
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 8 July 2022 at 10.13am

(Day 24)

1 PRESIDENT NEAVE: Before we begin, Ms Ellyard, I have a
2 restricted publication order to make. The Commission is
3 committed to being open and transparent, respecting the
4 preferences of victim-survivors and considering the impact
5 that evidence from these hearings may have on other
6 investigations, legal proceedings and the wider community.

7
8 The next witness has agreed to be identified, but in
9 order to protect the identity of a particular person the
10 Commission has decided to make a restricted publication
11 order. In the context of the scope of this inquiry the
12 Commission makes this order because it is satisfied that
13 the public interest in reporting on the identity of that
14 person is outweighed by relevant legal and privacy
15 considerations.

16
17 I will now briefly explain how the order will work.
18 The order requires that any information in relation to the
19 identity of the perpetrator is kept confidential. This
20 means that anyone who watches or reads the information
21 given by the next witness must not share any information
22 which may identify the perpetrator; that information is not
23 limited to their real name and may include other
24 information which may identify them such as where they live
25 or work. I make the order which will now be published. A
26 copy of the order will be placed outside the hearing room
27 and is available to anyone who needs a copy. I encourage
28 any journalist wishing to report on this hearing to discuss
29 the scope of the order with the Commission's media officer.

30
31 Thank you, Ms Ellyard.

32
33 MS ELLYARD: Thank you Commissioners. The first witness
34 this morning is Ms Leah Sallese, she appears remotely and I
35 ask that she take the affirmation.

36
37 <LEAH LOUISE SALLESE, affirmed: [10.15am]

38
39 <EXAMINATION BY MS ELLYARD:

40
41 MS ELLYARD: Q. Good morning, Ms Sallese, I take it you
42 can see and hear me okay?

43 A. Yes.

44
45 Q. Could I ask you to tell the Commission again your full
46 name?

47 A. My name is Leah Louise Sallese.

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Q. And you live in Tasmania now?

A. Yes, I do.

Q. You were a student in Tasmania and you've described in a statement that you've prepared your experiences of being abused by a teacher at an independent school in Tasmania?

A. Correct.

Q. You're giving evidence today in the context of that abuse but to reflect particularly on the experiences that you had when you came forward in the last five or six years to report the abuse that you experienced to police and to participate in the Criminal Justice System; is that right?

A. That's correct.

Q. Before we go to those matters though, can I touch just on a couple of aspects of your experience of trying to report the abuse you experienced at the time. Am I right in understanding that at the time you were being abused by a teacher at the school you did try to report?

A. Yes, twice.

Q. Can you tell us about those attempts that you made to report?

A. The first time was to the school chaplain, and he went on my behalf and spoke to the senior staff, the Vice-Principal and the Principal at the school, and they dismissed him and told him that he must have it wrong. So, then my father and mother were the next people to know and they went to the school, they were assured that my abuser would be sacked immediately. My parents subsequently found out, at the end of year speech night that he was still employed by the school, and that was some six months later.

Q. And this abuse had occurred when you were around about the age of 16 years old; is that right?

A. Correct.

Q. And as far as you're aware, at the time of the school being notified firstly by the chaplain and then by your parents of abuse, no steps were taken by the school to report to police at that time?

A. No, I haven't had any experience with the police up until when I came forward the third time in 2017.

Q. Can I ask you, as you went through your life after you

1 left school having had what we can now clearly see was an
2 experience of being sexually abused by a teacher, what was
3 the narrative that you were carrying with you about what
4 that experience had been?

5 A. So, I was - I believed that I had "an affair" with the
6 ■ teacher. So, that was the blueprint I had in my brain
7 basically whenever anybody referred to it, I basically took
8 the blame and the shame of having that relationship: he
9 didn't.

10
11 Q. And so, when you reflected on the role that he'd
12 played and the role that you'd played and how it should be
13 described, you described it to other people and you
14 described it to yourself as an affair that you had had?

15 A. Yes, yes.

16
17 Q. And it sounds from what you're saying is that you did
18 name it, it was part of your public narrative or what you
19 let people know about you?

20 A. Yes, that's correct.

21
22 Q. When you look back now, what do you think was
23 happening in the way that you had chosen to kind of take
24 that blame on yourself and to frame it for yourself and
25 others as an affair?

26 A. Well, when I first started seeing my psychotherapist,
27 I just basically had laughed - you know, I just used humour
28 to sort of laugh it off basically, and I admitted to it
29 freely. It wasn't something that I really - I just thought
30 it was my doing and that I had to bear the consequences of
31 that basically, and it wasn't until I saw the
32 psychotherapist that he made me confront it and basically
33 asked me to give him a brief synopsis of my life when I
34 first started seeing him and I went through a few things
35 and I said, "I had an affair with my ■ teacher" and he
36 said, "Wait a minute, what?" He said, "No, you didn't,
37 that's childhood sexual abuse". So, that's the first time,
38 as a 40-something-year-old woman, that I ever questioned
39 what I had in my mind as a narrative my whole life.

40
41 Q. That mustn't have been an easy task to confront a
42 narrative that had been part of your life for such a long
43 time?

44 A. No, and with that comes - you know, I sort of
45 avoided - you know, I'd avoided a lot of the trauma up
46 until that point, so I actually re-experienced a lot of
47 trauma in my early 40s basically from re-identifying and

1 re-writing that narrative basically to get to where I am
2 today basically.

3
4 Q. And part of that re-writing, I take it, was
5 recognising that, rather than an equal participant or the
6 instigator of an affair, you were the victim of abuse?

7 A. Yeah, well, there was a balance of power and I was a
8 vulnerable child and he was twice my age and in a position
9 of power. So, I'd never really looked at it like that
10 before because I had shouldered the blame, like I said I
11 had always shouldered the blame; all the adults in my life
12 had held me accountable for it.

13
14 Q. As I understand from your statement, there was another
15 person who perhaps was relevant to your ultimate decision
16 to come forward. You've told us about how your
17 psychotherapist helped you start to reframe your
18 experiences, but as I understand it you had contact with
19 someone at school around about the same time whose comments
20 also helped you?

21 A. Yes, she actually said to me, "What happened to you
22 should never have happened" and she said, "I feel sick",
23 and she actually became a [REDACTED] teacher and she said, "It
24 makes me sick that he was my mentor and he did this to
25 you". So, I felt a bit of validation in that as well;
26 there was, you know, a light switch going on basically,
27 after telling myself for years, 24 years, that I had been
28 an instigator and a party to something that really wasn't
29 my fault.

30
31 Q. And so, can you tell us then the process by which you
32 decided that you wanted to make a police report?

33 A. I had a couple of conversations with various friends
34 and my ex-husband then, and I was referred to [REDACTED]
35 [REDACTED], and she was the detective that was actually
36 responsible for my case.

37
38 Q. And so, the first time you went to the police station
39 to report, was it to see [REDACTED]?

40 A. Yeah. I'd spoken to her on the phone and then we made
41 an appointment and we went into the city to have a video
42 interview.

43
44 Q. Did you have any expectation of what that interview
45 process was going to be like?

46 A. Not really. I knew it was going to be tough, and it
47 had been 24 years at that stage from when I had actually

1 gotten through all of this the first time, so as an
2 historical case, you know, and also reliving trauma, yeah,
3 I knew it was going to be hard and I knew that there were
4 going to be bits that I didn't remember in chronological
5 order, et cetera, but I had a diary fortunately that
6 actually gave me some dates and times of some of the abuse,
7 so that was helpful in me relaying what had gone on at the
8 time.

9
10 Q. The Commission has heard evidence from a number of
11 people describing their experiences of making contact with
12 the police and how the police dealt with them; what was
13 your experience once you went into that interview room and
14 began that process of engagement with the police?

15 A. Bear in mind that I had never had any contact at the
16 time of my abuse with police, I had a really wonderful
17 experience, if you can call it that, with [REDACTED]; she was
18 amazing. I wish anybody that comes into contact with her -
19 you know, someone like her to look after your case, because
20 she just treated me with respect, care, kindness; she was
21 amazing actually. The police were really good in my case.

22
23 Q. And, do you think that response that you got from the
24 police influenced your ability to be part of the criminal
25 justice process and stick with it?

26 A. Yes, I do.

27
28 Q. One of the things that we've heard from other
29 witnesses is sometimes the experience of feeling blamed or
30 shamed even in the police context or their experiences of
31 abuse being minimised as they saw it by the way the police
32 responded; it sounds like that, happily for you, you didn't
33 have that experience?

34 A. I did not have that experience at all; like I said, I
35 was very fortunate to have the detective I had, I think. I
36 think it comes down to empathy and understanding; [REDACTED]
37 was amazing to me.

38
39 Q. And, as I understand it, she in your experience was
40 also a good investigator because, having spoken with you,
41 she investigated the matter and interviewed the abuser?

42 A. Yes, she did.

43
44 Q. And he made admissions to her, he confessed?

45 A. Yes, he did.

46
47 Q. And, as I understand it, he was charged and brought

1 before the courts in Tasmania. As I understand it, though,
2 once the criminal justice case got to the stage of being
3 prepared for trial and being with the Department of Public
4 Prosecutions, your experience wasn't so positive?

5 A. No, I had a terrible time during that particular part
6 of it all. Considering that he actually admitted to his
7 crimes, the way in which I was interviewed and
8 re-interviewed and had to reiterate, and ask in different
9 ways how, why, when, over and over in different ways, and
10 it is - I'm already traumatised, it's re-traumatising to
11 have to go through the same information and I really -
12 looking back now, I think that was a big ask basically from
13 them, especially because he'd admitted to it; he'd admitted
14 - he'd done me that dignity, and he had actually admitted
15 to what he'd done. I don't see how me trawling over all of
16 that information again, when I've already done an interview
17 with the police, et cetera, it was just really unnecessary
18 and brutal, to be honest.

19
20 Q. Were you given any explanation by the prosecutor at
21 the time about why these kind of detailed questions were
22 necessary in their view?

23 A. So, I know that, you know, that's the job, their job,
24 they have to ascertain that things are, you know, down to a
25 finite bit of perfection, like, they actually - everything
26 has to be dotted and crossed, I get that, but when you're
27 dealing with someone who has experienced trauma, has an
28 active case of complex PTSD, I don't think their approach
29 was particularly kind or understanding of victim-survivors
30 basically; it is actually really horrendous having to go
31 through that, that was probably the worst part of it for
32 me.

33
34 Q. We've heard about the existence of a Witness
35 Assistance Service; did you have assistance in the process
36 from someone from that service?

37 A. I had one consultation with her and then there was no
38 follow-up.

39
40 Q. Is there a kind of support or assistance that you
41 think could have been made available to you that would have
42 made going through that process less traumatic?

43 A. I think just perhaps if they had someone who's trained
44 in trauma and psychology to actually be on hand to be in
45 those sessions where you being grilled or, you know,
46 constantly questioned in different ways to actually be
47 there as a support to the person that's being questioned,

1 the victim-survivor; I think that's really, from my
2 experience, that's something that I would say that could
3 definitely be changed.

4
5 Q. So you're identifying the need for specified
6 therapeutic support?

7 A. Yes.

8
9 Q. So, a kind prosecutor or a well-intentioned prosecutor
10 can't do that job?

11 A. No.

12
13 Q. You need a specialist counsellor?

14 A. The lawyers are there to do a job, I understand that,
15 and they're not trained to be psychologists or, you know,
16 they're trying to get the truth and argue the truth. So,
17 for them to be expected to, you know, be able to cope with
18 the difficulties that victim-survivors are going through at
19 that moment in time when they're answering all the
20 questions that they're asking, it's not tenable really, you
21 know, they need someone, a specialist to be in there, some
22 sort of counsellor.

23
24 Q. At paragraph 25 of the statement that you prepared,
25 Ms Sallese, you reflect on the process of preparing your
26 victim impact statement; can you tell us what that process
27 was like?

28 A. I had help to prepare my victim impact statement.
29 They also, they wrote and rewrote what I had to say.
30 Because everything had to be so carefully put, basically,
31 you know, and that was really traumatic because I was
32 actually trying to say - I wanted to say certain things,
33 and I was told I couldn't do that, and this is what you
34 have to do, so I felt like a little bit of my power had
35 been taken away. Because basically the one thing I did
36 want to do was actually get up in that Supreme Court and
37 present my witness statement to his face; that was the one
38 thing I promised my 16-year-old self that I would do, and I
39 felt like that was, like I said, taken away from me a
40 little bit; I didn't really get to say everything I wanted
41 to say, basically.

42
43 Q. Can I ask you then about the sentencing process. Your
44 abuser was sentenced to a period of imprisonment and the
45 offence was, as it was known at that time, the offence of
46 maintaining a sexual relationship with a minor and, as I
47 understand it, in the sentencing remarks the judge

1 described the relationship as "consensual but
2 inappropriate" because of your age. When you first knew
3 that that was how it had been described, how did that
4 strike you?

5 A. At the time it didn't really strike me because I was
6 going through a lot of other things, but afterwards, and I
7 started noticing it more and more in articles and reports,
8 that there were a lot of cases that were being labelled
9 consensual and that is just - I just don't understand how,
10 if you're a child, you can consent: you can't vote, you
11 can't drive - you know, you can't buy alcohol, you can't,
12 you know, you can't do anything an adult does, so I find
13 the term "consensual" really offensive and "maintaining a
14 sexual relationship with a minor" offensive as well.
15 Because we've got these people that are representing the
16 Justice System with this really warped way of looking at
17 things and it is really offensive, frankly, and I've been
18 quoted before as saying that the language needs to change,
19 and it is changing, but that's forever going to be what was
20 said about my case as a 16-year-old.

21

22 Q. And it wasn't just that he was an adult, he was a
23 person in a position of authority over you, he was a
24 teacher?

25 A. Exactly.

26

27 Q. And I think you've reflected that it's really, someone
28 who's in a position of power talking about consensual
29 relationships in that context, it's just completely wrong
30 because it's impossible for consent to occur in that power
31 imbalance?

32 A. Yeah, it's an oxymoron really, it's actually not - it
33 doesn't go hand-in-hand at all; it's the opposite of that.

34

35 Q. One of the things that you say at paragraph 35 is that
36 any references to relationship and any connotation of
37 consent suggests some degree of blame on the part of the
38 victim?

39 A. Yeah, it's like we shoulder the blame of that by
40 saying that we've had a part in that relationship where
41 we've been groomed, we've been repeatedly sexually abused
42 by someone in a position of power; so, we're already
43 blaming and shaming ourselves, we don't need a description
44 such as that adding to our trauma.

45

46 Q. Ms Sallese, can I ask you, perhaps from the vantage
47 point of a few years on now since you went through the

1 criminal justice process, overall was it a positive thing
2 for you that you named the abuser and participated in that
3 process?

4 A. I had both positive and negative experiences, and this
5 was both at the time and later when I came forward, but
6 overall I'm glad I came forward. I was really happy that
7 my abuser got convicted. It's a shame that they don't get
8 the sentence that we get, the lifelong sentence of that
9 legacy that they've left us with; it's a shame they don't
10 get punished like we do, so that's something that doesn't
11 sit very well with me, but it's the way it is. It's really
12 important to me that what he did to me was labelled a
13 crime.

14
15 Q. And so, thinking about the way in which you would like
16 to see the Commission make recommendations for changes that
17 might be of assistance to other people who are in your
18 position, you've made some comments and recommendations at
19 the end of your statement; what are some of the things that
20 you would like to see change or which you think could be
21 done to make the criminal justice process, in your words,
22 less harrowing?

23 A. Well, I think there should be better support through
24 the Witness Assistance Service; it would have been helpful
25 for me to have someone who specialises in victim-survivor
26 counselling, especially when I was answering questions for
27 the prosecution.

28
29 I also could have been questioned much - far less,
30 basically, because I was re-traumatised by having to go
31 through my story over and over again, and it's - you know,
32 it's not a pleasant thing to do at all. While not a major
33 criticism, I also think the Victim Support Service should
34 have, or could have, followed up with me closer to the
35 criminal trial; some follow-through counselling might have
36 been helpful too.

37
38 Q. As I understand it, you were asked by the Victim
39 Support Service at one point if you wanted to seek
40 compensation but that wasn't what was on your mind at the
41 time?

42 A. No, at the time it wasn't about any sort of monetary
43 compensation, I just wanted justice.

44
45 Q. And then perhaps you might feel you've already said
46 this again, but thinking about perhaps the power of
47 language, Ms Sallese, and the way in which things are

1 described can impact the way people feel about themselves
2 is; is there anything more you'd want to say on this
3 question of the way the law and those in authority should
4 describe abuse done to children in a way that's more
5 helpful?

6 A. I think that my biggest problem with the Justice
7 System, particularly about my case and others that have
8 followed, is that, as I said before, the people that are
9 representing the Legal and Justice Systems are, you know,
10 highly educated people calling something that's been done
11 to a child consent, that the child has consented to having
12 sex with someone twice their age, or whoever it is in
13 authority above them in whatever situation, institution,
14 et cetera, no child can give consent. And, I know that has
15 been discussed quite a lot in this Commission of Inquiry
16 and I just want to reiterate that basically, it's really,
17 really important that the language is changed.

18
19 MS ELLYARD: Thank you, Ms SALLESE. Commissioners, those
20 are my questions but I'll look to you to see if there are
21 any questions you have.

22
23 COMMISSIONER BENJAMIN: Q. Yes, it's Robert Benjamin
24 here. Your original interview with the police was recorded
25 on a video-link, wasn't it, I think you said there was a
26 tripod set up?

27 A. Yes.

28
29 Q. So, there was no reason the DPP could not have looked
30 at that and seen a full statement when you first gave it,
31 was there?

32 A. Exactly.

33
34 Q. And, for my part, thank you for your evidence on the
35 question of "consent" for the false notion of a child being
36 able to give consent. Thank you.

37 A. Thank you.

38
39 COMMISSIONER BROMFIELD: Q. Ms SALLESE, Commissioner
40 Leah Bromfield, hi. Thank you for your evidence today. I
41 know that you experienced your abuse in an independent
42 school which is outside of our terms of reference, but do
43 you have any hopes in relation to the lessons that we're
44 learning from government schools being applied to the
45 private sector in Tasmania?

46 A. Yes. I think, I hope, and I believe, that there is
47 movement. I know that there are people that have inherited

1 this legacy through historical sexual abuse cases and who
2 are trying to right the wrongs of their predecessors
3 basically, and I think, you know, the awareness is better
4 and I think it will keep getting better but, like I said, I
5 keep saying the language; everything about the language has
6 got to change within the realms of the legal system and
7 Justice System; that's really, I think, you know, I think
8 that there's going to be, I hope, I hope there's going to
9 be no more of this: no more cover-ups, no more sweeping it
10 under the carpet, et cetera. I think the people that come
11 after will hopefully be in a lot safer place due to this
12 inquiry.

13

14 Q. Thank you. I didn't have any more questions but I did
15 just want to say thank you for your evidence, your language
16 today has been so powerful for survivors, and you talked
17 about how you came seeking justice and it's really clear
18 that part of that justice that you deserved was taken from
19 you when the Justice System used language that put blame
20 onto you and I thank you for the power of language you've
21 used today in articulating that so clearly for us.

22 A. Thank you very much.

23

24 PRESIDENT NEAVE: Thank you so much, Ms Sallese, for the
25 great courage you've shown in speaking to the Commission.
26 It was good to hear about your sensitive and kind treatment
27 from the police, and obviously it was a pity that that
28 kindness and sensitivity was not continued in the later
29 part of the process. I also would like to recognise the
30 really important comments that you made about the language
31 which is used to describe child sexual abuse in the future.
32 So, thank you very much, and we wish you all the best for
33 the future.

34 A. Thank you very much.

35

36 PRESIDENT NEAVE: And, we'll have a short break.

37

38 **SHORT ADJOURNMENT**

39

40 MS ELLYARD: Thank you, Commissioners. We now have a
41 panel comprising the Solicitor-General for the State of
42 Tasmania, Ms Sarah Kay SC and the Assistant
43 Solicitor-General, Mr Paul Turner SC; I ask that they be
44 sworn or affirmed.

45

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2 <SARAH KATE KAY, sworn: [11.05am]
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4 <PAUL TURNER, affirmed and examined:
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6 <EXAMINATION BY MS ELLYARD:
7
8 MS ELLYARD: May I begin with you please, Ms Kay, can you
9 tell us your full name?
10
11 MS KAY: Sarah Kate Kay.
12
13 MS ELLYARD: And you're the Solicitor-General for the
14 State of Tasmania?
15
16 MS KAY: Yes, that's correct.
17
18 MS ELLYARD: How long have you held that office?
19
20 MS KAY: Since Christmas Day last year.
21
22 MS ELLYARD: But your time working in the
23 Solicitor-General's Office dates from before then. Can I
24 ask you to summarise your relevant work history that's led
25 you to that role?
26
27 MS KAY: Yes, I commenced in the Office of the
28 Solicitor-General on 4 January 1999. At that time I had a
29 division of roles between the Solicitor-General's Office
30 and the DPP which was then responsible for the conduct of
31 civil litigation. So, for approximately three or
32 four years I had that dual role; thereafter my role was
33 dedicated to advisings work through the Solicitor-General's
34 Office.
35
36 MS ELLYARD: And turning to you, Mr Turner, you presently
37 have the role of Assistant Solicitor-General, Litigation;
38 how long have you held that role?
39
40 MR TURNER: I'm not quite sure because there have been a
41 number of iterations of the role over the course of the
42 time that I've been --
43
44 MS ELLYARD: Perhaps I'll ask you this: your substantive
45 function and role at present is to be the head of the
46 section of the Solicitor-General's Office which deals with
47 civil litigation?

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MR TURNER: Correct.

MS ELLYARD: The location of that function has moved over time?

MR TURNER: Yes, it was originally within the Office of the DPP to conduct civil litigation, or within the role of the DPP to conduct litigation, that's when I started, some 28 years ago, and then it moved to the Office of the Solicitor-General shortly after Mr Michael O'Farrell SC was appointed as Solicitor-General, and I think that was approximately eight years ago or thereabouts.

MS ELLYARD: So, whether it's been located in the Office of the DPP or the Office of the Solicitor-General, your practice as a lawyer over the past, I think you said 25 years or so, has been in the conduct of civil litigation on behalf of the State of Tasmania?

MR TURNER: That's correct.

MS ELLYARD: We've already touched on in the answers that you've given something perhaps significant to understand about the structure of the Solicitor-General's Office and the two quite discrete sides of its practice. You've mentioned advisings, Ms Kay, and we've also talked about litigation, could you summarise, please, the structure of the Office of the Solicitor-General and the functions that are performed?

MS KAY: Certainly. So, when I began in the Office of the Solicitor-General the sole function, I suppose, was to advise the Crown and to represent the Crown in constitutional and other significant litigation.

In November, I think it was November 2015, the Attorney-General gave a direction to the then Solicitor-General to conduct civil litigation; previously that role had sat with the DPP. So, presently the work of the Office is effectively divided between an advising role in which we advise Ministers, instrumentalities of the Crown, everyone effectively falling under the broad umbrella of the Crown, and we also conduct civil litigation which is headed up by Mr Turner.

MS ELLYARD: The Commission has heard some evidence in

1 earlier weeks of the Commission from, for example,
2 Secretaries of departments about the fact that they are
3 obliged to consult with your Office to receive advice; is
4 that right?

5
6 MS KAY: Yes, that is correct, and that comes about by
7 reference to several considerations, but perhaps primarily
8 in relation to civil litigation at least through directions
9 from the Attorney-General and an instruction under the
10 Financial Management Act, it's called a Treasurer's
11 instruction, which requires that all requests for legal
12 advice, including in relation to civil litigation, are to
13 come to the Solicitor-General's Office.

14
15 MS ELLYARD: We might just go briefly to a couple of the
16 guideline documents that you've referred to, Ms Kay.
17 Firstly, there's a document issued by the Attorney-General,
18 "Guidelines in relation to the provision of Legal Services
19 to the Government", and I'll ask that that be brought up,
20 so you should be able to see it on the screen in front of
21 you momentarily. [COM.0000.0000.0205]

22
23 So this is one of the guideline documents I think
24 you've referred to, Ms Kay?

25
26 MS KAY: Yes, that's correct.

27
28 MS ELLYARD: If we scroll down to see paragraph 3, we see:

29
30 *The Solicitor-General is required to act as*
31 *counsel for the Crown in the right of*
32 *Tasmania.*

33
34 And then as you've identified there's also been a
35 direction that the Solicitor-General undertake the state's
36 civil litigation?

37
38 MS KAY: Yes, and those two points reflect provisions of
39 the Solicitor-General Act in which the primary role as
40 acting as counsel for the Crown is contained in section 7,
41 and an additional part of section 7 which allows the
42 Attorney-General to give directions to conduct or perform
43 such other functions as the Attorney-General requires, so
44 that conduct of civil litigation comes about by reason of
45 that direction. It can be removed, modified, it's entirely
46 a matter for the Attorney-General in relation to that
47 matter.

1
2 MS ELLYARD: Just to be precise, we can see in that
3 footnote 5 there's a reference to the Solicitor-General's
4 Act, section 7(b), and that provides that a person holding
5 the office of Solicitor-General can exercise functions or
6 such other duties ordinarily performed by legal
7 practitioners as the Attorney-General directs or requests
8 him or her to perform?
9
10 MS KAY: Yes.
11
12 MS ELLYARD: Thank you. That can come from the screen.
13 There's also a guideline then that provides for the way -
14 guidelines for seeking advice from the Solicitor-General's
15 Office, and I'd ask that that come up.
16 [COM.0000.0000.0202]. This, as I understand it, is a
17 guideline which operates on all departments and agencies
18 who are required to seek advice from your Office?
19
20 MS KAY: Yes, that's right.
21
22 MS ELLYARD: And, perhaps touching on something you've
23 said a short time ago, if we scroll down to paragraph 5,
24 it's clear there's been a Treasurer's instruction that says
25 that, unless otherwise lawfully permitted, the Crown, which
26 means all of the various instrumentalities and departments
27 of the state, has to obtain its advice from law officers of
28 the Crown which relevantly includes you and your Office.
29
30 MS KAY: Yes.
31
32 PRESIDENT NEAVE: Can I just ask a question. Sorry, I
33 interrupted you, Ms Ellyard.
34
35 MS ELLYARD: Not at all.
36
37 PRESIDENT NEAVE: Does that apply to independent statutory
38 authorities?
39
40 MS KAY: The requirement? Well, this comes back to the
41 operation and application of the Financial Management Act
42 which applies to agencies, and there's a schedule in that
43 Act which --
44
45 PRESIDENT NEAVE: Yes.
46
47 MS KAY: -- there are some separate - so primarily it's

1 the departments, the executive, but there are also other
2 entities that are listed in that schedule, so they are the
3 ones who are bound by the Treasurer's instructions, and it
4 comes back to financial management and the accountability
5 for the expenditure of public funds, so that's the source
6 of that element of the requirement.

7
8 PRESIDENT NEAVE: Can you just remind me, I don't recall,
9 I know we've heard some evidence about this, whether the
10 Integrity Commission can seek external advice?

11
12 MS KAY: Not without approval. The Integrity Commission
13 is --

14
15 PRESIDENT NEAVE: An the Ombudsman?

16
17 MS KAY: -- an agency to which the Financial Management
18 Act applies.

19
20 PRESIDENT NEAVE: And the Ombudsman?

21
22 MS KAY: The Ombudsman is also, I believe, in the
23 schedule to the Financial Management Act.

24
25 PRESIDENT NEAVE: Right. So, although those agencies are
26 independent in a sense, they still need to go to you for
27 advice, unless they get a dispensation so that they can go
28 outside and get advice from another solicitor?

29
30 MS KAY: Yes.

31
32 PRESIDENT NEAVE: Thank you.

33
34 COMMISSIONER BENJAMIN: And that would include the
35 Children's Commissioner as well?

36
37 MS KAY: I would have to check the schedule, sorry,
38 Commissioner; I can look at it now, I think I've got the
39 Act here.

40
41 PRESIDENT NEAVE: You can leave that, we can check that
42 for ourselves.

43
44 MS KAY: I'll take that on notice.

45
46 PRESIDENT NEAVE: Yes, we'll take it.

47

1 MS ELLYARD: And what's clear, if we scroll down over the
2 page please, madam operator, to paragraph 8, where there's
3 a heading, "Binding nature of Solicitor-General's advice:
4

5 *Government must accept legal advice*
6 *provided by the Solicitor-General's Office*
7 *as accurately stating the law.*
8

9 Is that right?
10

11 MS KAY: Yes, that's correct, and that derives from the
12 constitutional convention which attaches to the Office of
13 Solicitor-General and, to take a step back, I suppose, the
14 role of providing legal advice sits in a fundamental sense
15 with the Attorney-General, but because of the
16 Attorney-General's political role, it devolves to the
17 Solicitor-General as second law officer, and coming with
18 that constitutional convention is the obligation that
19 agencies must accept that legal advice, and they must also
20 accept it for another reason, that's through the
21 Treasurer's Instructions.
22

23 MS ELLYARD: Just to be clear and perhaps it becomes
24 clearer when one looks at paragraph 9 which provides when
25 advice should be sought, so which helps us understand the
26 range of circumstances where there will be advice being
27 provided that has to be accepted. It's expected that
28 advice from your Office will be sought in relation to the
29 legal powers, functions and responsibilities of the Crown
30 or the lawfulness of any action or proposed action, where
31 there's an uncertainty about laws that apply or how they
32 should be interpreted; is that right?
33

34 MS KAY: Yes, that's right.
35

36 MS ELLYARD: And so, when we talk about accepting legal
37 advice as accurately stating the law, I take it perhaps a
38 practical example might be advice as to whether or not a
39 particular provision applies or doesn't apply to a
40 situation that an agency is facing?
41

42 MS KAY: Yes, it's very hard to describe in general terms
43 the breadth of the request for advice we get, they're many
44 and varied, but I think the primary point is that the Crown
45 must obey the law and be seen to obey the law, and it's
46 relevant to that that agencies must, if they're not sure
47 about the law, seek advice and clarity from my Office and

1 adhere to that advice unless the court says otherwise or
2 unless the advice is revisited, and we do that from time to
3 time. We're only human, we sometimes get it wrong and
4 we're more than happy to revisit previous advice.

5
6 MS ELLYARD: But of course, in the scope of the range of
7 legal issues that an agency might encounter, there might be
8 cases where the issue is, what's the law? And there might
9 be cases where, given what the law is, how should I
10 exercise a power or discretion in a particular way?

11
12 Would I be right in understanding that under the
13 various documents that we've looked at the agency's bound
14 to respect and follow your advice as to what the law is,
15 but you wouldn't necessarily be the one to advise on how a
16 discretion or power should be exercised?

17
18 MS KAY: No, that's right. We provide advice as to the
19 legal parameters. So, we might assist them in identifying
20 how their discretion should be exercised by giving advice
21 about ensuring that relevant considerations are taken into
22 account, irrelevant considerations are not taken into
23 account, and those sorts of considerations, but ultimately
24 the decision will rest with the decision-maker. So, we
25 might assist them to form their decision within correct
26 legal parameters in order to protect that ultimate decision
27 from challenge, but we do not dictate what sort of decision
28 that might be made.

29
30 MS ELLYARD: That can come from the screen, thank you,
31 madam operator. And so, perhaps to follow up on that last
32 point, Ms Kay, the Office of the Solicitor-General won't
33 ever be the decision-maker in the advisings capacity about
34 what an agency will in fact do in any given circumstance?

35
36 MS KAY: Yes, that's correct.

37
38 MS ELLYARD: They will be giving advice which is properly
39 to be regarded as independent legal advice as a legal
40 practitioner?

41
42 MS KAY: Yes.

43
44 MS ELLYARD: And it's a matter for the agency then to
45 decide how they'll take the benefit of that advice noting
46 of course that they're not free to ignore what you've said
47 about the law?

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MS KAY: Yes.

MS ELLYARD: As I think you're aware, this issue has come up in some of the evidence that the Commission has heard. The Commission has heard, for example in evidence last week in the Health case study, evidence from an HR officer at the Launceston General Hospital who gave evidence about what he would have done had he been made aware of a suggestion that a current employee of the hospital had, in another context, engaged in child sexual abuse; and his evidence was, "I would ring the Solicitor-General or the Solicitor-General's Office". Is that the kind of matter that you would expect your Office to be consulted on for advice?

MS KAY: Sometimes, not always; it's not an issue that arises through necessity. Those sorts of issues are predominantly dealt with within a department, and the accountability sits with the Head of Agency, but if there's a need for some guidance through that process, advice about the meaning of the State Service Act and the relevant Employment Directions which guide those processes, then we certainly provide that assistance.

MS ELLYARD: So, for example, and I'm not sure that this was teased out in full in the evidence that the witness gave, in that kind of factual scenario a question might arise about the existence of any power in the hospital to take action against an employee where the allegation is about conduct occurring outside of their employment and perhaps even before their employment. That might be a matter where you could give advice as to the existence or otherwise of a power to act?

MS KAY: Yes, we can advise as to the scope of their authority to deal with the matter.

MS ELLYARD: But you wouldn't ever be the ones telling them how they should act?

MS KAY: No, no, we don't dictate to departments the decisions they should make.

PRESIDENT NEAVE: I just have a follow-up question on that. It's a subtle distinction, it's one that lawyers may understand better than people who are not lawyers. Do you

1 think that distinction between providing advice about
2 powers and lawfulness and actually making the decision is
3 clearly understood by, for example, heads of government
4 departments?

5
6 MS KAY: I'm not sure that I can speak on behalf of those
7 Heads of Agency. I expect so. I think it's reasonably
8 clear that we're providing advice on the legal meaning of
9 matters and the state of the law and then we leave it to
10 them to arrive at a decision that they consider
11 appropriate, quite often based on their level of
12 satisfaction, for example.

13
14 PRESIDENT NEAVE: Thank you.

15
16 MS ELLYARD: I want to ask a couple of follow-up questions
17 that arise in the context of particular advices that we've
18 received from your Office and that I understand there's
19 been a waiver of any privilege that might exist. I'll just
20 ask my instructors to hand across to each witness a bundle
21 of documents. It's unlikely that we'll need to refer to
22 any names arising out of these documents and, as the
23 Commission has indicated, there are some restricted
24 publication orders in force.

25
26 If I draw your attention to the top bundle here. I
27 think you've already identified that one of the ways in
28 which it might be necessary for an agency to seek advice
29 from the Solicitor-General's Office is in relation to the
30 application of the State Service Act and the code and
31 Employment Directions that sit under the code; is that
32 right?

33
34 MS KAY: Yes.

35
36 MS ELLYARD: One such employment direction is Employment
37 Direction 5 pursuant to which investigations of a
38 disciplinary nature can occur in relation to whether
39 there's been any breach of the State Service Code?

40
41 MS KAY: Yes.

42
43 MS ELLYARD: One of the issues arising in the context of
44 that is the extent to which conduct that might be of
45 concern to an agency is conduct that has occurred in the
46 course of the person's employment in the agency; is that
47 right?

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MS KAY: That can be a question that arises occasionally.

MS ELLYARD: And the scope of the phrase "in the course of" or "in connection with employment" is a matter about which the Solicitor-General has been called upon to give advice from time to time over the years?

MS KAY: Yes, and they are words which appear in the Code of Conduct in section 9 of the State Service Act, so they're embedded into the statute and we have given advice about the meaning of those particular words.

MS ELLYARD: And I think the first document that you've been handed relates to a person who is known as "Wayne" for the purposes of our proceedings and, without being precise about the date, this is an advice in fact given by you earlier in your time in the Solicitor-General's Office relating to whether on the particular facts put before you the conduct of Wayne could be regarded as conduct occurring in the course of his employment?

MS KAY: Yes, that's correct.

MS ELLYARD: This was conduct which related to him taking a student whom he had met in the course of school for a recreational activity outside of the school environment, and in the course of that recreational activity behaving in a sexually inappropriate way?

MS KAY: Yes.

MS ELLYARD: And the advice at that time, having regard to the state of the law at that time including the law as to vicarious liability, was that that conduct wouldn't be regarded as occurring in the course of his employment?

MS KAY: Yes.

MS ELLYARD: Would that advice be given now, having regard to the state of the law?

MS KAY: Possibly; I couldn't express a concluded view as to that, I would have to research the current state of the law.

MS ELLYARD: And so, on the facts of that particular

1 matter it appears that what happened was that this person
2 who was a teacher had behaved in a way that might be
3 regarded as objectively - allegedly behaved in a way that
4 was objectively concerning and might speak to their fitness
5 to be in the State Service; would you agree with that?
6

7 MS KAY: Yes.
8

9 MS ELLYARD: But because of the construction of "in the
10 course of employment" the view that was formed by your
11 Office was that there's no power to take action under the
12 employment directive?
13

14 MS KAY: No, I wouldn't go that far, it was a question
15 about the meaning of "course of employment" and that was
16 the limit of the advice. I wasn't asked there about
17 whether action could be taken or what action could be
18 taken, it was a question about the construction of a phrase
19 in the statute. And, they are the words of the statute, so
20 whether something might be considered inappropriate or not
21 objectively is a separate matter to considering the scope
22 of the words that we're dealing with in section 9 of the
23 State Service Act.
24

25 MS ELLYARD: If we look to the end of that letter it's
26 clear that, having expressed the view that the alleged
27 conduct wasn't in the course of employment but was a
28 private matter, you identify that the matter might be of
29 interest to the Teacher's Registration Board insofar as it
30 related to the character of the teacher, and you made a
31 recommendation that perhaps it could be referred to the
32 board?
33

34 MS KAY: Yes. I mean, it was obviously concerning
35 behaviour and so I made that recommendation.
36

37 MS ELLYARD: But, as I understand it, and perhaps this is
38 consistent with the discussion we've had earlier, you were
39 called upon to answer, and did answer, a precise legal
40 question as to the scope of a particular phrase in the Act?
41

42 MS KAY: Yes.
43

44 MS ELLYARD: And it wasn't part of your role to offer any
45 broader advice on other ways in which action might be taken
46 about the conduct?
47

1 MS KAY: I don't recall, and it's certainly not reflected
2 in that advice that I was asked that broader question.

3
4 MS ELLYARD: And, unless asked, you wouldn't offer it?

5
6 MS KAY: No, we generally limit ourselves to answering the
7 questions that are asked of us. Sometimes it's something
8 that is obvious that needs to be expressed, but if the
9 agency hasn't asked us the question we don't generally seek
10 to offer advice on that matter. I mean, it's not black and
11 white in that regard.

12
13 MS ELLYARD: And, I ask you this question as someone who
14 has sat in the advising section and no doubt been called
15 upon to offer advice many times over a long period of time,
16 has there been, in your observation, any change in the way
17 in which this concept of "in the course of employment" has
18 been understood by your Office and therefore reflected in
19 advice given to departments and agencies?

20
21 MS KAY: Not that I've noticed. It's not something that
22 comes up regularly, you know, it's not something that we'd
23 look at on a regular sort of basis. I haven't observed
24 that there's been any change, it's not something that I've
25 had to consider in detail recently, so no, I don't think it
26 has.

27
28 MS ELLYARD: There's another section of the code that, as
29 I understand it, provides a mechanism for agencies to
30 potentially take action against an employee where the
31 alleged conduct might affect the reputation of the agency.
32 Perhaps I would make the self-evident comment that someone
33 engaging in the kinds of behaviour of which the Commission
34 here is concerned, behaviour that suggests that they pose a
35 risk to children, is conduct which perhaps would be capable
36 in certain circumstances of affecting reputation?

37
38 MS KAY: Yes, certainly.

39
40 MS ELLYARD: Can you recall, and I don't want to ask you
41 for specifics, being asked to advise on the meaning of the
42 phrase "reputation" and the kinds of impacts that might be
43 required before an agency could take action against an
44 employee under that heading as distinct from the "course of
45 employment" heading?

46
47 MS KAY: I don't recall providing advice on that, the

1 meaning of those words, but I consider that those are value
2 judgments for others and perhaps matters that are probably
3 better addressed by Head of Agency.
4

5 MS ELLYARD: Mr Turner, did you want to add to that
6 answer?
7

8 MR TURNER: I'm hesitant to.
9

10 MS ELLYARD: I'd invite you to.
11

12 MR TURNER: But I do know that Mr Michael O'Farrell SC,
13 who was the predecessor to Ms Kay, gave advice about 9(14)
14 of the State Service Act which is the reputational matter,
15 and that encompassed, I think, Banerji from the advice. I
16 don't have detail of it as you might appreciate, but it's
17 certainly been a topical matter. But I think that was some
18 time in the middle of last year or thereabouts, I'm a
19 little bit hazy, but I certainly do know that he gave
20 advice about it.
21

22 MS ELLYARD: Thank you for that, that's helpful. Perhaps
23 you'll say that this is another matter that's perhaps
24 better suited to Head of Agencies, Ms Kay, rather than
25 strictly a matter for the Solicitor-General, but the
26 observation might be made that, save where it can be
27 clearly said to be occurring in the course of someone's
28 employment, the disciplinary options for the state if it
29 becomes aware of concerning behaviours engaged in by a
30 State Service employee are limited? There's not many
31 disciplinary levers, it would appear, that can be pulled
32 unless the conduct can be brought into the course of their
33 employment?
34

35 MS KAY: Well, the disciplinary measures are set out in
36 respect of breaches of the Code of Conduct in section 10,
37 so there is a limit around them but there's some
38 flexibility, I think, within the words of that provision as
39 well.
40

41 MS ELLYARD: One comment that might be made is that a pure
42 discipline approach, which I accept is the appropriate that
43 you're called upon to advise on, is ill-suited to dealing
44 with what one might call questions of risk as opposed to
45 questions of conduct, and I want to ask you if you've got a
46 reflection on that - risk posed to children?
47

1 MS KAY: There's certainly an overlap, but dealing with a
2 breach of Code of Conduct isn't necessarily the only way of
3 dealing with an apparent risk. So, the Crown has a duty of
4 care and it has to separately address that regardless of
5 any suggested breach of the Code of Conduct by a particular
6 employee.

7
8 MS ELLYARD: And so, picking up that point that
9 disciplinary measures are not the only way: take the
10 hypothetical example of information made available about a
11 teacher or a nurse suggesting that, other than in the
12 course of his or her employment, they've engaged in
13 behaviours which pose a risk to the sexual safety of
14 children. What are the mechanisms other than the
15 disciplinary mechanism that you would regard as available
16 to the state in those circumstances?

17
18 MS KAY: I think ultimately that's a management question
19 for the Head of Agency to address, but considerations about
20 procedural fairness would need to be taken into account
21 insofar as that particular employee if there's any
22 suggestion of any wrongdoing on their part. So, it's a
23 difficult path to tread, but it's ultimately, in my
24 opinion, for the Head of Agency to manage.

25
26 MS ELLYARD: Having regard to the evidence we've received,
27 I think there's a strong sense that in those circumstances
28 the Head of Agency would ring your Office and say, "What
29 are my powers to act in relation to my employee?" So I
30 take your point about procedural fairness, but the question
31 is, what are the levers to be pulled other than the ED5
32 process if there's someone coming to work who's credibly
33 accused of posing a risk to children?

34
35 MS KAY: So, the State Service Act contains provisions
36 which allow for a Head of Agency to re-allocate duties and,
37 I'm sorry I don't have the Act in front of me to refer to
38 the particular provisions, they can re-assign employees and
39 relocate them from one location to another, but in a
40 framework. And so, we might advise about the existence of
41 those powers and the ability to use them; how they're used
42 is for the Head of Agency, but we would probably, you know,
43 just confirm that they need to take account of
44 considerations of procedural fairness.

45
46 COMMISSIONER BENJAMIN: Just assist me with this. I
47 understand what you've said here; you're asked for specific

1 advice in relation to a specific section and you gave that
2 advice, which may or may not have changed between then and
3 now because you haven't looked at the law. But if an
4 employee of an agency comes along and says, "Look, we are
5 concerned that one of our teachers may present a risk to
6 one of our students", did the course that was adopted not
7 by you but by the Office in general to adopt this very
8 narrow approach, has that continued? Because as I was
9 reading the advice it struck me that they may have been
10 given advice as to their obligations to report the conduct
11 to police or Child Protection, they may have been given
12 advice as to other ways that they could deal with this
13 problem rather than the narrow advice that was given? And
14 again, it's not a criticism of you because you're asked to
15 do a particular task, but in terms of the approach and the
16 culture of the Office at that time?

17
18 MS KAY: Look, there's a bit in that I suppose. It
19 depends on the question that's asked. If we're asked
20 advice as to, "What should we do here and what are our
21 options?", if there was any suggestion of criminal
22 wrongdoing we'd certainly say, "Look, you need to refer
23 this to police". We might give advice about the Code of
24 Conduct, we might refer to the Registration to Work with
25 Vulnerable People legislation, there are requirements under
26 that Act, and we might look at questions of duty of care.
27 So, there are a range of avenues that we might be asked to
28 look at, we might offer depending on the way in which the
29 request is delivered to us.

30
31 COMMISSIONER BENJAMIN: But sometimes the request is
32 delivered by people without legal knowledge, and sometimes
33 they would be relying on your Office to say, "Well, we
34 understand this is the question you're asking, but in the
35 context of the facts that you've presented to us perhaps
36 there are broader questions that ought to be asked". Does
37 that happen much?

38
39 MS KAY: Look, it does, I mean, there's no sort of black
40 and white approach here, we just try to take a reasonable,
41 logical approach to providing advice on these matters.

42
43 PRESIDENT NEAVE: Would it be helpful for some guidance to
44 be provided to people in the office about approaches made
45 to you by non-legal people for advice in contexts where
46 child safety is at risk?
47

1 MS KAY: Yes, it would be, but on the other hand child
2 safety is only one part of the - small part of the larger
3 content of advice that we provide.
4

5 PRESIDENT NEAVE: Of course.
6

7 MS KAY: So, risk management issues will come up across
8 the board and we don't try to get involved too much in
9 telling agencies how they should respond to a problem
10 except insofar as a legal question arises. We leave a lot
11 of the management of an issue to the departments and we'll
12 provide advice when sought.
13

14 PRESIDENT NEAVE: Thank you.
15

16 MS ELLYARD: But that does, in practice, mean that there's
17 a fair bit riding on the way in which the questions are
18 posed to your Office, because it sounds like it will often
19 be the case that you'll answer the question asked and not
20 necessarily say, "Well, you've asked me this question, but
21 actually on the facts you've given me you should have asked
22 me this different question". You wouldn't ordinarily take
23 that approach?
24

25 MS KAY: Sometimes we do, sometimes the questions are not
26 necessarily clear and you can tell that the person asking
27 the question probably hasn't really understood the legal
28 issue, and so, the question is sometimes restated to cover
29 the issue in an appropriate way, and it's not unusual or
30 uncommon for us to offer or make recommendations as to
31 courses of action.
32

33 MS ELLYARD: Following through with the example of Wayne
34 who we've been considering, one of the other themes that we
35 can see emerging in the two subsequent documents that are
36 in the bundle I've given you, Ms Kay, picks up this fact
37 that everyone has to consult your Office. And as we know
38 that in the advice that we've just looked at a
39 recommendation or a suggestion was made that there could
40 perhaps be a referral to the Teachers Registration Board
41 given issues of character arose, and what's clear is that
42 somehow or other that must have happened because, in the
43 course of the succeeding years, the Teachers Registration
44 Board consulted your Office for advice about Wayne and how
45 they should deal with him?
46

47 MS KAY: Yes, that's apparent from those documents.

1
2 MS ELLYARD: And we heard evidence in the course of the
3 Education week from Ms Moxham from the Teachers
4 Registration Board of her understanding, as I think you
5 would agree with, that she's obliged if she needs legal
6 advice or that board's required to consult your Office for
7 advice?
8
9 MS KAY: Yes, the Teachers Registration Board falls under
10 the broad umbrella of the Crown and so they're subject to
11 the guidelines from the Attorney-General and the
12 Treasurer's Instruction obliging them to seek advice from
13 my Office unless there's some reason to seek an exemption
14 from that.
15
16 MS ELLYARD: And what would a reason be?
17
18 MS KAY: For an exemption?
19
20 MS ELLYARD: Yes.
21
22 MS KAY: It's not likely to arise often with a board like
23 that, but in general terms some of the reasons for seeking
24 external advice might be, we don't hold the relevant
25 expertise, or that the matter is particularly complex and
26 we just don't have the resources to deal with it. The
27 other circumstance in which external advice might be given
28 or granted is in relation to a potential conflict of
29 interest, and that might arise because of personality
30 connections, it might arise because - not in respect of the
31 Teachers Registration Board, but an allegation of
32 misconduct against, say, a Minister, for instance.
33
34 MS ELLYARD: So, if someone was investigating an
35 allegation of misconduct against a Minister, that would be
36 likely the Integrity Commissioner?
37
38 MS KAY: Well, that's a possible avenue.
39
40 MS ELLYARD: And in such a case that might be an area
41 where you would grant, if the Integrity Commission asked
42 permission, grant permission for advice to be sought
43 externally?
44
45 MS KAY: Yes, that would certainly be a possibility.
46
47 MS ELLYARD: One of the things that Ms Moxham reflected on

1 in her evidence was, and stepping aside from the facts of
2 the Wayne case now, she was aware of cases where she wanted
3 certain documents in the course of her role with the board
4 from the Department of Education, and was aware that the
5 Department of Education had advice from your Office not to
6 provide them, but her only option to get advice on the
7 matter arising under privacy legislation was to come to you
8 as well. Would you accept that, at least on its face, that
9 suggests a tension and perhaps a potential perception, at
10 least, of a conflict in whether or not the two separate
11 instrumentalities are getting independent and equal access
12 to advice?
13

14 MS KAY: I think there are some fundamental points to be
15 made here and that is that we advise the Crown; the
16 Department of Education is part of the Crown, the Teachers
17 Registration Board is part of the Crown, so there's no
18 conflict, we just have the one client, and that we provide
19 the same advice. We don't have any sort of bias towards
20 one organisation over another, we just provide advice as we
21 see it on the law.
22

23 MS ELLYARD: But the system provides that there's no
24 opportunity for a second opinion, for example, in the
25 example there, where obviously your organisation had
26 advised the Education Department first, you're also a
27 lawyer for the board, but the board effectively has to take
28 the advice that's already been given, and under the system,
29 as I understand it, wouldn't be able to get a second
30 opinion or an alternate view?
31

32 MS KAY: Yes, and the Crown should have one single view of
33 the law. So, if agencies are allowed to go and get a
34 second opinion, we end up in a situation where the advice
35 given to the Crown may be in conflict itself, which is
36 undesirable.
37

38 MS ELLYARD: And so, perhaps picking up your point made
39 earlier on that the people in your Office are human and
40 make mistakes, say for the sake of argument that a
41 construction has been put on the privacy legislation that
42 is restrictive and other lawyers might take a different
43 view where two views are reasonably open, it doesn't appear
44 that the Crown will ever be able to have the benefit of
45 that kind of analysis if there's no opportunity to get
46 second opinions.
47

1 MS KAY: Yes, well, that will operate regardless of
2 whether there are two organisations involved in that matter
3 or not. We will give advice to a department, we could be
4 wrong, that department won't have the benefit of someone
5 else considering it; it's just the nature of the way in
6 which we provide advice.

7
8 MS ELLYARD: One of the areas in which, as I understand
9 it, there has been over time a change, and this relates to
10 one of the pieces of advice that you have in front of you,
11 is the way in which certain provisions of the Right to
12 Information Act have been understood over time?

13
14 MS KAY: Yes.

15
16 MS ELLYARD: And the document you have in front of you is
17 a document of your predecessor, Mr O'Farrell, reflecting a
18 view which was different to a view previously held about
19 the applicability of public interest tests to certain
20 categories of requests for documents. That's an example,
21 as I understand it, of advice or a view within the office
22 changing?

23
24 MS KAY: It is, that earlier advice was given by the
25 Solicitor-General preceding Michael O'Farrell, and it's not
26 uncommon for people in our Office or the Solicitor-General
27 to review earlier advice and take into account different
28 matters or just look at it afresh and decide that, actually
29 we didn't get this right, I think this is the correct view;
30 much in the same way as that a court might form a view on
31 appeal, that that might be overturned, different judges on
32 a single bench might take different views. It's just the
33 nature of the law; we can see it through different eyes.

34
35 MS ELLYARD: But to pick up your analogy of the law
36 changing in terms of the way judges interpret the law,
37 opportunities to revisit settled law or established legal
38 principles arise in the court because different litigants
39 go and get their own advice and, where there's a contested
40 question, they can bring proceedings to have the question
41 determined. The system that appears to operate in Tasmania
42 means that any change will only happen within your Office;
43 no instrumentality will have the opportunity to challenge
44 your constructions in court, they'd have to just ask you to
45 re-examine?

46
47 MS KAY: Yes, well, that is the system.

1
2 COMMISSIONER BENJAMIN: Doesn't that undermine the
3 regulatory process? If you've got an Integrity
4 Commissioner or a Nursing Registration Board or a Teachers
5 Registration Board that has some advice which significantly
6 impinges their views as to how they can regulate, the only
7 person they can look to is you. They can't argue with you
8 because the only legal advice they have is your legal
9 advice, so they're caught in that awful catch-22 situation.
10 Why wouldn't they generally be permitted to seek broader
11 advice so that they can undertake effectively their
12 regulatory capacity? I mean, they'd still be bound
13 presumably by your advice, but they could go back with a
14 second advice and say, "Look, what do you think of this?",
15 otherwise they don't have the skills to do that, do they?
16

17 MS KAY: And this comes back to, this is the system we
18 have. The Financial Management Act and the directions and
19 the instruction under that requires that they come to my
20 Office or to Crown Law for advice, and that's a financial
21 issue, that's why it's under the Financial Management Act;
22 who's paying for the external advice. There are provisions
23 or accommodations for external advice if required, but if
24 it's just an expression as to the construction of a
25 statute, for example, there's not likely to be the type of
26 conflict that would require external advice. And, we're
27 always willing to take into account the views of, say, the
28 Integrity Commission, they can come and have a debate with
29 us, express their views and concerns, it happens all the
30 time, so we do have that sort of input.
31

32 And, in a regulatory sense, you quite often have
33 parties who might be represented and their legal position
34 may be put forward to the department and we'll take that
35 into account and revisit our advice if required.
36

37 PRESIDENT NEAVE: Are the rules in Tasmania about external
38 legal advice more restrictive than those which exist in
39 other jurisdictions, do you know?
40

41 MS KAY: I don't know, sorry, President.
42

43 PRESIDENT NEAVE: Thank you. Can I ask you one other
44 question? How many departments have internal lawyers who
45 may assist, for example, in formulating the request for
46 advice?
47

1 MS KAY: I would say that most departments have legally
2 qualified individuals; they generally are not employed as
3 lawyers, because of the need to have a central legal
4 office. There's a principal legal officer in the Police
5 Department, for instance, who provides advice to the
6 Commissioner, but by and large they're employed because of
7 their legal qualifications but not as lawyers.

8
9 PRESIDENT NEAVE: Thank you.

10
11 MS ELLYARD: Pardon me a moment. You mentioned, Ms Kay,
12 that "this is the system we have" and when you talk about
13 "the system we have", I take it you're referring in part to
14 the system that's been created by way of the Treasurer's
15 Directive and by the guidelines that the Attorney-General
16 has seen fit to promulgate that require everyone to come to
17 your Office for advice? When you say "that's the system we
18 have", that's what you're referring to?

19
20 MS KAY: Yes, it's not necessarily created by those
21 guidelines, the latest iteration of the guidelines were
22 only issued or prepared late last year, I believe; I think
23 they are more reflective of the underlying system in terms
24 of the constitutional conventions, that the Crown takes its
25 advice from the Solicitor-General.

26
27 MS ELLYARD: To the extent, as I understand it, there are
28 other jurisdictions in Australia which have different
29 arrangements for government departments to receive advice
30 and which balance the role of the Solicitor-General and the
31 role of a range of law firms in a different way to
32 Tasmania, that's obviously another model. Where, as you
33 see it, does the power sit to, if it were appropriate,
34 change the model that is in Tasmania? Is it a question of
35 the government of the day taking a different view and
36 legislating accordingly?

37
38 MS KAY: Well, I think primarily it's for the
39 Attorney-General in the first instance it would be a
40 question of policy for the government more broadly.

41
42 MS ELLYARD: So these are matters of policy if a view was
43 taken that it would be desirable to change the kind of
44 system that we've been discussing?

45
46 MS KAY: Yes.

1 MS ELLYARD: Can I turn then to the question of civil
2 litigation, and Mr Turner's been sitting very patiently for
3 us to reach this stage. Perhaps, just recapping,
4 Mr Turner, your role in the Solicitor-General's Office is
5 in the civil litigation side?
6

7 MR TURNER: Yes.
8

9 MS ELLYARD: And as we've already made clear, the
10 Attorney-General has under section 7(b) of the
11 Solicitor-General's Act given the responsibility for the
12 conduct of civil litigation on behalf of the state to your
13 Office?
14

15 MR TURNER: To the Solicitor-General, yes.
16

17 MS ELLYARD: And that relevantly includes litigation
18 arising from allegations of child sexual abuse?
19

20 MR TURNER: Yes.
21

22 MS ELLYARD: There are a number of guidelines which exist
23 which, as I understand it, will be relevant to the work
24 that you do. The first is the Model Litigant Guidelines
25 and I ask that they be brought up on screen.
26 [COM.0000.0000.0207] And perhaps, while they're coming up,
27 I'll ask you this kind of question of principle, Mr Turner:
28 what does it mean to be a model litigant?
29

30 MR TURNER: The state is obliged to conduct litigation as,
31 in effect, an exemplar, a moral exemplar, so as to set a
32 standard that is impeccable in relation to the conduct of
33 that litigation, and one can reduce the several guidelines
34 that are specific in their terms to, essentially, that the
35 state must be fair and must not take advantage of its
36 resources when conducting that litigation.
37

38 MS ELLYARD: So, picking up that last point first, the
39 state will ordinarily, not always perhaps, but ordinarily
40 be in a stronger resourced position than those who litigate
41 against the state?
42

43 MR TURNER: That's usually the case, yes - well,
44 notionally, of course; if you're talking about specific
45 resources when it comes to people doing it, maybe not, but
46 of course the state has great resources.
47

1 MS ELLYARD: And certainly, in cases of claims arising
2 from child sexual abuse brought by individual people who
3 have allegedly experienced harm, there's a clear
4 differential of resources and power there between the
5 plaintiff and the state?
6

7 MR TURNER: I accept that.
8

9 MS ELLYARD: If we scroll down to paragraph 9 and
10 following, please, madam operation, which refers to the
11 nature of the obligation, the Model Litigant Guidelines
12 relevantly include obligations to deal with matters
13 efficiently and expeditiously and to make an early
14 assessment of prospects?
15

16 MR TURNER: Yes.
17

18 MS ELLYARD: If we go over the page, the Model Litigant
19 Guidelines contemplate that legitimate claims will be
20 settled promptly without regard to litigation?
21

22 MR TURNER: Yes.
23

24 MS ELLYARD: So that means that, in circumstances where
25 it's apparent at an early stage that the state is liable or
26 likely to be found liable, the Model Litigant Guidelines
27 contemplate that the state will recognise that and act to
28 compromise or otherwise settle the claim rather than
29 forcing it through to the bitter end?
30

31 MR TURNER: Most certainly.
32

33 MS ELLYARD: The Model Litigant Guidelines also
34 contemplate that parties might be required to prove things
35 that the state knows are true?
36

37 MR TURNER: Again, cannot be done as a model litigant.
38

39 MS ELLYARD: Yes. So, for example, where a plaintiff
40 alleges that they were a student at a particular school, or
41 that they engaged in a particular activity, where that's in
42 the knowledge of the state that wouldn't be a matter that
43 the state would ever be contesting in litigation?
44

45 MR TURNER: Of course not, but from the perspective of
46 receiving a claim it is necessary to make an enquiry as to
47 whether or not the person was a student at that school at

1 that time, for example, but given that the information is
2 available and whether it's readily available is another
3 issue; of course, that's not a contestable proposition.
4

5 MS ELLYARD: No.
6

7 MR TURNER: And the convention, if I can call it that, is
8 to try as best one can to, for example, pleading to a
9 statement of claim, make as many admissions as possible.
10 There's a tactical reason for that, you don't want to be
11 tied up with issues associated with interrogation, but the
12 point is, concede as much as possibly can be conceded at as
13 earlier a point as can be done.
14

15 But, having said that, there are significant issues in
16 relation to the assessment of factual circumstances and the
17 provision of instructions in relation to those. Pleadings
18 commonly contain pleadings of law. Insofar as the legal
19 matter is uncontentious, it'll be admitted. Sometimes it
20 will be a controversial pleading in relation to a question
21 of law, whether or not the duty as expressed exists, while
22 the, again, convention in the office is to ensure that
23 there is a pleading that is properly responsive to that by
24 saying, that's not the duty but we concede that the duty is
25 this, for example. That's a garrulous answer to your
26 question, I'm sorry.
27

28 MS ELLYARD: No, that's fine. To summarise, what you've
29 described is the way the state ought to act in relation to
30 litigation, and I take it your evidence is, that's the way
31 the state does act?
32

33 MR TURNER: As far as can be, yes. This the expectation,
34 and we take it seriously. From time to time the contention
35 will be made that the state is not acting as a model
36 litigant or hasn't complied with the guidelines which the
37 Cabinet have directed apply to abuse in care claims. We by
38 and large don't think that those have substance, those
39 complaints - they're rare, I hasten to say, but we're just
40 acutely conscious of these and how they are to apply and
41 how the state is to conduct litigation.
42

43 But there is criticism, and the criticism can be
44 public, that is to say, in the media.
45

46 MS ELLYARD: Yes, and we'll come back to some of those
47 criticisms I expect shortly, but can I ask that the next

1 document be brought up? We've looked at the Model Litigant
2 Guidelines which apply to all kinds of litigation, but you
3 also have available on your website another document that's
4 called, "Guidelines for the Conduct of Civil Claims" which
5 appears to anticipate, in particular, claims relating to
6 historical sexual abuse?

7
8 MR TURNER: Yes, that's so, and whilst it's general in its
9 terms, it was expressly in consequence of claims for, as
10 you say, historic child sexual abuse.

11
12 MS ELLYARD: And so, these guidelines which apply to the
13 state and its agencies set out a range of more specific
14 matters that can be understood to be guidelines for the way
15 in which the state and its lawyers should act in cases
16 where child sexual abuse claims are brought?

17
18 MR TURNER: Yes, that's so, and the operative word is
19 "should".

20
21 MS ELLYARD: Well, as I understand it, all of that
22 litigation's conducted by your Office?

23
24 MR TURNER: Yes.

25
26 MS ELLYARD: And, as I understand it, based on evidence
27 that we've had from a number of Secretaries, what's done by
28 your Office in sex abuse claims is not just to be the
29 lawyer but also to exercise a role in decision-making or
30 forensic decisions about the way in which claims will be
31 handled; do you accept that?

32
33 MR TURNER: I think it's a bit more nuanced than that.

34
35 MS ELLYARD: Tell me about the nuance.

36
37 MR TURNER: Ms Kay has referred to, and you've actually
38 brought up the document that refers to section 7(b) of the
39 Solicitor-General Act and the direction that has been
40 given, and there have been successive directions over the
41 course of the years, the most recent I think is from 2020
42 to Ms Kay's predecessor, Mr O'Farrell SC. Oh, I beg your
43 pardon, there's one in January, I assume in like terms as
44 the one in 2020.

45
46 MS ELLYARD: And the direction's a direction made under
47 section 7(b)?

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MR TURNER: Yes.

MS ELLYARD: Which is a direction that things can be done that could be done by legal practitioners?

MR TURNER: Well, Mr O'Farrell took a view about the effect of the direction and that came down, it filtered down, and that was to the effect that the conduct of litigation reposes in the Solicitor-General, and if there was a conflict, if we can call it that, between an instructor and the Solicitor-General in terms of what should occur in the litigation, then it would be the Solicitor-General's call ultimately.

But we don't have that, and this is the nuance that I wanted to emphasise, which is that, the Solicitor-General, and we're talking me and people in the litigation section, have close contact with instructors and we have discussions and sometimes debates about various things.

You would have seen in the - I think it's referred to in some correspondence to Ms Kay - various documents, for example, what has been described as a matrix for instructions which show what is sought from agencies; that is to say, when a claim is made, whether it's an informal claim that hasn't yet made its way into the court system, or whether it's a formal claim by way of a writ that is an action being commenced; so, the role of agencies, people in agencies, instructors, is to gather up the information that is necessary for purposes of answering the claim, factual instructions, documents, et cetera.

Now, I adverted before to, let's say, a statement of claim that might plead a matter of law: well, we don't need instructions about that because that's within the purview of the legal practitioner who has carriage and as --

MS ELLYARD: Can I just interrupt you and challenge you on that? No doubt it would ordinarily be the case that a client would accept their lawyer's advice on how to plead to a matter of law, but it does seem that what you're describing blurs what would be the ordinary distinction between the client on the one hand and the lawyer on the other.

As I understand it, in this case thinking about a

1 child abuse claim, the Office of the Solicitor-General is
2 the lawyers acting for the claim, but let's assume it's a
3 claim made in respect of someone who was a ward and who
4 experienced abuse in out-of-home care; that's a claim where
5 the responsibility and the documents and the
6 decision-making would sit in the department, well, right
7 now the Department of Communities: is that right?

8
9 MR TURNER: I'm not quite following the question, to be
10 honest, and --

11
12 MS ELLYARD: I'll reframe it because clearly I didn't do
13 it well enough. You seem to be suggesting a system where a
14 claim will come in, there will be a request go out for
15 documents and information, matters of fact that will assist
16 in pleading a response to the claim.

17
18 MR TURNER: Yes.

19
20 MS ELLYARD: Then you said, "If there's a matter of law
21 pleaded we don't need to ask them about that because we
22 know the answer to that", and I'm challenging you on that
23 because ultimately this pleading will be a pleading made on
24 behalf of the state --

25
26 MR TURNER: Yes.

27
28 MS ELLYARD: -- and would be a pleading prepared by a
29 lawyer but entered into on the basis of instructions from
30 the state that that's what should be done, and your model
31 teams to align the two together?

32
33 MR TURNER: No, I don't think it does. You've got to
34 remember, as Ms Kay's pointed out, we are the state. We
35 don't have --

36
37 MS ELLYARD: So, the state's acting for itself, the state
38 doesn't have lawyers in that sense?

39
40 MR TURNER: No. There's not the traditional, if I can
41 call it that, relationship of law firm instructing counsel
42 receiving instructions from a company which will provide
43 instructions through the relevantly authorised persons.
44 We're all in this as one thing. I know it sounds or it
45 seems to sound a little difficult for you to understand,
46 but you're in a different milieu.

1 So, coming back to the particular point. If the
2 pleading contains, as I adverted to before, the assertion
3 of, for example, a novel duty, then we wouldn't seek any
4 instructions about how to plead to that in response from
5 any instructor. We need to get instructions in relation to
6 matters of fact, and that's one of the problems that we
7 face in getting things in a timely way so that things can
8 be done as expeditiously as required by the guidelines,
9 both model litigant and otherwise, and that represents a
10 disjunct between what is to be done and what can be done at
11 times.

12
13 PRESIDENT NEAVE: Can I give you a concrete example? Let
14 us assume that the Solicitor-General, the people handling
15 the matter in the Solicitor-General's Office accept that
16 there is a basis for liability, accept that the events as
17 pleaded occurred, and made a recommendation about the
18 amount of compensation that it would be appropriate to
19 settle for.

20
21 MR TURNER: Yes.

22
23 PRESIDENT NEAVE: Let's assume that that occurs. And
24 let's assume that the head of department says, "Look, we
25 made a really bad mistake here, we did a whole lot of
26 things, we think that the amount that you're proposing to
27 settle for is too low". Who has the final call in those
28 circumstances?

29
30 MR TURNER: Could I answer that, and I hope this is a
31 responsive answer as you'd expect, by saying that it's
32 never occurred, and that's in the 28 years that I've been
33 in the role.

34
35 MS ELLYARD: Perhaps humour us. Assuming it occurred
36 like, every system has to have a fail-safe.

37
38 MR TURNER: I understand that and that's where I was
39 coming to, which is the second part of the answer, which is
40 that there would be discussion between Head of Agency -
41 let's say it's Head of Agency and me: there would be a
42 discussion between us about that, and I would revisit the
43 advice and I would look at it again to see whether in fact
44 the amount as postulated by the Head of Agency could be
45 justified, having regard to the framework to which Ms Kay
46 has referred, being the Financial Management Act and the
47 Treasurer's Instructions under it recalling that section 55

1 of the Financial Management Act, in effect, codifies - and
2 that was advice given by Mr O'Farrell SC - ex gratia
3 payments. So, there's no prerogative of ex gratia payments
4 and, in any event, that was never within the purview of
5 Head of Agency, so you cannot give money away of the state
6 beyond that for which there is a liability.

7
8 So, let's say there was a - we're at loggerheads; that
9 I considered that the amount should remain and Head of
10 Agency considered it shouldn't. I would ask someone else
11 to look at it. No disrespect at all to Ms Kay, but under
12 Mr O'Farrell I would have given it to him because he had an
13 extensive civil litigation background. In those
14 circumstances, as I've just described, I would hand it to
15 someone who was experienced, without indicating to them
16 what the issue was, but asking them to come to it afresh
17 without being sullied by my view on it. And if they came
18 to that figure that was the same, then it would be
19 escalated, in effect, to the level of the Attorney-General
20 or to the Solicitor-General first; here's what it is, what
21 do you say, and then to the Attorney-General but, as I say,
22 it's just never occurred.

23
24 COMMISSIONER BROMFIELD: Can I just - it's never occurred
25 that the advice about a settlement quantum has been
26 queried?

27
28 MR TURNER: Well, that's a slightly different question,
29 and the answer is, yes.

30
31 COMMISSIONER BROMFIELD: Okay.

32
33 MR TURNER: It's been queried because it's been too much.
34 That's not in, I hasten to say, abuse in care claims.

35
36 MS ELLYARD: Can I ask you to confine your answer to abuse
37 in care matters, because the Commission has received
38 evidence from at least two Secretaries of their
39 understanding that it's you who has the call, "you" as in
40 your Office, and at least one Secretary has or will give
41 evidence that there's been cases where they've had the view
42 that the amount fixed is too low, and that, while they can
43 challenge and query, ultimately the end point is, you're
44 the one who has the call?

45
46 MR TURNER: Well, as I said, that's a, in my view,
47 somewhat simplistic way of saying it because there are the

1 nuances that I've described.

2

3 MS ELLYARD: Well, there's lots of nuances, there's lots
4 of opportunities for consultation and for you to be
5 persuaded or for you to persuade them, but in the end the
6 decision-maker in default of a consensus being reached, is
7 you?

8

9 MR TURNER: Yes.

10

11 MS ELLYARD: I want to put it to you that that seems odd
12 because you're the lawyer, not the client?

13

14 MR TURNER: Well, yes, but we are part of the Crown.

15

16 MS ELLYARD: And, am I right in understanding that you
17 consider that it's your role, and appropriately so, because
18 of this broad construction that Mr O'Farrell gave to the
19 direction that the Attorney had given?

20

21 MR TURNER: That's what we have operated under and
22 Mr O'Farrell was my superior, as Ms Kay is, and I defer to
23 that.

24

25 MS ELLYARD: And it would be fair then, and it's not
26 appropriate for us to exchange in extensive legal debates,
27 but I've already drawn both your attention to the fact that
28 what section 7(b) talks about is functions and powers given
29 to the Solicitor-General that are those ordinarily carried
30 out by legal solicitors. Now, in private practice it will
31 never be a lawyer's call what the amount of compensation
32 is?

33

34 MR TURNER: I accept that, but I can only repeat what I've
35 said as to how that has been construed and I am bound by
36 it.

37

38 MS ELLYARD: Ms Kay, can I invite you to respond to that
39 observation? It appears on one view that the Office of the
40 Solicitor-General, perhaps over time, has regarded itself
41 as empowered to act beyond the scope of what section 7(b)
42 could permit it to do, that is, to be do things other than
43 be the lawyers in these claims.

44

45 MS KAY: No, I don't think we ever try to be anything but
46 lawyers, we provide legal advice, and I suppose the
47 flipside of this is, on what basis does a Head of Agency

1 have to settle a matter contrary to legal advice, and
2 that's a financial management issue and that's where the
3 financial management - sorry, the Treasurer's Instructions
4 come into play, and they are required by the Financial
5 Management Act to comply with those instructions.
6

7 MS ELLYARD: So, this is viewing it all, as I understand
8 it, through the prism of, it's ultimately a financial
9 question of any amount of money that's going to be paid,
10 but can I put this to you. In the settlement of any
11 litigation, but particularly perhaps litigation relating to
12 child sexual abuse, there are financial and non-financial
13 considerations; would you agree with that?
14

15 MS KAY: Yes.
16

17 MS ELLYARD: And amongst the non-financial considerations
18 might be matters like the extent to which the department or
19 agency wishes to have regard to matters of reputation or
20 broader public interest; do you accept that that's
21 potentially a relevant matter?
22

23 MS KAY: Yes.
24

25 MS ELLYARD: And the extent to which the agency takes a
26 view about wanting to act in a way consistent with that
27 agency's values or what it thinks the public expects of
28 them?
29

30 MS KAY: Well, it's the state's values ultimately;
31 departments don't have any sort of legal status, they're
32 just parts of the executive.
33

34 MS ELLYARD: Ordinarily, can I put it this way, in a
35 context where there was a more overt division than exists
36 in Tasmania between the provider of the advice and the
37 provider of instructions, the advice would draw the
38 attention of the client to the broad range of matters that
39 might be considered, or the client might say, thanks for
40 that legal advice, but for reasons that are non-legal and
41 non-financial I wish to act in a different way.
42

43 In the system that you're describing does the state
44 receive advice about those matters of reputation and
45 principle as well as pure matters of liability and money?
46 I'm happy for either of you to answer.
47

1 MR TURNER: In general, no.

2

3 MS ELLYARD: And so, where, if anywhere, in the model of
4 civil litigation that's followed in relation to child
5 sexual abuse is the opportunity for reflection about
6 whether or not this is a matter where it's not in the
7 public interest for the matter to be denied and it would be
8 in the public interest for the matter to be settled even on
9 terms that might seem to be beyond the scope of the state's
10 pure liability?

11

12 MR TURNER: That has not arisen, and I'm struggling to put
13 it within the legal paradigm.

14

15 MS ELLYARD: Well, because you're the lawyer.

16

17 MR TURNER: That's right.

18

19 MS ELLYARD: But this is the point about the client.
20 There may be a client - let's say, for example, a claim
21 that's brought against a particular government institution
22 that has its own sense of itself and a desire to be seen in
23 a particular way in the community and to move beyond
24 problems of the past. The client might take a view that
25 for reasons of building community trust, re-establishing
26 its status in the community, matters should be settled even
27 though the legal basis would be there to fight it?

28

29 MR TURNER: That doesn't fit within the Financial
30 Management Act and the instructions under it. It is
31 devoted or they are devoted to financial matters and that
32 goes back to, is there liability and, if there is liability
33 or if there's debate about liability, what would be the
34 reasonable amount of quantum.

35

36 PRESIDENT NEAVE: Let's assume that the institution has
37 behaved egregiously and it now concedes that; that it has a
38 concern to overcome that, that the particular individual
39 has been harmed very seriously, might even be a matter for
40 the award of aggravated damages against the institution -
41 that's a legal issue --

42

43 MR TURNER: Yes.

44

45 PRESIDENT NEAVE: -- but all of those are sort of
46 discretionary matters that you would take into account,
47 wouldn't you, if you're a private lawyer settling a matter?

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MR TURNER: Yes.

PRESIDENT NEAVE: And you might say to your client, "Look, you might get up, you might get away with a payment of this amount but we don't think that's a good idea for these reasons". Now, I think what you're saying is, you can only look at the financial implications, you can't go beyond that in any way?

MR TURNER: Correct.

PRESIDENT NEAVE: Thank you.

MS ELLYARD: Can I ask some questions about steps taken in litigation, Mr Turner, and you may feel we've covered them --

COMMISSIONER BROMFIELD: Sorry, Ms Ellyard, before you do, I just wanted to check whether the broad interpretation of the conduct of litigation under the Office of the Solicitor-General was the same as the interpretation when this function was held by the DPP?

MR TURNER: I can't answer that because I just don't know. I don't recall.

COMMISSIONER BROMFIELD: Ms Kay, do you know, you were in that office?

MS KAY: No - well, that was a very long time ago, and I was a junior lawyer, so I didn't turn my mind to those considerations.

MS ELLYARD: Can I suggest, Mr Turner, you probably do know because you must recall from those days where you got your instructions from, if indeed you had to get them from anywhere?

MR TURNER: Yes, but it was never an issue, as I said before, and it was only in recent times - and I don't know what prompted it - that Mr O'Farrell made it very plain what his interpretation was of the direction. So that, in the event - the unlikely event of there being a dispute of the kind that we've been discussing, the Solicitor-General would say - and, let me say, I wouldn't be doing it, it would be the Solicitor-General personally - the

1 Solicitor-General would make a determination about that.

2

3 MS ELLYARD: Can I move on to some more specific things?
4 I think it's consistent with the system you've been
5 describing, Mr Turner, that decisions about how to plead
6 matters of law are decisions taken within your Office?

7

8 MR TURNER: Yes, that was in relation to duty.

9

10 MS ELLYARD: What about the availability of defences, for
11 example, limitation defences?

12

13 MR TURNER: Well, that's where we're going. Again, it
14 would depend upon the circumstances and there would need to
15 be a discussion with the relevant instructor. So, a
16 limitation defence is the obvious example. Let's say the
17 action arises out of circumstances, and we're not talking
18 section 5B here, say it's a personal injuries claim that
19 occurred in 1960. Complex issues about limitation: is it
20 the Limitation Act 1974 or is it the Mercantile Law Act
21 which applies? It would ordinarily be pleaded and there
22 may not be consultation with the instructor. But as we --

23

24 MS ELLYARD: I'm sorry to interrupt you, but let's bring
25 it to the point with which this Commission's concerned, and
26 I think you're aware, that the Commission's received some
27 evidence about cases in which a particular point has been
28 taken --

29

30 MR TURNER: Yes.

31

32 MS ELLYARD: -- in defences filed by the
33 Solicitor-General; that particular point being that
34 although there's been a change --

35

36 MR TURNER: Yes, it's section 5B.

37

38 MS ELLYARD: -- that there's been an acknowledgment of
39 limitation periods in certain cases, a pleading has been
40 seen in pleadings filed by your Office that, because it was
41 a consensual relationship, the limitation exemption for
42 child sexual abuse matters doesn't apply. Now, where
43 that's been pleaded, as I understand what you've said so
44 far, that's been pleaded as a result of a decision taken by
45 you or someone in your Office?

46

47 MR TURNER: Well, plainly, but in consultation with

1 relevant officers within the --

2

3 MS ELLYARD: When you say "in consultation", it's a matter
4 of law, is it, that you regard yourself as being --

5

6 MR TURNER: No - well, there are three in which it was
7 pleaded, that is section 5B in that, broadly in that way;
8 one of them is a good illustration of the point I am trying
9 to make, where the relevant officer considered on the basis
10 of the materials that it was an appropriately legal thing
11 to do, putting to one side other issues which impact in an
12 adverse way, I suppose, but from a legal perspective it was
13 appropriate. And that was discussed with relevant officers
14 within the department who were very reluctant about it, and
15 that ultimately escalated to discussions between
16 Mr O'Farrell and the relevant Head of Agency, and then it
17 is pleaded. However --

18

19 MS ELLYARD: Sorry to interrupt you. That seems to be the
20 example where, to try and put it in the paradigm of the
21 ordinary lawyer-client relationship, you offered advice
22 that a defence should be taken; the client didn't want to
23 take your advice for reasons that perhaps relevantly
24 included reputational matters and how --

25

26 MR TURNER: Well, an officer or officers within the Crown,
27 yes.

28

29 MS ELLYARD: But ultimately it was your call and so it was
30 pleaded; is that what happened?

31

32 MR TURNER: I think it better to say that the officers
33 were persuaded that that was so, but if that was because
34 they thought, well, they had no choice in it, then yeah.

35

36 MS ELLYARD: And so, just to be clear about what was
37 persuaded, officers were persuaded to assert in a defence
38 being filed on behalf of the state that a child had
39 consented to the sexual abuse against them so that their
40 claim would be statute barred; that's the nub of the advice
41 that you gave and which they were persuaded to take?

42

43 MR TURNER: That it was appropriate to raise a limitation
44 defence of that kind, yes, and could I say --

45

46 MS ELLYARD: I'm sorry that that's the --

47

1 MR TURNER: The Attorney-General has given a direction
2 that those defences are not to be taken and the pleadings
3 have been amended as soon as that direction was given by
4 the Attorney-General, so it's not a live issue in any case
5 and it will not be a live issue, that is to say 5B, in any
6 other case. At some point I'd like to say a little bit
7 about consent in the context of particularly the question
8 that was put by Commissioner Benjamin to Leah earlier
9 today.

10
11 MS ELLYARD: And it may well be that we'll get to that,
12 but just for now and with respect I want to avoid
13 euphemism. The advice that you gave and which, as I
14 understand it, since it's a matter of law the department
15 was obliged to accept, was that the relationship should be
16 understood as consensual so that the limitation defence
17 ought be taken.

18
19 MR TURNER: Yeah, we're probably, you know, talking in a
20 semantic way. The phrase "sexual abuse" as it appears in
21 section 5B of the Limitation Act is not defined and has not
22 been the subject, as I am aware, of any curial
23 determination.

24
25 MS ELLYARD: When you bring your mind to bear on these
26 issues, Mr Turner, I mean, one of the things that's clear
27 from the guidelines with the conduct of civil claims is an
28 expectation that legal practitioners will be trained in the
29 effects of child sexual abuse and using trauma-informed
30 frameworks.

31
32 MR TURNER: Yes.

33
34 MS ELLYARD: So I would understand from that when you come
35 to consider what does sexual abuse mean for these purposes,
36 you do so with an understanding of the impacts and dynamics
37 of child sexual abuse?

38
39 MR TURNER: Yeah, and --

40
41 MS ELLYARD: And what's the source of that understanding
42 that you have?

43
44 MR TURNER: There is the experiential with the claims that
45 have been made and the accompanying materials, particularly
46 the statements that are made by the victim-survivors, by
47 the reports of psychiatrists. We have undergone training

1 by a psychologist and we are acutely aware of how things
2 impact on, and including 5B when it was pleaded, on
3 victim-survivors. And, decisions about these things are
4 not taken lightly, they are taken with considerable
5 discussion, debate between officers, that is, in the
6 office, including previously with the Solicitor-General;
7 also discussion and debate with officers in agency, so it's
8 not the result of one person's whimsical approach.

9
10 And the reason I adverted to what Commissioner
11 Benjamin had said before is because, you've asked about, in
12 effect, learnings, and I've had a learning experience in
13 hearing Leah's evidence and in particular what she
14 described as "re-writing the narrative" of her life and
15 re-framing what was described as a "relationship" as child
16 sexual abuse.

17
18 For my part, and I know for other practitioners in
19 this area, have great difficulty with the word
20 "relationship". It's a descriptor but it is not reflective
21 of it. And the learning experience, as I describe it, for
22 me, an epiphany if you like, is that re-framing, and
23 saying, as Leah said, she couldn't understand how, if
24 you're a child you can consent. Then we get into then the
25 issue about consent for a lawyer, for someone who's legally
26 trained, and the tort of battery, commonly pleaded as
27 sexual assault but it's battery, in the Pantheon of torts
28 requires an absence of consent. And we also encounter
29 consent in the civil law in the context, as Commissioner
30 Benjamin would have many times, in Gillick competence for
31 purposes of giving consent to what would otherwise be an
32 unlawful operation.

33
34 MS ELLYARD: I'm sorry to interrupt you, Mr Turner, and I
35 absolutely accept that Ms Sallèse's evidence today was very
36 powerful, but am I to understand that it wasn't until today
37 that you understood the issue associated with saying that
38 sexual abuse could be consensual? Is that what --

39
40 MR TURNER: No, I'm saying that it's something that, as I
41 said, for me as an epiphany needs to be considered in a way
42 that is not necessarily sitting within the legal framework,
43 and I say that because Commissioner Benjamin referred to
44 "the false notion that a child can give consent", but I
45 don't apprehend that there has been any case in this
46 country so far which says that, simply because a person is
47 a child and the events are criminal in circumstances where

1 consent is not an element of the crime, that that
2 relevantly constitutes a tort.

3
4 There has been a statement obiter by Justice Davies in
5 the case of Lewis v Doyle which sort of elides the two, the
6 criminal and the civil, but we just haven't reached that
7 point. And this is the dilemma or one of the dilemmas,
8 which is that, from a legal perspective, if there is
9 consent then there is no battery, and that impacts upon the
10 state in circumstances where it is pleaded that the state
11 is vicariously liable for the tortious acts of its
12 employees - teachers.

13
14 COMMISSIONER BROMFIELD: Mr Turner, I am not legally
15 trained, but it occurs to me that if there were a
16 relationship more like client and lawyer between a
17 Secretary of a department and the Office of the
18 Solicitor-General, that then the Secretary could come with
19 a non-legal view to say, "I don't want us to be here
20 talking about consent because my department doesn't
21 consider that children can consent to being sexually
22 abused".

23
24 MR TURNER: Yeah, that's really apt, Commissioner.

25
26 COMMISSIONER BROMFIELD: Would that be helpful, do you
27 think?

28
29 MS KAY: Can I just add that I think it's been overtaken
30 by the policy approach and the direction from the
31 Attorney-General, and I have no difficulty in accepting the
32 Attorney's view in relation to that, and so, it's become a
33 non-issue.

34
35 MS ELLYARD: Well, I understand that there's now been a
36 directive given by the Attorney-General, and as I
37 understand the evidence the defence was being taken perhaps
38 without her particular knowledge and when it came to her
39 particular attention she gave that directive almost
40 straight away. But doesn't that illustrate the point that
41 Commissioner Bromfield's just made, which is, outside the
42 closed circle of a very legalistic tort law approach, there
43 was clearly a view to be taken by the government for
44 reputational and other reasons that that's not a legal
45 point to take?

46
47 MR TURNER: Well - sorry.

1
2 MS KAY: I was going to say, yes, and these are policy
3 issues for the government in many ways, but some of these
4 policy issues really need to be led from above through the
5 Attorney-General, if not Cabinet.
6

7 MS ELLYARD: I want to move on but I think the last
8 point I would wish to give you, in particular, Mr Turner
9 the opportunity to comment on, and I understand the
10 analysis you've given about the extent to which there are
11 decided cases in tort law.
12

13 PRESIDENT NEAVE: We haven't talked about duties of care
14 and negligence, we've referred only to assault and battery.
15

16 MS ELLYARD: I understand these claims are sometimes
17 brought as breach of duty and not purely as battery claims.
18

19 MR TURNER: Quite so, but that's the direct liability,
20 President; that is to say, the liability of the state.
21

22 PRESIDENT NEAVE: I'd be amazed if there was a situation
23 in which an institution, government or private, had taken
24 no steps whatever to protect children from sexual abuse;
25 that you might have both a direct liability claim and a
26 vicarious liability claim in certain circumstances. So, I
27 think it's more complicated than just looking at assault
28 and battery, that's all. I'm sorry, I don't want to take
29 you too far down that track.
30

31 MR TURNER: Sorry, I didn't mean to convey it in that way
32 if that was the impression gained, it's one aspect of it.
33

34 MS ELLYARD: The point that I want to make, and this
35 perhaps invites reflection on the nature and extent of
36 training that you and your colleagues have received, is
37 that, the approach that's been taken until it was overtaken
38 by a change in direction by the Attorney would seem to
39 suggest a lack of understanding on the part of those in
40 your Office making these decisions about the nature and
41 effects of child abuse and the highly problematic concept
42 of suggesting that children can consent, and I want to give
43 you the opportunity to comment on that. You've said you
44 know about these things; the way in which practice occurred
45 until it was stopped by the Attorney-General would suggest
46 the contrary.
47

1 MR TURNER: I disagree, but I repeat that we are looking
2 at things from a legal paradigm and the constraints of the
3 Financial Management Act and the directions that are made
4 thereunder.

5
6 But with respect, how does the Financial Management
7 Act impinge on the question of whether or not it's asserted
8 in a defence that a child consented to sexual abuse?

9
10 MR TURNER: Well, it doesn't, but we're constrained, we're
11 constrained to look at the legal position and the legal
12 position as far as I'm aware is not yet to the point that
13 Commissioner Benjamin has postulated.

14
15 MS ELLYARD: And so I take it then that it's your
16 understanding of the legal position that you have brought
17 to, for example, the way in which settlement conferences or
18 mediations have been conducted in matters of this kind?

19
20 MR TURNER: Yes.

21
22 MS ELLYARD: You'd be aware, I think, of the evidence
23 given by Ms Sdrinis about her observations of some
24 settlement conferences that I think she said took place in
25 2019? You're aware of that evidence?

26
27 MR TURNER: Yes, and I checked my diary, it was Monday,
28 7 December 2019, and I in fact recall very well the --

29
30 MS ELLYARD: So, just to be clear, you were present as one
31 of the lawyers acting for the state?

32
33 MR TURNER: I was the only lawyer, I attended with an
34 instructor.

35
36 MS ELLYARD: So the observations that she made about what
37 she saw as the problematic way those settlement conferences
38 were conducted, the observations she's making are
39 observations of you?

40
41 MR TURNER: Yes.

42
43 MS ELLYARD: And her observation was that there was an
44 absence of the kind of trauma-informed approach that she
45 would expect to be reflected in settlement conferences of
46 this kind. Now, that's a couple of years ago now. Would
47 you accept any part of the criticisms that she made of the

1 way you conducted those conferences?
2

3 MR TURNER: Well, first of all, there was a mediation, an
4 informal settlement conference in the morning and one was
5 scheduled for the afternoon: there weren't three as
6 Ms Sdrinis said, not that that's particularly important.
7 One took place in the morning and the one scheduled in the
8 afternoon did not take place.

9
10 I was constrained in the instructions that I had
11 received and I have reflected upon the evidence that has
12 been given by Ms Sdrinis, as she said, and it is difficult,
13 very difficult for me to say, well, I agree with her, but I
14 accept that what transpired - and it was not in the
15 presence of the victim-survivor - could be seen to have
16 been brusque or curt and in that regard not
17 trauma-informed, and certainly at that point we were not -
18 I was not - in a position of knowledge, and incomplete
19 knowledge as I've already said and it's a continuing
20 learning for me and for others in the office, and so, that
21 could readily be perceived and I would do things
22 differently now.

23
24 MS ELLYARD: What would you do differently?
25

26 MR TURNER: The message, the ultimate message would be the
27 same, but I would have explained it in a bit more detail.
28

29 MS ELLYARD: And sorry, perhaps let's be clear then, would
30 the message be, we're not liable? Is that the message?
31

32 MR TURNER: The message would be the amount - well, the
33 same as before: "this is the amount that can be offered"
34 and it bore but a small proportion of what had been sought,
35 so that's why the matter, you know, went AWOL.
36

37 MS ELLYARD: When you say you were constrained by your
38 instructions, having regard to the discussion we've had,
39 what would be the instructions that were constraining you?
40

41 MR TURNER: As I said, I remember this particular matter
42 very well, and my immediate instructor was unable to
43 procure instructions for an amount, and I had to go further
44 up the line, so to speak, and had to use all my powers of
45 persuasion to achieve a particular amount and that was
46 reluctantly given, and I'm probably going into areas of
47 privilege --

1
2 MS ELLYARD: And I don't want you to do that but I just
3 want to understand that given the discussion that we've
4 had, as I understand it --

5
6 MR TURNER: At that point - at that point Mr O'Farrell had
7 not said that, "It was your call", but even had it been -
8 you know, in a simplistic way - but even it had been the
9 amount would have been much the same and that was the
10 constraint.

11
12 MS ELLYARD: And so, I take it then that the way that
13 settlement conference was conducted from your point of view
14 reflected some of the evidence that you've given about what
15 you see as the state of the law and the extent to which the
16 state could be regarded as liable having regard to the
17 state of the law for the abuse that the plaintiffs were
18 alleging?

19
20 MR TURNER: Yes, but that was, without going into the
21 circumstances, there was a significant potential for
22 liability but for a very short time, and that was part of
23 the debate, you know, was it a longer period or not.

24
25 COMMISSIONER BENJAMIN: Mr Turner, I think you were saying
26 you were going there with a figure; is that right?

27
28 MR TURNER: Yes.

29
30 COMMISSIONER BENJAMIN: And I think, if I've read your
31 guidelines, they're not in front of me at the moment, that
32 you encouraged going to mediation and looking at
33 alternative dispute resolutions; if you're going there with
34 a figure, and that's it, what's the point of that process?

35
36 MR TURNER: Well, that was to explore whether that was
37 going to be achievable, and it was readily apparent at a
38 very early point that it was never going to be achievable,
39 there was such a discordance between the two positions.

40
41 COMMISSIONER BENJAMIN: But that wasn't entering any sort
42 of alternative dispute resolution process, that was you
43 going with a figure and saying, "That's it and it can't go
44 any further".

45
46 MR TURNER: We were going with an intention to explore
47 matters, but when the - look, I'm very reluctant --

1
2 COMMISSIONER BENJAMIN: Oh, I don't want to talk about the
3 particular matter, I don't want to talk about them, I just
4 want to talk about the mindset driving it.

5
6 MR TURNER: Oh, the mindset? The mindset is be open and
7 flexible as one can be, but of course there is a range, if
8 you like, from this to this being what is assessed as being
9 the reasonable range up to a maximum as per what has been
10 discerned in terms of potential for liability and quantum,
11 and not infrequently there will be a significant disparity
12 between the position of the plaintiff - the claimant - and
13 the defendant.

14
15 Could I say this: the vast bulk of claims settle and
16 presently 28 - sorry, 36 have been settled; something in
17 the vicinity of --

18
19 COMMISSIONER BENJAMIN: Has there been any analysis done
20 as to the attitudes of the plaintiffs in those cases as to
21 whether they feel exhausted, worn down, and whether
22 settlement may simply have been that it's all too much and
23 the easiest way out is to walk away?

24
25 MR TURNER: No qualitative analysis, Commissioner.

26
27 MS ELLYARD: I understand from Ms Webster's statement that
28 the average time for resolution of a child sexual abuse
29 matter is 506 days. Does that sound right to you?

30
31 MR TURNER: Look, I couldn't say but that's roughly one
32 and a half years, that sounds, you know --

33
34 MS ELLYARD: It is, and that's to the extent that matters
35 settle, they don't necessarily settle early? Would you
36 accept that?

37
38 MR TURNER: Well, I come back to, an assessment has to be
39 made about liability, an assessment has to be made about
40 damages, and we are entirely reliant upon others to provide
41 the information that is necessary to particularly make the
42 assessment about liability.

43
44 MS ELLYARD: Can I ask you a couple of questions about the
45 assessment of damages. Of course in these cases a
46 significant component of the damages assessment will be
47 working out some kind of assessment of what the impact of

1 the abuse has been on the plaintiff, both in terms of their
2 emotional state and perhaps their economic circumstances?

3
4 MR TURNER: Ah, yes - well, yes, of course, but - and this
5 isn't to in any way diminish the experience of every
6 person, they're unique - but that's relatively
7 straightforward. The general damages are relatively
8 straightforward.

9
10 MS ELLYARD: Well, there's a role, I would assume, for
11 expert evidence in the form of reports perhaps from those
12 with whom the plaintiff has consulted, psychiatrists,
13 psychologists, things of that kind?

14
15 MR TURNER: In relation to?

16
17 MS ELLYARD: Do you ordinarily expect a plaintiff to
18 demonstrate their damage, for example, by means of a
19 psychiatric or psychological report?

20
21 MR TURNER: That is the ordinary course, yes.

22
23 MS ELLYARD: And, is that normally done by way of a
24 provision from someone with whom they have an existing
25 treating relationship, or is your standard practice to send
26 them to be independently assessed?

27
28 MR TURNER: I don't know that you could say that there is
29 a standard practice, it depends upon the content of the
30 materials and I'm not sure --

31
32 COMMISSIONER BROMFIELD: Could you reflect on your common
33 practice then?

34
35 MR TURNER: The common practice would generally be, I
36 think, to arrange for a medical review, but it's always in
37 the context of what is furnished. And, I was thinking,
38 before you asked the question, about how best to say this,
39 but there can be a very significant difference in quality
40 of reporting depending upon from where it comes and when,
41 et cetera. So, sometimes the reports are fantastic and you
42 don't need to do anything further; sometimes they're not as
43 comprehensive as they really ought to be and you do need to
44 go further.

45
46 COMMISSIONER BENJAMIN: So consequently if that's the
47 case, is it your practice generally when you get a report,

1 to serve it irrespective of what the report says?

2

3 MR TURNER: No.

4

5 COMMISSIONER BENJAMIN: Why not? If you're a model
6 litigant, why not?

7

8 MR TURNER: The report, as you would be aware, if it is
9 secured in those circumstances, as opposed to a joint
10 report and the like, is one which attracts client legal
11 privilege.

12

13 COMMISSIONER BENJAMIN: I understand the reason, I
14 understand the legal reason why you don't. What I'm trying
15 to understand in the context of a model litigant, when you
16 have a plaintiff who may or who is likely to have been the
17 subject of child sexual abuse, why you wouldn't give them a
18 copy of the report upon which you're going to base your
19 recommendation or your direction to a Secretary as to how
20 much ought to be paid?

21

22 MR TURNER: Yes, look, I understand that, Commissioner.
23 There is one matter in particular --

24

25 COMMISSIONER BENJAMIN: I don't want to talk about --

26

27 MR TURNER: I understand that but it's illustrative
28 generally, I'm not going to go into the details, but there
29 was lively debate within the Office about that very issue,
30 and it was resolved by the former Solicitor-General making
31 a call on that. And so, the position is generally that, in
32 circumstances where a report has been obtained which
33 attracts that privilege it won't be waived unless an
34 advertent decision is made that it is favourable to the
35 interests of the state, in which case it will be.

36

37 COMMISSIONER BENJAMIN: That's not trauma-informed though
38 in terms of the plaintiff, in that, that plaintiff has
39 gone, they've exposed the whole history of their abuse, the
40 impact of their trauma and they're told by the state, the
41 State of Tasmania through your Office, through the
42 Solicitor-General's Office that, "You can't have it, that's
43 none of your business"; that can hardly be trauma-informed,
44 can it?

45

46 MR TURNER: And put in that way, Commissioner, I accept
47 that and I will take from this a query for purposes of the

1 disposition in a trauma-informed way; that is code for me
2 seeking from Ms Kay a direction accordingly.

3
4 MS ELLYARD: Can I perhaps ask a follow-up question which
5 might be regarded as the final question, subject to any
6 further questions that the Commissioners have? You've
7 indicated, I think Mr Turner, that issue and the consent
8 issue as two particular learnings perhaps that you've taken
9 from today or, if not just from today, from perhaps the
10 work of the Commission more broadly. Are there others?
11 Are there other ways in which the evidence that you've
12 become aware of through this Commission is going to bear
13 upon the way you approach your important work of
14 representing the state in this highly sensitive and
15 complicated area of work involving highly vulnerable
16 plaintiffs?

17
18 MR TURNER: The legal paradigm at one level of abstraction
19 is inept for dealing with claims of this nature, and this
20 is one of the things that has caused significant disquiet.
21 There is a binary choice: go down the pathway of National
22 Redress to which the state signed up, or go down the
23 pathway of litigation, where it's an informal claim or
24 action as I've described, and so, we are doing the best we
25 can. Is it perfect? I don't think so. Have we learned
26 from things? Yes, we have.

27
28 And, I need to say that there are four legal
29 practitioners, plus me, who sits above who are dealing with
30 claims and three administrative staff who do a wonderful
31 job in very difficult and trying circumstances not simply
32 because of the things that we see, which are shocking, and
33 I might have been a bit naive. The things that have been
34 or which have emerged are truly awful.

35
36 And we have people who are not automatons, they are
37 caring people; they are not anything other than people with
38 feelings, and so, the staff sometimes are the subject of
39 criticism which I think is unfair and unwarranted. And,
40 something that has stuck in my mind for a number of years
41 was told to me by a very eminent neonatologist who looks
42 after babies, and sometimes things don't work out and
43 babies died.

44
45 And I asked him, and I've had professional involvement
46 with him, I asked him how he coped, and he said, "Paul,
47 you're no good if you're emotional, but you're not human if

1 you don't cry, and, we are human.

2

3 MS ELLYARD: Ms Kay, could I invite you for any
4 reflections that you've had in light of the discussions
5 that we've had today about the way in which, going forward,
6 the learnings derived from this Commission, and to be frank
7 the learnings derived from the National Royal Commission
8 which lasted for five years and ended five years ago, could
9 better inform the way in which the Solicitor-General
10 conducts this kind of litigation?

11

12 MS KAY: Yes, and I should in response to that question
13 indicate that there is a review underway in relation to the
14 manner in which civil litigation is conducted; that's a
15 matter of public knowledge, the Attorney-General has
16 announced that and tasked the Secretary of the Department
17 of Justice with that role, and presently we are considering
18 the way in which other jurisdictions go about dealing with
19 these claims and seek to learn from that; we're always
20 looking for improvement, we're not about making life
21 difficult for individuals. And, you know, anything that we
22 can do to be more sensitive to the claimants and their
23 circumstances we'll definitely be willing to take on board.

24

25 MS ELLYARD: Thank you, Ms Kay. Thank you, Mr Turner.
26 Thank you, Commissioners, those are the questions that I
27 have.

28

29 COMMISSIONER BENJAMIN: I just wanted to thank Ms Kay and
30 Mr Turner for exposing themselves to what would not be an
31 easy process.

32

33 PRESIDENT NEAVE: Thank you very much. We'll now adjourn.

34

35 LUNCHEON ADJOURNMENT

36

37 MS ELLYARD: Thank, you Commissioners, the final witness
38 for today is Ms Ginna Webster, the Secretary for the
39 Department of Justice, I'll invite her to come into the
40 witness box.

41

42 <GINNA MARIA WEBSTER, affirmed and examined: [1.51pm]

43

44 <EXAMINATION BY MS ELLYARD:

45

46 MS ELLYARD: Q. Good afternoon, Ms Webster. Could you
47 tell us, please, your full name?

1 A. Ginna Maria Webster.

2

3 Q. And you're the current Secretary for the Department of
4 Justice in Tasmania?

5 A. That's correct.

6

7 Q. You previously gave evidence in week 1 of the hearings
8 and at that time there was a statement which you had made.
9 Since that time you've prepared a second and more extensive
10 version of that statement answering additional questions
11 posed to you by the Commission?

12 A. That's correct.

13

14 Q. Have you got a copy of that second and more extensive
15 statement with you?

16 A. I do.

17

18 Q. Am I right in understanding that everything you would
19 wish to say in response to the Commissioner's questions
20 posed to you is now contained in this second more expansive
21 statement?

22 A. Yes, that's also correct.

23

24 Q. And the contents are true and correct?

25 A. They are.

26

27 Q. As I understand it, Ms Webster, you've been present
28 for and have heard some of the evidence over the past few
29 days of hearings?

30 A. I have.

31

32 Q. And you've also been made aware, either through
33 watching or briefings, of evidence that's been given in the
34 other weeks of the hearings since your first appearance?

35 A. I have.

36

37 Q. As I understand it, there is a statement you would
38 wish to make partially in response to the observations that
39 you've made?

40 A. Yes, please.

41

42 Q. I invite you to do that now.

43 A. Thank you and thank you for the opportunity make a
44 statement to the Commission.

45

46 *I would like to personally acknowledge and*
47 *thank the victim-survivors who have shared*

1 their experience with the Commission of
2 Inquiry, and this morning I have had the
3 opportunity to hear Ms Sallese's evidence.
4 I am moved by her and others' commitment to
5 improving the lives of children and young
6 people and I want to assure you that my
7 department and I are listening, we are
8 learning and we will take our learning
9 forward to improve services across the
10 department.

11
12 I'd also like to acknowledge the family
13 members of victim-survivors who have been
14 unable to participate or are tragically no
15 longer with us, and those who have come
16 forward to tell the Commission of their
17 abuse in other ways. I also acknowledge
18 that there will be people who the
19 Commission will hear from in later hearings
20 and I acknowledge those people.

21
22 To all of you, thank you for speaking up
23 about what is the most dreadful of crimes,
24 child sexual abuse. I am so sorry for all
25 that you have suffered. I have watched
26 many of the hearings remotely and when I
27 have not been able to I have been briefed
28 on the evidence. I have been deeply
29 saddened by the evidence we have heard
30 during all the weeks of the hearings. But
31 as former Secretary of the Department of
32 Communities, Tasmania, I was distressed by
33 the experiences of young people in
34 out-of-home care through evidence and case
35 studies in that week of hearings, and I
36 feel that it is important for me to extend
37 my sincere personal apology to those people
38 who were abused while in the care of the
39 state.

40
41 I would also like to acknowledge the
42 individuals, particularly government
43 employees, who have spoken up in defence of
44 victim-survivors. Thank you for being the
45 type of State Service that Tasmania needs
46 and deserves. You have my admiration and
47 support.

1
2 *To the State Service servants and members*
3 *of the Tasmanian community who have heard*
4 *about the failings of our system and are*
5 *devastated by what they have heard, I am*
6 *sorry that you have been let down by that*
7 *system.*

8
9 *The Department of Justice is an*
10 *organisation that touches the lives of many*
11 *Tasmanians who are the most vulnerable in*
12 *our community. It has always been my*
13 *desire to lead that organisation in a way*
14 *that does not further harm those people who*
15 *find themselves in our system. Clearly,*
16 *there has been evidence over the last weeks*
17 *that this has not always been the case.*

18
19 *I want to acknowledge the evidence of*
20 *Ms Sallese who described her experience of*
21 *the Criminal Justice System as unnecessary*
22 *and brutal. I am very sorry for that*
23 *experience and I have heard that there*
24 *needs to be changes to the language and the*
25 *way that we work with victim-survivors.*

26
27 *Throughout the Commission so far I have*
28 *heard about many areas that need reform*
29 *from victim-survivors, those with lived*
30 *experience and those with years of*
31 *expertise and knowledge. I want to assure*
32 *you that I have been listening to that and*
33 *I am strongly committed to making the*
34 *changes necessary to keep children and*
35 *young people safe.*

36
37 Thank you, Commissioners, for allowing me to make that
38 statement.

39
40 Q. Thank you, Ms Webster. Your statement deals with a
41 large range of matters and we're not going to have the
42 chance to cover them all but I want to begin with a topic
43 that was touched on at the time of your first appearance in
44 week 1 of the hearing and that's about the question of
45 where responsibility and accountability will sit within the
46 departments in Tasmania for the implementation of
47 recommendations arising from the National Royal Commission.

1
2 You deal with this, amongst other places, at
3 paragraphs 78 and following of your statement where you
4 identify that your department is the lead agency, but there
5 was some discussion between you and Ms Bennett in the first
6 week of the hearing about where accountability sat and the
7 implications of dual accountability?

8 A. Yes.

9
10 Q. And I want to give you the opportunity to provide
11 perhaps some further evidence on the question of
12 accountability for those recommendations.

13 A. Yes, as I said in my statement, I've been reflecting
14 on that and I think Ms Bennett mentioned in that first
15 hearing that dual accountability equalled no
16 accountability, and I've been reflecting on that and I
17 don't necessarily agree that dual accountability equates to
18 deficiencies in accountability. I think there are many
19 benefits, particularly in a relatively small public service
20 from working collaboratively in drawing from the experience
21 and expertise available within the public service as a
22 whole.

23
24 But I would like to acknowledge and support the
25 Premier's recent announcement to clarify those expectations
26 and approve accountability and Heads of Agency performance
27 agreements, and that accountability for keeping children
28 safe will be included in all Heads of Agencies' performance
29 agreements and that work has already commenced.

30
31 Q. And so, it's still the case, as I understand it, that
32 going forward your department will be the key department in
33 terms of taking responsibility for ensuring that, whatever
34 work is required to be done in the implementation of
35 recommendations is being done?

36 A. That's right.

37
38 Q. So that, to the extent that other departments who have
39 responsibility for implementing recommendations fail for
40 whatever reason to do so, it will, as I understand, be part
41 of your department's role to hold those other departments
42 to account and make sure that any tardiness or laxness is
43 remedied?

44 A. That's correct.

45
46 Q. Can you explain how you're going to do that?

47 A. Yes. We have had further discussions around that, of

1 course, since the Commission of Inquiry has been in place
2 and we actually have an IDC that works across agencies for
3 that purpose and we've committed to having a workshop to
4 work through where we're at with some of those and be very
5 clear about what needs to be addressed, what we can do
6 better to support those agencies, including obviously with
7 the change of governance structures for the Department of
8 Communities Tasmania. So, the first point that we want -
9 the first thing that we really wanted to do was to do a bit
10 of a stocktake of where we're at again and make sure that
11 we're very clear about who is accountable, how it's going
12 and what support we can lend to those agencies and do that
13 on a regular monitoring evaluation arrangement.

14
15 COMMISSIONER BROMFIELD: Q. Just for clarification, I
16 assume IDC is an interdepartmental committee?

17 A. Sorry, Commissioner, yes, it is an interdepartmental
18 committee, thank you.

19
20 MS ELLYARD: Q. So, perhaps to try and get some
21 practical sense of how that would work in every department
22 sovereign in its own right to some extent, but save for
23 example through the monitoring work that you're
24 department's going to lead, it becomes clear that progress
25 on a particular recommendation is falling behind timeframes
26 or hasn't been prioritised, what will be the levers, if I
27 might use that expression, that will be available to you as
28 the agency with overall accountability to ensure that
29 relevant departments do what they ought to be doing?

30 A. Yes, I think the best lever of that is, as I
31 mentioned, the change to the performance agreements and the
32 accountability arrangements for each Head of Agency, and
33 they're actually very clear around what - and I'm currently
34 completing mine at the moment - what we are responsible
35 for, who is the lead agency and who may be the support
36 agency, so that will work through, in my case, the
37 Attorney-General as well reporting to her, but then all the
38 way to the Premier, so I suggest that's the highest
39 accountability that we have.

40
41 Q. Thank you. I want to ask you some questions now
42 arising out of particular areas of evidence that we've
43 heard over the last few weeks. Yesterday we heard, as I
44 understand you'd be aware, some evidence from Ms Edwards
45 about the Victim Support Service and the various pieces of
46 work that that service is responsible for, and it was clear
47 from her evidence, amongst other things, that that's a

1 service that could do more if it was resourced in a more
2 expansive way, and I'd be grateful for any comments that
3 you've got on plans to build on that service or to reform
4 it.

5 A. Thank you. I do acknowledge Ms Edwards' evidence
6 yesterday and I really admire her for speaking up around
7 her service. I think the counselling, and I've heard
8 throughout the hearings the impact that counselling service
9 has had and particularly I recall two particular
10 victim-survivors talking about that, and it's very
11 powerful. I think Ms Edwards referred to it as a small
12 output with a big footprint and I'd say that's the case for
13 many Justice outputs.

14
15 Out of the family violence action plan which, there's
16 \$12.5 million dollars across government, we've been able to
17 secure \$160,000 for additional counselling in the North and
18 North West. I do know, and Ms Edwards acknowledged this,
19 that the clients are very broad and there are referrals
20 that don't just come through the statutory system. So, I
21 think there's also work that we do, and I know that there
22 are referrals to Laurel House, for example, in the North
23 and SASS in the South, so I think there is a process there
24 to make sure that the main thing for me would be that the
25 victims get the support that they need. So, I think the
26 additional support that I mentioned, the \$160,000 will go
27 some way; I certainly wouldn't rule out other support that
28 we need to provide, and I would also like to acknowledge
29 the training that Ms Edwards mentioned as well, and I think
30 the work we'll doing around the Child Safe organisations
31 and rolling training out around trauma-informed practice
32 and a range of other things through that will be training
33 that will be provided to the Victim Support Service of
34 course, but I would expect that those statutory officers, I
35 would also make that training available to those statutory
36 officers.

37
38 Q. Because I think you'd agree with me, having heard the
39 evidence this week, that clearly anyone who's going to be
40 in a victim-facing role needs to have received appropriate
41 training in trauma and in how to provide services in a
42 trauma-informed way?

43 A. Absolutely agree with that.

44
45 COMMISSIONER BROMFIELD: Q. Sorry, Ms Ellyard. I think
46 you could extend that to anyone who was making decisions
47 about victims?

1 A. I would agree, yes, Commissioner.

2
3 MS ELLYARD: Q. Can I turn then to the question of
4 criminal justice reforms. You heard, as I understand it,
5 the evidence of the Director of Public Prosecutions
6 yesterday, and he gave the Commission his views, both in
7 his statement and his oral evidence, on what he saw as
8 changes that have already happened and changes that might
9 need to happen. Can I ask you, with your hat both as the
10 Justice Secretary and as the Secretary for the Department
11 with responsibility for implementation of National Royal
12 Commission recommendations, what would you see as the most
13 important reforms that have been or need to be implemented
14 to improve the criminal justice process?

15 A. I think one would be the pre-recording of evidence and
16 all reforms under the Evidence (Children and Special
17 Witnesses) Act, I think that's proven to be extremely
18 beneficial. One that I think is probably more symbolic but
19 that was very difficult reform, was the failing to report
20 and abrogating the professional privilege; that was very
21 tough to achieve, and I don't believe all jurisdictions
22 have achieved that but --

23
24 Q. Why was it tough to achieve?

25 A. Well, I think there was a - you know, there was a bit
26 of resistance to that within the community, but I think it
27 was important symbolic reform, and the government I think
28 demonstrated that they were very keen to make that reform.

29
30 And I think the other one, apart from the reforms that
31 we do need to make, are the Witness Intermediary Program
32 which has been a very, very positive reform; pretty much, I
33 think, exceeded expectations to this date, and I would say
34 that the expansion of that and the evaluation of that, I
35 would be very surprised if that didn't come back in an
36 extremely positive way.

37
38 PRESIDENT NEAVE: Q. Would that extend to requiring the
39 police to use witness intermediaries in certain
40 circumstances? I mean, in the legislation in other words?

41 A. Yes, interestingly, I think the police have proven to
42 be the biggest user. So, we have had 573 referrals for the
43 Witness Intermediary Program and 72 from the courts. So,
44 573 in total, 501 from the police. So, even though it
45 isn't in legislation the use has been extremely high. I
46 certainly wouldn't rule out legislating in the future for
47 that, but I think that's exceeded expectation.

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MS ELLYARD: Q. And so, it's a pilot at the moment as we understand it?

A. That's right.

Q. And ordinarily a pilot will be evaluated before decisions are made about making programs permanent. Is there an evaluation plan?

A. Yes, so there's a first stage evaluation that's currently underway and that will be, as I understand it, broadly a desktop review of the sorts of things that we've seen and the use, and then there will be a much more broad-reaching reform - well, sorry, evaluation towards the end and then a recommendation made to government about the future of that program.

Q. One of the things you say in your statement is that the scope of the program will be considered.

A. Yes.

Q. Do I take it then there's consideration to the possibility of it being made available for a broader range of witnesses than the pilot presently contemplates?

A. Yes, that could certainly be one of the recommendations, including - and it has been used for accused. So, we've approved out of scope use of the intermediaries.

Q. Certainly one of the things that I think the Commission has been told and will be told in later weeks is that it really needs to be a scheme that operates for the benefit of accused young people as well as for the benefit of complainants; would you accept that?

A. Yes.

Q. We've talked about what you see as some of the key reforms that have already happened arising from the Royal Commission. At paragraph 130 and following of your statement you say that, of the Criminal Justice Report recommendations, 75 have either been completed or commenced, and then you go on to describe further recommendations that are going to be given effect to in the near future. Can you tell us about those matters?

A. Yes, certainly. So, later this year the government will be progressing those recommendations from the Royal Commission's Criminal Justice Report. It will introduce a Bill that will reform tendency and coincidence laws

1 consistent with the model Bill agreed by the Council of
2 Attorneys; introducing a new crime of failing to protect a
3 child within a relevant institution from a substantial risk
4 of sexual abuse by an adult associated with the
5 institution; create a rebuttal presumption that a child or
6 any person with a mental impairment does not consent to
7 sexual intercourse where the offender is in a position of
8 authority with respect to a victim-survivor.

9
10 PRESIDENT NEAVE: Q. Can I pick you up on that one,
11 because I've read a couple of things about the proposals.
12 In the context of children the suggestion, as I understand
13 it originally, was that the provision introduced a
14 presumption of non-consent. Now, in my view at the moment
15 that may not go far enough. In some states the fact that
16 there is a person in a position of authority over a young
17 person aged 17 is sufficient to negate consent. It's
18 meaningless to talk about consent in that context. Has
19 that been considered or is it only the introduction of a
20 presumption?

21 A. I think, if I can just talk about consent for a moment
22 because I think that has been obviously the subject of a
23 number of things present, I think.

24
25 Q. Yes.

26 A. And I heard the evidence of victim-survivors and
27 obviously Professor Henning as well in relation to that,
28 and I think that language is really - does need to be
29 significantly reviewed. I think consent is quite an
30 archaic concept when you think about a young person under
31 the age of 18.

32
33 PRESIDENT NEAVE: Thank you.

34
35 MS ELLYARD: Q. You go into more detail about proposed
36 reforms, just for your purposes, Ms Webster, at
37 paragraph 475 and following, so you might wish to have
38 regard to that as I ask you these questions. One of the
39 particular reforms that you've identified is that the Royal
40 Commission recommended that legislation should be
41 introduced to remove limitation periods.

42
43 The Commission heard evidence from a witness who we've
44 called "Rachel" to the effect that ultimately because of
45 the existence of a limitation period no charges were able
46 to be brought against the person who had sexually abused
47 her. Am I right in understanding that the effect of reform

1 in this area would be to remove that barrier for people in
2 her position?

3 A. That's correct.

4
5 Q. And that's obviously an important matter having regard
6 to what we know about the long delay that can occur before
7 people feel able to come forward and disclose?

8 A. Absolutely, and I think the Royal Commission indicated
9 that it was around about 22 years before someone feels
10 comfortable, and that's obviously a broad generalisation,
11 or longer, and I think to remove that would be very
12 important.

13
14 Q. Thank you. Now, on the question of criminal law
15 reforms, the Commission's aware there's been some public
16 comment about a proposal that mandatory minimum sentences
17 be introduced in relation to child sex offences. Now,
18 that's not a recommendation that the National Royal
19 Commission made and it's not a matter that, as I understand
20 it, has been recommended by the Tasmanian Law Reform
21 Institute, but it is a proposal, as I understand it, of the
22 government currently.

23
24 There was some evidence given yesterday by Ms Henning
25 and by Mr Coates about the implications potentially for the
26 system of such reforms and I'd be grateful for your
27 response to those implications and why, perhaps
28 notwithstanding those implications, this proposal is going
29 forward?

30 A. Yeah, thank you, and I'm of course aware of those
31 concerns raised by the DPP and others. I would say that
32 this, obviously, it's a longstanding government policy for
33 this government, but I would also say that whilst we're in
34 a process where we want to increase the public confidence
35 in the Justice System, the evidence or the information that
36 we heard from the Sentencing Advisory Council was that
37 Tasmanian offenders continue to receive sentences that were
38 below levels imposed by other jurisdictions.

39
40 There are exceptions in the Bill to deal with persons
41 under the age of 18, for example, and those with mental
42 impairment, so I think, in terms of what has happened in
43 Tasmania, I do think that there is - this is a public
44 confidence and public expectation issue as well; not to say
45 there aren't a range of things to balance, and of course,
46 if there were concerns that were brought out over that Bill
47 which is currently being tabled in the House of Assembly,

1 we would respond to those if we had to.

2

3 Q. Ultimately, the aim of any sentencing proposal is to
4 protect the community from criminal activity; would you
5 agree with that?

6 A. Yes.

7

8 Q. And to reflect in an appropriate way the damage that
9 crime does?

10 A. Correct.

11

12 Q. But it would be perverse, wouldn't it, if sentencing
13 arrangements had the effect of, for example, reducing the
14 number of people who pleaded guilty because that would
15 effectively make victims responsible for giving evidence in
16 cases where at the moment they might not need to?

17 A. If that were to be an outcome, yes.

18

19 PRESIDENT NEAVE: Q. I think that's the evidence from
20 other jurisdictions. I'm a Victorian, as you know, and
21 there was some toing and froing on these issues in Victoria
22 and I think it was pretty clear that one of the effects of
23 reducing judicial discretion in the area of sentencing was
24 reduction in the number of guilty pleas. So, I wondered
25 whether there was any opportunity or any role that the
26 department or some other body could play in educating the
27 community? What about the complexities? Because I think
28 it's a very normal community reaction to say, this terrible
29 thing happened, this person has only been sent to jail for
30 X months or something, which is trivial, but when people
31 have explained to them what the implications may be my
32 experience has been that that sort of pressure reduces, so
33 I wonder if there was any thought about educating the
34 community about the issues in this area?

35 A. Yeah, it's certainly something that we could take on
36 board around that and, if I can use an example where people
37 will often say to me, "Why is that person out on parole?",
38 for example, and one of the things I often say is, "Well,
39 they're actually being supervised by a Community
40 Corrections officer and that is often much better than the
41 person being removed from prison without that supervision".
42 So, I think that education generally in the community about
43 the system, and certainly the evidence that I've heard
44 through the Commission most recently, is that there is a
45 lot of education that we need to do.

46

47 Q. If I remember correctly, in Tasmania there was an

1 examination of what juries thought about sentencing when
2 they were given all the information.

3 A. I think that is --

4
5 Q. And that tended to support, again, the notion that,
6 once people had full information they understood the
7 sentencing process. I think that might have been conducted
8 by the Law Reform Institute?

9 A. I think it was the former Governor, actually, yes.

10
11 MS ELLYARD: Professor Warner, I'm told.

12 A. Yes, it was the former Governor.

13
14 Q. Still in this area of criminal law reform, Ms Webster,
15 you will have heard the evidence of the Director of Public
16 Prosecutions yesterday about the resourcing issues which,
17 in his evidence, affect the ability of his department to do
18 their jobs and deliver justice, and also perhaps the
19 resourcing issues more broadly in the sector including
20 courts, the number of judges and so forth. I take it that
21 it wouldn't have been news to you that he has those
22 concerns about resourcing limitations?

23 A. No.

24
25 Q. Can I ask you what, if anything, is in train already
26 to respond to those resourcing issues?

27 A. I think we've recently appointed a seventh judge
28 within the state, which is the first time I think we've
29 ever had a seventh judge; I'd have to be corrected on that,
30 I don't want to say that, I'm not 100 per cent sure. That
31 position is, we now have a permanent judge in the
32 North-West, in Burnie, and I think that has started to make
33 a big difference. So, I would say that we're absolutely
34 alive to those issues around resources.

35
36 I would also say that there is a balance between
37 making sure in a Criminal Justice System that resources are
38 provided across the board and that, you know, if you're
39 providing resources to the DPP, for example, then we need
40 to make sure that legal aid, for example, are adequately
41 resourced and all those sorts of things, and they're
42 certainly areas that we look at regularly, and I know that
43 government does as well.

44
45 Q. So, one can't just fund one part of the system, one
46 needs to fund the whole system?

47 A. Yes.

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Q. But would you accept that, at the moment, given the evidence of people like the DPP, the system suffers from resourcing constraints?

A. There are definitely some resource constraints within the system; that's not unusual, you know, across Australia, but yes.

Q. Of course, and it's a matter which has some priority, I take it, in your portfolio, the allocation of appropriate additional resources?

A. Yes.

Q. I wanted to ask you about, recognising of course that you're the Secretary to the Department of the Justice and you're not the Secretary that's going to be taking up the leadership of the broader Department of Education, children and families after the change in administrative relationships, but are you able to perhaps update us from the last time this matter was before the Commission on how that new department's going to work and how it, in your understanding, is going to serve the interests of the children in the context that we've been considering?

A. I think the Department of Education, one of the things that I've seen has worked, and I'm not sure if this is, you know, strictly what you're asking, Ms Ellyard, but the Office of Safeguarding Children which has actually come out of the review of Professors Smallbone and McCormack has been a tremendous impact, positive impact on certainly the work that we've been doing: whether it's the Commission of Inquiry, the Royal Commission recommendations, and a range of other things.

I think the Education Department are used to dealing with children in a different way and in a lifelong way, if you like, you know, throughout their childhood. I think they have a slightly different language that's a little bit more positive often than perhaps Child Safety and Youth Justice, so I think changing that language, changing the way we think about children as, you know, a whole, not - you know, they don't come to this service and then to this service, they have to be treated as a whole, so I think that that will be beneficial.

Q. And can I just interrupt you there?

A. Certainly.

1 Q. That carries with it the assumption that it's the
2 education approach and language that will change Child
3 Safety Services and Youth Justice rather than the other way
4 around?

5 A. Yes, what I've said certainly does, yes.

6
7 Q. And, what is it that makes you confident that that's
8 the way the change of culture and language would go?

9 A. I think the fact that they very much take a, as I
10 said, well, it's more of a whole - well, I'm not saying
11 that the Department of Communities doesn't do this, because
12 they do, but it is actually about the interaction across
13 the whole life of the child. I think the other benefit I
14 would say is that, larger departments like the Department
15 of Education, the resources around psychologists and school
16 nurses and those sorts of things are having to tell the
17 story, you know, we've heard throughout the Commission more
18 than once is problematic, so sharing those records, sharing
19 the information, sharing the resources, is also extremely
20 beneficial.

21
22 Q. It's in part a question of culture, isn't it, I think?

23 A. Yes.

24
25 Q. And about the way in which the newer larger department
26 will reflect the appropriate culture that will best serve
27 the interests of children?

28 A. I think that's fair, yes.

29
30 Q. And I ask you this question in part in your role as
31 you've acknowledged as a former Director of the Department
32 of Communities, there's some evidence before the Commission
33 already from the Out-of-Home Care week that I think you'd
34 acknowledge, and perhaps some coming in the Ashley week yet
35 to come, about whether or not the culture that presently
36 exists in those organisations is the right culture to
37 respond to the risks of sexual harm to children?

38 A. I think, and I note that I haven't been in the
39 Secretary role for almost three years --

40
41 Q. Of course.

42 A. -- and the department only existed for about a year
43 and three months when I was Secretary. I think what I
44 would say is that it is one of the most challenging and
45 complex and often sad areas of work in government. I think
46 this is an area where there is constant reform, and
47 understandably there are times when an often tragic

1 circumstance occurs and reform is underway and that can
2 often bring forward reform - you know, reforms that you
3 might have had further down the path, bring them forward,
4 it might divert the reform, and you don't always get an
5 opportunity then to fully implement that reform or to fully
6 evaluate that reform, so I think that culturally can be
7 extremely difficult.

8
9 I think the Strong Family Safe Kids program which was
10 underway when I went into the role is an extremely
11 significant and wholesale reform and there are some
12 significant achievements under that reform agenda, and the
13 approach, and I can only speak for when I was in that role
14 of course and assume that has continued around being
15 collaborative, putting children in the centre, but it's a
16 very complex, challenging area and, if you take the
17 children and young persons part of that portfolio, you also
18 have not only Child Safety but Youth Justice as part of
19 that, so it is extremely complex and challenging.

20
21 Q. And perhaps by reason of that challenge and
22 complexity, something that's - nothing will change just
23 because it moves into a new department; there would have to
24 be resourcing and commitments to meeting those challenges
25 that you've described about ongoing reforms?

26 A. Yes.

27
28 Q. Would you agree that there are potentially some
29 disadvantages from Child Safety and Youth Justice which
30 are, as you've identified, specialised, difficult areas of
31 practice involving particularly vulnerable children? There
32 are some potential disadvantages in them going into a
33 larger department that's about all children rather than
34 being as it presently exists in a department where they
35 perhaps receive a bit more focus?

36 A. I think one of the challenges - while of course the
37 Department of Communities includes a range of other
38 services which are not child-related.

39
40 Q. Of course.

41 A. I would say that one of the challenges is that the
42 transition itself can divert resources and energy away from
43 the reform, but once they're settled I think taking that
44 child-centred approach is extremely important and I suppose
45 - and I use this, I'm not saying they're distractions - but
46 taking away the distractions of those other areas of the
47 department would seem to be fairly beneficial in the way

1 that we deal with children.

2

3 Q. The Commission is aware, and I know you are too, this
4 idea of bringing all aspects of children into one
5 department was something that was done in South Australia
6 and the learnings from South Australia was that it didn't
7 work?

8 A. Yes.

9

10 Q. Doesn't that give some cause for concern about whether
11 this is a reform that will actually succeed in successfully
12 placing children at the centre of things?

13 A. Yes. I think the important thing would be, I think
14 Tasmania is a slightly different context in that we are a
15 smaller jurisdiction, and I would also say we should be
16 taking the learnings from South Australia and, you know,
17 when the original intent of that reform, how can we take
18 away from what was learnt that didn't go so well and why,
19 you know, why didn't it succeed, so I'd hope that we'd be
20 learning from that, I haven't been involved in that process
21 of course, but I would hope that we'd be taking those
22 learnings away.

23

24 Q. Can I turn to the question of Child Safe Standards and
25 reportable conduct. You were asked some questions about
26 this in your first week of hearing, it's at paragraph 88
27 and following of your statement. I think the evidence that
28 the Commission's heard in the various weeks since then has,
29 if I may say, richly brought home the desirability of Child
30 Safe Standards and Reportable Conduct Schemes being part of
31 the landscape to protect children in Tasmania. I'd be
32 grateful if you could give us any update you can about
33 precisely when one might expect those reforms to be in
34 place in Tasmania?

35 A. Thank you. So, the Bill to establish the Child and
36 Youth Safe Framework and an independent Statutory Office
37 will be introduced before the end of this year. It has
38 been entirely rewritten and addresses the criticism about
39 the adoption of the National Principles of Child Safe. We
40 are just reviewing that latest version now, so that will be
41 introduced to Parliament by the end of this year and then
42 the intent would be that the independent regulator and
43 oversight body would be established by 1 July 2023 and then
44 the proposed commencement date would be that phase 1,
45 including all organisations in scope for the Child Safe
46 Standards and the Reportable Conduct Scheme would be
47 implemented by 1 January 2024, and phase 2 including all

1 remaining organisations that were in scope would be 1 July
2 2024.

3
4 COMMISSIONER BROMFIELD: Sorry, I just missed the last two
5 points. Could you just run past me, in the first phase?

6 A. Those organisations that are in scope for the
7 Reportable Conduct Scheme, which is clearly one of the most
8 important aspects of that piece of legislation, and then
9 those remaining organisations that don't have the same
10 touch points with children would be 1 July 2024.

11
12 MS ELLYARD: Q. You say at paragraph 93 of your
13 statement, Ms Webster, that there's going to be an
14 independent statutory oversight body but there's a need to
15 contextualise for the Tasmanian environment. What does
16 that mean? We have heard some evidence about the
17 particular demographics, challenges and opportunities in
18 Tasmania, but what's the Tasmanian environment that's
19 relevant here?

20 A. Yes, and I think the next point of my statement is
21 that the Royal Commission noted that, in establishing that
22 oversight body, we might enhance the roles of existing
23 Children's Commissioners or guardians, and I think Tasmania
24 has a process where we have the Commissioner for Children,
25 we have the Public Guardian, we have a range of other
26 oversight bodies, so I think that's the context, we are
27 slightly different than what other jurisdictions have. But
28 I've also said in my statement that the Victorian
29 legislation and the model that's currently in place there
30 could be used most definitely as a template for that and we
31 would want to take the best of that model, and also New
32 South Wales, which has also introduced their Reportable
33 Conduct Scheme and that oversight body, and obviously work
34 with the current Children's Commissioner to get her
35 thoughts on what that might look like as well.

36
37 Q. So, it's going to be a combination of taking advantage
38 of what already exists in Tasmania and looking to
39 structures that exist in other places that might work?

40 A. Absolutely.

41
42 Q. And not just developing your own from scratch?

43 A. No, absolutely not, no.

44
45 PRESIDENT NEAVE: Q. I'm just thinking ahead. It may be
46 that we would want to make some recommendations about the
47 independent regulator and what shape that should take.

1 Now, you've, I think, said that that would be 1 July 2023.
2 We are required to report by 1 May.

3 A. 1 May, yes.
4

5 Q. -- 2023, so I'm just wondering how you would take
6 advantage or at least consider the recommendations that we
7 might make about the shape of the independent regulator?

8 A. Yes, so we'd certainly want to be doing that,
9 President, of course. I think, similar to what we did with
10 the Integrity Commission, for example, there's an
11 establishment around the premises, you know, those sort of
12 logistical things that we need to do as well that
13 establishes the statutory body and selecting those people,
14 making sure that it's properly resourced and staffed. That
15 isn't to say that between 1 July 2023 and 1 January 2024
16 that we couldn't make sure that we implemented that body in
17 the way that the Commission recommended.
18

19 Q. I mean, I was just thinking aloud really. I mean,
20 would there be any opportunity if you had a draft Bill, for
21 example, by the end of 2022 for us to at least know what
22 your proposal - what the government is proposing so that we
23 could point out things that we thought were not a good idea
24 or a wonderful idea?

25 A. We'd certainly welcome that opportunity, absolutely.
26

27 PRESIDENT NEAVE: Thank you.
28

29 COMMISSIONER BROMFIELD: I think as a general principle
30 the Commission would like to move into a phase of
31 potentially refining some of its recommendations in
32 consultation in order to make sure that they are adapted
33 and suited to the Tasmanian context.

34 A. Yes, Commissioner.
35

36 MS ELLYARD: Q. Another thing to perhaps take advantage
37 of, I suggest, Ms Webster, is the evidence that, and this
38 emerged in the Out-of-Home Care week, that there are a
39 range of non-governmental organisations who work in this
40 area who already hold themselves to the standards that
41 apply in other parts of Australia and who have already got
42 systems and processes in place that ensure that their
43 workforces comply with Child Safe Standards and adopt Child
44 Safe practices. There's the opportunity, is there not, to
45 draw on the expertise that already exists in the
46 non-governmental sector?

47 A. Absolutely, and one of the things that I should have

1 mentioned was that, part of the way we'll be doing the -
2 developing the framework is that there will be project
3 advisory groups that will include those sectors; it will
4 also include lived experience and so, in a separate group,
5 and children and young people through working with the
6 Commissioner for Children around that.

7
8 Q. May I ask you a question which, again, harks back to
9 the role that you've previously held as the Secretary of
10 the Department of Communities and recognising that you
11 don't hold that role now. An observation that might be
12 made about the way in which the government has thus far
13 responded to the work of the Commission is that there have
14 already been a range of announcements and proposed reforms
15 that draw on the evidence of, for example, the Education
16 week, and for example draw on the very recent evidence in
17 relation to Health.

18
19 There hasn't been anything publicly announced that
20 might reflect the very serious matters that were raised and
21 ventilated in the Out-of-Home Care hearing week, and I
22 suppose I want to ask you, in your capacity as someone who
23 previously held that role and has some understandings of
24 the complexities of that difficult work, why that might be?

25 A. As you say, I haven't been involved in that for some
26 time. I do know that the Department of Communities
27 continue through the work that we're doing with the Child
28 Safe Organisations framework to contribute to that and are
29 active in that. I do know that they've also recently, and
30 I'm not going to get the terminology right because it's
31 been a while, but certainly from our perspective the Child
32 Safe Principles and the work that they're doing in
33 out-of-home care embedding that. It may be that they
34 haven't made that public or haven't made a public
35 announcement about that.

36
37 It also may be though, as I mentioned, that the work
38 that they're doing is long-term reform and it is a system
39 that does take some turning around and that work has been
40 ongoing since Strong Families Safe Kids. So, I'm not sure
41 I can answer why there hasn't been a public announcement
42 but I do know that that work is continuing.

43
44 COMMISSIONER BROMFIELD: Q. In the Out-of-Home Care week
45 we had lived experience witnesses and there was a
46 suggestion that children who were former wards of the state
47 can feel like they are less than to government. Would you

1 accept that, when there is no announcement following
2 Out-of-Home Care week, that that could reinforce that kind
3 of perception for former wards of the state?

4 A. I can accept that that may be the case, yeah,
5 absolutely, and I would hope that those people who have
6 that experience of out-of-home care take away that that is
7 not the case, and I, as I mentioned in my opening
8 statement, you know, I apologise to those children and to
9 those victim-survivors who have come forward. I know
10 that's not the case. I know that that isn't the way I felt
11 and I know that's not the way my - and that's not my
12 experience of working in that space.

13
14 COMMISSIONER BROMFIELD: Thank you.

15
16 MS ELLYARD: Q. May I ask you a quick question about
17 matters of information sharing and the extent to which
18 there are barriers at the moment, Ms Webster, you deal with
19 this at paragraph 135 of your statement, when you say you
20 do believe that there's a shared commitment to improve
21 child safety but that there's a difficult area of reform in
22 the area of access and sharing of information.

23 A. Yes.

24
25 Q. The Commission's heard about this from a few different
26 perspectives that the way in which information privacy laws
27 operate in Tasmania has been understood to create barriers
28 to the effective sharing of information relevant to child
29 safety; is that your experience?

30 A. Yes, I've heard that.

31
32 Q. Are you able to assist us on what's going to be done
33 about that, because it's obviously unacceptable that
34 privacy laws should be a barrier to children being
35 protected?

36 A. Absolutely, and it will be undertaken as part of the
37 Child Safe Organisations framework and the Commission - the
38 oversight body, that work will have to be done and the
39 Department of Justice will lead that work. I also know
40 there is some work already underway around the PIP Act, the
41 acronym now escapes me, which is outrageous because it is
42 my department.

43
44 PRESIDENT NEAVE: Personal Information Protection Act.

45 A. Personal Information Protection Act, thank you very
46 much, President, and some work on exemptions is currently
47 underway, but I would accept that that has been, from a

1 perception issue and from a real issue, something that we
2 can definitely improve and we should be working to improve
3 and will through the Child Safe Organisation framework.
4

5 MS ELLYARD: Q. Thank you. May I ask you now some
6 questions about programs for those who commit sexual abuse
7 and rehabilitation programs and extended supervision
8 programs and I'm drawing your attention to paragraph 365
9 and following in your statement, Ms Webster, and I'll get
10 there myself.

11 A. Yes.

12
13 Q. This was in answer to some questions that were posed
14 to you about the management of sexual offenders. One of
15 the things you refer to at paragraph 365 is the new
16 directions program, can you tell us about that?

17 A. Yeah, so that is a program delivered within the Prison
18 Service for prisoners in custody for sexual-based
19 offending. It is at the higher end of the risk scale for
20 those offences. It was impacted through COVID as many of
21 the programs were, and obviously as face-to-face programs
22 and visits had to take a back seat to COVID, but we
23 continued one-on-one through Zoom with some of those
24 participants. We currently have a program underway and in
25 2021 I can tell you that we had 16 participants, we had
26 eight who have graduated and eight who are ongoing and we
27 currently have a program underway as I said.
28

29 Q. And this is a program for people in prison?

30 A. It is, correct.
31

32 Q. It's not a program, for example, that can be made
33 available for people who are in the community on suspended
34 sentences or community-based orders?

35 A. No, we don't run that particular program in Community
36 Corrections for example, but we are having a look and
37 having a discussion with Forensic Mental Health Services
38 about what we can do in the community. Of course, in the
39 community there's greater ability for offenders to access
40 other services than in prison, including group services and
41 one-on-one, but at the moment we only run that program in
42 the prison.
43

44 COMMISSIONER BROMFIELD: Q. The services available in
45 the community, like the individual or the group services,
46 are you aware of what specialist services there are for
47 offenders either at group or individual in the community?

1 A. I can get you that information, Commissioner, but I
2 probably wouldn't want to - it's been some time since I was
3 involved in, you know, directly in that Community
4 Corrections.

5
6 Q. I think we would appreciate that information.

7 A. Absolutely, yes.

8
9 MS ELLYARD: Q. Because one of the issues, as you'd
10 appreciate, Ms Webster, is the desirability of there being
11 some kind of continuity of access to treatment, for example
12 if someone's in prison but for a relatively short time and
13 then leaves but would still be someone who would themselves
14 benefit and the community would benefit from them
15 continuing to receive treatment?

16 A. Yes, and I would just also add that if they're going
17 into a probation order or parole order or some sort of
18 other community supervision - it might be electronic
19 monitoring or something like that - following their period
20 of incarceration, it would be easier for us to of course
21 facilitate access to programs other than if they were
22 released from the prison into the community generally.

23
24 Q. How does that program measure success, what does
25 success look like for those who participate, and I think
26 you used the words graduated out of?

27 A. So, completing the program I think is - and I think if
28 I can just draw a bit of a correlation to our court
29 mandated drug program, where often we know that offenders
30 will have to start that program or undertake those
31 programs, you know, a number of times before they'll
32 succeed in graduating. So, for quite a number of our
33 offenders we know that, for whatever reason, lack of
34 opportunity, education, a range of issues, they haven't
35 been able to complete programs or activities or education.
36 So, there does need to be a more one-on-one approach often
37 with offenders. So, sometimes we measure success by the
38 fact that they complete, that they continue to turn up; and
39 I know that doesn't sound like it's a very high measure of
40 success, but in some cases it is a very high measure of
41 success. So, there's obviously that, but also there's the
42 recidivism data that we would have around re-offending and
43 those sorts of things.

44
45 Q. It's obviously a service that depends on appropriately
46 qualified and experienced clinicians to deliver the
47 program. We've heard some evidence in Tasmania about the

1 limited pool in some contexts of appropriately qualified
2 people to work in these kinds of areas. Has that been a
3 barrier, as you understand it, for this program?

4 A. Yeah, I think we are in a market where attracting and
5 retaining staff is an issue across the board because we do
6 have a high employment rate, so I think we've seen that,
7 and I think we have been increasing our opportunity for
8 programs; so that, and as have other services, so often
9 you're competing with another organisation.

10
11 Then we did get some funding I think last year for
12 five additional interventions officers, so we have to be
13 fairly flexible in the way we apply our staffing, and we
14 also have to often look at other ways of delivering the
15 service, so whether it might be partnering with another
16 organisation or something like that, so we do have to be a
17 little bit flexible and creative around that because of
18 those issues.

19
20 Q. Can I turn to the question of civil litigation, and I
21 know you were present for the evidence earlier today from
22 the Solicitor-General and the Assistant Solicitor-General.
23 You've given evidence both in your previous appearance
24 before the Commission and at paragraphs, I think it's about
25 282 and onwards of your statement about, from your
26 perspective the way in which the civil litigation process
27 works.

28
29 As I understood the effect of your evidence, your
30 experience is that it's the Solicitor-General's Office who
31 makes all of the decisions?

32 A. Yes.

33
34 Q. And, as I understand it, you say this at
35 paragraph 284, you have had occasion where you've queried
36 advice that you've received?

37 A. Yes, there was one particular occasion where that
38 occurred.

39
40 Q. And, what was the outcome of the querying?

41 A. So, obviously without going into detail about the
42 particular matter --

43
44 Q. Of course.

45 A. -- because it was quite specific, I asked a question
46 around the quantum and the outcome was that that didn't
47 change, yep.

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Q. Does it follow from the fact that you asked a question about it, that it didn't feel right to you, the number that was being offered to you?

A. The particular matter was quite specific and quite unusual, and I just wanted to understand the difference within that. Sorry I can't be more specific.

Q. No, that's okay. So, I take it then that your experience is that it is the Solicitor-General, whatever queries or concerns might be put to them, who make all of the decisions about how litigation will proceed and whether it will be settled?

A. That's correct.

Q. Can I ask you for your reflections on whether that's the right way to go and perhaps by referring you to the matters that I put to Ms Kay and Mr Turner about the extent to which there might be non-legal risk or non-financial matters that litigants in litigation might want to have regard to and which might be relevant to how cases run. In your experience do you or others get the opportunity to receive advice about those things or to bring those things into --

COMMISSIONER BROMFIELD: I would invite Ms Webster to not necessarily have to comment on whether it's right or wrong but perhaps if those things might be helpful, if that's easier for you?

A. That might be easier, I think that would be helpful, thank you, Commissioner.

I think I just wanted to make one point if I could, and I did raise with Mr Turner in the lunch break that I have raised that issue and I didn't raise it with them, and he indicated to me that he wasn't aware of the matter that I raised, and it was with another legal practitioner and the previous Solicitor-General, so I just wanted to make that point.

I think the issue of course is the difference between the legal issues and the moral community expectation issues, perhaps, and I think we've certainly observed throughout the hearing that there is work to be done in the space around things like language and, as I said in my opening statement, you know, it is a complex system and the Justice System can be very, very difficult, it's one of the

1 reasons why the Royal Commission introduced a National
2 Redress Scheme, of course, but the way in which sometimes
3 we use language and we know that taking power away from
4 victims is so - you know, it is re-traumatising, so there's
5 clearly education and training that we need to do around
6 language and the way we do things.

7
8 If I can just make this comment: someone once said to
9 me that, "People will very rarely remember what you said,
10 they will always remember how you said it".

11
12 MS ELLYARD: Q. Yes. You mentioned the National Redress
13 Scheme. Now, of course, we understand that that's a scheme
14 with a finite life?

15 A. Yes.

16
17 Q. And it's not a scheme that will respond to the
18 interests and needs of all victims including victims who,
19 sadly, are being abused in the very recent past or into the
20 future. Are you able to tell us what, if any, planning is
21 in place for alternative or replacement schemes to meet
22 both the counselling needs and the compensation
23 entitlements of victims who are not going to have their
24 needs met by the Redress Scheme?

25 A. Yes, I think that's post 2018 offending. The
26 government is very interested to get advice from the
27 Department of Justice around what might be required in
28 terms of compensation and counselling; I think it will be
29 fair to say they're very amenable to that, and the Attorney
30 has indicated to me that she's very open to look at what we
31 do around compensation and counselling for those cases that
32 fall out of the remit of the National Redress Scheme.

33
34 Q. There's certainly been evidence received by the
35 Commission from witnesses, including Ms Beach and Ms Pearn,
36 I think, that their experiences of the National Redress
37 Scheme was that it was not trauma-informed and didn't meet
38 their expectations or their needs. I take it that, in
39 planning for any scheme for post 2018 offences, that you'll
40 be having regard to what hasn't worked about the National
41 Redress Scheme?

42 A. I think the concerns that we had initially and that we
43 raised around - and the department raised and the Attorney
44 raised as well I'm aware, around delay, some of the delay;
45 some of the issues around client engagement and the way
46 that occurred, and case management; I think it's fair to
47 say that we would be very keen to learn from that.

1
2 Q. Thank you. The last point I wanted to - firstly, I've
3 been asked to ask you whether - you mentioned that
4 recidivism data is one of the means of measuring the
5 success of that particular program; is that data that you
6 would be able to make available to the Commission?

7 A. Yes. I'm not sure if I can make - if it specifically
8 would go down to the level of offence that you would
9 require, but certainly recidivism data broadly and any
10 information we had I'd be very happy to make available to
11 the Commission.
12

13 Q. Thank you. This raises the final topic that I wanted
14 to ask you, which is, how are you able to measure
15 improvements in the Justice System? We've had a lot of
16 talk and you've indicated in your statement a lot of things
17 that have happened or are going to happen which all have,
18 as their desired goal, the improvement of the system for
19 the benefit of victim-survivors. What are the means by
20 which you're going to be monitoring and able to test
21 whether or not reforms are working?

22 A. I think, you know, I could talk about the report on
23 government services and the various indicators within the
24 Budget Papers, but I think given what we've heard over
25 recent weeks one of the key ways of monitoring would be to
26 ask the people that use the system and to make sure that,
27 when we develop policy in the future, that we take lived
28 experience, victim-survivor, whatever policy it is, I'm not
29 just talking about child sexual abuse, and I think
30 government can sometimes forget to do that, take their
31 experience into consideration. So, clearly, I think having
32 a more hands-on approach to that and being more aware of
33 that, when you design a system, you have to co-design it, I
34 would say, and I don't think that entirely answers the
35 question about monitoring, but it certainly from my
36 perspective has been very clear that that's the way we have
37 to move forward in the future.
38

39 Q. So there's going to have to be a system that measures
40 qualitative as well as quantitative measures?

41 A. Absolutely, yes.
42

43 MS ELLYARD: Thank you, Ms Webster. Thank you,
44 Commissioners, those are the questions that I had for the
45 Secretary.
46

47 COMMISSIONER BROMFIELD: Q. Just one. We heard evidence

1 yesterday about the Youth Justice System from one of our
2 expert witnesses, and how it was, I think it could be
3 summarised as an abject failure in terms of, we are taking
4 the most traumatised children, putting them into Youth
5 Detention, which is in no way supporting their recovery, in
6 fact it was making both their life outcomes and their
7 criminal justice outcomes worse. That witness spoke about
8 trauma-based or trauma-designed Youth Justice Systems. I
9 was wondering if you had any reflection on whether they
10 were generalisations to be made about the adult Justice
11 System?

12 A. I think that's absolutely right, and there was some
13 findings that, I forget the actual detail, that came out of
14 the Royal Commission about the number of case studies, for
15 example, of people who were in prison. And, I think
16 anything we have learned around child sexual abuse
17 throughout these hearings could equally apply to the adult
18 Corrections system, where people don't just end up in
19 prison because - usually, I should say, 99 per cent of the
20 time - without some sort of background of disadvantage or
21 trauma or vulnerability. And, I think that has also been
22 quite a learning from us, and what we know about the way we
23 interact with prisoners is - and I use the court mandated
24 diversion program as an example - back, you know, 12 years
25 ago when I was Director of Community Corrections I would
26 get a lot of - there would be a lot of criticism about the
27 cost of that program and, you know, why wouldn't we just
28 send people to prison? But now - and I get invited to all
29 the graduations and I attend as many as I can - now there
30 isn't that commentary because we know that it's much better
31 to keep people out of prison and divert them and put the
32 money into those programs, because they get their kids
33 back, they get to get a job, all those sorts of things.
34 So, I think that's a very long-winded way, Commissioner, of
35 agreeing with you.

36
37 Q. And, you said that you attended a lot of graduations,
38 you know, wherever you could. It strikes me that, as a
39 Secretary, by attending those kinds of graduations you are
40 in some way demonstrating the value that you're putting on
41 those kinds of programs?

42 A. Absolutely, yes.

43
44 Q. I wonder if you have a view on the role of what we've
45 been talking about as active and visible leadership in
46 terms of setting the culture, if there's any reflections
47 you'd like to make about that?

1 A. Yeah, I think that's absolutely right, I think you
2 have to be, my view is you have to be present. I would
3 reflect on the last few years of COVID and say, I wish I'd
4 been more present in, you know, the areas around the state.
5 It is difficult, I have to say, to get out and about as
6 much as you would like, but the benefits of that far
7 outweigh sitting in the office and not being part of or not
8 observing the issues that staff have on the ground, and
9 just, yeah, walking up to an offender after they have -
10 well, they're not an offender because their order's been
11 cleared - after they've graduated from a court-mandated
12 drug program and shaking them by the hand and
13 congratulating them probably does more for me than it does
14 for them in some ways, I think, because they probably don't
15 want to know me necessarily but for me it's really
16 important to see that this is actually, you know, this is
17 why I guess we do what we do.

18
19 COMMISSIONER BROMFIELD: Thank you. I had no further
20 questions.

21
22 PRESIDENT NEAVE: Thank you very, very much for your
23 evidence. A short break.

24
25 **SHORT ADJOURNMENT**

26
27 PRESIDENT NEAVE: Yes, Ms Ellyard.

28
29 MS ELLYARD: Thank you, Commissioner. We now draw to a
30 close this part of the hearings which have focused on the
31 Justice System in Tasmania. Over the last three days we've
32 heard from a victim-survivor, from experts and from senior
33 members of the Criminal and Civil Justice Systems in
34 Tasmania. What they've told us reflects the experiences of
35 many other victim-survivors from whom we've heard from
36 during the course of the hearings so far. We've heard
37 about a system that can at times be reaffirming to
38 victim-survivors but which is often brutal and
39 re-traumatising.

40
41 In particular, this morning we heard from Ms Sallese,
42 a victim-survivor of abuse, and she reminded us profoundly
43 of the importance of language in reflecting the reality and
44 the gravity of child sexual abuse. She said there's no
45 role for concepts such as consent and relationships when
46 describing these crimes. She told us how supportive and
47 empathetic Tasmania Police members were for her when she

1 disclosed her abuse in 2017, reflecting that she was very
2 fortunate to have had the detective she did, but she found
3 the process of proceeding to trial, particularly the
4 requirement to re-tell her story to prosecutors, as
5 unnecessary and brutal, and she felt constrained about how
6 she could express her story in her victim impact statement.

7
8 In reflecting on her journey through the Criminal
9 Justice System, she reminded us that, whilst it might be
10 imperfect, the Criminal Justice System has an important
11 role in holding perpetrators accountable. She said:

12
13 *I had both positive and negative*
14 *experiences, and this was both at the time*
15 *and later when I came forward, but overall*
16 *I'm glad I came forward. I was really*
17 *happy that my abuser got convicted. It's a*
18 *shame that they don't get the sentence that*
19 *we get, the lifelong sentence of that*
20 *legacy that they've left us with; it's a*
21 *shame they don't get punished like we do,*
22 *so that's something that doesn't sit very*
23 *well with me, but it's the way it is. It's*
24 *really important to me that what he did to*
25 *me was labelled a crime.*

26
27 On the first day of this case study hearings we heard
28 from Detective Senior Constable Hindle and Commissioner
29 Hine about how Tasmania Police responds to and investigates
30 allegations of child sexual abuse, and in particular how
31 they responded to the various case study examples from the
32 Health week.

33
34 Both Detective Senior Constable Hindle and
35 Commissioner Hine explained Tasmania Police's handlings of
36 the investigations into James Griffin and into Dr Tim, and
37 they, importantly, acknowledged a number of missed
38 opportunities to stop or disrupt Mr Griffin's offending and
39 a failure to properly investigate Zoe Duncan's sexual abuse
40 allegations against Dr Tim.

41
42 As the Commissioners will recall, Detective Senior
43 Constable Hindle was the investigating officer who was
44 charged with investigating Mr Griffin. He said that on
45 being allocated the file he conducted a search on what
46 information the police already held. He noted that there
47 were four previous notifications on the police system of

1 allegations of a sexual nature in relation to children; the
2 most important of those was from 2015 when police had
3 received credible information that Mr Griffin was
4 discussing child abuse and child sexual exploitation
5 online.
6

7 In 2019, when Detective Senior Constable Hindle came
8 to review the matter for the first time, he formed the view
9 that it might be unresolved and that further investigations
10 could be undertaken. He also noted that there was no
11 record in police holdings of Ms Pearn's off-the-record
12 discussion with a Tasmanian police officer in 2011 when she
13 had disclosed being sexually abused by Griffin.
14

15 Detective Senior Constable Hindle reflected on the
16 police's ability to properly investigate child sexual abuse
17 and how it can be compromised by conflicting obligations.
18 He said:
19

20 *It's an ethical dilemma to drive home each*
21 *day thinking that I've spent the day*
22 *looking for CCTV in relation to a wounding*
23 *that happened in town, and yet I've got*
24 *this person I believe is trying to ingrain*
25 *himself with another young single mother*
26 *and abuse their children as well. So, I*
27 *don't believe my organisation should put me*
28 *in that situation, I think my organisation*
29 *should identify that child abuse and child*
30 *exploitation is something that needs some*
31 *direct attention to, yeah.*
32

33 Commissioner Hine in his evidence apologised for the
34 failings of Tasmania Police in their response to
35 Mr Griffin. In 2000 police received a report about a
36 computer previously owned by Mr Griffin which contained
37 Child Exploitation Material and Commissioner Hine
38 acknowledged that police should have acted more quickly on
39 that report.
40

41 In 2011, police received a notification from Child and
42 Family Services about allegations of historical sexual
43 abuse perpetrated by Mr Griffin but they did not respond
44 because CFS would not provide information about the
45 notifier. Commissioner Hine acknowledged that the police
46 could have handled this better and that it was a lost
47 opportunity for investigations to be made about Mr Griffin

1 and his conduct.

2
3 In 2013, police received a notification about
4 Mr Griffin's grooming of Tiffany Skeggs. They referred it
5 to the Child and Family Services. Commissioner Hine said
6 that the fact that the police itself took no further
7 investigation and that the matter was handled by a Child
8 and Family Services worker was not acceptable then and is
9 certainly not acceptable practice now.

10
11 In 2015, as I've noted, credible information about
12 Mr Griffin's sexual offending and sexual discussions online
13 was available to Tasmania Police but no action was taken to
14 act on that information, and Commissioner Hine said that
15 that should have been followed up.

16
17 Reflecting on victim-survivors experiences of seeking
18 to give statements to police after Griffin had died,
19 Commissioner Hine acknowledged that the Tasmania Police
20 should continue to take statements from people who wish to
21 come forward with allegations about a person even if the
22 alleged perpetrator is dead, and it may, as he
23 acknowledged, assist police to identify information about
24 other offenders, as well as reflecting in a proper way the
25 needs of victim-survivors.

26
27 Commissioner Hine also discussed and made concessions
28 about the inadequacies of the police investigation into Zoe
29 Duncan and her allegations of abuse. He observed that the
30 opportunity to conduct a timely forensic examination was
31 lost because the matter hadn't been referred by other
32 services to police in a timely way, but he also accepted
33 that, once the police were notified, not everything was
34 done that could and should have been done. The
35 investigation was not comprehensive and complete, a
36 potential witness was not spoken to, and relevant
37 information was not obtained. He agreed that it was
38 unacceptable that there was a delay in referring to police
39 and he agreed that vital evidence could have been lost.

40
41 Perhaps comfortingly, he said that, if someone like
42 Zoe reported abuse today, management of that complaint
43 would be totally different, although of course that doesn't
44 change in any way the significance of the failings in Zoe's
45 case.

46
47 I turn then to the expert evidence that we heard over

1 the last three days. We heard from Dr Tidmarsh and
2 Detective Chief Inspector Yeomans about how police in other
3 jurisdictions conduct investigations in relation to child
4 sexual abuse and trained to be able to do so effectively.

5
6 They told us how critical the effective Whole Story
7 policing model can be to gain a full narrative of
8 experiences of victim-survivors, to capture the dynamics of
9 grooming, and to enable the best evidence to be given.

10
11 We also learned about the risks associated with
12 combining family violence and sexual assault policing,
13 noting that the volume of family violence matters can
14 resist overwhelming the dedicated resources that are
15 required to do the complex work of child sexual abuse
16 investigations justice.

17
18 We also heard from Ms Christine Handy and Ms Elena
19 Campbell about different aspects of restorative justice
20 initiatives, how they can be perhaps tailored to meet the
21 needs of victim-survivors and those who harm them.

22
23 Ms Campbell told us that ideally Youth Justice Systems
24 would be trauma-designed rather than trauma-informed,
25 recognising that many young people within the system have
26 often experienced significant violence and neglect early in
27 their lives. She spoke about the benefits of institutions
28 adopting restorative justice approaches when engaging with
29 those who have been harmed.

30
31 Yesterday, we heard from Adjunct Associate Professor
32 Henning. She gave us the benefit of her expertise working
33 over many years in Tasmanian law reform. We heard her view
34 on the value of expanding and legislating key features of
35 the Witness Intermediary Scheme which is designed to
36 support individuals, particularly children, to give their
37 best evidence. She explained some of the key barriers for
38 complainants in sexual assault matters, including many of
39 the stereotypes about victim behaviour that can be a
40 barrier to convictions. She agreed that increasing the
41 information available to those working within the Justice
42 System, including the judiciary, is one way to overcome
43 those damaging myths.

44
45 She acknowledged that reforms have tried over time to
46 make the criminal justice process less brutal for
47 victim-survivors but stereotypes still remain and, as she

1 said, a root and branch reform is needed. She said:

2
3 *Even though we think the reforms that we*
4 *have achieved, for example, reforms around*
5 *sexual experience and sexual reputation,*
6 *even though we think they are quite*
7 *profound ... our system is still situated*
8 *in a society which is a patriarchal*
9 *society; it is a male-dominated society and*
10 *it is imbued with traditional stereotypes*
11 *and with views that are really hard to*
12 *dislodge.*

13
14 *It takes a lot more than we have currently*
15 *achieved, and how we achieve that now is, I*
16 *say, root and branch reform, and how we*
17 *achieve root and branch reform giving the*
18 *social context in which our system operates*
19 *is really, really, difficult to determine.*

20
21 Ms Catherine Edwards from Tasmania's Victim Support
22 Service gave evidence yesterday explaining the services
23 that are available to support victims of crime. She
24 described significant resourcing challenges that make it
25 difficult for the service to deliver on its ambitions,
26 including the need for regular training for its staff and
27 decision-makers. She described some limits on eligibility
28 including for claims that predate the legislation or fall
29 outside limitation periods. Those matters are currently
30 the subject of review.

31
32 She articulated the significant need for funding to
33 ensure that Victim Support Services are equipped to be
34 trauma-informed and to help victims through the criminal
35 justice progress.

36
37 We also heard yesterday from the Director of Public
38 Prosecutions, Daryl Coates SC. He recognised the Criminal
39 Justice System is often traumatic for victim-survivors and
40 he recognised the importance of considering ways in which
41 this can be mitigated. He said that over the last
42 few years there have been a range of legislative reforms
43 which have improved the capacity to prosecute child sex
44 abuse cases, but there remains more work to be done,
45 including in relation to the language which is used to
46 describe relevant child sex offences.

47

1 The DPP explained how his office would be assisted by
2 more resources and further legislative reforms to improve
3 the way child sex abuse matters can be prosecuted and to
4 provide a more trauma-informed practice. There also remain
5 opportunities to further develop and embed specialisation
6 and techniques like pre-recorded evidence.

7
8 This morning we heard from Ms Kay SC and Mr Turner SC,
9 the Solicitor-General and Assistant Solicitor-General for
10 the State of Tasmania. They provided an overview of the
11 current system of advising and representing the State of
12 Tasmania in litigation, including in relation to child sex
13 abuse matters, and I submit to you that their evidence
14 revealed the problematic nature of the current system
15 including, firstly, the Office of the Solicitor-General
16 being part of adopting a position, with the acquiescence of
17 the government, which does not reflect the current and
18 traditional client-solicitor relationship where the client
19 instructs and decides and the lawyer advises. Instead,
20 it's clear that, consistent with evidence you've heard
21 earlier in these hearings, that the Office of the
22 Solicitor-General both advises and decides on the conduct
23 of civil litigation involving child sex abuse matters,
24 including the amount of compensation that might be paid
25 despite what might be the contrary views of a secretary or
26 department head.

27
28 Even though the Office both advises and decides, it
29 appears from the evidence that it only considers legal and
30 financial considerations and not other matters like the
31 state's reputation or values, morality, the public
32 interest. It was suggested that these were policy matters
33 for Cabinet or the Attorney-General; it's clear that
34 they're not matters about which the state is presently
35 being advised by its lawyers when it responds to child sex
36 abuse matters.

37
38 It was acknowledged that the pleading of a defence in
39 relation to child sexual abuse based on consent was only
40 discontinued after an Attorney-General direction, and I'll
41 invite you to reflect on the detailed discussion that we
42 had about those matters which were of some concern, in my
43 submission.

44
45 It was clear, in my submission, that there was a lack
46 of trauma-informed practice about the way these matters are
47 currently done. Mr Turner acknowledged the evidence we

1 heard today about the problematic nature of some of these
2 concepts like consent, and that was powerful evidence, but
3 whether or not those matters should have been well fully
4 understood well before today is a matter that you might
5 want to consider.
6

7 Finally, Mr Turner and Ms Kay also reflected on other
8 challenges involved with advising the state; they have a
9 monopoly on the provision of legal advice and we had some
10 discussion about whether or not that poses difficulties
11 where multiple government departments, including
12 potentially independent regulators, all have to accept
13 advice from the same course.
14

15 The final witness this afternoon whom you've just
16 heard from was Ms Webster and I acknowledge the apology
17 that she offered to victim-survivors including Ms Sallese.
18 Importantly, in my submission, Ms Webster also acknowledged
19 the experiences of victims of harm in out-of-home care.
20 She apologised to those who had been abused in the care of
21 state. She acknowledged that people in out-of-home care
22 have told the Commission about their view that they feel
23 that they are less than other victims. She acknowledged
24 that that feeling might be exacerbated or contributed to by
25 the absence of any public response from the government to
26 the themes of the Out-of-Home Care week. She did indicate
27 that work in this space was ongoing but wanted to confirm
28 appropriately that children who are harmed in out-of-home
29 care are not less than anyone else.
30

31 Ms Webster outlined her intention to make improvements
32 to the Justice System, she said she was strongly committed
33 to making the changes necessary to keep children and young
34 people safe, and it's clear that there are still a number
35 of reforms that need to be done. She acknowledged some of
36 the reforms that have already happened and she described to
37 you the way in which further reforms are going to occur.
38

39 Importantly, she confirmed that a legislated Child
40 Safe Framework with an independent regulatory and oversight
41 body is to be introduced by the end of this year with a
42 phased implementation, and this will include reforms to
43 information sharing barriers where a child is at risk.
44 Ms Webster also acknowledged some of the evidence received
45 about the civil Justice System. She told us that they have
46 on their radar the need for a new scheme to replace the
47 National Redress Scheme when it concludes.

1
2 She also reflected from her perspective on matters
3 relevant to the restructuring of the Department of
4 Communities and the way in which the interests of the
5 children who are in the Out-of-Home Care and Youth Justice
6 System can be met, and we thank Ms Webster for making
7 herself available to return to give that further evidence.
8

9 I thank all witnesses who attended over the course of
10 the three days, particularly the lived experience
11 witnesses, for their contributions and I thank all those
12 involved in the hearings, and that concludes the evidence
13 before you.
14

15 PRESIDENT NEAVE: Thank you very much, Ms Ellyard. Thank
16 you Ms Rhodes too, and I'd also like to thank counsel for
17 the state and all staff who have contributed to the work of
18 the Commission over the last two weeks.
19

20 We will, of course, be reconvening at a date to be
21 notified to discuss the outstanding issues. So, thank you
22 very much everybody.
23

24 MS ELLYARD: If the Commission pleases.
25

26 **AT 3.17PM THE COMMISSION WAS ADJOURNED TO**
27 **THURSDAY, 28 JULY 2022 AT 10.00AM**
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