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

# WITNESS STATEMENT OF TERESE HENNING

I, Terese Henning of [redacted] in the State of Tasmania, Adjunct Associate Professor at the Faculty of Law, University of Tasmania, 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 the following qualifications:

   (a) Bachelor of Arts from the University of Tasmania (1974);

   (b) Diploma of Librarianship from the Tasmanian College of Advanced Education (1975);

   (c) Tasmanian Teachers Certificate from the Tasmanian Education Department (1975);

   (d) Bachelor of Laws (Hons 1) from the University of Tasmania (1984); and

   (e) Master of Philosophy in Criminology from Cambridge University (1991).

4. I was admitted as a Barrister and Solicitor of the Supreme Court of Tasmania and the High Court of Australia in 1986.

5. I was appointed Adjunct Associate Professor at the Faculty of Law at the University of Tasmania in January 2020.

6. Prior to this, I was the Director of the Tasmania Law Reform Institute (**TLRI**) between January 2015 and December 2019. I lectured in and researched law at the Law Faculty, University of Tasmania from March 1989 to December 2019. In my role as Director of the TLRI, my focus was on law reform research involving the investigation of the operation of Tasmanian laws with a view to

their potential reform. As an academic, my principal areas of expertise were Evidence Law, Criminal Procedure and Criminology.

7. I have had a long Involvement in law reform, particularly in the area of evidence law, criminal law and procedure, vulnerable witnesses and human rights. I have been a member of State and Commonwealth law reform committees and have provided law reform advice to the Tasmanian Department of Justice and the Tasmanian Parliament.

8. I was a member of the Tasmanian Sentencing Advisory Council from 2015 to 2019.

9. Attached to this statement and marked **TH-1** is a copy of my curriculum vitae.

**The Witness Intermediary Scheme Pilot Program**

10. Tasmania's Witness Intermediary Scheme Pilot Program was introduced as part of the Tasmanian Government's response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) and the TLRI Report, '*Facilitating Equal Access to Justice: An Intermediary / Communication Assistant Scheme for Tasmania?'* (**Facilitating Equal Access to Justice Report**).[1] This Report can be found at: https://www.utas.edu.au/__data/assets/pdf_file/0011/1061858/Intermediaries-Final-Report.pdf

11. The Scheme provides for the use of trained intermediaries with specialist skills to support children and adult witnesses with communication needs to participate effectively in the criminal justice process in matters relating to sexual offences and homicide.

12. The Scheme was brought into effect by the *Evidence (Children and Special Witnesses) Amendment Act 2020* (Tasmania).

13. I was one of the authors of the Facilitating Equal Access to Justice Report. I prepared this report with [redacted] then Crown Counsel with the Office of the Director of Public Prosecutions, and [redacted] the Assistant Director of the TLRI. In this report, the TLRI recommended that a witness intermediary scheme be legislated for at every level of the criminal justice

[1] https://www.utas.edu.au/__data/assets/pdf_file/0011/1061858/Intermediaries-Final-Report.pdf.

process, because that ensures its longevity, promotes consistency of its operation and ensures that it can be more readily subjected to evaluation.

14. The Report envisaged the witness intermediary scheme as one component of a triumvirate of measures designed to control the questioning of people with communication needs and in so doing facilitate their access to justice. The other two components are the use of pre-trial hearings to take their evidence in the absence of the jury to enable greater judicial and witness intermediary intervention in questions and the use of directions hearings to specify the types of questions that can be asked. These three components work together to enable the best possible evidence to be elicited from witnesses with communication needs.

*Police not legislatively mandated to use witness intermediaries when interviewing*

15. I do not have direct insight into how the pilot program is tracking operationally.

16. However, I am aware that, while the Department of Justice website says that the scheme applies to both court proceedings and to Tasmania Police when they are interviewing witnesses, the scheme as it applies to police is not written into legislation.

17. This is in contrast to other jurisdictions – principally South Australia. It is also contrary to the recommendations made by the TLRI in the Facilitating Equal Access to Justice Report.

18. It is my understanding that, at this point in time, the use of witness intermediaries by police is only addressed in the guidelines contained in the Tasmanian Police Manual (**TPM**). These guidelines do not have any statutory force. Further, from a transparency point of view, it is not optimal that the use of witness intermediaries is only in guidelines, because the guidelines are not easily accessible on the Tasmania Police website.

19. If the use of witness intermediaries is only addressed in a Police Manual which operates just as an administrative guideline, there may be occasions where police won't comply. Compliance or otherwise might depend on the extent to which the police officer is educated in the operation of the scheme, the extent to which they personally can see the benefit of using a scheme like this, or whether they think that it's actually going to operate in a way that impedes or

slows down their investigation. In the relevant Order the TPM provides that "*If a witness intermediary is unavailable when requested by police, police can elect to proceed with the interview or defer the interview until a witness intermediary is available*."

20. Further, the TPM appears to have a relatively limited view of the role of witness intermediaries – specifically TPM 4.6.1.1(3) & (4) provide:

> *(3) Witness intermediaries are communications specialists who will facilitate communication between the witness and police or the courts. Witness intermediaries will provide police with practical strategies and recommendations on how to best communicate with the witness so they can understand the questions and provide their best evidence.*
>
> *(4) Witness intermediaries do not interpret or translate a witness's evidence, or interview or discuss the allegation with the witness or victim.*

21. Additionally, there are some strange restrictions in the TPM, specifically, TPM 4.6.5(6) & (7):

> *(6) Witness intermediaries are not to be told about the subject matter of the investigation, but police should let them know if there is subject matter to be avoided.*
>
> *(7) Witness intermediaries conduct an assessment of the witness in the presence of the investigating officer and may be present at interviews. They do not act however as an independent or responsible person in child interviews.*

22. It is unclear what purpose these provisions serve but they may well hobble the effectiveness of the witness intermediary role.

23. Under the *Evidence (Children and Special Witnesses) Act 2001* (Tas), s 5, statements taken by police from complainants can be admissible as the evidence in chief of the complainant. If a judge decides that a witness intermediary should have been employed to assist police in taking a statement from a child or young person, but a witness intermediary was not used, then the judge has a discretion to exclude the evidence (see s 138 *Evidence Act 2001* (Tas)). I am aware of one case in which a witness intermediary was not used when interviewing a suspect. It was quite clear to the judge that the accused person had communication difficulties and so the judge excluded evidence of admissions made by the accused to the police, on the grounds of

fairness. This is one way that trial judges might exercise their discretion to encourage police to use witness intermediaries in appropriate circumstances, even if they are not legislatively required.

24. However, if use of a witness intermediary is legislatively mandated, these problems may be ameliorated. In my view, the use of witness intermediaries by police should be legislated, and ideally there should be a separate protocol in place to enable the police to identify the people who would benefit from use of a witness intermediary. There are general guidelines in the TPM for dealing with complainants in sexual offences cases, children, and people with disabilities. Their sufficiency where witnesses with communication needs are concerned should be evaluated.

*Witness intermediaries do not presently have an interventionist role*

25. In the Facilitating Equal Access to Justice Report, the TLRI recommended that witness intermediaries be given an explicitly interventionist role where they think that questioning during hearings or police interviews is improper or inappropriate.

26. Under the current legislation, witness intermediaries are not given an explicit interventionist role. They are primarily given an advisory role (see subsections 7H(1)(a) to (c) of the *Evidence (Children and Special Witnesses) Act* and further, may "*perform any other function that a judge in a specific proceeding considers is in the interests of justice*" (subsection 7H(1)(d)). In my view, this wording is too vague.

27. Witness intermediaries should be able to intervene to tell a judge that, for example, a particular line of questioning is going beyond what the intermediary has approved and recommended.

28. While my canvassing of the operation of other schemes elsewhere indicates that witness intermediaries tend not to intervene regularly in this way, it is my opinion that they should nevertheless have the power to do so when necessary.

*The Witness Intermediary Scheme only applies to recognised experts*

29. The Scheme only applies to recognised experts. Whilst it is good that it should apply to recognised experts, I also think it would be very useful for the Court to

have the power to approve someone whose expertise is based on experience of the particular witness or complainant.

30. For example, someone who has had care of a witness, often have a good knowledge of the communication capacities of people with communication needs. In some circumstances, and subject to the person being suitably schooled about an intermediary's duties to the Court, it might be very useful to approve a person to act as an intermediary who has experience of a particular witness's capacities. This is possible under the South Australian scheme: *Evidence Act 1929* (SA), s 14A(4).

*The Witness Intermediary Scheme does not contemplate intermediaries being used for suspects or accused people with communication needs*

31. The legislation only contemplates that witness intermediaries will be used for witnesses. There is no legislative requirement for the use of an intermediary for a suspect or an accused with communication needs. The TPM expressly excludes suspects who are being interviewed.

32. I see this as another problem with the model being used in the pilot in Tasmania. My view and the TRLI's view, for the reasons expressed in the Facilitating Equal Access to Justice Report, is that the Scheme should apply to witnesses, complainants, suspects and accused people. If the Scheme does not apply equally to all people involved, it creates a system of differential justice. We know that this was a problem in the United Kingdom and they eventually changed their legislation to cover the accused as well.

33. If you've got a system of differential justice, you may not get meaningful buy-in to the extent needed from the legal profession, particularly from defence lawyers. If criminal defence lawyers object to the scheme, don't see the value of the scheme, or see it as being oppositional to the interests of their client's case, then they might be less willing to adhere to its mandates fully and freely where complainants and victims are concerned because they think it's unfair.

**Barriers to successful prosecution in cases of sexual assault**

34. Prosecution of sexual offences is uniquely difficult. This is largely because of deeply held and persistent societal views about genuine victims, who they are and their behaviour, and the nature of consent and what might ground a mistaken belief in consent. Stereotypes that have bedevilled these cases are

hard to dispel. Beliefs about the mendacity of sexual offences complainants and the reliability of children provide prominent examples.

35. Over the past 40 years that I have been involved in law reform, fundamental reforms to the law, both adjectival and substantive, have been achieved. Some of the most significant of those reforms relate to:

(a) the definition of consent and mistaken belief in consent;

(b) the kinds of questioning that defence counsel can engage in around sexual reputation and sexual experience evidence;

(c) the common law relating to the recent complaint rule;

(d) requirements relating to corroboration and directions that trial judges had been required to give in relation to the reliability of the testimony of sexual offences complainants and children.

36. All of these things played to stereotypes that juries have in relation to who is a 'genuine victim'. However, evaluations (see for example Helen Cockburn (2012) *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* available at https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf, and Australian Women Against Violence Alliance (2017) *Sexual Violence: Law Reform and Access to Justice Issues* and references cited there) show that these misconceptions about who is a 'genuine victim' are deeply entrenched in our society so that the reforms only go so far in ameliorating them. For example, in cases of historical sexual assault, there is obviously an absence of recent complaint. Defence counsel play on that and it doesn't matter that the judge is mandated to instruct the jury that absence of recent complaint does not necessarily indicate the mendacity of the complainant, or fabrication of the offence (s 371A *Criminal Code 1924* (Tas)). It's just one of those misconceptions that are difficult to dislodge.

37. Tasmania has the most advanced consent and mistaken belief in consent laws in Australia. But trials can still play to powerful traditional notions about what constitutes consent. Prosecution counsel and complainants are faced with generations of deeply embedded and persistent perceptions about sexual offences and prejudices around children's credibility, and around the credibility of people with disabilities, so those complainants start off at a considerable

disadvantage in addition to the difficulties of withstanding the rigours of the trial process itself. In recent years I have come to the radical view that root and branch reform is necessary of a kind that I know will never gain traction like changing the burden of proof in relation to consent and mistaken belief in consent. That is, if the defendant says the complainant consented or that he mistakenly believed that the complainant consented, the burden should be on the defendant to prove these matters on the balance of probabilities. This was the case in relation the defence of mistake in Tasmania until 1990 when the law as stated in *Martin* [1963] Tas SR 103 was overruled in *AG Ref No 1 of 1989* [1990] Tas R 46.

38. There is provision in the *Evidence Act 2001* (Tas) s 108C, for juries to be educated by experts about children's behaviour and, for example, why their failure to complain or their failure to respond to abuse in particular ways is normal – to try to dispel what we know to be commonly held perceptions and beliefs about children's reliability. I am not aware of the extent to which this section is being used in practice. It displaces the common knowledge rule prohibiting expert opinion evidence on child behaviour.

**Police and Prosecution Specialisation**

39. In my view, there should be specialisation of police and prosecution for cases for sexual assault matters, particularly where there are child victims or witnesses, or victims or witnesses with communication difficulties.

40. Expertise and special skills are needed to deal with these cases, in order to know what communication tools are available, and how to get the best evidence out of these kinds of witnesses. These cases need to be managed in particular ways, and you need to have particular expertise to manage them appropriately.

41. While there is no guarantee that specialist training and expertise would increase the rate of convictions, it will certainly enable prosecutors, lawyers and judges to ameliorate the process as much as possible for victims and witnesses, to protect them and thereby to elicit better evidence from victims and witnesses, which will lead to a situation where people are much better prepared, and where there is a lower attrition rate (that is, a lower rate of

lapsing of sexual offences from the criminal justice system prior to hearing or findings of 'not guilty').

**Recent evidence reforms relating to evidence of children and sexual offences**

42. For children, the most significant recent reforms have been the abolition of corroboration requirements and the abolition of a presumption that children are unreliable witnesses.[2]

43. As a result of those amendments, if the judge wants to alert the jury to a possibility of unreliability, they have to be able to identify something particular in the evidence of the child which demonstrates a possibility of unreliability. They cannot give directions to the effect that children are an unreliable class of witness, therefore the jury should treat this evidence with care and that there is a danger in relying on it to convict the accused in the absence of corroboration.

44. Other achievements have been in constraining defence counsel's ability to cross-examine complainants on their sexual reputation and experience, and the introduction of restrictions on the availability of committal proceedings (now preliminary hearings). Constraints have been placed on the availability of preliminary hearings in sexual offences cases: s 331B *Criminal Code 1924* (Tas). These limitations are a good thing. The committal process could be abused in the past; and they essentially required victims to go through the trial process twice. The committal process was used as a means for garnering inconsistent statements, rather than its proper purpose as a means of establishing a sufficient foundation for a trial to go ahead.

**Assessing effectiveness of the criminal justice system in responding to child sex abuse**

45. To assess the effectiveness of the criminal justice system in responding to child sex abuse, it's not enough to look at whether conviction rates are increasing, because that could be a result of many things.

46. In my view, it would require a really in depth evaluation of the implementation of all of the recommendations made by the Royal Commission. For example, in relation to what Tasmania Police are doing to implement those recommendations, it would look at how are they doing it, how is it working,

[2] Section 164(1) and s 165A *Evidence Act 2001* (Tas).

what effect is that having on police practice, and what do we need to be doing at a fundamental level to make sure those recommendations that apply to the police are actually being implemented. It would need to be a very detailed examination.

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

Declared at Hobart
on 1 July 2022

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Terese Henning

Before me

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[***Full name of Justice, Commissioner for Declarations or Authorised Person***]