Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings

WITNESS STATEMENT OF PROFESSOR JUDITH CASHMORE

I, Professor Judith Cashmore AO of [redacted] in the State of New South Wales, Professor of Socio-Legal Research and Policy, Sydney Law School and Professorial Research Fellow, School of Education and Social Work, University of Sydney and [redacted] do solemnly and sincerely declare that:

1. I make this statement in my personal capacity.

2. I make this statement on the basis of my own knowledge, save where otherwise stated. Where I make statements based on information provided by others, I believe such information to be true.

BACKGROUND AND QUALIFICATIONS

3. I have a PhD in Developmental Psychology and a Masters degree in Education. My research over more than 35 years has concerned children's involvement in civil and criminal proceedings and other processes in which decisions are made about children's lives. The special focus of this research has been on children's experience and perceptions of the process and the implications for social policy.

4. I have consulted to various government agencies and been involved in numerous State and federal government committees concerning children and families.

5. My professional memberships include the following:

    (a) 2004 to date, Member of the Judicial Commission of New South Wales;

    (b) 1999 to date, Member of the New South Wales Office of Director of Public Prosecutions Sexual Assault Review Committee (SARC);

    (c) 2005 to 2017, Member of the Advisory Committee National Clearinghouse on Child Protection (now the Child Family Community Australia: Research, Policy and Practice Exchange).

6. I am a member of the editorial board and/or regularly review for the following journals:

    (a) *Child Abuse and Neglect*, an international and interdisciplinary journal publishing articles on child welfare, health, humanitarian aid, justice, mental health, public health and social service systems and the official publication of the International Society for Prevention of Child Abuse and Neglect;

(b) *Psychology, Public Policy, and Law*, a quarterly journal which evaluates the contributions of psychology to public policy and vice versa;

(c) *Current Issues in Criminal Justice*, the journal of the Sydney Institute of Criminology at the University of Sydney Law School, which provides analysis and discussion of crime and justice issues; and

(d) *Developmental Child Welfare*, a quarterly peer reviewed journal.

7. I have been granted the following awards and honours:

(a) 2013, Stanley Cohen Distinguished Research Award by the Association of Family and Conciliation Courts for outstanding research and/or research achieved in the field of family and divorce. This was a joint award with Professor Patrick Parkinson;

(b) 2010, Officer of the Order of Australia, for distinguished service to the protection of children, as a research psychologist and advocate for the rights of children, through the development and implementation of social policy and law, and through leadership roles of organisations supporting child welfare;

(c) 2005, Macquarie University Distinguished Alumni Award Community Service; and

(d) I am a Fellow of the Academy of Social Sciences (UK).

8. I have authored a large volume of publications, including books, edited books, chapters, journal articles, conference papers, and research reports. My colleague Professor Rita Shackel and I established and co-teach a post-graduate course for Law and Criminology students, *Diverse perspectives on on child sexual abuse.*

9. Annexed to this statement and marked "**JC-1**" is a copy of my Curriculum Vitae, which includes a list of academic works published by me, alone or in collaboration with colleagues.

CHILD SEXUAL ABUSE IN INSTITUTIONAL CONTEXTS

10. In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse (**National Royal Commission**) commissioned Professor Patrick Parkinson and me to prepare a research report that assessed different degrees of risk of child sexual abuse in institutional contexts. Annexed to this statement and

marked "**JC-2**" is a copy of that report, entitled: *Assessing the different dimensions and degrees of risk of child sexual abuse in institutions* (**2017 Research Report**).

11. The National Royal Commission focussed considerable attention on the types of risks of child abuse in institutional settings and highlighted what those risks are. In my view, a number of key areas have been illuminated in this process. Without being exhaustive, they include: :

    (a) the risk factors for child sexual abuse that are present in institutional contexts;

    (b) a greater prevalence of child-to-child sexual abuse than previously recognised, discussed at paragraph 20 below; and

    (c) the impacts of delayed reporting where it occurs (discussed from paragraph 29 below).

12. For clarity, I adopt the National Royal Commission's definition of an 'institution' as discussed in the 2017 Research Report at page 13. This includes institutions that may not be within the scope of this Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (**Commission of Inquiry**) (such as private faith-based organisations and services, voluntary sporting associations and clubs, and private educational services), however the discussion and findings in the 2017 Research Report remain applicable to institutions that are within the scope of this Commission of Inquiry.

FEATURES OF INSTITUTIONS AT HIGHER RISK OF CHILD SEXUAL ABUSE

13. The 2017 Research Report at page 7 identifies four dimensions of risk:

    (a) situational risk — arising from the opportunities for abuse that the environment offers;

    (b) vulnerability risk — arising from the characteristics of the children cared for by that institution;

    (c) propensity risk — arising from a greater-than-average clustering of those with a propensity to abuse children and young people; and

(d) institutional risk — stemming from the characteristics of an institution that may make abuse more likely to occur or less likely to be dealt with properly if disclosed.

14. The research evidence suggests that situational risk, vulnerability risk and propensity risk are elevated in certain institutional contexts. Institutional risk, as the description suggests, varies with the different kinds of institutions, and is informed by characteristics such as the institution's activities with children (like health care or education), its staffing profile and other cultural factors.

15. This analysis appears to be applicable in contexts outside of the specific examples highlighted by the National Royal Commission. It is also my view these risk factors remain useful criteria with which to assess risk factors of child sexual abuse in the institutional contexts that exist within the Terms of Reference of this Commission of Inquiry, such as hospitals, educational facilities and out-of-home care.

16. I have observed similar risk profiles arising from the material before the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**). For example, vulnerability risk is also a risk explored in that context, particularly with children who have difficulty either understanding or conveying what is happening to them — such as children with intellectual disabilities. These children are particularly vulnerable if they do not have anyone around them they can report to. Similarly, this is like the vulnerability risk that presents in institutional settings. For example, a child in a hospital setting who is unwell or has an intellectual disability is at greater risk of child sexual abuse because, for instance, they may not have anyone to report to or may not be in position to communicate what is happening to them.

17. Institutional risk is also a risk directly relevant to the Commission of Inquiry's terms of reference. The 2017 Research Report identifies certain features regarding the assessment of institutional risk as to whether child sexual abuse is more likely to occur:

(a) factors that impair prevention efforts;

(b) situations where the organisational ethos is such that child protection is not given priority; and

(c) organisational cultures that facilitate misconduct.

18. The disclosure of child sexual abuse in the context of the Commission of Inquiry is also informed by these institutional risk factors, and an organisation's willingness to disclose child sexual abuse committed by its members or associates will provide a better protective response. Inadequate protective responses include factors such as:

    (a) a culture of not listening to and respecting children, which discourages complaints and minimises the significance of child sexual abuse;

    (b) an environment with close-knit and longstanding relationships between the adults and a strong group allegiance, making it more difficult for those adults to believe that the abuse has occurred;

    (c) deference to the rules that govern the organisation to the exclusion of other authorities; and

    (d) limited child protection and complaints policies.

19. In particular, the following characteristics inform particular risks in institutional settings:

    (a) A lack of culture of respect for children. Often children at risk or subject to sexual abuse are also subjected to bullying, emotional abuse or physical abuse by other children and adults, which fosters an environment conducive to other abuses.

    (b) Relatedly, a culture of placing children at the bottom of an institutional hierarchy fosters a lack of willingness to believe children when they do report an instance of child sexual abuse. For example, children who were abused in religious settings were often not believed and there was no perceived obligation to report to police for any independent investigation; indeed reporting the abuse was often seen as at odds with the hierarchy that placed the priest and God at the top.

    (c) Cultures that place greater importance on the protection of reputation than on the wellbeing and protection of children. For example, where children have been sexually abused in sporting organisations that influence the children's future in the sport, those organisations are dependent upon being supported and all involved remaining quiet. The cost of speaking up may mean that the child does not realise their aim of competing professionally

and may encourage others to downplay such reports to protect their own interests. This means that early red flags are often overlooked, such as describing grooming attempts like touching as merely 'accidental'.

HARMFUL SEXUAL BEHAVIOUR

20. The National Royal Commission demonstrated that there is also a greater risk than previously recognised of abuse in institutional settings of child-to-child sexual abuse. The greatest risk in institutional settings are co-residential settings, such as residential or foster out-of-home care, boarding schools, juvenile detention or residential facilities for young people with psychiatric disorders (2017 Research Report, page 11

21. Child-to-child sexual abuse or harmful sexual behaviours may occur in sexualised bullying or hazing contexts. As discussed at page 57 of the 2017 Research Report, it is difficult to identify specific institutional risk factors for child-to-child abuse. However, an institution's failure to adopt, implement and make known general child protection policies increases the risk of child-to-child abuse. These policies and practices are important in preventing such abuse, particularly making children aware that abusive behaviour towards them — in any form — will not be tolerated and encouraging and empowering children to report issues to staff or a parent. In residential care, risk factors may arise from the way an institution selects children and young people to live together. As the 2017 Research Report notes:

> *For example, an organisation may, for cost reasons, place a young person who has been known to engage in predatory sexual behaviour towards other children and young people in a residential setting with children who are vulnerable to sexual exploitation. That increases the risk of child-to-child abuse.*

PREVENTION OF CHILD SEXUAL ABUSE IN INSTITUTIONAL CONTEXTS

PREVENTATIVE MEASURES FOR ALL FORMS OF INSTITUTIONAL CHILD SEXUAL ABUSE

22. The risk assessment for institutions will invariably change subject to their circumstances. However, the highest risk contexts are residential institutions, such as juvenile justice centres, immigration detention centres, residential out-of-home care and boarding schools. These residential environments pose high situational, vulnerability and propensity risks. These particular risks are discussed at pages 92 and 93 of the 2017 Research report.

23. In residential settings, the primary risk of child sexual abuse comes from staff and other residents (including other children). For example, in juvenile justice detention centres, children who have already experienced sexual abuse and come from families that are dysfunctional on many levels may attract the sexual interest of adults or other children within the centre. Those who are abused in that facility may not wish to report such abuse for fear of reprisal from the perpetrator or those loyal to the perpetrator within that centre or losing ‘privileges’ including access to alcohol and drugs.

24. Accordingly, the highest risk of child sexual abuse, as discussed on page 93, is associated with institutions that also contain elements of, and meet the definition of, a ‘total institution’. These are institutions where the culture and rules governing interactions are ‘separate’ from the outside world’, such as juvenile justice detention centres and residential care facilities. This also includes institutions that have children and staff residing together (like boarding schools), where there is a strong hierarchy of power and adult authority.

25. The 2017 Research Report at page 92 provides a general overview of how such risk factors could be assessed and includes an account of preventative measures to protect a child from the risk of sexual abuse. These are critical measures. Where the culture is child-focused and child protection issues are given a high priority, an organisation that might otherwise score highly on vulnerability risk and situational risk (like residential care) may have a lower incidence of child sexual abuse than others with a lower risk profile. This outcome requires a well-managed focus on child protection and prevention of child sexual (and other) abuse.

26. It is important that an institution's culture and leadership are designed to put children's welfare above factors like those discussed in paragraphs 17 and 18 above. For as long as the tone from the top is not child-focused, child sexual abuse will continue to occur.

27. There is also a balancing act that must occur, to allow for a culture of appropriate emotional and physical connections. For example, I have spoken with young people in care who have not had psychological support from their carers due to their carers' fears about appropriate levels of affection. One young woman was placed in care from the age of 5 or 6, and never experienced a hug until she was 18. Her carers were too afraid to hug her. It is important that we do not get to a point where we cause harm to children by denying them important emotional support and care.

28. There are also environmental measures an institution can take. For instance, in juvenile detention centres there must be processes and practices in place around visibility of children, training of appropriate conduct and careful selection of staff employed at centres (including policies and practices that do not allow child abusers to work or visit such centres). It is also important to ensure that such policies and procedures are effectively implemented. Allowing independent visitors for children in juvenile detention centres may be helpful if it offers an independent person (not connected with the insular environment of the detention centre) that the child or young person is willing to trust.

DELAYED REPORTING OF CHILD SEXUAL ABUSE AND RESPONSE TIMES IN INSTITUTIONAL SETTINGS

29. Another area of importance is how we respond to these issues, and specifically how we can get better evidence from children rather than delaying their disclosure and reports into adulthood.

30. In 2016, the National Royal Commission commissioned a report entitled: *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases*. I co-authored that report with Patrick Parkinson, Alan Taylor and Rita Shackel. The report examines how the criminal justice system in New South Wales and South Australia dealt with complaints of child sexual abuse reported in childhood to the police compared with cases in which the report was delayed until adulthood. It investigated trends in delayed disclosure and reporting of child

sexual abuse, and maps the prosecution process and outcomes associate with varying degrees of delay in reporting. Annexed to this statement and marked "**JC-3**" is a copy of that report (**2016 Research Report**). Also annexed is a published article based on that report and marked "**JC-4**" which summarises much of the material in the report.

31. Other publications I have also authored or co-authored relating to delayed reporting include the chapter 'Child Witnesses' in *Children and the Law in Australia — 2nd Edition* published in 2017 (**Child Witnesses**). Annexed to this statement and marked "**JC-5**" is a copy of that Child Witnesses chapter.

32. Some of the relevant findings in the 2016 Research Report at pages 190-191 include:

    (a) Trends in reporting (General):

        (i) There were similar patterns in New South Wales and South Australia in terms of the relationship between the person of interest/suspect and the victim, consistent with research that the vast majority of sexual offences against children are perpetrated by someone known to the child. Most commonly, this person of interest/suspect is unrelated to the child. In about 7 per cent of these cases (where the relationship has been recorded), this person is a 'person of authority' (page 190).

        (ii) A significant and increasing proportion of the persons of interest/suspects in both states were children or young persons under 18. Where the location of the incident was an educational institution, over half of the persons of interest/suspects were under the age of 18 (pages 190–191).

    (b) Observations regarding delays in reporting:

        (i) In New South Wales and South Australia, about 80 per cent of the reports were made when the complainant was still under the age of 18 (page 191).

        (ii) In both states, most reports were made within three months of the incident, but nearly one in four sexual assaults were reported more

than five years after the offence, with the number increasing for reports after 20 years (page 145).

(iii) Males were more likely to delay their reporting, and for longer, than females; (page 191).

(iv) The longest delays occurred when the person of interest was a person in a position of authority. In these cases, the majority of reports were made at least 10 years after the incident; this was more marked in South Australia (75 per cent of sexual assaults) compared with 56.5 per cent in New South Wales, likely reflecting the abolition of the statute of limitations in 2003 in South Australia (page 191).

33. These data confirm that there are relatively high instances of delayed reporting of child sexual abuse where that abuse occurs in institutional settings. These reports relate to historical child sexual abuse in some older style residential institutions as well as some more recent church-based and sporting organisations. Whether the very delayed reporting evident in these earlier cases will continue for more recent and current sexual abuse is uncertain, given the increased awareness and exposure of both sexual abuse and the associated cover-up to protect the institutions.

34. The findings of the national Royal Commission and the analyses of these data also highlight the unexpected prevalence of child-to-child sexual abuse in educational institutions.

FACTORS THAT CONTRIBUTE TO DELAYED REPORTING

35. There are a number of reasons why children do not report sexual abuse or delay disclosing it. The reasons are discussed in Child Witnesses at page 564 and include:

> *threats being made by the perpetrator; fear of the consequences and reactions of others; not feeling that they had an appropriate opportunity to tell; not understanding that the abusive behaviour was unacceptable; and not wanting to jeopardise their relationship with the perpetrator. The 'grooming' behaviours of perpetrators operate on these fears and feelings and are deliberately intended to gain and maintain children's compliance,*

secrecy and loyalty. This contributes to the children's confusion, denial and feelings of being complicit and responsible for the abuse.

36. These factors also include the child's fear of not being believed by adults they might report to or the fear of 'telling on' an adult, particularly where there is a power imbalance that invariably favours the adult.

37. Other factors include developmental factors, such as intellectual disabilities, cognitive limitations in younger children who cannot articulate the abuse or do not recognise that they are being abused.

38. Children's disclosures may also be 'accidental' or inadvertent; for example, younger children may describe the conduct without understanding (the implications of) what they are saying. For instance, records of interview and court transcripts I have reviewed recount instances where younger children have inadvertently disclosed the abuse by describing "the white stuff coming out of the penis".

39. In contrast, older children and adolescents are generally well aware of the implications of the abusive behaviours and are ashamed and very reluctant to disclose it.

EVIDENTIARY CHALLENGES WITH DELAYED REPORTING

40. The 2016 Research Report identifies a number of evidentiary challenges with delayed reports (Chapter 8), including:

    (a) the likelihood of degraded evidence, as the availability and reliability of evidence degrades over time; for example, evidence being lost or destroyed, loss of medical evidence; witness memory fading, witnesses dying, and crime scenes being contaminated or 'erased'; and

    (b) evidentiary and admissibility issues, such as witness credibility and reliability, and associated directions to juries in relation to the impact of delay on the capacity of the accused to defend the charges.

41. Whether or not the case proceeds to prosecution depends on a number of other factors, and this is the focus of an Australian Research Council I am conducting with colleagues. Prosecutorial discretion involves an assessment of whether or not there is a reasonable prospect of a conviction based on the strength of the evidence and whether it is in the public interest to prosecute (2016 Research

Report, page 36). A number of factors affect the likelihood of the matter proceeding. These include considerations of how well the witness will cope with testifying, taking into account the age of the victim, the level of family support for the victim, the nature and circumstances of the alleged abuse and the availability of supportive evidence. Willingness of the witness is a very influential factor in determining whether a prosecution will proceed, and prosecutors have a tricky balance in trying to prepare a witness for the unpleasantness of the prosecutorial process without discouraging or deterring the witness. The quality of the police interview of the complainant is also an important factor (2016 Research Report, page 37). System delays include factors like adjournments and delayed hearings, retrials and stretched court resources

POSSIBLE APPROACHES TO ENCOURAGE TIMELY REPORTING BY CHILDREN

42. A number of measures can together help children to overcome their reluctance to report (like those discussed in paragraph 28). We know from the National Royal Commission and a consistent set of research findings that children have often tried to tell a number of people about their abuse and have been "brushed off". This often happens in a culture where the priority is to protect the adults or the reputation of the institution above the needs of the child. Facilitating a culture of respect for the child and their voice lays the groundwork for protecting children. It is important to instil measures so that children can trust that if they do report their abuse to somebody, then that will lead to an appropriate response to stop the abuse and prevent other children being abused. It is also important to talk with children in a developmentally appropriate way and with their non-offending parents/carers about what is likely to happen after reporting. Restoring trust and allowing some control over the way in which they disclose (as an adult or a child) and who they disclose to, and the circumstances in which that occurs, are key elements.

43. In my role as a member of the Judicial Commission of New South Wales, I have recently been involved in updating sections of the *Sexual Assault Handbook* [https://jirs.judcom.nsw.gov.au/benchbks/sexual_assault/index.html] as outlined in the article in the *Judicial Officers Bulletin*, March 2022 (Cashmore & Shackel 2022: https://jirs.judcom.nsw.gov.au/publish/job/vol34/mar/article1.html "**JC-6**").

MEASURES TO EASE THE PROSECUTION PROCESS FOR CHILD VICTIM-WITNESSES

44. Only a small proportion of complaints about child sexual abuse reported to police result in prosecution and conviction. The overall estimate based on the New South Wales statistics is that only about "12% of offences reported to police resulted in a conviction", and this was relatively stable rate over 14 years. This is are consistent with the findings of comparable studies (reported in Cashmore, Taylor and Parkinson, 2019, pages 85, 91). Some of the reasons for this low prosecution and conviction rate are discussed at paragraphs 40 to 41 above. They are also discussed on pages 566 to 569 of Child Witnesses.

45. The various barriers to children's evidence and the difficulties victim-witnesses face during the prosecution process have been articulated in a range of inquiries,task force reports and research studies across Australia, as well as in overseas jurisdictions (see **"JC-7**" for discussion about the points of attrition in an article published in *Child Maltreatment*: Cashmore et al., 2019, pages 85–87). This has contributed to increased awareness of the needs of child witnesses and the circumstances in which they can provide reliable evidence. These changes are important.

46. The presumption that children are reliable and competent witnesses has not always been the case. A leading legal text published in 1984 on evidence, *Evidence: Cases and Materials* (1984), illustrates relatively recent attitudes about the "dangers" of evidence from children in sexual abuse cases, listing six perceived problems with children's evidence, including that:

    (a) "children are prone to live a make believe world, so that they magnify incidents which happen to them or invent them completely";

    (b) "children sometimes behave in a way evil beyond their years"; and

    (c) "children may consent to sexual offences against themselves and then deny consent". (See annexures "**JC-8" and "JC-6"**, an article for the *Judicial Officers Bulletin* outlining research and literature that addresses these misconceptions.

47. A large body of evidence has established that children's memory is reliable (*Child Witnesses*, page 576). Often, however, those questioning children do not ask

questions in ways that optimise the reliability or accuracy of the child's answer. Further, once a matter is in court, the child-witness is potentially exposed to a range of stressors that make it more difficult to process information, answer questions and provide reliable evidence. These include the formality of the court, potentially facing the alleged abuser and cross-examination that is often confusing and developmentally inappropriate, designed to discredit the evidence of the witness.

48. Page 577 of *Child Witnesses* (annexure "**JC-5**") and replicated below as relevant is what is considered optimal conditions for questioning child witnesses, and what court conditions are often like. It is time to challenge the belief that the adversarial contest is the best way to test and get evidence, particularly for children. A number of aspects of the ways children are questioned in a court are in stark contrast to the conditions that facilitate reliable evidence. The following table demonstrates the extent of the mismatch between these two conditions:

Optimal conditions	***Court conditions***
Soon after event/disclosure	*Months/years after disclosure*
At child's pace	*To fit limits of court schedule*
Aim is to elicit complete, accurate, account	*Aim in cross-examination is to discredit witness*
Questioner trained in child development	*Legally trained — direct, forensic approach*
Rapport building	*Quick focus*
Open-ended and age appropriate questions	*Structured and often leading questions in cross-examination*
Opportunity to follow up	*Limited by rules of evidence*

49. Some of the measures to improve children's evidence and reduce the mismatch in the court conditions adopted in Australia and overseas include the following:

(a) witness intermediaries;

(b) the use of close circuit television

(c) pre-recording the investigative interview and hearings for use as evidence-in-chief; and

(d) protections under uniform evidence legislation (or equivalent) that imposes a positive duty on the court, or gives the judge a discretion, to disallow questioning of witnesses at trial that is harassing, intimidating, offensive or oppressive.

50. Each of these measures are discussed below.

WITNESS INTERMEDIARIES

51. In 2016, the New South Wales Department of Justice established the **Child Sexual Offence Evidence Pilo**t (CSOE **Pilot**) which introduced measures to allow witness intermediaries to assist in the communication between Police and children, and legal professionals (judicial officers and lawyers) and children; to allow the pre-recorded hearings of children's evidence including their cross-examination; and the appointment of specialist District Court judges trained in the management of child sexual abuse matters. The aim of the Pilot was to reduce the difficulties and stress for child witnesses in matters involving alleged child sexual offences and to improve the accuracy and quality of their evidence without impinging upon the defendant's right to a fair trial. Together with colleagues Rita Shackel, Ilan Katz and Kylie Valentine, I co-authored the process evaluation of the Pilot, and the outcome evaluation with Professor Rita Shackel.

52. Annexed to this statement and marked:

(a) "**JC-9**", is a copy of the **Process Evaluation Report**, dated July 2017; and

(b) "**JC-10**", is a copy of the Final Outcome Evaluation Report, dated August 2018 (**Final Evaluation Report**)

53. The evaluation found strong widespread support for all of the measures introduced by the Pilot.

54. The Department of Justice described the role of a witness intermediary as "an accredited professional with specialist training who will assess the child victim's communication needs and will tell the judge, the ODPP [Office of the Director of Public Prosecutions] and the Defence the best ways to communicate with the child victim when they are giving evidence at the pre-recorded hearing" (Final Evaluation Report, page 43).

55. Chapter 6.2 of the Final Evaluation Report provides a summary of the overall response to the use of witness intermediaries:

(a) Witness intermediaries were recognised by police, prosecutors and defence counsel as having an educative role. This was particularly so in the case of children with complex needs and children from diverse social, cultural and linguistic backgrounds.

(b) There was also, overall, a recognition that witness intermediaries assisted with creating a fairer environment for the child-witness in police interviews, and that they improved the child's confidence at court and therefore led to better evidence by the child.

(c) Parents and children were also generally very positive about the help the witness intermediary provided.

(d) Witness intermediaries were qualified speech pathologists, psychologists, occupational therapists and social workers. The majority were female. The overall feedback was that these qualifications were suitable, but that there was difficulty recruiting males, Aboriginal and Torres Strait Islander and culturally and linguistically diverse people.

56. The Final Evaluation Report recommended that the witness intermediary program continue with a range of additional phased measures and extended geographically beyond Sydney and Newcastle for more equitable access (as detailed on pages 9 to 13).

57. The Pilot has been established as a program and recently extended until 30 June 2024 but has not beem extended beyond Sydney and Newcastle.

58. I understand Tasmania has implemented a Witness Intermediary Scheme Pilot in matters relating to sexual offences and homicide.

PRE-RECORDING: INTERVIEWS

59. Audio or video recording the investigative interview with children serves several purposes related to the reliability of their evidence and to facilitating children's testimony, constituing their evidence-in-chief if and when the matter reaches court. It preserves the child's early report is preserved soon after disclosure. A verbatim account of the questions and answers are provided, and show the child's non-verbal presentation. This record is particularly useful when there are long delays between the investigative interview/s and the finalisation of the court process. It also assists by creating a record of the child's evidence; since children

may not provide a full account on one single occasion, these accounts can be viewed as a collective record. It. This may of course open the window for cross-examination on any inconsistencies between children's evidence in these interviews, so it important to remember that our memory is a reconstructed and does not function like a videotape. Differences in the details and the amount of information provided are therefore to be expected and are not necessarily an indicator of unreliability.

60. The onus is on the police interviewing child complainants and witnesses to question children appropriately and to explore inconsistencies that arise from their questioning; it is also on the prosecution lawyers to explore and help explain any inconsistencies as a result of the interviews.

61. Interviewing child-witnesses is a complex task and requires training, monitoring and feedback on an ongoing basis; it is not a single-shot 'inoculation'. See article by Powell and Barnett (2015) **- "JC-11"**.

PRE-RECORDING: HEARINGS

62. As an additional measure to the existing measure of pre-recorded investigative interviews, the CSEOP (Pilot) introduced pre-recorded hearings so that children's cross- examination (and any re-examination) can be recorded in advance of the full trial. Child witnesses give evidence via CCTV to reduce their stress by removing them from the presence of the accused and from the physical formality of courtroom environment. This evidence is recorded.

63. The recording is played to the court at the full trial together with the child's recorded police investigative interview. It can also be used in further trials if the trail is aborted. The child is rarely required to give further evidence. The Child Sexual Offences Pilot also appointed two specialist District Court judges to manage these pre-recorded evidence hearings and now several other judges are also managing these pre-recorded hearings.

64. The Final Evaluation Report states:

> *This [pre-recorded hearing] allows children to exit the criminal trial early, provides more certainty about the timing of their testimony, and allows them to give evidence in the absence of a jury and to reduce other trial related stressors. Both legal and non-legal professionals involved in the evaluation*

were generally very positive about these benefits, but there were some concerns among some defence lawyers and about the impact of the recordings with inadequate technology.

65. The feedback from all stakeholders, children and parents is discussed at pages 62 to 71 of the Final Evaluation Report.

66. It is my view that pre-recorded hearings are a useful measure that assist in easing the experience of child-witnesses, and that witness intermediaries facilitate better communication and more reliable evidence.

CLOSED CIRCUIT TELEVISION

67. Vulnerable persons, including children, in New South Wales have for several decades now been able to provide live evidence via closed circuit television (**CCTV**), with a jury watching the evidence remotely. The benefit to the child is that they do not need to be in the formal environment of the courtroom or in the presence of the accused.

This is generally the default option now for child witnesses in most Australian jurisdictions (including in pre-recorded hearings) but it does require good quality screens and cameras to provide a clear image in the courtroom.

JUDICIAL INTERVENTION FOR INAPPROPRIATE QUESTIONING

68. In New South Wales, section 41 of the *Evidence Act 1995* enables a judge to intervene in the question of a vulnerable witness (including a child) to prevent inappropriate or oppressive questioning.

69. The efficacy of this power is sometimes questionable. Some judges are reluctant to intervene during cross-examination, but are more inclined to do so in response to an objection from one of the parties. Judges and lawyers are well-schooled and immersed in legal language and styles of cross-examination and are not necessarily sensitive to certain styles of cross-examination that might be inappropriate or oppressive when directed to a child or vulnerable witness. In my experience, effective cross-examination designed to discredit the child's evidence is rarely aggressive and may not be seen by those familiar and comfortable with the court process as oppressive. For instance, I recall observing on CCTV a child witness who was about eight years old under cross-examination. The lawyer asked her 42 times the same question along the lines of "it's hard to remember

when things happened a long time ago, isn't it?". The questions were gently put, but asking that question repeatedly was quite destructive in that the child became confused and reticent in response. In that situation, there was no objection from the prosecution and no judicial intervention, when there should have been.

70. This issue is also discussed on page 583 of Child Witnesses.

VALUE OF THE ABOVE MEASURES

71. Overall, it is my experience that the above measures are valuable measures that ease child witnesses' experience of giving evidence in ways that do not impugn the defendant's right to a fair trial. It is also my observation that these measures, and particularly witness intermediaries, may have some educative value for lawyers, judges and others involved in the process. This understanding promotes and improves the adoption of a child-sensitive approach by all stakeholders in the prosecutorial process.

MEASURES TO EASE THE PROSECUTION PROCESS FOR ADULT VICTIM-WITNESSES

72. It is my observation that we have generally underestimated the needs of adult survivors in the prosecutorial process. While children are considered vulnerable on the basis of their age, adults are generally not offered the stress-reducing protective measures. They are, however, subject to distress and psychological triggers, both from the abuse itself and the stressors of recounting the abuse again and again in the investigation and court hearing, which are similar to the stressors discussed in paragraphs 48-49 above.

73. Measures such as CCTV and pre-recorded hearings should be available to vulnerable adult victim-witnesses as required.

OTHER POSSIBLE AVENUES TO INVESTIGATE AND DEAL WITH REPORTS OF CHILD SEXUAL ABUSE

74. Despite considerable discussion in various inquiries, and in health and criminal justice agencies in relation to the reporting of child sexual abuse and how evidence is obtained in prosecutions, it is my view there needs to be some serious

thinking about other avenues of justice, including certain restorative justice approaches. For instance, New South Wales also had in place a pre-trial diversion program where familial offenders had to take responsibility by pleading guilty and comply with strict requirements including disclosing their conduct to family members and their workplace; breaches resulted in the offender returning to court for sentencing. There were positive evaluations of the pre-trial diversion program by my colleague, Professor Jane Goodman-Delahunty, and it is not clear to me why this program was discontinued in New South Wales. Attached and marked **JC-12** is Professor Goodman-Delahunty's evaluation report, *NSW Pre-trial Diversion of Offenders Child Sexual Assault Program - An evaluation of treatment outcomes.*

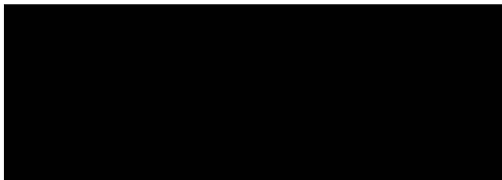
75. More generally, the court process and its adversarial nature is a difficult process to change. Special measures such as CCTV and pre-recorded hearings may be able to alleviate some of the stress and difficulties that child and vulnerable adult victim-witnesses face, but as I indicated in the chapter on Child Witnesses, these measures are "not a panacea and are not without problems; not the least of which are the attitudinal barriers of the professionals involved in the court process. What is needed, as long as children are required to testify in adversarial court proceedings, is not just a 'technological fix', but a change in the way children [and vulnerable witnesses] are treated in the court process. They need to be asked questions they can understand and to be treated with respect. … It is now well recognised that the way children are questioned affects both their emotional state and the consistency and completeness of their testimony. The need for lawyers to change their style and for judges to exercise greater control over inappropriate questioning and show sensitivity to children's needs is, however, less recognised" (page 585).

76. To illustrate this point, I recall reading an account of a person who underwent traumatic cross-examination over several days. They were allowed to pat a support dog in a break of that cross-examination. However, nothing was actually done to protect them from the experience of cross-examination. There are ways to change some parts of the process, like those I have discussed above, but changing the fundamental nature of what victim-witnesses are put through is more important. As long as those who are most familiar with the system – prosecutors

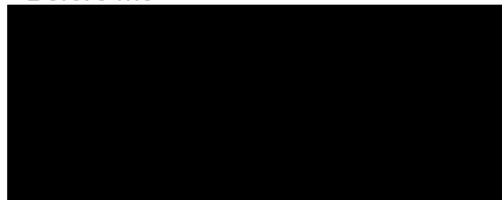
and defence lawyers and judges – would advise their own children not to proceed with a prosecution, there is an urgent need for change.

I make this solemn declaration under the *Oaths Act 2001* (Tas).

Declared at [Sydney]
on 3 May 2022



Signature of Judith Cashmore
Before me



An Australian legal practitioner within the meaning of the Legal Profession Uniform Law (Victoria)

This Declaration was witnessed by audio-visual means in accordance with the 'Notice Under Section 17' dated 4 September 2021, as authorised by the *COVID-19 Disease (Miscellaneous Provisions) Act 2020.*