are covered, not just child sexual abuse, although there are specific problems in the context of child sexual abuse. So, if you made it retrospective, presumably it would have to be - well, it would be hard to justify, given it will be in some areas and not in others?
A. Yes, there's a difficult issue there in terms of quality for the law and in terms of status; giving victims in one of --

Q. Can I ask you one other question again which reflects my ignorance of your scheme? The time limit is relevant to the application for compensation. Does it also apply if somebody is seeking counselling, for example? So, I realise in my mid-20s that the reason I'm suffering a whole series of psychological problems is because I was sexually assaulted as a child: can I come to you in those circumstances and seek the counselling support? Does the time limit only apply to the --
A. That person could seek counselling support.

Q. I see, so there's no time limit for the counselling support?
A. That's right.

Q. Only for the payment of compensation?
A. That's right.

PRESIDENT NEAVE: Thank you.

MS RHODES: Q. I understand from your statement that the extension of time requirement is going to be removed; is that right? Is there amendments in - I'll go to the paragraph.
A. Yes, that's my understanding, that there's a deliberative process that's being given the highest priority to progress that. I'm not privy to all of the internal deliberative processes, but certainly that's my

understanding, that it's being progressed.

Q. That's at paragraph 142 of your statement.
A. Yes.

Q. Noting your answer that you don't have all the details, are you aware of whether that is going to be retrospective so that, if someone applies - the offence happens before this new legislation comes in, they can still apply out of time or whether it would only operate for offences that occur after the introduction of the amendment?

PRESIDENT NEAVE: And I think, not before the introduction - the original introduction of the legislation, but something that happens from 76 to the time that the legislation is amended.

MS RHODES: Yes.

Q. So, say, for example, this extension of time requirement is removed tomorrow, would people whose crimes occurred prior to tomorrow were to apply for compensation, would the old requirements of the time limits apply or would they not?
A. My understanding is that the measures are intended to operate as beneficially as possible, so the older - I'm not expressing it very well. My understanding is that the intention is to lift the requirement, but there's still the challenge of the Act --

COMMISSIONER BROMFIELD: Q. So, retrospective of the implementation of the Act?
A. The 1976 problem, yes. Sorry, I've expressed that very badly.

COMMISSIONER BENJAMIN: Put aside the 1976 problem, and I apologise if I led you astray, but if somebody was, say, a child --

MS RHODES: Sorry to interrupt, I've just been notified by my learned friends that it's going to be a procedural amendment - it's a proposed procedural amendment, so it will apply for any offences occurring from 1976.

COMMISSIONER BENJAMIN: Thank you. So, we don't need to (indistinct words) --

MS EDWARDS: Sorry, I gave a very long-winded answer there.

MS RHODES: Q. I think it was a very complicated question there, so not your fault.
A. Yes, there was a genuine difficulty with matters prior to 1976.

MS RHODES: Yes.

COMMISSIONER BENJAMIN: Yes, I understand that. Thank you.

MS RHODES: Q. You've talked a lot about trauma-informed responses, but I can see from the statement that you've provided there's not been a lot of training to your staff, whether counsellors or otherwise, in trauma-informed practices. Is there any particular reason why that training hasn't occurred?
A. Resourcing constraints. I have been - there have been significant resourcing barriers to implementing training for staff, because I fully appreciate that ideally training should be on a regular annual basis, but the resourcing issues have been a barrier to me delivering that.

Q. And so, because that training hasn't been able to be provided for reasons out of your control, when you say "trauma-informed", how are you making that - trauma-informed practice under all of your Services, how are you able to measure that and how do you know that what you're doing is trauma-informed?
A. Well, I'm fortunate that the counsellors with the VoCS team have - they're qualified social workers and they have had training, but I - and it pains me to say it, much of their training has actually been delivered through other roles. The training that is - each of the staff have an opportunity to identify training needs through their performance development and professional development. So, we have been able to deliver some training, but it's been very ad hoc and certainly not to the extent that I would want to see.

Q. Also from your statement I can see that there's quite a lot of training in relation to family violence, White Ribbon training, et cetera, over the five years that you've told us about; is that because that's been funded by a

different model to what - family violence is funded differently to your other crime assistance services?
A. Yes. Some of the training has been delivered through the Department, but other initiatives through the Safe at Home Program, and it gets back to what I was talking about before, that there certainly have been advantages in delivering - well, there have been distinct advantages for the Court Support and Liaison Service as part of the Safe at Home Program.

Q. Thank you.
A. So, the Court Support Service doesn't face the same level of budget pressure as the other three services.

Q. You're a manager and a Commissioner: what is your role as the manager of these services?
A. So, I'm responsible for the management of the four services: financial management, reporting, recruit - staffing, processes and procedures. I represent the Victim Support Services on external committees, stakeholder groups and forums, and I'm the after-hours contact person for the Eligible Persons Register as well.

Q. And then, on top of all of those things, you're also a sessional Commissioner?
A. Yes.

Q. And what are the key parts of that role as a Commissioner?
A. So, in terms of my contribution to the Victims Assistance Unit as Commissioner I'm responsible for the file reviews of all matters, except where there's a conflict of interest, so that means file reviews of all of the new matters coming in and then management of current and active files. So, that also involves authorising interim awards so that the VAU can obtain medical reports for victims, and I think that's the extent of the file review process.

I used to also carry out a hearing load as well and conducting a hearing list, but for the last 12 months my commitments as manager have been so great that I haven't actually done hearings for 12 months because there hasn't been the opportunity time-wise to do that.

Q. And how are you able to manage both of those roles together without there being a conflict of interest?

A. Okay, so the way I manage conflicts of interest: if there are any issues or matters that I've had to address from a manager perspective - to give an example, if we've had an issue or concern raised by a member of the public about their interactions with the Justice System, and it may or may not be about VSS, it could be about broader interactions with the Justice System, if I'm dealing with that as a manager I would not deal with - if that person subsequently lodges an application for Victims of Crime Assistance I will not deal with the matter as a Commissioner. So, strict demarcation between the manager and the Commissioner role on any issues where there's any contention.

Q. With the Victims of Crime Compensation applications, there is a limit, isn't there, in terms of compensation? I understand in your statement at paragraph 161 you've provided a table of compensation and there's a maximum, I believe, of $50,000?
A. Yes, that's right.

Q. If you're the primary victim?
A. Sorry, it is indexed, so the figure has just recently changed as at 1 July. Just bear with me.

Q. Sorry, paragraph 161 is the table.
A. Yes, so the figures have just recently been indexed, so the maximum award for a primary victim of more than one offence is $51,531, so the odd number is a function of indexation. The Commissioners can make an award for future medical expenses in addition to the maximum and the awards for future medicals are not capped.

Q. But there's no award for future loss of earnings; that would be capped at this maximum? Would that be correct?
A. Yes. So, the applications are assessed in accordance with common law principles, damages for personal injuries up to the jurisdictional limit.

Q. Do you believe that those levels are adequate for victims?
A. The challenge is dealing with applications for victims who have very serious physical and psychological injury, and certainly there are a significant cohort of cases where victims have suffered serious injury where, if they were to sue civilly, their expectation of what they could achieve would be in excess of the cap, but that's a function of

statutory schemes that set limits on caps, so ...

PRESIDENT NEAVE: Q. Can I ask a question about that. There's a differentiation between a victim of a single offence and a victim of more than one offence.
A. Yes.

Q. Now, one of the characteristics of institutional sexual abuse is often that you have a continuing course of conduct, so you might have grooming followed by offences over a long period of years.
A. Yes.

Q. I don't think that is quite as likely to be the case in some of the other offences that you provide compensation for, but might be for family violence. Do you have any comments about whether the Act differentiates or whether the provision differentiates sufficiently between one-off situations and course of conduct situations?
A. I would make the observation that, following - and, again, I'm talking in broad brush terms - but following the Royal Commission it has been clear, clear to the VSS, that there's been a significant cohort of victims of sexual abuse in community settings coming forward in response to some of the findings of the National Commission, and there is a significant cohort of those victims who have suffered injury as a result of multiple acts of - multiple offences, and invariably those cases are tracked, that cap, for --

Q. $50,000.
A. Yes. It is difficult when presented with applications where a victim has suffered significant harm. I mentioned before that there's the capacity for the Commissioner to make an award for future medical expenses, so the Commissioner can make a fair - make a generous award for future medical expenses to ameliorate the fact that there's a constraint, but the fact remains that there's a cap of $50,000.

PRESIDENT NEAVE: Thank you.

MS RHODES: Q. Each matter that goes before a Commissioner, the Commissioner makes their decision and it's a discretionary decision, there's no real parameters for them to - or factors to look at to determine what they should award besides those under section 5 of the Act, which is the jurisdiction of Commissioners to make awards;

is that correct?
A. Well, the Act does set out the various heads of damage that the Commission is required to assess when proceeding with the assessment, so that includes obviously components for pain and suffering and loss of income, medical expenses, counselling expenses and the like, so the Commissioners are required to address their minds to each of those elements.

But what often happens with cases where there's a very severe injury is that the assessment of loss for pain and suffering alone exceeds the maximum, and in a sense what it means for some of the very serious severe cases, in a sense the assessment is much more straightforward in a way because you do the assessment and, on pain and suffering alone you've hit the maximum, which may mean that you only have to give a very short summary of the other heads of damage, because you've hit the cap.

Q. Besides hitting the heads of damage, the Commission has heard from victim-survivors about their experiences going through the process, and one victim found the process quite distressing and a comment was made that the Commissioner who was dealing with this particular victim was not particularly trauma-informed or aware of child sexual abuse and the nature of child sexual abuse, and made an assessment of the victim's personality or traits of being quite an intelligent person and, being an intelligent person, why would they let this happen to them?

Now, that does not appear to be very trauma-informed, and decisions about compensation are made at the discretion of the Commissioner hearing the process, so how does your Service ensure that Commissioners have the appropriate training and the appropriate understanding of the nature of child abuse so that such comments like that aren't provided?
A. Yes. Well, firstly, I - I'm troubled to hear that feedback, and certainly it's - I would make the observation that victims can present in a myriad of ways at hearing and, if a victim is presenting in a stoic manner, that in no way derogates from the gravity of the harm that they've suffered. So, I'm very concerned to hear that, and I think it comes back to the point of the importance of trauma-informed training, and the VSS needs a budget to be able to deliver training on a consistent basis, because that is certainly not a view expressed through the feedback

that I would endorse at all; it's not acceptable.

Q. You make a comment at paragraph 46 of your statement and you say that:

> *... I am limited in my ability to direct Commissioners' to undertake training even in response to complaints.*

Can you expand on that, what you mean by that comment?
A. Yes, and I have reflected on that. I don't have powers as a manager to direct a Commissioner in response to their decision-making as they're independent statutory decision-makers. I would also say that, should resourcing be available to VSS to enable a training program, it would be my expectation that Commissioners would attend training in order to be continued to be allocated lists.

COMMISSIONER BROMFIELD: Q. Can I just clarify there? So, I completely understood from your statement, you don't appoint the Commissioners?
A. Yeah.

Q. You don't line manage them, you did the best you can within that framework?
A. Yeah.

Q. But, just from that comment, you do have then some power to determine whether a Commissioner is allocated an EDS or not?
A. Yes.

Q. So, that does give you some leverage?
A. Yes, that's right, yes.

COMMISSIONER BROMFIELD: Thank you.

MS RHODES: Q. And just one final question, it's in relation to the review mechanism or lack of review mechanism in terms of a decision made by a Commissioner. So, I understand that a decision made about compensation cannot be appealed unless it's taken on judicial review to the Supreme Court; is that correct?
A. Yes.

Q. That's quite an expensive, long process to do judicial review; do you see any benefit in having the ability to

have the Administrative Tribunal, TasCAT, with the power to review decisions of Commissioners?
A. Yes, I do.

Q. And, can you expand on that?
A. Well, I think judicial reviews in respect of Victims of Crime Assistance have been rare, so in a sense I think that it's - I think for people, particularly if they're not represented, it can be a challenge to make a judicial review; that's the comment I'd make, yeah.

PRESIDENT NEAVE: Q. Would you be able to give us a brief estimate of, perhaps not totally reliable estimate, about the number of cases that have been taken on judicial review during your period?
A. Yes, since I've been manager I believe there's been five.

Q. Five over how many years?
A. Since December 2014.

PRESIDENT NEAVE: Thank you.

MS RHODES: Q. Just to clarify. So, being a Commissioner under a statutory scheme, the decision that they're making is an administrative decision, so having the ability to appeal to TasCAT would be a merits review as opposed to a judicial review; is that your understanding, or you don't know?
A. Yeah, I'd need to have some sense of broadly what was proposed, but yes, broadly, yes.

Q. And you accept that a decision about compensation is quite a significant decision for someone who is a victim of sexual abuse, particularly child sexual abuse?
A. Yes.

Q. And that there should be some mechanism for them to be able to challenge that decision?
A. Yes.

MS RHODES: Thank you. They're my questions, Commissioners.

COMMISSIONER BENJAMIN: Q. I've got a couple of questions. I think Commissioners get appointed for no more than three years, don't they?

A. They're typically a three-year appointment, yes.

Q. In your role, are you routinely asked by government as to the efficacy of appointment or re-appointment of particular people or does it come as a surprise to you?
A. So, my role in that process, I'm asked to chair the panel, and I convene the panel and conduct interviews; I do a report.

Q. And then you make recommendations?
A. Yes.

Q. So you're very much involved in that aspect of it?
A. Yes. So, I do a report to the Statutory Appointments Officer, and then the Statutory Appointments Officer briefs the Minister and then I'm advised of the outcome of that process.

Q. So, if you had a Commissioner - and I'm not saying you do - who was less than trauma-informed, you could have regard to that in the transparent process?
A. Yes.

COMMISSIONER BENJAMIN: Thank you.

COMMISSIONER BROMFIELD: No questions from me, thank you.

PRESIDENT NEAVE: Thank you very, very much indeed, Ms Edwards. You've finished, haven't you, Ms Rhodes?

MS RHODES: I have, thank you.

PRESIDENT NEAVE: Thank you very much indeed, that was very helpful. And, a short break.

SHORT ADJOURNMENT

PRESIDENT NEAVE: Before we start, I want to remind anybody, including any journalists who are present or who are watching these proceedings online, that the restricted publications orders the Commission has issued in previous weeks continue to apply; that includes the restricted publication order issued on 9 May 2022 in relation to the Education hearings. Copies of those orders are available on the Commission's website and outside the hearing room door. I encourage any journalists wishing to report on this hearing to discuss the scope of any orders with the

Commission's media liaison officer. Yes, Ms Ellyard.

MS ELLYARD: The final witness today is the Director of Public Prosecutions, Mr Daryl Coates SC. I'll invite him to come into the witness box.

<DARYL GEORGE COATES, affirmed and examined: [2.51pm]

<EXAMINATION BY MS ELLYARD:

MS ELLYARD: Q. Thank you, Mr Coates. Could you tell the Commission, please, your full name?
A. Daryl George Coates.

Q. And you are the Director of Public Prosecutions for the State of Tasmania?
A. That's correct.

Q. You've made a statement to assist the work of the Commission signed by you and dated 6 June 2022. Do you have that statement with you?
A. I do.

Q. Are the contents of the statement true and correct?
A. They are.

Q. Thank you. May I begin just by a bit of discussion about the role that you play as Director of Public Prosecutions. You deal with this at paragraph 1 of your statement, but to be clear, in your role as Director of Public Prosecutions you are responsible for all matters relating to the prosecution of offences in the Supreme Court of Tasmania?
A. Offences in the Supreme Court and many summary offences as well in the Magistrates' Court.

Q. And thinking about the kinds of offences with which the Commission is concerned, namely sexual offences against children, those are matters which would ordinarily be prosecuted by your office?
A. Yes, or offences, sexual offences against children are prosecuted by my office.

Q. And so --
A. Whether in the Magistrates' Court or in the Supreme Court.

Q. And so, whether arising in the Magistrates' Court or the Supreme Court, any prosecution of a person accused of child sex offences, whether historical offences or more recent, will be a prosecution for which you and your office have responsibility?
A. That's correct.

Q. You will be the ones who make the decisions about whether charges should be laid?
A. That's correct.

Q. And you'll be the ones who will be involved in any relevant negotiations about settlement and plea agreements?
A. Could I just clarify this second-last question?

Q. Yes.
A. Generally we're responsible in relation to charging, but sometimes police will charge without reference to us, but ultimately whether that matter proceeds is - comes to me.

Q. Thank you. Thinking about your extensive experience in this field, as I understand your experience as set out in paragraph 2 of your statement, pretty much your whole professional life as a lawyer has been involved in the criminal law?
A. That's correct.

Q. And largely on the prosecution side?
A. That's correct.

Q. And you were first the Assistant Director of Public Prosecutions in 2004?
A. That's correct.

Q. And you were first Acting DPP in 2013?
A. That's correct.

Q. And you've held the role substantively since 2015?
A. That's correct, yes.

Q. Would you feel able to give an estimate, Mr Coates, of the number of sex trials you've been involved in in your time in the law?
A. Oh, many; many. So, I think the first sexual assault trial I did was in 1987, and I've done many since.

Q. And thinking more specifically about offences where the offence alleged is child sexual abuse?
A. Yes, I've done numerous.

Q. And you've been in the position in the course of your evidence today to offer some reflections on the way in which practices and procedures have changed in relation to child sexual abuse matters over that time?
A. Certainly.

Q. One of the things you described in your statement is the organisational structure of your office and in particular the way in which it responds to child sexual abuse matters. At paragraph 51 and then again at 62, you describe the Sexual Assault and Family Violence Team within your office which has been established since 2016 and which is responsible for the conduct of, relevantly, child sex abuse prosecutions?
A. Yes.

Q. So, would it be fair to understand them as a specialist team inside your office?
A. Yes, a specialist team inside the office, but the people in that team rotate in and out of it.

Q. How frequently do they rotate in and out?
A. Every two or three years.

Q. Later on in your statement you answer a question that I'll ask you about now, about the benefits of specialisation in this area of practice. What do you see as the benefits of specialist prosecutors working in the area of child sex abuse matters?
A. Well, firstly, they're dedicated to those offences, so it doesn't get - it doesn't get left with all the other prosecutions that are going on. Secondly, they can develop an expertise in the area. Thirdly, there's a collegiality where they can - have got more senior people in the team that they can refer to, and fourthly, I think it's good for outside agencies, like Tas Police to know where to go to in our office.

Q. Would you say then that there is something particular about child sex abuse prosecutions that requires perhaps a different skillset to the kinds of skills that might be called upon in other areas of prosecution?
A. Definitely. The law can be complex in this area,

particularly with tendency and coincidence evidence and some of the provisions of the Criminal Code, the expert evidence that might be required, and most importantly dealing with the complainants or the victims in this area.

Q. You may feel that this is beyond your area of expert knowledge, but can I invite you: do you have any advice on the desirability of specialisation in other parts of the Criminal Justice System? For example, from your observation is there a role for specialisation in the police force in terms of who investigates and prepares matters for trial?
A. Well, I think I've dealt with that in my statement; definitely in respect to interviewing complainants, victims. I would have some concern about all the police officers being specialised, because Tasmania is a relatively small place, and you don't want to lose experienced detectives who run investigations, so definitely in regards to interviewing complainants I definitely believe there's specialisation, and indeed some of our members - some of my staff, senior staff, have been involved in courses to assist the police in that. But there is a - I do think there's some incredibly experienced detectives in this state and I wouldn't like to see them being not part of major investigations in the sexual assault cases because of the specialised unit.

Q. What about specialisation in the sense of perhaps advanced knowledge or specialist lists in the courts? I'm conscious perhaps of what you might say about Tasmania's size, but in other jurisdictions the Commission has heard there are in certain places specialised lists and perhaps additional knowledge and information provided to judges who are going to sit in those lists.
A. I don't think it's practical in Tasmania. We only have seven judges, they rotate around the state, they do sessions in civil, and I just don't think it would be - I think it would be incredibly difficult to run a specialised list. Having said that, a number of the judges will case manage cases. Particularly there's a practice direction that we're informed by the Supreme Court of any cases involving children so that they can be case managed.

Q. But I take it then, if the Supreme Court, as you've described, contains seven judges, to the extent that they all have to have an understanding of these areas since they all sit in it, that's a relatively limited number of people

who might need to be provided with such further information as would assist them in their work?
A. Yes, and as I think I put in my statement, it's a fairly large proportion of the work. I think there's - close to 20 per cent of the cases were sexual assault cases; the large proportion of those are child sex abuse cases, and a larger proportion of those cases go to trial than other matters, so it is a significant part of all the judges' workload already in any event.

Q. So, it's core business for the Supreme Court then?
A. That's correct.

Q. Child sex trials as part of the criminal list?
A. Yes, certainly.

Q. Can I turn to ask you some questions about the recommendations of the National Royal Commission both as they relate specifically to your office and more generally. At paragraph 119 and following of your statement you answer some questions about this. From your perspective, are there any barriers that are perhaps particular to Tasmania that are relevant to whether or not your office is able to or has been able to take up the recommendations that the National Royal Commission made?
A. I think, as I described in my statement beforehand, we've tried to comply with all the recommendations that affect our office in relation to child - in relation to the Royal Commission. However, our office doesn't have the size of, say - or the resources that they have in Victoria or New South Wales or in other states. Our Sexual Assault Unit is very overworked and underfunded, and so, at times, for example, we try and have a consistent one counsel to go right through the whole time for child sex cases. On occasions that's not possible because many - well, all - obviously all child sex cases are serious, but there's a range of them and there's a range of seriousness and a range of complexity, and at times we need Senior Counsel to do these, and they've got conflicting cases, so at times we can't comply with that.

Q. As I understand it, there's been some additional responsibilities placed on your office in recent years because of changes in the law that bring new matters into your office, but has the funding increased commensurate with that?
A. Well, funding has increased, but I don't think it's

increased at the rate of the increased work, and also the rate of increased expectations on the office. For example, pre-recording, which is obviously a very valuable tool, but it puts extra work, much extra work on the office, because to do a pre-recording the counsel has to prepare for the whole trial, know all the issues, pre-recording's done, and then it may not get on for several months, so then they've got to do it all again; so, that's an issue.

The Sexual Assault Advice Service that we offer to the police has increased significantly. In my view it's a very valuable service because, firstly, there can be a number of outcomes of the advice: firstly, it might be that the person should be charged. Sometimes we'll say that a person should be charged where the police recommend that no charge is laid and, if we didn't have the advice, we'd never hear about those cases.

And on other occasions we'll say, "There's not quite enough evidence at the moment, but go and look at this, this and this, there will be enough, there should be enough". And on a third example we'll say, or even if we say there is enough evidence, there's still some issues with this case, this is what the defence will say, can you go and do some investigations into this so we can rebut that?"

The final advice could be that there's no reasonable prospects of conviction and therefore the accused shouldn't be charged, and that means complainants don't get false expectations in respect of the matter. Of course, on occasions that's not the end of it because, especially in paedophile-type cases, we may not have the first time we're asked to give advice in respect of it we may not have sufficient evidence, but six months or 12 months later there might be a second complainant and then we look at whether there's tendency coincidence evidence.

So, over the last few years that has increased significantly, and of course that was one of the recommendations of the Royal Commission, that we have early advice in respect to prospects of conviction and in relation to charges.

PRESIDENT NEAVE: Q. Can I ask a question about that. So, you make the point I think in your response to questions that a large amount of your office resources are

devoted to that process of providing advice?
A. Yes.

Q. You've got to balance that, of course, against the work that has to be done to actually prosecute if a decision is made to charge and prosecute. Are you confident that you've got the balance between those two functions right and, if so, why?
A. I think - sorry, I may have misunderstood your question. Are you saying, have I got the balance right?

Q. The balance between providing the initial advice to police and doing the work when there is actually a charge, the work that you do in the context of the prosecution of offences?
A. No, we need more people to do this advice work definitely.

Q. And that's, if you've got more resources, you would tend to put those resources into the early advice work, would you?
A. Well, I think we need resources for prosecution, we need to expand the Sexual Assault Unit to Launceston. So, currently we've only got it for Burnie and Hobart, and we need more resources in respect to the Sexual Assault Advice Service. At the moment we try to keep it in the Sexual Assault Unit but at times we have to give it out. We've got a, unless it's urgent, we've got it benchmarked at six weeks: we're not making that benchmark at the moment, and sometimes the urgent work takes precedent over the important work. So, it's just human nature for my counsel that, if they've got a judge on their backs about a matter, they're going to prioritise that ahead of the advice work, so we need, I think, a couple of dedicated people to do that.

Q. So, in some other states that tension is dealt with by having some external prosecutors; is that something that's being considered in Tasmania?
A. I don't think that's really an option because I don't think there's the expertise outside of my office to do the prosecutions. In recruitment - in recruitment at the junior levels we get a lot of applicants, but at the more senior levels there tends to be a significant amount of internal promotion because they have the experience above people from outside the office.

PRESIDENT NEAVE: Thank you.

MS ELLYARD: Q. Mr Coates, one of the separate points that you make about barriers unique to Tasmania for the implementation of Royal Commission recommendations more generally is a point about delay. At paragraph 129 of your statement you refer to some remarks that you made in a recent annual report about the various impacts of delay, including perhaps, very relevantly for our purposes, the impacts on victims and then on conviction rates because of delays.
A. Yes. Well, it's not only impact on victims, it's impact on witnesses, it's impact on accused persons, but --

Q. And that delay, as I understand it, isn't just about lack of resources in your office, it's a feature of the Justice System more generally, that there's a backlog of cases?
A. Yes. I think it's the feature of the number of defence counsel, the courts have recently had an increase in the number of judges there, but definitely a reflection on the amount of people in our office, yes.

Q. At paragraph 136 of your statement you answered very frankly what you hoped would occur as a result of this Commission, and particularly about outcomes that would be relevant to your work, and a couple of them we've already touched on; we've touched on the need for more resources, but you've identified a number of issues that relate to systems and technical supports; can you tell us about those and why you see them as important?
A. Okay. Well, within our office, and this is where we don't have, you know, the economies of scale: we don't have an office manager and we don't have somebody devoted to information technology to help the prosecutors. The facilities in the Supreme Court are fairly good, but the need to improve video facilities and things in the Magistrates' Court; so, that's in relation to resources.

Q. You've also indicated that you'd like to see, and we'll come in more detail I think to some of the legislative changes that you would see as useful, but you've identified systems for record-keeping and data analysis. At the moment what's your capacity, for example, to review past matters or have a complete record of what was done and ready access to files about past prosecutions?
A. Well, unfortunately, I think it was about in 2015/16

we had a new practice system put in. In the old practice system from converting all the data, I don't know why, but we now can't search on the basis of crime basis, we can only search in relation to names. So, from 2017 onwards we can search in relation to crime basis, but we could endeavour to have systems that even go further about, for example, the age of the victims and so on, but we can't do that at the moment.

Q. Can I turn to ask you some questions about the process by which decisions are made about charges and the appropriateness of charges and matters which are taken into account. Perhaps by way of background it's useful to begin by indicating, what are the different charges that can be laid where the allegation is of sexual abuse against a child? And as I understand it, looking at the Criminal Code, the range of offences that are possible to be charged include indecent assault under section 127?
A. Yes.

Q. Penetrative sexual abuse of a child or young person?
A. Under 124, yes.

Q. And then the other key offence is persistent sexual abuse of a child or young person, section 125A?
A. Yes.

Q. And there are a number of other associated offences including indecent outdoor procuring, but the three key levels of offences that are specific to children and sex matters are indecent assault, penetrative sexual abuse, and persistent sexual abuse?
A. And they can also be charged with rape as well.

Q. And they can be charged with rape.
A. Yes.

Q. Can I ask you to unpack a bit, or perhaps I'll go back a step. Under the Criminal Code in Tasmania, save in certain limited circumstances where the accused person and the victim are quite close in age, a child under the age of 17 can't give consent; is that right?
A. That's for charges of indecent assault, penetrative sexual abuse of a child, an indecent act directed towards a child; for those offences consent - and I should say, when I'm talking about consent, I'm talking about technical consent under the Criminal Code, not what is more broadly

understood in the community. But in the case of rape --

Q. The age of consent, if I might use that expression, perhaps it's not the expression used in the code.
A. That's right. In the case of rape one of the ingredients that the Crown does have to prove beyond reasonable doubt is a lack of consent. So, if a person was charged with rape of a young child or young person, the Crown has to prove consent, and under section 335 of the Criminal Code penetrative sexual abuse of a child would be left as an alternative. So, if the jury weren't satisfied beyond reasonable doubt about consent in that situation, then they can convict of the alternative.

Q. I want to tease out and explore with you, Mr Coates, how it is in circumstances where it's the law in Tasmania that a child under a certain age cannot give consent, why there would be offences laid involving children that call for consideration of consent? It seems incongruous, if I could put it that way, to talk about children consenting to offences or charging offences in relation to children where consent is an issue.
A. Okay, well, can I just say firstly that penetrative sexual abuse of a child is an extremely serious offence, and obviously can have long-lasting effects on victims. However, rape is regarded - I suppose it's a hierarchical thing - rape is regarded higher in the hierarchy. And when you're talking about consent in the case of rape, it's considered as it's defined in the Criminal Code and generally for purposes of this for rape, it's where either in these situations where a person said "no" or --

PRESIDENT NEAVE: Q. Said nothing?
A. Said nothing, yes, or was overborne by the position, or was enable to understand the nature of the act. And when I say "understand the nature of the act", I don't mean understanding the whole psychological things that go with sexual acts, it's just understanding the physical nature of the act. So, with young children, that's not a problem because a 10-year-old or 8-year-old doesn't understand the physical nature of the act.

The difficulty is when, I suppose with teenagers, and I understand what's been said, if the person's just charged with penetrative sexual abuse of a child, there's no issue, there would be nothing mentioned about consent. If the charge was rape, well, it would be, we'd have to prove lack

of consent.

The general problem comes with persistent sexual abuse which is a very useful offence and it was brought in to overcome the High Court's decision in a case called S v The Queen which stated that you had to particularise every event. Now, under that section basically we have to prove three unlawful acts and, once you prove that, you can take into account the whole relationship.

Now, an unlawful act can be - well, the three normal ones - there are others, but the three normal ones are indecent assault, rape or penetrative abuse of a child. Now, we have to particularise what we're relying on. On occasions, so we could be making a submission to the judge that the person was in a position of trust, they groomed them, it was exploitative and so on - and when I say "so on" I don't mean that in a derogatory way, it's serious matters - the court and the defence will want to know whether we were particularising it as rape or penetrative sexual abuse of a child, and generally that is indicated by the Crown Counsel to the judge that we - although we say there's all these aggravating factors we're not suggesting that it wasn't consensual in accordance with the strict definition of the Criminal Code.

And you'll see many, for persistent abuse, you'll see many judges comment when passing sentence where they say "It's not suggested it's consensual". Now, having thought about it, we don't have to say that, what might be better to say is that what the Crown is alleging is penetrative sexual abuse of a child; we could just say that, or we're alleging rape.

MS ELLYARD: Q. Can I just interrupt you there, Mr Coates, because I think what you're describing is the system, and I think you're describing the system as it is, you've said effectively there's a hierarchy with rape at the top, and what you mean, as I understand it, is an understanding in the system and the profession of a hierarchy of seriousness, not to suggest that anything's not serious?
A. Yes, that's right. And to give another example, murder and manslaughter --

Q. Just answer my question, I'll make a note that you want to give another example. The Commission has heard a

lot of evidence about - and that evidence won't come as a surprise to you, you and your staff know it, about the way in which children are groomed to be sexually abused and about the probably significant majority of cases where children are groomed in such a way that at the time they think they are consenting, or would be giving every outward appearance of consenting and actually that makes it worse, it makes it worse for them in the longer term, it arguably makes the offender more morally culpable. And the argument might be put, and I invite you to comment on it, that any system that suggests that rape is worse than persistent sexual abuse of a child carries with it an implication that a child who's groomed into giving the appearance of consent hasn't been harmed in such a serious way as a child who's been "raped"?
A. Well, look, I would accept that, but I suppose with the charge of rape when we are doing that, that doesn't mean to say all those other factors haven't occurred as well. I suppose the problem is that penetrative sexual abuse of a child or a young person and persistent sexual abuse of a child or a young person can cover such wide conduct. So, for example, you can have it where a 17-year-old and a 14-year-old are having a sexual relationship and they're just outside the three years; and they could be weeks outside the three years. One might allege that it was a consensual sexual relationship; the other might say it was a violent rape, so you've got those situations.

On the other hand, at the other end of the spectrum you've got, as you said, where young persons are groomed by persons in authority. I think it's like all these sections, that some are classified more serious than other. As the High Court says, at the end of the day you don't consent - you don't normally sentence on the basis of the categorisation of the offence but the conduct --

Q. Can I tell you one of the ways in which this arises, Mr Coates, we're going to hear some evidence tomorrow --

COMMISSIONER BENJAMIN: Q. Can I ask you a question, if I may, I struggle. As you know, my background is in civil and family law. As I understand it, in Tasmania a child under the age of 17 years cannot give consent to sexual intercourse. Is that the case?
A. Well, it's --

Q. Not legally give consent?
A. Well, it's not an offence to penetrative sexual abuse that the person has consented, so it's a little bit different to what you've stated. And section 124 of the Criminal Code actually recognises that, under the criminal law, there can be consent but it's not a defence to that offence unless in limited circumstances about the age range between the complainant and the accused.

Q. I'm excluding that five-year age number.
A. But, I'll just get the wording of the provision.

MS ELLYARD: So it says, section 124:

(1) Any person who has unlawful sexual intercourse with another person who is under the age of 17 years is guilty of a crime.

Charge: Penetrative sexual abuse.

Subsection (3):

The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –

(a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or

(b) that person was of or above the age of 12 years and the accused person was not more than 3 years older than that person.

So, there's a defence of consent that can be raised in those certain circumstances, but otherwise the law effectively states, does it not Mr Coates, that if you're under 17 you can't consent?
A. No. What the law says, and it's a subtle difference, what the law says is, a person can consent within the provisions of the consent definition of section 2A, but for penetrative sexual abuse of a child or young person it's not a defence. So, that's what it's saying, and so, for

example, in rape in respect to section 185 of the Criminal Code it is a defence; not only is it a defence, it's an element of the offence that we prove beyond reasonable doubt.

So, the code is specifically regular recognising that in some circumstances a young person can consent, it can meet the provisions of section 2A of the Criminal Code, but for the purposes of sexual abuse of a young person, penetrative sexual abuse of a young person, it doesn't matter; that's what it's saying.

PRESIDENT NEAVE: Q. I guess that Commissioner Benjamin's question really is, why would you ever charge with rape in the case of - leaving aside the similar age provisions - in the case of penetrative sexual activity with a child; why would you ever? Given that, as I understand it, the maximum sentence is the same, why would you ever do that?
A. Okay, just - in Tasmania, except for murder, all maximum - there's just one maximum sentence of 21 years, okay?

Q. Yes.
A. So, it's left - and I think if you read the 1924 Criminal Code Second Reading Speech, it's left to the judge's discretion, so within that discretion over the years sentencing ranges have occurred. And, generally speaking, the sentencing range for rape --

Q. Is higher.
A. -- is higher. And the sentencing range for penetrative sexual abuse of a child is becoming much higher than it used to be. It used to be quite low compared to rape; it's less so now.

COMMISSIONER BENJAMIN: Q. Just to use an example. In a particularly nasty - there's no such thing as a non-nasty rape, but a particularly violent rape or sexual assault, you're left with the decision as to whether you take the chance on the rape charge where consent might be an issue for that 14, 15, 16-year-old where the offender may then be exposed to higher ranges of sentencing if convicted, or you take an easy way out which is the penetrative offence where the offender would then face a lower range?
A. I wouldn't say we'd take the easy way out.

Q. Excuse me, I shouldn't use that value laden - but you'd take the less risky way out?
A. Depending on the circumstance it's not really risky to take - to charge with a more serious offence because the other is an alternative. So, the jury will get directed that if they're not satisfied beyond reasonable doubt that the complainant didn't consent, then they should consider the alternative. And look, I've done many trials where that's been the case, where they've considered - had to consider the alternative. Now --

Q. That then leaves the survivor or the victim, or the alleged survivor or the alleged victim, able to be cross-examined as a child as to their consent or not, doesn't it?
A. Yes, but if - in lots of situations, whatever we charge, if you changed the law so that you could take that into account for penetrative sexual abuse, they'd still be open to cross-examination because the accused would say it wasn't a violent rape, it was sexual intercourse in these terms so --

Q. But that would be a matter of sentencing though, wouldn't it?
A. No, we'd still have to call - we'd still - if we allege a circumstance of aggravation we have to prove it beyond reasonable doubt, and therefore we'd have to call the complainant.

MS ELLYARD: Q. Can I ask perhaps by way of clarification, perhaps then is it right, Mr Coates, that it's not really correct to speak of an age of consent in strict terms. There's references to persons under the age of 17 and that's relevant for some offences, but in general terms it's not correct to say that there's an age of consent for all purposes in Tasmania?
A. No, and as far as I'm aware it's similar in other states as well.

Q. Can I ask you this question just to understand, and I don't want us to get off track, but section 124 which we've just been looking at says:

> *Any person who has unlawful sexual intercourse with another person who's under the age of 17 ...*

I don't understand "unlawful sexual intercourse" to be defined in the code. What is unlawful sexual intercourse? The way it reads it suggests that there would be such a thing as lawful sexual intercourse with a person under the age of 17?
A. Well, unlawful when it appears in the Criminal Code simply means not just defined in law, but people under 17-years-old can have sexual intercourse, so it's not an offence if the complainant, the victim, was above the age of 15 years of age, and the person was no more than five years older; or if the person was above 12 years of age that the other person was more than three years.

Q. There's a defence of consent available. So, do I take it that they'd be charged but they could plead in their defence that the person --
A. No, they wouldn't be charged. For example, if a 15-year-old and a 16-year-old had sexual intercourse that was consensual, they wouldn't be charged with anything because no offence has been committed.

Q. Leaving aside age differences, is it correct to say that in Tasmania it will always be unlawful for a 25-year-old person to have sex with a 15-year-old person?
A. Always unlawful.

Q. Okay. And, whether or not that person is charged with penetrative sexual abuse or rape, as I understand it, will turn on the particular factual circumstances; is that right?
A. That's right. If it's a one-off situation or just two or three occasions, it'll be either section 124 or section 185. In the cases that you've been looking at generally they'll be charged under section 125A which is persistent sexual abuse of a child or young person.

Now, you've raised the report of the prosecutor in the --

Q. So I'll frame it this way. We're going to hear some evidence tomorrow from a lived experience witness whose offender was prosecuted, he pleaded guilty, but in the sentencing remarks the judge at the time, this is a few years ago now, referred to the fact that it was consensual and her reflection to the Commission will be, at the time she didn't see that as being a problem because she'd been groomed to believe that she had consented and

that she shared responsibility, but she's come to understand in her perspective how unfair it is to suggest that she as a child "consented".

So, consent obviously has a technical legal meaning, but the evidence before the Commission suggests that it really does have the potential to blur where responsibility sits and to potentially make victims partly responsible for what happened if we're going to speak about young people consenting?
A. Look, I accept that and, as I said, a way around that is not to use the word "consent" but use the unlawful act that's being alleged. So, the judge could say, "The accused has been found guilty or pleaded guilty to persistent sexual abuse of a child or young person. The unlawful acts alleged are penetrative sexual abuse of a child, it's alleged that it occurred on 20 occasions". That would be a simple way around the whole problem.

PRESIDENT NEAVE: Q. You'd be aware, Mr Coates, that there has been some case low now on the relevance of consent in cases of unlawful sexual penetration?
A. Yep, definitely, yes, I'm aware of it.

Q. So, in those circumstances I think the preponderant view both in the UK and certainly in Victoria is that it's not, in the case of unlawful sexual penetration, it's not a mitigating factor of any kind the fact that the person consented, and maybe that's the best we can get?
A. Yeah, it's definitely not a mitigator, and it's not a mitigating factor here for that offence.

Q. Yes.
A. It's, I suppose, an aggravating factor if there's no consent, just like it can be an aggravating factor that the person's in a position of authority, the person's groomed them; there's lots of different aggravating factors. And, the case that was reported in the newspaper that you raised with me, I think it's been taken out of context. The prosecutor went on to say, she said that because - to indicate to the judge what acts were being alleged, but she went on to say that the person was in a position of trust, the complainant was vulnerable and all that.

Q. Yes.
A. So, she wasn't trying to say that this was something good that had happened or anything like that, you know, and

she outlined the aggravating factors of the case.

MS ELLYARD: Q. But, Mr Coates, I take it then from what you've said that you would agree that it would be preferable, it would perhaps better reflect what we understand to be the dynamics of sexual abuse and it would certainly be more victim and trauma-informed if these matters were able to be prosecuted in a way that just left the whole concept of consent out of the equation given that, as we've discussed, save for certain age exemptions, consent doesn't make a difference to whether or not there's an offence?
A. Well, I think consent sometimes can make a difference; it just depends on what's being - just like, if a person's in authority can make a difference, it's just one of the factors, and I think it can all be got around by prosecutors, defence counsel and judicial officers referring to what the unlawful act is rather than the nature of it.

PRESIDENT NEAVE: Q. Can I just ask you one other question because it was raised in your comments. You don't have a specific provision in Tasmania at the present which says that, even if the child is aged 17, it's an offence for a person in a position of authority to engage in sexual acts with them? And, I have a feeling there might have been an announcement that there was going to be a change in that area, but would you support a similar provision?
A. I actually think it would be better to - I'd actually think it would be better to increase the age from 17 to 18 and just leave it as an aggravating factor, because I've had to look at a case in Victoria quite recently, and I think all these different provisions make it quite complex because --

Q. Yes.
A. -- we have to charge - we'd have to charge with a number of different offences, so I think personally you could extend it from 17 to 18; I mean, I think most people in the community would think that a person's still a child when they're 17 or a young person when they're 17, that 18 is when you become an adult.

MS ELLYARD: Q. Could I ask you a more general question, Mr Coates. The Commission's received some evidence or is aware of various cases over the years where there's been a degree of concern perhaps on the part of the public about

whether or not offenders have been charged with sex offences, or whether or not people have escaped prosecution when they should have been prosecuted.

Now, I don't want to ask you to speak to the facts of any particular case, but can I invite you to summarise for us the kinds of matters that will be considered that perhaps go beyond pure evidentiary questions when deciding whether or not to lay charges of child sexual abuse?
A. Okay. Well, obviously, the first thing you look at is whether there's a reasonable prospect of conviction. Secondly, you look at the views of the complainant and the vulnerabilities of the complainant. Thirdly, you'd take that into account and you'd weighed that up about the prospects of conviction, how serious the offence is going to be.

So, for example, I've had cases where I doubted whether there was a reasonable prospect of conviction. If it was I thought that the accused people wouldn't get a very significant sentence and the complainant would have had to give evidence multiple times in multiple trials, and in those circumstances often the complainants have been very vulnerable, they don't want to give evidence, their parents don't want them to give evidence, all those circumstances are taken into account.

Sometimes, very rarely, the offences are so serious that you - you know, you really, really try to persuade the complainant to give evidence. It's always a balancing act.

Q. And what about cases where, perhaps this is where the reference to reasonable prospects of a conviction come in; what's the process that your office follows, perhaps thinking about today, it might have changed over time, what's the process your office follows if the view is that charges shouldn't be laid? There's a complainant who's ready and willing to give evidence but, on your assessment, charges shouldn't be laid; what contact is had with the complainant in that case and what, if any, power does he or she have to challenge the assessment that you've made?
A. Is this where charges have been laid?

Q. No, where charges haven't been laid. Say where there's been a decision made, look, we're not going to charge?
A. Okay, so we're giving the police advice?

Q. Yeah.
A. So, what we'd look at is: we'd evaluate all the evidence, evaluate any defences, evaluate any discrepancy in the evidence, look to see whether any more evidence can be obtained; look to see whether, before we can make an assessment, we need to see the complainant.

Q. So, you wouldn't always see the complainant?
A. Not when we're giving advice to the police. And, then we'd look at what evidence we think's admissible and what isn't admissible; what directions are likely to be given in the case, and then determine whether there's a reasonable prospect of conviction and, if there's a not, we'd send a letter to the police advising them of that, my office would, and on occasions the complainant will ask me to review that. On some occasions we can't make that decision without seeing the person.

Q. And is that because it's going to be a case where the case will stand or fall on whether or not the complainant's giving evidence that's going to be accepted by a jury?
A. Yes, and so, we need to evaluate her and, you know, there might be some really strong parts in her evidence, there might be some real difficulties and we need to understand what she's going to say about that when she's being asked.

Then there's another example where, look, if they accept her evidence or his evidence, the complainant's evidence, that a jury could reasonably accept it but we think the likelihood is that there will be an acquittal. In those circumstances we'll see the complainant, we'll explain to her - had one quite recently - we'll explain to her or him what's going to be involved and the problems with the case and what, you know, is the likely outcome. We'll say there's a possibility there will be a conviction but this is a good chance of an acquittal.

In those cases, if the person wants to go ahead with it, we will go ahead with it; if they don't, we won't. In a recent case the complainant I've had did want to go ahead with it so we prosecuted it. If the person's been charged and we decide that we're not going to proceed with it or there's - and should I say, when we give that advice, if the person - so when we give advice to the police, if the advice is to charge then it doesn't have to be checked by a

senior person, but if the advice is that it's not going to be charged, then it does.

If the person's been charged, whether we proceed or not, the process is that the person who has carriage of the file has to write it up outlining the facts and the law and making a recommendation. That will go to an internal committee made up of the most senior members of our office, including the Deputy Director and the Assistant Director. If two of them agree with the recommendation - well, if it's a recommendation to prosecute, you just need one person to consider it; if it's to discharge, then two will look at it. Their decision might be that they agree with the person, the Crown Counsel, that there's not enough evidence, or they don't agree, or it should go back to the police for more investigation.

Q. And ultimately, as I understand it, ultimately it's a decision for you and your office as to whether any individual matter goes forward to trial?
A. Yes, that's right. Then we'll get - if the decision - if they agree; if they disagree it comes to me. If the decision is to discharge, then the person who has charge of the file will speak to the complainant. Now, the complainant should at this stage already be aware that there's some difficulties with it because that person would have spoken to the complainant beforehand.

Q. So, if the process is working well, it shouldn't be news to the complainant when they get called in for a meeting to be told that their matter's not going forward?
A. Well, it shouldn't be news that there are problems with it. Then they'll take into account their views, tell them what the decision is and explain it, explain why it is, give them a letter in writing that they can ask for the Director to review the decision, and they're also told that they can have - they can also be told that they can have the reasons in writing. There is a witness assistance officer present when these meetings take place.

Q. This questions arises, as I think you're aware because you've answered some specific questions about it, Mr Coates, in the context of a witness whom the Commission heard from in week 2 of the hearings in relation to an alleged offender who's known for our purposes as "John".
A. Yes.

Q. And Ms Collins was the witness who gave evidence, and just to summarise her evidence which related in part to events occurring in 2004 when a matter in which she was the complainant was discontinued by the DPP, her evidence in substance was that it was news to her when she was given the news, as she recalled it in a telephone call - although there's some suggestion that there may have been a letter as well - as she recalled being told in a telephone call, without much notice, that the matter was going to be discontinued, and that the news that it wasn't going to go ahead and the reasons for it came as a surprise to her.

Now, you're aware, as I understand it, of that evidence that she's given?
A. Yes, I am.

Q. And, as I understand it from your statement, you've identified from your records that there is a detailed letter of the kind that you've described that was sent to her around the time that the decision was made to discontinue the prosecution?
A. Firstly, there was a file note; firstly there was a file note where the prosecutor telephoned and spoke to her father and spoke to her and told her that the Director will be available to be spoken to if she wanted to after 1 o'clock. At the same time there was a letter sent to all the complainants detailing the reasons why the prosecution wasn't continued.

There was a letter from Ms Collins three days later to the Director acknowledging the phone call from Crown Counsel and acknowledging his letter. There's a subsequent letter on the file from the Attorney-General to the Director, the then Director, outlining that Ms Collins - Ms Munro as she then was - had forwarded Mr Ellis's letter to her.

Q. So that, there's certainly evidence about a process of communication following on from, as I understand your records, an initial telephone call, which perhaps matches Ms Collins' evidence that the initial information came in a telephone call. But the substance of the issue that that case study raised, thinking about this time period, was the process by which she became aware that a matter that she thought was going ahead was not going ahead.

Now, as I understand it, that issue would be handled a

bit differently now; is that right?
A. Yes, and look, this is not - I'm not being critical. Then the person dealing with sexual assault cases then was extremely good; in fact, he'd won an award for his work, but it was just him and there was no WAS, there was no unit, it was just him.

As I said, it's written in my guidelines that the person has to be spoken to in person. I mean, on occasions it may not be possible to speak to somebody in person, but in person with a witness assistance officer.

Looking at that case, the biggest problem with that case was, and with the future of it, was the charging in the first place.

Q. And just pausing there, as I understand it what you're saying there is that, having regard to the law as it stood at that time, really on proper consideration at that time there wouldn't have been a reasonable prospect of acquittal in respect of the particular matters involving Ms Collins?

PRESIDENT NEAVE: I think you meant a reasonable prospect of conviction?

MS ELLYARD: Q. Of conviction, sorry.
A. No, the law, and I think of in my statement I've outlined all the difficulties and all the changes in the law, I think since then there have been even a couple of more changes, in the law that have occurred between 2004 and now, and I think I've annexed my advice when there was a fifth complainant in 2018, and I've outlined there all the changes.

Q. So, the state of the law in 2004 was that, although there were multiple complainants in respect of John, the state of the law was such that those complainants couldn't have their matters heard in the one joint trial; there would have had to be a separate trial for each complainant?
A. There would have had to have been a separate trial with each complainant. There would have been - and that was because of a decision of the High Court in Hoch v The Queen which we had abolished in this state. Also, if they were tried separately, they would have been given a Longman Direction, which is another High Court case, which would have meant that the judge would have been bound to direct the jury that they couldn't convict - it would be dangerous

to convict on their evidence uncorroborated, and there was little corroboration.

Q. So the state of the law there was, although there were four complainants, each jury would be told that there was only one and that it would have been dangerous to convict on their evidence alone?
A. Yes, so you would have had all of that. Unsurprisingly, as we know, they made inconsistent statements, and that is not a criticism of the complainants, that is often the case; they remembered things later. Now --

Q. It would be fair to say that there's a more nuanced understanding now than there was in 2004 about why that might occur and why it shouldn't be regarded as damaging to the credibility of the complainant?
A. Certainly.

Q. Of course, the law has changed as you've identified in a number of respects, so that if we move forward to 2018 where you had some role in reviewing the matter and writing the advice that you've described, by that time had those various women come forward it would have been possible for John to be prosecuted in a trial which involved all complainants together?
A. Well, by that stage it would have been a prosecution of five complainants all in the one indictment, they would have been cross-admissible, so the jury would have got a direction that, if they thought John had a tendency to sexually assault or indecently assault young children in his care, and there's other facts similar, they can use that evidence in particular to support the evidence of each complainant. There wouldn't have been a Longman Direction, it would have been a modified direction, but not a Longman direction, so they wouldn't have been told it was dangerous to convict on their evidence. There would have been a direction under section 371A of the Criminal Code that a jury should be aware that in cases like this there's often good reasons why complainants don't complain at the time. So, there would have been - it's a much different case to what could have been presented in 2004.

Q. But as we understand it, on the particular facts of this matter, although all those changes had happened, there were procedural reasons, if I could use that expression, why it wasn't possible to re-enliven the matters insofar as

they related to Kerri, and I just want to understand from you what those procedural reasons were; because on one view matters which had never been the subject of any finding and which could perhaps have been regarded as still open couldn't be re-opened because of the way they'd been dealt with in 2004 and I want to understand whether that was a procedural irregularity or whether it was standard practice that the charges were dismissed in 2004 rather than being left open.

PRESIDENT NEAVE: Ms Ellyard, would you mind referring me to the relevant paragraph? I ask because, for some reason, my marked-up copy I couldn't get into.

MS ELLYARD: Paragraph 390 and following is where questions about this were answered.

PRESIDENT NEAVE: Thank you.

MS ELLYARD: Q. And so, Mr Coates, just to be clear, I'm asking you to respond to the matters that are contained in your memo which you quote at some length in your answers. The effect of your memo, as I understand it, was that there was a procedural reason why it wasn't now possible, in the wake of legislative changes, to re-open and prosecute John for the charges against him?
A. In the Supreme Court, if we discontinue a matter, there is no bar to us prosecuting it in the future.

PRESIDENT NEAVE: Q. But there was in the Magistrates' Court, am I right?
A. Yes, there was in the Magistrates' Court. So, what had occurred here was, John was charged with a number of indecent assaults.

Q. Yes.
A. He elected proceedings in the Magistrates' Court. Unfortunately, he was then - well, he was then charged with maintaining a sexual relationship, which is now called persistent sexual abuse of a child. So, it was discontinued in relation to those, but the individual unlawful acts that made up that charge were the indecent assaults that was in the Magistrates' Court which, it's a bit hard to tell from the records, but it's likely that they were dismissed. And, you might see in 2018, I even went to the Police Prosecutor to find out what his recollections was of that. If they've been dismissed we

can't recharge them and, more importantly, we can't use them as tendency evidence in respect of the fifth complainant.

In the Magistrates' Court normally at that time they would be dismissed, so that's the reason why we can't proceed. And, you might - in one of the points that I've asked for, for the Commission to consider in reform, we have this problem with family violence matters all the time; that the police would charge an offender with, or alleged offender with assault; the complainant wouldn't want to give evidence and they'd go down and there'd be no evidence and it will be dismissed. And then there'd be a really serious assault on the complainant and it was a case - I've forgotten the name but it's in my statement - it says, "We cannot use that evidence as tendency or coincidence or relationship evidence". So, there was an amendment to the Family Violence Act that said in those circumstances, where no evidence has been presented and in effect there's been no adjudication you can use that. And, if we had that here we would be able to.

Q. So you just want a similar provision now?
A. Yes, a similar provision now.

Q. Similar provision to the one that exists in the area of family violence to apply in this situation?
A. Yes. And, you know, this is - when you're dealing with cases involving paedophilia this is often the case; you might have some minor examples where there's not enough evidence, and then you've gone from one or two complainants where there's not enough evidence to suddenly five or six.

Q. Yes.
A. In my view, I can't see why there should be any difference between the Magistrates' Court and the Supreme Court on that; if there's been no adjudication of it, you should be able to use it again.

Q. Has that ever been tested, the fact that it can't be used in evidence in the Supreme Court if you initiated Supreme Court proceedings, has that ever been actually tested?
A. Yes, it's actually in the - it's actually in the Criminal Code it began.

MS ELLYARD: Q. It sounds like the legislative reform

you're describing, Mr Coates, if it occurred, would go some way towards fixing what's, certainly from what Ms Collins' perspective, is an injustice?
A. Look, I can see, as I said in my letter, I can see from their point of view that it's an injustice: I mean, I think it's an injustice, but there's nothing I can do about it. And, having said that I think it's an injustice, I'm not saying it's an injustice because the 2004 decision was wrong, because I don't think it was wrong in accordance with the law as it stood at that time.

Q. But the requirement at the time, as I understand your evidence, that the charges be dismissed rather than discontinued operated an injustice because it meant that, once the legislative framework was better, Ms Collins couldn't have her matter brought to court?
A. That's correct.

Q. But under the reform you're describing, perhaps at least her evidence could be relevant in another prosecution?
A. That's right.

MS ELLYARD: I'm sorry, Commissioner Bromfield?

COMMISSIONER BROMFIELD: Q. I was just going to say, it really does sound like, in the case of Ms Collins, she has suffered from a range of things in her case that have now been addressed, but unfortunately there was poor charging by police that's now been addressed through the advice being given to police: yes?
A. Yes, that's correct, and so --

Q. And then she suffered from the rules at the time in relation to tendency and coincidence --
A. Yes.

Q. Again, those things you outlined have now been addressed, and now suffering from a procedural issue and you are trying to, through this Commission, get that addressed?
A. Yes, that's correct.

Q. And within all of this - I mean, you've spoken in your evidence about the issue of expectation management, and I am assuming that that's because, where expectations are created and not met, that is devastating for survivors?

A. Oh, definitely, and we've had in the past - I mean, I've sat through many of these cases where I've - I mean, I've had to give news that's heartbreaking to them and they'll say, "But the police thought that there was enough". Well, one, the test for a police charge is different and, secondly, unfortunately with sexual assault cases the most simplest case has become very legally complicated and it's been addressed in some ways but in 2004 it was extremely difficult and complicated.

Q. And we're still not quite there yet, by the sounds of it?
A. No.

MS ELLYARD: I note the time but if the Commission is prepared to sit on very, very, slightly there's just a couple of more relatively short matters I'd be glad to have the opportunity to --

PRESIDENT NEAVE: Yes, Ms Ellyard.

MS ELLYARD: Q. Mr Coates, we some evidence this morning from Adjunct Professor Henning and one of the issues that she spoke about was what I'll call cultural issues and the extent to which there are myths or cultural attitudes perhaps in the professional, perhaps in the judiciary, which are relevant to how child sex matters can proceed.

You touch, as I understand it, on some of these matters where in answer to Question 32 at paragraph 265 and following you identify a number of further legislative reforms that you think would be appropriate, and we've touched on one of them already. But, for example, you've talked about a practice in this state in relation to Murray Directions, and I'd be grateful for your reflections either about that specifically or more generally about whether you would see the need for reforms, not just perhaps to legislation but to understandings and attitudes in the system?
A. Well, I think the problem with the Murray Direction - so, the Murray Direction is a case in the 1980s where, if the only evidence is that of the complainant, then the jury should be directed that that is the case and that they have to be satisfied beyond reasonable doubt of his evidence, and before they can do that they've got to scrutinise the evidence with care.

Now, I don't have difficulty with the jury being pointed out that the only evidence is of the complainant and that you've got to be satisfied beyond reasonable doubt of the evidence. But the way it's given, scrutinise with care, is very similar to the terms that were abolished, dangerous to convict on the uncorroborated evidence, that's the first thing. And the second thing, although judges don't mean it, juries can see that the judge is probably giving them a hint in relation to this case, and I think, certainly to be fair to the accused, something along those lines needs to be given but it should be balanced out by the fact that a judge should say, "I'm not saying anything in particular about this complainant, this is given in all these cases", and of course in many of these cases there will be only the evidence of the complainant because these offences by their very nature occur in private without any witnesses.

Further, a number of judges have extended the direction to when there is supporting evidence because they say, "Well, the jury might not accept the supporting evidence, therefore you're left with the unsupported evidence of the complainant", so I would ask - you know, there could be some legislative model direction in relation to it.

Q. Mr Coates, that's an example where the law's changed but the change hasn't necessarily been given full effect in the understandings of how juries should be instructed?
A. That's correct, and as I think I've got in my statement --

PRESIDENT NEAVE: Q. I think I might be right, I think it may be the case that Tasmania is the only state in which Murray Directions are still given in those circumstances. Do you know whether that's the case?
A. I think they're still given in New South Wales. There is --

Q. There's a provision now in New South Wales?
A. Section 294A of their Criminal Procedure Act, where it stipulates that you've got to say - that is, the circumstance of the case generally and not the complainant that require that direction, and that it's not unusual in cases of sexual assault that the case - the conduct's not witnessed.

Q. So that's the sort of amendment that would deal with that particular issue?
A. Yes.

PRESIDENT NEAVE: Thank you.

COMMISSIONER BENJAMIN: Q. Should that be tied in with the bench book that you recommend?
A. Yes, certainly. You could either have it in legislation, you could have it in actual legislation.

Q. Yes, I'm talking as an addition, you'd have the legislation then you'd have a bench book so that you had a consistent direction from the different members of the judiciary?
A. Yes.

MS ELLYARD: Q. One of the other recommendations that you've made for reform, Mr Coates, is about statutory discounts for pleas of guilty, and in that context I wanted to ask you whether you could tell us, perhaps not express a view, but we're aware that the government's proposing to introduce legislation for mandatory minimum sentences in certain cases and I wonder whether you could tell us what you would see as the practical effect of such reforms if they came in on the way in which child sex abuse matters are able to proceed through the system?
A. Well, firstly, I'd like to say that the sentences for sexual abuse of children, whether it's children now or historical cases, have increased substantially in the last 10 years and the Sentencing Advisory Council has a report out of that and in respect to that. So, that's the first thing I'd like to say.

The second thing: look, all cases of sexual abuse of children are serious, but the range of seriousness can vary significantly from one case to another, so the sentence can vary significantly from one case to the other. Now, I don't want to make comments about whether there should or should not be mandatory sentencing, but I will say that, if the scheme is brought in, as sure as night follows day, defence counsel will say, "If you're going to plead that aggravation, we're going to trial". And then we'll have to say to the complainants, "If they're going to say that, you're going to have to give evidence". So, that's one of the effects, it will reduce the plea, you know, will reduce the number of pleas of guilty.

And look, can I say, there is a high trial rate in any event in sexual assault cases involving children. So, they're the effects that I think it could have.

Q. Adjunct Professor Henning spoke this morning about her view that mandatory minimums would perhaps push the responsibility for deciding sentencing back onto the police and the prosecution because, as I think you've indicated, it would mean that prosecutors might be put in the invidious position of charging the way the facts say on the one hand and forcing a trial, versus potentially charging an offence that's less than warranted so as to secure a plea and avoid the effects of a trial?
A. Yes, or thirdly, victims have to give evidence where previously they wouldn't have had to give evidence.

Q. The last point really just as an opportunity to comment that I wanted to raise, Mr Coates, is, I mentioned the evidence of the witness that we're going to hear from tomorrow. One of the things that she will say is that, whilst she understood why it happened, she found it very traumatic during her contact with prosecutors to be asked on, as she recalls, multiple occasions to go through the details with some precision of the offending against her, and she felt that, although there was someone from the Witness Assistance Service available, whose help she appreciated, it was nevertheless a very traumatic experience and she found it hard to understand why it was necessary in circumstances where the offender was pleading guilty.

And perhaps I want to ask you to comment on her observation that it was really very traumatic to have to deal with prosecutors, although she's not critical of the prosecutors, and to what extent is it possible to have a Criminal Justice System that avoids the obligation on victims to speak multiple times about their story over the course of the criminal process?
A. Well, I don't find it surprising that she found the Criminal Justice System traumatic; it's a case where you have to relive awful memories and your evidence gets tested and, if it goes to court and you have to give evidence, then your honesty can be challenged.

And, I've spoken to the prosecutor in this case and looked at the file, even - just speaking generally - even

in a plea of guilty it's often necessary to ask the victim about the offence. Firstly, what the accused says in his interview or what he's suggesting he'll plead guilty to may be significantly different to what the complainant's suggested. And secondly - and so, the prosecutor has to speak to the complainant what has been said, make a decision whether the evidence is going to be disputed, because if we are alleging aggravation, we have to prove it beyond reasonable doubt, and so, the complainant would have to give evidence, so we've got to discuss that with the complainant.

Sometimes it's not clear whether - the extent of the criminal conduct. Now, as I said, I've spoken to the prosecutor in this case and she had acknowledged that the complainant was very traumatised, but there was a - the accused was disputing material and it was a live issue about the extent of the conduct that occurred before the complainant's 17th birthday and what was after the 17th birthday, so she had to look at that. I think, as I understand it, in her pre-recording with the police statement she was very general about the conduct.

Now, I can say that the prosecutor was so distressed about having to do this she actually wrote down, typed it out what she would ask. So, on the one hand I can understand why the complainant was so distressed, but for the prosecutor to do her job, she had to ask those questions.

Q. And there's no solution to that, is there?
A. There's no solution to that. And can I say, not all complainants are the same, obviously they're not, they're different people. And the other thing she had to clarify what she was going to say in the Crown statement of facts. Some complainants really don't want to deal with the prosecutors at all, others want to know every word that's going to be said. And, of course, they might change as it goes on, and if the prosecutor had said in court things that the complainant didn't think was correct, then she would be aggrieved in that situation.

And I suppose the other thing I might say in relation to that: the Royal Commission in their chapters on the Criminal Justice System really emphasised the importance of briefing complainants to know what they will face in court, what they're likely to be cross-examined about, and that -

it's probably a little bit different to this situation, but you're going to have to often put to a complainant what you're going to be cross-examined about, first of all so they know what's coming and, secondly, you know what the answers to these questions are going to be so you can re-examine on them.

I can understand why the complainant is distressed; on the other hand it's an adversarial system and unfortunately there's not a lot we can do about it other than, you know, try our best to do it in an empathetic manner with a witness assistance officer.

MS ELLYARD: Thank you, Mr Coates. Thank you Commissioners, those are my questions.

PRESIDENT NEAVE: Q. I just have one question. I've read the provisions of the Evidence (Children and Special Witnesses) Act several times, they do seem complex. I did want to ask you two things. Firstly, is pre-recording of children's evidence now used in all cases involving child sexual abuse?
A. I can't say it's all but it would be just --

Q. A significant proportion?
A. It would be a special reason when it's not used, yes.

Q. Should there be some sort of presumption that it will be?
A. Yes, certainly, I'd be content with that.

Q. And, what would you say about the extension of at least some of the special provisions that apply to children also applying to adult complainants?
A. Well, they do apply if you get --

Q. Some do and some don't?
A. Yeah, they do apply if you get a special --

Q. I think it is, if you get an order?
A. If you get an order, and obviously in my guidelines I asked - the prosecutor's got to consider whether an order should be given.

Q. Yes.
A. The advantage of having an order irrespective of whether they have a pre-recording or not, is that, if

there's a retrial, then you can use that evidence again, so that's the big advantage of it.

Q. Yes. Could you not have an automatic provision for recording of all - of evidence of both child complainants and adult survivors?
A. Pre-recording or just --

Q. Yes.
A. Well, you could. There are - look, I think that pre-recording children's evidence is really good. One, they get their evidence out of the way earlier. Secondly, when they go and give their evidence, that's all that they - they go and give it, there's no waiting around waiting for their turn to get on.

Q. That's right, yep.
A. Thirdly, look, there's advantages for the prosecutor. Prosecuting child sex cases is extremely stressful; that's all they have to do on that occasion, is lead that evidence or have that pre-recording; they don't have to worry about other witnesses, about making an opening address, about any legal responses to the judge.

Q. Yes.
A. On the other hand, it is a resource issue because, firstly, both Crown and defence counsel have got to prepare for a pre-recording as much as they prepare for the trial because they've got to know all the issues. Secondly, it's a logistic problem because then, for the trial, you've got to get the defence counsel, the Crown Counsel and the judge all aligned again. So, if you were going to put it to all complainants, then you would have those issues. Of course, if you get an order you can still - I mean, I've had pre-recordings with adults. And look, on occasions it's just not possible to have that same Crown Counsel who's done the pre-recording to do the trial, and we don't like doing that because that's a waste of resources because you've had two people that have had to have a look at that.

So, certainly it can be considered, but it's got to bear in mind, if you're going to do that, it's got to be resourced.

COMMISSIONER BENJAMIN: Q. Is the technology at present up to that task?
A. Generally if it's been recorded on the proper high

definition, it is. In the Supreme Court and in some of the Magistrates' Courts, it's not sufficient.

Q. But the vast majority of these go to the Supreme Court, don't they?
A. Yes. On occasions, though, we've had to do it again because the recording hasn't been working properly.

Q. That's a terrible outcome.
A. Oh, It's devastating, yes.

COMMISSIONER BENJAMIN: Thank you.

PRESIDENT NEAVE: Thank you very much. Thank you, Mr Coates, and we'll now rise.

AT 4.30PM THE COMMISSION WAS ADJOURNED TO FRIDAY, 8 JULY 2022 AT 10.00AM