Statement of Daryl Coates SC, Director of Public Prosecutions

RFS-DPP-001

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This statement is made by me in response to RFS-TAS-001 issued on 13 May 2022 by the President of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (the Commission), the Honourable Marcia Neave AO.

Background

Q1. What is your current role and professional background (particularly within the State Service)?

1. I am the Director of Public Prosecutions. My functions are set out in section 12(1) of the *Director of Public Prosecutions Act 1973* which states:

> (1) The functions of the Director are –
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> (a) where he considers it desirable to do so –
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> (i) to institute and undertake, on behalf of the Crown, criminal proceedings against a person in respect of a crime or an offence alleged to have been committed by that person; and
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> (ii) subject to subsection (2) , to take over and continue any such proceedings that have been instituted or undertaken by another person; and
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> (iii) subject to subsection (2) , to discontinue at any stage any such proceedings that have been instituted or undertaken by the Director or by another person; and
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> (b) to give advice and assistance to –
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> (i) a prescribed person; or
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> (ii) a person to whom, in a particular case, the Attorney-General may direct or request the Director to give advice and assistance –
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> in respect of the conduct of any criminal proceedings in the conduct of which that person is concerned; and
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> (c) on behalf of the Crown or any other person, to have the conduct, as practitioner, of any proceedings (other than proceedings to which paragraph (a) or paragraph (b) of this subsection relates) when so directed or requested by the Attorney-General; and
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> (d) to instruct, and supervise the work of, counsel and State Service officers and State Service employees and other persons whose services are provided

or procured for the conduct of any proceedings or otherwise for assisting the Director in the performance of his functions; and

(e) to act as counsel for the Crown in right of the State or for any other person for whom the Attorney-General directs or requests the Director to act; and

(ea) to issue to –

(i) prosecutors; and

(ii) persons acting on the Director's behalf; and

(iii) the Commissioner of Police; and

(iv) any persons or Agencies who conduct prosecutions –

guidelines in relation to prosecutions, including in respect of the offences, or classes of offences, that are to be referred to the Director for the institution and conduct of proceedings; and

(eb) to grant indemnities from prosecution, whether on indictment or otherwise; and

(ec) to give undertakings to persons that answers given, or statements or disclosures made, by those persons will not be used in evidence against those persons; and

(f) to carry out such other functions ordinarily performed by a practitioner as the Attorney-General directs or requests.

I am also to provide counsel for coronial inquests, section s 53(3) of the *Coroners Act 1995.*

2. My professional details are as follows:

   a. March 1985 - Graduated University of Tasmania with combined degrees: Bachelor of Arts/Bachelor of Law

   b. 05/09/1986 - Admitted as a legal practitioner of the Supreme Court of Tasmania

   c. 1986-1995 Employed in the Office of the Director of Public Prosecutions as a Crown counsel: work conducted included summary prosecutions, child protection work, coronial inquests, indictable crime and criminal appeals

   d. 1995-2003 Senior Crown Counsel: employed to prosecute serious indictable crime and conduct appeals in the Court of Criminal Appeal and the High Court

   e. 16/10/2000 - Appointed by His Excellency the Governor-in-Council as a Crown Law Officer pursuant to Section 1 of the Tasmanian *Criminal Code 1924* authorising me to initiate or discontinue criminal proceedings on indictment

f. 02/04/2003 - Appointed by the Chief Justice of the Supreme Court of Tasmania as a Senior Counsel

g. March 2004- Appointed Assistant Director of Public Prosecutions: responsible for the criminal section of the Office of the Director of Public Prosecutions including allocating the work of the Office, administering the staff, running the Supreme Court criminal list, authorising prosecutions and prosecuting the most serious criminal trials and appeals

h. 01/09/2008 - Appointed by the Judges of the Supreme Court pursuant to s 610 of the *Legal Profession Act 2007* as Deputy Chairperson of the Legal Profession Disciplinary Tribunal

i. 31/07/2009 - Appointed by the Judges of the Supreme Court pursuant to s 610 of the *Legal Profession Act 2007* as Chairperson of the Legal Profession Disciplinary Tribunal, a three-year appointment

j. 06/11/2013 - Appointed Acting Director of Public Prosecutions

k. 27/11/2015 - Appointed Director of Public Prosecutions

3. During my 35 years as a Crown Counsel I have prosecuted hundreds of criminal trials involving all of the most serious crimes in the *Criminal Code*.

4. I have conducted many sexual assault cases, my first being in 1987. The sexual assault cases include cases involving children, in both familial and institutional circumstances. They include many historical cases. The cases range from single complainants to multiple complainants, involving tendency and coincidence evidence. I have prosecuted many adult sexual assault cases.

5. Over the past 30 years I have appeared on many occasions before the Court of Criminal Appeal. I have conducted numerous appeals in relation to sexual assault cases. I have also appeared before the High Court on a number of occasions.

6. In the past I have been asked to lecture on the topic of tendency and coincidence evidence, including to the Tasmanian Criminal Law Conference and the National Magistrates Conference. I have been asked by the University of Tasmania to mark law faculty honours theses in relation to criminal and evidence law.

7. In the past eight and a half years I have attended twice yearly meetings of the Australian Directors of Public Prosecutions where methods and systems in place to prosecute sexual assault cases are routinely discussed. I have also attended four international conferences for Directors of Public Prosecutions where dealing with sexual assault cases in the various jurisdictions are discussed.

8. I have spoken to, obtained reports and led evidence from experts in relation to the effects of child sexual abuse.

9. I made submissions and gave evidence to the Royal Commission into Institutional Responses to Child Sexual Abuse.

Q2. Do you have any personal performance measures, key performance indicators or financial bonuses attached to how the Office of the Director of Public Prosecutions responds to child sexual abuse?

10. No. However, I am required to report to Parliament annually. Section 15(1) of the *Director of Public Prosecutions Act 1973* provides:

> The Director shall, within 3 months after 30th June in each year, prepare and submit to the Attorney-General a report on the performance by the Director of his functions under this Act during the period of 12 months ended on that day.

11. In the Annual report I publish statistics, including:

    a. Committals to the Supreme Court

    b. Persons presented in the Supreme Court

    c. Crime (type) major groupings by persons convicted

    d. Disposal of criminal matters

    e. Persons tried (by result)

    f. Bail applications

    g. Witness assistance services provided

    h. Child safety matters

    Further, I regularly report on the number of advices provided by the Sexual Assault and Family Violence Unit (pre-charging advice).

12. I am accountable to the Court.

13. The Office is also accountable to considerable public scrutiny.

Q3. Did you or the Office of the Director of Public Prosecutions make a submission to the Commission?

14. Yes. I complied with NTP-DPP-001 and NTP-DPP-002.

Organisational structure and culture

Q4. Provide an organisational structure identifying key reporting lines within the Office of the Director of Public Prosecutions.

15. A copy of the Organisational Structure is at **Annexure A**.

16. The Deputy Director is one level below the Director.

17. The Assistant Director (Summary Prosecutions) is one level below the Deputy Director and reports directly to the Director. The Assistant Director also prosecutes serious indictable crime.

18. The Director, Deputy Director, Assistant Director (Summary Prosecutions), Witness Assistance Service manager and the Director of Crown Law Services (in charge of Human Resources) meet on a weekly basis.

Indictable Criminal Prosecution

19. Principal Crown Counsel are one level below the Assistant Director. Principal Crown Counsel report directly to the Deputy Director. There are four Principal Crown Counsel in the criminal prosecution unit. Three Principal Crown Counsel are Crown Law Officers, appointed by the Governor to institute or prosecute criminal proceedings in the Supreme Court under Section 1 of the *Criminal Code Act 1924*.

20. There are four teams in the indictable criminal prosecution section of the Office. The Sexual Assault and Family Violence Team, the General Crime Team and the Fraud Complex Drugs and Unexplained Wealth Team. Each of these teams are headed by Principal Crown Counsel, who are responsible for the level 3, 2 and 1 Crown Counsel within their team. There is a fourth team in the indictable criminal section of the Office, namely the solicitors unit. This is headed by a Level 4 Principal Solicitor who is responsible for the Crown Counsel and Legal Practitioners within that team.

21. The Deputy Director, Principal Crown Counsel and the Principal Solicitor attend weekly meetings to allocate newly committed files. This group also meet regularly to finalise trial grids and arrange listing matters. Principal Crown Counsel, in their capacity as team leaders, are expected to have knowledge of the capacity and capabilities of members in their team. This group also discusses listing of matters generally and trial grids.

22. All Crown Counsel report to Principal Crown Counsel in the first instance.

23. Level 3 Crown Counsel (and some experienced level 2 Crown Counsel) supervise level 1 and 2 Crown Counsel.

Policy

24. The Policy unit reports directly to the Director. It is manned by the equivalent of one full time level 3 Crown Counsel.

Summary Prosecutions Unit

25. The Summary Prosecution unit conducts regulatory summary offences including complex WorkSafe matters, environmental and animal welfare prosecutions, prosecutions for summary criminal offences arising out of serious motor vehicle accidents and hearings for indictable matters that have been remitted for trial before a magistrate pursuant to section 308 of the *Criminal Code Act 1924*. This Unit also conducts all Lower Court Appeals and assists the Coroner as Counsel Assisting in allocated matters.

26. This Unit is headed by Principal Crown Counsel who reports directly to the Assistant Director of Summary Prosecutions.

Child Safety Legal Group

27. The Child Safety Legal Group represents the Secretary of the Department of Health and Human Services under the *Children Young Persons and their Families Act 1997.* This unit also assists the Coroner. The Legal Practitioners in this Unit report to the Child Safety Legal Group Service Manager (who is the equivalent of Principal Crown Counsel), who reports directly to the Assistant Director.

Witness Assistance Service

28. The Witness Assistance Service manager reports directly to the Director. The Witness Assistance Officers report to the Witness Assistance Service manager.

Director Crown Law Services

29. The Director of Crown Law services is split between the Crown Solicitors Office, the Solicitor General's Office and my Office. The Director of Crown Law Services oversees the finances of the Offices, human resources and the administrative side of the Office. The Manager of Business Support reports directly to the Director of Crown Law Services. The Manager of Business Support is responsible for the administrative and clerical support in the Office.

30. The reporting lines are shown in Annexure A.

Q5. Has the Office of the Director of Public Prosecutions been the subject of significant changes (for example, restructures) during the Relevant Period? If yes, describe any changes that are relevant to the Commission's Terms of Reference?

31. A summary of the changes that are relevant to the Commission's Terms of Reference are as follows:

Directors Prosecution Policy and Guidelines

32. Guidelines were drafted in respect to how sexual assault matters should be dealt with in the Office of the Director of Public Prosecutions (**the Office**) in 2014/2015.

33. The Directors Prosecution Policy and Guideline's (**the Guidelines**) were published in approximately 2016, following an amendment to the *Director of Public Prosecutions Act 1973* which gave the Director the statutory power to issue guidelines in relation to prosecutions, section 12(ea) of that Act. Draft guidelines were circulated to interested parties for consultation prior to being published.

34. The Guidelines are a detailed and publically available set of policies and guidelines applied within the Office. They provide guidance to prosecutors in their work and ensure consistency in procedures, charging and discharging decisions. It is hoped these guidelines also assist the judiciary, legal profession, complainants and people involved in the justice system to understand the basis and principles on which the Office operates.

The Committee

35. In about 2000 the Criminal Committee commenced. It is now more formal than it was when first established. The Committee is comprised of the Director, Deputy Director, Assistant Director (Summary Prosecutions) and Principal Crown Counsel. The Committee determine whether an indictment will be filed (and for what charges), whether an alternative summary charge will proceed or whether the accused will be discharged.

36. Over the relevant period the memorandum prepared for the Committee have become far more detailed. Current memoranda provide a detailed analysis of the facts and law, and make a recommendation. Early in the relevant period they generally provided a perfunctory summary of the pertinent evidence and limited information about the law. How matters are reviewed by the Committee is set out below.

Process of internal review – the Committee system

How determinations are made to indict or discontinue **see also pages 15-18 of the DPP Prosecution Policy and Guidelines*

37. When the file is satisfactorily complete (or ought not be completed further because it will remain unviable as an indictable charge) prosecutors with conduct of the case must determine whether, in their view, an indictment

should be filed, or whether the accused should be discharged, or whether alternative summary charges should be laid.

38. Prosecutors must prepare a memorandum setting out the facts essential to the charges to be considered (which can or cannot be established to the requisite degree), strengths or difficulties with the evidence including with witnesses, possible legal arguments and the authors thoughts on their likely resolution. The Guidelines provide, at 15,

> Where it is recommended that a matter should not proceed, or that charges should be substantially downgraded, due to an assessment of the credibility of an account given by a complainant or a witness, that complainant or witness should be interviewed to assess their evidence. Assessments of credit are to be clearly stated in objective terms.

39. The memorandum is to be forwarded to the Director or the Committee (in most circumstances it will be forwarded to the Committee in the first instance). Generally memoranda are only forwarded to the Director in the first instance for charges that require the Directors authorisation.

40. If an indictment of practically the same or similar charges for which the accused has been charged and/or committed is sought, the agreement of one member of the Committee is required. In the case of any Committee member making the recommendation, the agreement of another member is required.

41. A decision to indict or discharge a matter involving sexual abuse of a child is considered in the same way as for any indictable crime (consideration is given to measures, such as the *Evidence (Children and Special Witnesses) Act 2001*). In most instances it will involve a discussion with the complainant before a final determination is made.

42. My Guidelines provide information specific to witnesses and children and special witnesses specifically (see pages 47 to 50). In particular the Guidelines refer to the principles governing the treatment of complainants set out in the Tasmanian Charter of Rights for Victims of Crime; the need to consult with complainants throughout the process; the need to refer to the sexual crimes guidelines; special measures that are to be taken with children and special witnesses; that the Criminal Justice Report that identified the importance of recording a complainant's evidence in order to avoid the need for them to give evidence again if there is a subsequent trial; reference to the Australian Institute of Judicial Administration Bench Book for Children Giving Evidence In Australian Courts. Pages 28 and 29 of my Guidelines provide some specific information about prosecuting sexual assault crimes.

Discontinuance of proceedings **see also pages 16-18 of the DPP Prosecution Policy and Guidelines*

43. If a matter is discontinued after charging the reasons for the discharge are clearly documented with detailed reasons.

44. There is a process of internal review for matters that are discharged. This has been in place since about 2000. Again, this has become more formalised. Any recommendation to discharge must be agreed upon two Committee members (unless the recommendation is that of a Committee member, in which case the agreement of another Committee member is required). If the recommendation to the Committee is to prosecute on the same or similar charges but one member of the Committee recommends a discharge or a substantial downgrading of the charges then two other Committee members must also agree with such a discharge or downgrading of the charges. Where the Committee cannot agree in these terms, the matter is to be forwarded to the Director for review and determination.

45. The Director's agreement to a discharge or substantial downgrading to the charges is generally final. However, the Director will meet with complainants to discuss the matter. Generally a decision will only be overturned if it is plainly wrong, there is new evidence, there has been a change in the law, or the proper procedures were not followed and that had an impact on the decision.

Notifying the complainant of a discharge or substantial downgrading of charges

46. Informing the complainant of the proposed discharge or reduction in charges is an important step in the process. It is recognised that it is important that the complainant understands the reasons why the decision has been made.

47. The Guidelines state, at 15:

> If the crime(s) charged have a victim, some discussion with the victim should also take place to ascertain their views and forewarn them of the possibility that there might be a discharge or reduction in number and/or severity of charges, and the reasons that might be so.

48. The prosecutor with conduct of the case is to meet with the complainant to inform them of the decision and the reasons for decision. It is preferable that this meeting be done in person, where this is not possible it should be done by telephone. When informing a complainant of the decision the prosecutor should advise how decisions are made, provide a brief history of the matter and brief reasons for the decision. The complainant should be given an opportunity to provide his or her views about the decision.

49. Complainants have a right to request a review of the decision by the Director (unless the decision was approved by the Director). Requests for review are generally to be made within 7 days of notification of the decision. If complainants request longer the time will be extended. However, it cannot be an indefinite period because we have to advise the court and accused person that the matter is not proceeding. Ordinarily, this is discussed with the complainant at the time they are notified of the decision. The Guidelines provide that a letter is to be provided to the complainant confirming that the charges will not proceed and that the

complainant has the right to request the Director to review the decision. A copy of the template standard form letter is attached as **Annexure B**.

50. The police file is returned to the Assistant Commissioner (unless the file needs to be delivered to Police Prosecution Services if there are related summary proceedings) with a copy of Crown Counsel's memorandum recommending a discharge and the reasons for the discharge and together with a brief covering letter.

Criminal Teams

51. In 2016/2017 the Sexual Assault and Family Violence Team (**the Unit**) was the established.

52. In 2017/18 the Office moved to a team structure more generally. Currently within the indictable crime section of the Office there are four teams, the Sexual Assault and Family Violence Team, the General Crime Team, the Fraud/Complex Drugs and Unexplained Wealth Team and the Solicitors Unit.

53. These teams are overseen by the Director and Deputy Director. The Sexual Assault and Family Violence Team (team) is one of these teams. Each team is managed by a Principal Crown Counsel (Level 4) and is made up of level 1, 2 and 3 Crown Counsel (but for the Unit, which does not have any level 1 prosecutors). Principal Crown Counsel supervise the Level 3 Crown Counsel and the Level 3 (and some more experienced Level 2) prosecutors supervise the Level 1 and 2 Crown Counsel.

54. The team structure commenced to enable closer mentoring of staff, greater supervision of work, a more thorough knowledge of each practitioner's workload and greater input by staff into running of the organisation. The team structure commenced in part as a result of the fact that we had more junior practitioners than we had in the past. This structure enables closer monitoring and supervision of staff.

Pre charging advice

55. Pre charging advice has been provided for the entirety of the relevant period. The demand for, and complexity of, pre-charging advice has increased during the relevant period. Early on the pre-charging advice that was provided was brief. It was rare for an advice to span more than a few paragraphs. In contrast, today pre-charging advice is highly detailed. In addition to providing a recommendation to Tasmania Police, current advice outlines all of the available evidence, recommendations for further investigations, and a discussion of the factual and legal issues involved. Letters of advice generally span pages. The detailed advice increases accountability in decision making and provides clear guidance to Tasmania Police. The Office endeavours to give charging advice at an early stage so that fewer charges are downgraded or discharged.

56. Since the advice service has been routinely provided by more than one practitioner, any recommendation not to charge must be reviewed by and

agreed with by Principal Crown Counsel or above. Unless the advice has been given by Principal Crown Counsel.

57. This service is predominately provided by members of the Sexual Assault and Family Violence Team.

Allocation of sexual assault offence matters generally

58. Early in the relevant period the Office had fewer Crown Counsel. The majority of prosecutions for sexual assault, including child sexual assault, were conducted by a few and very experienced senior Crown Counsel (at times with the assistance of junior Crown Counsel). The vast majority of pre-charging advice was provided by Principal Crown Counsel, [redacted]. In 2004 [redacted] received an award for *Women Safety in the Community* for his work in the prosecution of sexual assault cases.

59. Following this, the service was predominantly provided by four Crown Counsel in succession up until 2016/2017 when the Office began moving to a team structure. Of those four Crown Counsel one is now the Chief Magistrate, another the Deputy Director who was appointed Senior Counsel by the Chief Justice in 2018, and another the Assistant Director (Summary Prosecutions) who was appointed Senior Counsel by the Chief Justice in 2021. The Office has placed outstanding counsel in this position throughout the relevant period.

60. Over the years the number of requests for pre-charging advice has increased, as has the complexity of these matters generally. As a result the work is no longer able to be primarily undertaken by one Crown Counsel.

61. In 2016/17 the Sexual Assault and Family Violence team (the Unit) was established following a successful bid for funding for this purpose. This unit is overseen by a Principal Crown Counsel. Initially Principal Crown Counsel was assisted primarily by two Crown Counsel to provide pre-charging advice. Other Crown Counsel assisted as and when required. Currently advice is provided predominately by members of the Sexual assault and Family Violence team.

Sexual Assault and Family Violence team (Unit)

62. Currently all sexual assault matters are co-ordinated by a Principal Crown Counsel who is the manager of the Sexual Assault and Family Violence Team (the Unit).

63. The Unit is currently comprised of Principal Crown Counsel, two level 3 Crown Counsel, four level 2 Crown Counsel and a liaison clerk. Staff rotate in and out of the Unit when requested or required, or after a period of time. The Unit oversees sexual assault and family violence prosecutions. The purpose of the Unit is to streamline this work and enable oversight by a single Principal Crown Counsel to ensure consistency in approach and appropriate prioritisation of matters. The Unit aims to provide development opportunities for younger practitioners, in that

they can focus on this area of work and obtain the assistance of more experienced members within the team.

64. Generally prosecutions for sexual abuse offences are conducted by practitioners in the Unit. However, a portion of these files are allocated to prosecutors outside of the Unit, either due to the need to have senior prosecutors with experience in this area or due to resource limitations within the Unit. Where it is a particularly novel or complex matter it will be allocated to the most senior prosecutors in the Office. It is not feasible to have all of our most senior prosecutors conducting this type of work on a more permanent basis. If matters are allocated outside of the unit due to resourcing issues often that work will be allocated to Crown Counsel who have transitioned out of the Unit (these Crown Counsel may also have retained carriage of files after the transition) or senior prosecutors and prosecutors with experience in prosecuting crimes of sexual assault.

65. When matters are allocated to prosecutors outside of the Unit the prosecutor will generally be briefed, or assisted by, a level 2 within the Unit. Junior counsel assist with more complex matters in order to gain the knowledge, skills and experience required to undertake this work. This has been the case during the entirety of the relevant period.

66. Sexual assault prosecutions conducted from our Launceston office are generally undertaken by Principal Crown Counsel and two level 3 Crown Counsel within that Office.

67. At present the Unit is not big enough to meet the demand for this service. It is hoped in the future, subject to budget allocations, that the Unit will be expanded to cover the Launceston Office.

68. Prior to the establishment of the Unit prosecutions for sexual assault were not formally streamlined. The Deputy Director had responsibility for allocating all criminal prosecutions within the Office. Files were allocated to Crown Counsel when they were received. When the team system was established files were allocated at weekly meetings headed by the Deputy Director and attended by Principal Crown Counsel.

Prosecution for summary sexual offences

69. In 2015 the Office took carriage of indecent assault matters that are prosecuted summarily in circumstances where the accused elects (see s 72 of the *Justices Act 1959*) and summary child exploitation material offences under the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*. Prior to this, these matters were prosecuted by Tasmania Police.

70. This transfer came about following an agreement between myself and the Commissioner of Police. It was recently reviewed in an independent report prepared by Damian Bugg QC (former Tasmanian DPP) and [redacted] (former Police Commander). Following that review, the transfer became permanent. This transfer has the benefit of cases being conducted by

trained and experienced prosecutors, and complainants and witnesses having access to our witness assistance service.

Witness Assistance Service

71. The Witness Assistance Service (WAS) was established in 2008. The number of personnel employed within WAS has increased steadily since its establishment. The service commenced with the employment of two staff in Hobart - the Manager of the WAS and one Witness Assistance Officer. Later we had two staff in Hobart, one in Launceston and one in Burnie. In 2017 a further two staff were employed, one in Hobart and one in Launceston. This year (2022) another officer was appointed in the Burnie Office.

72. Sexual assault matters have been automatically allocated a WAS officer since 2010. Once an accused person is charged with a sexual assault offence Tasmania Police are required to notify the Office of the fact within four (4) working days. Within two (2) days of that notification the Sexual Assault Liaison Clerk writes to the complainant to explain the usual course of proceedings. Following notification that charges have been laid, the Sexual Assault Liaison Clerk forwards a copy the notification to the WAS Manager who allocates the matter to a WAS officer who then has the responsibility of contacting the complainant and is available to provide updates.

73. WAS provide a number of services to complainants and vulnerable witnesses, including support during charge selection, negotiation or discontinuance, assisting in the preparation of victim impact statements and post court debriefing.

Other work generally

74. I have focused on the criminal prosecutions, in particular sexual assault and family violence guidelines and procedures within the Office. Of course, over the relevant period the ambit of the work undertaken in all areas of the Office has expanded greatly. For example, Coronial Work, Proceeds of Crime and Unexplained Wealth, High Risk and Dangerous Criminal litigation and the Child Safety Legal Group.

75. In addition the Office conducts many more summary prosecutions, regulatory work is conducted for many Departments. We have also taken over complex prosecutions from Tasmania Police, for example offences arising out of death or injury from a motor vehicle accident and summary sexual abuse offences. The Office also provides advice on request to the Consumer Building and Occupational Services to assist with Working with Vulnerable People registration checks. Up until 2015 the Office conducted some civil matters on behalf of the State. This work is now conducted by the Solicitor General's Office.

General evolution in approach – prosecutions for child sexual abuse

76. Over the relevant period there has been evolution in approach to the prosecution of child sexual abuse offences. The benefits of pre-charging advice are well recognised and it is considered an integral part of the work within the Office. It was adopted by the Royal Commission. The pre-charging advice service continues to grow.

77. Reasons for decisions are more extensively documented. Decisions to indict, downgrade or discharge are reviewed and the review process is carefully documented. The procedures for discharge are clearly set out in the Guidelines. Complainants are notified of key decisions (where possible in person) and have a right to request a review of a decision. Complainants are notified of this right orally and in writing. Our website provides details how a person can provide complaints, feedback and suggestions to the Office.

78. There is greater reliance on the support provisions in the *Evidence (Children and Special Witnesses) Act 2001.* There has been an increase in collaboration between our Office and Tasmania Police regarding interviewing vulnerable witnesses, with Crown Counsel participating in training and providing feedback regarding training modules.

79. There is greater awareness of, and emphasis on, the importance of communicating with complainants throughout the prosecution process. The introduction of the WAS within the Office has greatly assisted with maintaining regular contact. Within the Office there is an expectation that there will be communication with complainants throughout the prosecution process. In the past this was, to a large extent, left to the discretion of counsel who had carriage of the matter. The introduction of the WAS ensures that contact with the complainant is not overlooked. Further, part of the WAS role is to ensure that prosecutors are advised of any problems that the complainant is experiencing that may impact on the prosecution process.

80. The WAS helps many people through a difficult time in their lives, often when they are at their most vulnerable. Trials run more efficiently due to the assistance provided by the service to witnesses and the provision of victim impact statements to ensure that the courts are better informed as to the effect of crime on victims. I am of the view that the WAS is integral to the function of this Office and to the administration of justice in this State.

Response to the Royal Commission

Q 6. Describe any steps and actions taken by the Office of the Director of Public Prosecutions to implement relevant recommendations of the Royal Commission? What, if any, recommendations directed at the Office of the Director of Public Prosecutions remain outstanding for implementation and why?

81. The Royal Commission made a number of recommendations in the Criminal Justice Report (the Royal Commission). Recommendations 37-43, 58 and 81 were specifically directed at each Australian Director of Public Prosecutions.

82. Following the recommendations of the Royal Commission the Guidelines were reviewed by myself and Crown Counsel to assess their compliance with the recommendations. Where required the guidelines were amended. The Office was already complying with the majority of the recommendations.

83. None of these recommendations remain outstanding.

84. Recommendation 37 is:

> All Australian Directors of Public Prosecutions, with assistance from the relevant government in relation to funding, should ensure that prosecution responses to child sexual abuse are guided by the following principles:
>
> > a. All prosecution staff who may have professional contact with victims of institutional child sexual abuse should be trained to have a basic understanding of the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and how it can affect people who are involved in a prosecution process, including those who may have difficulties dealing with institutions or person in positions of authority.
> >
> > b. While recognising the complexity of prosecution staffing and court timetables, prosecution agencies should recognise the benefit to victims and their families and survivors of continuity in prosecution team staffing and should take steps to facilitate, to the extent possible, continuity in staffing of the prosecution team involved in a prosecution.
> >
> > c. Prosecution agencies should continue to recognise the importance to victims and their families and survivors of the prosecution agency maintaining regular communication with them to keep them informed of the status of the prosecution unless they have asked not to be kept informed.
> >
> > d. Witness Assistance Services should be funded and staffed to ensure that they can perform their task of keeping victims and their families and survivors informed and ensuring that they are put in contact with relevant support services, including staff trained to provide a culturally appropriate service for Aboriginal and Torres Strait Islander victims and survivors. Specialist services for children should also be considered.
> >
> > e. Particularly in relation to historical allegations of institutional child sexual abuse, prosecution staff who are involved in giving early charge advice or in prosecuting child sexual abuse matters should be trained to:

> i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record
>
> ii. focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.
>
> f. Prosecution agencies should recognise that children with disability are at a significantly increased risk of abuse, including child sexual abuse. Prosecutors should take this increased risk into account in any decisions they make in relation to prosecuting child sexual abuse offences.

85. This recommendation is embedded into my Guidelines and within the culture of the Office generally.

86. Staff have training to have a basic understanding of the nature and impact of child sexual abuse and how it can affect people who are involved in a prosecution process. Crown Counsel receive the majority of this training through opportunities to act as junior counsel and when given assistance and instruction from their supervisors and team leaders. Crown Counsel, in particular senior prosecutors and Crown Counsel working in the Unit, are aware of the impacts of child sexual abuse. In particular the impact of abuse on memory, delays in reporting and difficulties victims and survivors may experience in the prosecution process generally.

87. In response to a query from all Directors of Public Prosecution seeking guidance on the implementation of this recommendation, Justice McClellan stated:

> It may well be that the best current training is already provided by your office or the office of one of your colleagues, or police agency, or some combination of prosecution and police agencies.
>
> ...
>
> A prosecutor experienced in child sexual abuse trials should be well placed to identify what it is that they would wish to know in relation to matters listed above in advance of giving evidence if they were a complainant in a child sexual abuse prosecution.

88. Continuity of counsel is prioritised, generally Crown Counsel have carriage of the matter from the time of committal to finalisation of a matter (at times it will be junior counsel who has carriage of the file, but will be assisted in the trial stage by senior counsel).

89. The Office recognises that complainants in sexual offence crimes are particularly vulnerable in the criminal justice process and recognises the importance of keeping the complainant informed. When a person is charged with an indictable sexual abuse crime the Office makes early contact, and maintains regular contact with complainants. The procedures adopted to ensure this contact is maintained are set out in the Guidelines. The Guidelines provide that within four (4) days of a person being charged with an indictable sexual crime Tasmania Police notifies the Office of the relevant details by email. Within two (2) days of receiving the email notification the Sexual Assault Liaison clerk:

a. writes to the complainant by providing advice as to the usual course of proceedings.

   A copy of the template standard form letter is attached as **Annexure B**.

b. forwards a copy of the notification to the Witness Assistance Service manager.

90. The Witness Assistance manager then allocates the matter to a WAS officer, who has the responsibility of contacting the complainant and is available to provide updates. After the letter is sent, a WAS officer will make telephone contact with the complainant. If the complainant is a young child, or there is a reason why making meaningful direct contact would be impractical or undesirable, or if any other exceptional circumstances exist, contact will be made with the parents or guardians of the complainant. From this time the WAS officer will have ongoing contact with the complainant throughout the prosecution process.

91. The prosecutor with conduct of the matter will discuss any key decisions with the complainants. The WAS officer will be present during these discussions. The WAS is currently sufficiently funded and staffed to ensure that they can perform their task of keeping sexual abuse victims informed and ensuring that these victims are put into contact with relevant support services. Contact with victims of sexual abuse offences is the first priority of the WAS. However as the need for the WAS continues to grow this has an impact on the assistance WAS is able to provide to other complainants and vulnerable witnesses.

92. It is embedded into the culture of the office, and on the job training, that prosecutors are non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record. Further, all staff focus on the credibility of the complaint. This is embedded into my Guidelines (see page 24).

93. At all stages of the prosecution process prosecutors take into consideration the complainant and their circumstances. It will inevitably be relevant in assessing the credibility of the complaint and considering any accommodations or provisions in the *Evidence (Children and Special Witnesses) Act 2001* that may be available to the complainant. The Guidelines provide that the prosecution of sexual crimes must not be undertaken without consideration of the provisions of this Act (see page 28). Further, the Guidelines have specific sections on children and special witnesses, special measures for children giving evidence in court and the witness intermediary scheme (see pages 47-50).

94. Recommendation 38 is:

> Each state and territory government should facilitate the development of standard material to provide to complainants or other witnesses in child sexual abuse trials to better inform them about giving evidence. The development of the standard material

should be led by Directors of Public Prosecutions in consultation with Witness Assistance Services, public defenders (where available), legal aid services and representatives of the courts to ensure that it:

a. is likely to be of adequate assistance for complainants who are not familiar with criminal trials and giving evidence

b. is fair to the accused as well as to the prosecution

c. does not risk rehearsing or coaching the witness.

95. Prior to the recommendation the Office had uploaded a DPP Witness Assistance Video. Following the recommendation standard material was prepared and published on our website. It can be accessed here <https://www.dpp.tas.gov.au/witnesses_and_victims>. It is as follows:

If you are a witness to or victim of a crime, you may be required to assist in the prosecution of a case. This would normally mean going to court and giving evidence by telling the judge and jury what you have experienced or witnessed.

Giving evidence can be a stressful experience and it is normal to feel nervous or anxious about going to court. Sometimes the information you are asked to talk about might be embarrassing or emotional. Being in the same room as the accused person may make it difficult, especially when the evidence you are giving is personal.

The Crown prosecutor may want to meet with you at some stage before you have to go to court. This is a good opportunity for you to meet the people dealing with the case and to talk to them about any concerns or questions you might have about the case.

Witness Assistance Service

If you are worried about giving evidence, you can talk to the Crown prosecutor or get support from the Witness Assistance Service.

This service supports witnesses and victims giving evidence for the State through witness assistance officers.

A witness assistance officer will

- give you information about court procedures and legal processes
- provide crisis counselling, debriefing from court and refer you to services in the community
- liaise between you and DPP staff
- take you on a tour of the court
- go to meetings with you
- help you prepare your victim impact statement

Children and special witnesses

Some groups of people may need extra help when giving evidence.

They include

- children (under 18) in relation to a broad range of offences
- people with an intellectual, mental or physical disability
- those who may be affected by age, cultural background, relationship to any party in the proceeding or the nature of the subject matter
- If the court accepts that you meet one of these criteria then it is possible to

- have a support person with you in court
- use an audio-visual link to give evidence rather than being in court
- have some persons excluded from the court room

If you think this would apply and be helpful to you, then you should ask the Crown prosecutor or witness assistance officer about it.

Legislation - *Evidence (Children and Special Witnesses) Act 2001*

Victim impact statements

A victim impact statement is an opportunity for you to tell the judge in your own words about the effect that the crime has had on you – physically, emotionally and financially.

The victim impact statement is tendered to the court as part of the sentencing process. You can either have your statement handed to the judge or read it aloud to the court.

A witness assistance officer can help you prepare your victim impact statement.

Read more about Victim Impact Statements

Feedback

The Witness Assistance Service welcomes feedback about your experience of the process.

If you have any suggestions as to how we can improve our service for witnesses and victims of crime, please send us an email to was@justice.tas.gov.au.

Giving evidence

If you are a victim of crime or a witness who has provided a statement in relation to a criminal matter, you may be asked, or required, to give evidence at a hearing or in a trial.

There are two types of notices that are provided to witnesses:

The first is a **preliminary notice**. This notice is to alert you to the fact that a case is about to commence in court. You do not have to attend court on the date listed on the notice. The trial will be listed after this date and we will be in contact to notify you of the court date and arrange to meet with you prior to the trial.

The second is a **final notice**. If you receive this notice it is essential that you appear at court on the date and time specified. If you do not, it is possible that the judge will order a warrant for your arrest. If there is an urgent reason why you cannot appear, it is important to tell the court and provide any supporting documentation, such as a medical certificate.

It is also possible that you may not receive a notice but simply be contacted by a staff member from the DPP's office to arrange for you to give evidence.

Please do not discuss your evidence with any other potential witness as this may impact on the case.

Witness preparation

If you are to be called as a prosecution witness, we will generally contact you to arrange a meeting at the DPP's office prior to the court date. In some limited

circumstances, meetings may be held in a location that is more convenient to witnesses. The meeting will give you the opportunity to meet with the prosecutor and members of staff who are dealing with the case. During the meeting we will:

- talk to you about the process of giving evidence and answer any questions you may have about the process generally
- ensure that the information in your statutory declaration is true and correct and obtain any further detail you may be able to provide in relation to the information contained in your statement
- advise when you will be likely to be required to attend court.

On the day

When you arrive at court please tell court staff that you are a witness. You will be shown to a waiting area where you will wait before you give your evidence. You will not be allowed in the court before giving evidence. Delays can occur, so please bring something to read or do while you are waiting.

When it is your turn to give evidence, you will be shown into the court room and directed to the witness box. When you get to the witness box please remain standing. Court staff will ask whether you wish to take an oath or make an affirmation to tell the truth. The oath is a religious promise on the bible or holy book and the affirmation is a non-religious promise to tell the truth. If taking the oath, you will be asked to say "I swear", if taking the affirmation you will be asked to say "I affirm".

The prosecutor will ask you some questions about your evidence, or the information contained in your statement(s). This process is called examination in chief.

Next, the defence lawyer will ask you some questions. This process is called cross-examination.

In some cases, the prosecutor will then ask you some clarifying questions. This process is called re-examination.

It is normal to feel nervous about giving evidence. Please take your time and listen carefully to the questions. If you do not hear a question, please ask for it to be repeated. If you do not understand a question, say so and ask for the question to be asked in a different way. Try to only answer the question that you have been asked and do not go on to give any unnecessary explanation. If you do not know the answer, please say so.

Please speak clearly and slowly. It is important that the court hears and understands your answers to the questions.

If you are feeling very stressed or tired, you can ask the judge or magistrate for a break.

After re-examination, the judge or magistrate will tell you that you are free to leave. You may then leave the court room.

General

If you wish to speak to us after you have given your evidence, please leave a message for us to contact you. It may be that we cannot respond to your enquiry until after the trial has finished.

The judge or magistrate should always be addressed as "Your Honour".

In the Supreme Court the judge and lawyers will be wearing wigs and gowns.

Witness expenses

The court may pay limited expenses for travel, contribution to loss of work income and so on. Please speak to a DPP staff member about this.

Special witnesses

In some cases, it may be possible to give your evidence from another room and have a support person sit with you when giving your evidence. Please speak to the prosecutor or witness assistance staff member if you think this would be of assistance to you. This applies particularly to children, victims of sexual assault, victims of serious violent crimes and people with a disability.

If there is any reason that you might find it difficult to understand the questions in court, such as English not being your first language, literacy issues or having a disability, please speak to DPP staff about this so that arrangements can be made to modify the questioning process.

Contact details

If you have changed, or are about to change, your contact details, it is important that you provide us with your updated details. This will allow us to contact you to discuss any matters arising.

96. This recommendation was brought in because of a concern about whether witnesses were sufficiently briefed. The practice in Tasmania is that the prosecutor spends a significant amount of time with a complainant prior to the complainant giving evidence. The prosecutor will meet the complainant a number of times before a trial or special hearing to build a rapport, explain the procedure, go through their evidence and raise points that may be asked in cross examination. The WAS officer allocated to the matter will attend these meetings to provide additional support and assistance to the witness.

97. Of course, when discussing evidence with a witness this is done in a non-leading way to ensure witnesses are not coached. The Guidelines state, at page 13:

> Prosecutors must not coach a witness prior to them giving evidence, in that they should not direct them as to what they should say. However, it is perfectly proper to ask a witness what their evidence would be on a point. It is also proper to point out any inconsistencies or prior inconsistent statements and request an explanation but care should be taken not to suggest answers to a witness.
>
> Prosecutors must fairly conduct the cross-examination of an accused as to credit. Material put to an accused must be considered on reasonable grounds to be accurate and its use justified in the circumstances of the trial.

I understand extensive breifings is not the practice in all jurisdictions.

98. Recommendation 39 is:

> All Australian Directors of Public Prosecutions should ensure that prosecution charging and plea decisions in prosecutions for child sexual abuse offences are guided by the following principles:

a. Prosecutors should recognise the importance to complainants of the correct charges being laid as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial. Prosecutors should provide early advice to police on appropriate charges to lay when such advice is sought.

b. Regardless of whether such advice has been sought, prosecutors should confirm the appropriateness of the charges as early as possible once they are allocated the prosecution to ensure that the correct charges have been laid and to minimise the risk that charges will have to be downgraded or withdrawn closer to the trial date.

c. While recognising the benefit of securing guilty pleas, prosecution agencies should also recognise that it is important to complainants – and to the criminal justice system – that the charges for which a guilty plea is accepted reasonably reflect the true criminality of the abuse they suffered.

d. Prosecutors must endeavour to ensure that they allow adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea and that the complainant is given the opportunity to obtain assistance from relevant witness assistance officers or other advocacy and support services before they give their opinion on the proposal. If the complainant is a child, prosecutors must endeavour to ensure that they give the child the opportunity to consult their carer or parents unless the child does not wish to do so.

99. As discussed in other areas of my statement the Office has provided pre-charging advice to Tasmania Police for a number of years. This ensures correct charges are laid as early as possible. Early consultation between investigating officers and the office is encouraged. Further, and as noted at page 26 of my Guidelines, the Office acknowledges that:

> The charging of a person with sexual crimes creates a particular expectation in the complainant that such charges will be proceeded with and raises particular disappointment and possibly further trauma if they are not. Therefore, where possible, consultation before charging is desirable.

100. Once a matter has been committed to the Supreme Court, and the Office is provided with the police file, all sexual abuse matters go to Principal Crown Counsel in the Unit. Files are then allocated to Crown Counsel with regard to the complexity of the matter and experience of Counsel. Files are reviewed at an early stage to confirm the appropriateness of the charges.

101. It is uncommon for charges to be "downgraded" after a matter has been committed for trial. However, when this does occur, in accordance with my Guidelines, complainants are consulted with during the negotiation phase and once a decision is made. Crown Counsel enquires as to the complainant's views about the proposed course. Those views are to be taken into consideration. Both Crown Counsel with conduct of the matter and the WAS Officer will be present during these discussions. Once a decision has been made complainants are notified of the right to request a review of the decision. Page 17 of my Guidelines provides:

> Where practicable, when there is a complainant of the crime originally charged, he or she should be informed of any proposed discharge or reduction in charges before the accused, police and court are informed. This is the task of the prosecutor with

conduct of the case. Where the complainant is under 18 years of age or has a disability, a parent, guardian or spokesperson of the complainant should be informed. Where the alleged criminal conduct has caused the death of a person the next of kin or an immediate family member should be informed.

Informing the complainant of the proposed discharge or reduction in charges is an important step in the process. It is important that the complainant understands the reasons why the decision has been made. It is preferable that the complainant be informed of the reasons in person. However, if this is not possible, it should be done by telephone. When informing a complainant of the decision the prosecutor should advise how decisions are made, provide a brief history of the matter and brief reasons for the decision. The complainant should be given an opportunity to provide his or her views about the decision.

A complainant should be advised that they may apply to have the decision reviewed by the Director (unless the decision was approved by the Director). Requests for review must be made within seven days of notification of the decision. Ordinarily, a letter should be sent confirming that the charges will not proceed and that the complainant has the right to request the Director to review the decision.

102. A matter will not proceed to discharge until the prosecutor has confirmed that the complainant has not sought a review of the decision.

103. Recommendation 40 is:

Each Australian Director of Public Prosecutions should:

a. have comprehensive written policies for decision-making and consultation with victims and police

b. publish all policies online and ensure that they are publicly available

c. provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.

104. I published Guidelines in about 2016. The Guidelines are comprehensive and set out how decisions are made within the Office and how complainants and police are to be involved in this process (see in particular pages 17 and 18). The Guidelines are publicly available on our website. The Guidelines confirm that complainants have a right to seek written reasons for key decisions (see page 18). It is the practice of this Office that complainants are always advised of the reasons for a decision, and provided an opportunity to provide his or her views about the decision (see pages 17 to 18). All matters are internally reviewed, as detailed in paragraphs 35-50 of my response to question 5.

105. Recommendation 41 provides:

Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.

106. If a matter is to be discharged, complainants are notified of their right to request a review of the decision. Crown Counsel notify complainants of this in person (or via the telephone) and again in writing. At the time of informing complainants my Guidelines provide that the complainant should

be given an opportunity to provide his or her views about the decision (see page 17). Complainants are told how they can request a review of the decision.

107. Our website also provides information for complainants to make a complaint <https://www.dpp.tas.gov.au/contact>. It provides:

> **Complaints, feedback and suggestions**
>
> The Office of the Director of Public Prosecutions (ODPP) strives to provide an excellent prosecution service to the community. Your feedback helps us to know what we have done well and how we can improve.
>
> Victims, witnesses, defendants and other members of the community who wish to provide feedback, make an enquiry or make a complaint to our Office about any of the following -
>
> - the conduct of ODPP staff or the DPP
> - a decision not to proceed with a prosecution
> - a sentence imposed
> - a decision not to appeal against a conviction and/or sentence
>
> are invited to contact us by emailing us at dpp.reception@justice.tas.gov.au or writing to us at:
>
> Office of the DPP
> Feedback
> Level 8
> 15 Murray Street
> HOBART TAS 7000
>
> Please provide as much detail as possible, including your name, telephone number and/or address, details of the matter and an outline of your complaint or feedback and what you would like the ODPP to do about the matter.

108. Recommendation 42 provides:

> Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.

109. Recommendation 43 provides:

> Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.

110. Since 2017/2018 the Office has conducted an annual audit of discharge files to review compliance with the guidelines issued by the Director. Discharges include matters the Supreme Court has remitted for trial in the Magistrates Court pursuant to s 308 of the *Criminal Code*. In some other cases summary charges are preferred rather than criminal indictable offences. 30% of discharged cases are randomly selected and benchmark them against the DPP guidelines in respect of a discharge.

The following factors are considered: correct authorisation of the charge; notification of the complainant; notification of the Assistant Commissioner of Police; the timely discharge of the accused; and in matters where only the Director could authorise a discharge, that such discharges were, in fact, authorised by the Director. The results of each audit are published in the Director of Public Prosecutions Annual Report which is tabled in Parliament. I believe I am the only Director of Public Prosecutions who does this.

111. Recommendation 58 provides:

> If it is not practical to record evidence given live in court in a way that is suitable for use in any subsequent trial or retrial, prosecution guidelines should require that the fact that a witness may be required to give evidence again in the event of a retrial be discussed with witnesses when they make any choice as to whether to give evidence via prerecording, closed circuit television or in person.

112. The Guidelines set out procedures that are to be followed with children and special witnesses and special measures for children giving evidence in court (see pages 47-48). The Guidelines provide that the prosecutor must give consideration to the *Evidence (Children and Special Witnesses) Act 2001* when dealing with a witness under 18 years of age, a person with intellectual disabilities, a victim of an alleged sexual offence, family violence or other crime of violence, or a person who is at some special disadvantage. That Act provides that if an affected person or a special witness is to give evidence at trial in any prescribed proceeding or specified proceeding, and facilities are available for making an audio visual record of the evidence, an audio visual record is to be made of the affected person's or special witness's evidence, s 7A(1). All Supreme Courts audio visually record the evidence. The recorded evidence can be relied upon at subsequent proceedings, see s 7A. Therefore it does not matter if the witness gives the evidence remotely or in court.

113. In particular, my guidelines provide at page 47:

> Regardless of whether any witness who may be declared a "special witness" will give evidence live in court, via closed circuit television or in a pre-recorded hearing, counsel should consider making an application to have the witness declared a special witness. The witness should be consulted in the decision; specifically a witness should be advised that they may be required to give evidence again in any retrial.

114. Recommendation 81 provides:

> Directors of Public Prosecutions should amend their prosecution guidelines, where necessary, in relation to the decision as to whether there should be a retrial following a successful conviction appeal in child sexual abuse prosecutions. The guidelines should require that the prosecution consult the complainant and relevant police officer before the Director of Public Prosecutions decides whether to retry a matter.

115. My Guidelines provide, at 19, that one of the factors to be considered in a retrial is the views of the complainant, including the likely impact a retrial would have on the wellbeing of the complainant or any vulnerable

witnesses. The Office would not commence a retrial without consulting with the complainant. Nor would we discharge the accused without consulting the complainant.

Q 7. Provide a list of the Royal Commission's recommendations which the Office of the Director of Public Prosecutions is responsible for implementing.

116. The Royal Commission made a number of recommendations regarding the prosecutions. The Tasmanian Government determined that the Office was responsible for implementing the following:

a. 37

b. 38

c. 39

d. 40

e. 41

f. 42

g. 43

h. 58

i. 81

Q 8. Identify the Senior Officials of the Office of the Director of Public Prosecutions with responsibility for the implementation of the Royal Commission's recommendations.

117. Ultimately in my role as Director I have responsibility for implementing the Royal Commission's recommendations. To do that I have relied on the support of my staff, in particular the Deputy Director and Principal Crown Counsel who heads the Sexual Assault and Family Violence Unit. There have been two Principal Crown Counsel since the recommendations were published. One is now the Assistant Director (Summary Prosecutions) and the other is the current team leader of the unit.

118. When the Royal Commission's recommendations were published I tasked Crown Counsel, a specialist in this area in the Office, to review the Directors Guidelines. Following that review, I amended the Guidelines where required.

Q 9. Describe in detail any barriers unique to Tasmania to the implementation of the Royal Commission's recommendations that are within the responsibility of the Office of the Director of Public Prosecutions.

119. We have limited number of senior Crown Counsel available to conduct complex prosecutions, which includes prosecutions for sexual abuse offences. The Office is currently in a phase of rebuilding. A number of more junior practitioners have been employed. It will take time for these practitioners to gain the skills and experience necessary to prosecute sexual abuse offences. This creates additional pressure and resource requirements for training, continuity of counsel and delay generally.

120. More junior staff conduct criminal trials than what would be the case in other jurisdictions. Further, unlike other jurisdictions we do not brief the private bar. Having said that, the private bar does not have many experienced criminal counsel particularly in the area sexual abuse matters.

121. An independent review into the Office was conducted by KPMG in 2010. KPMG compared our office with Offices of Director of Public Prosecutions in other States. The review stated its conclusions as follows:

> In respect to the analysis of the ODPP compared to other comparable jurisdictions, we note that the Tasmanian ODPP is both efficient and effective, suggesting that there is little, if any, scope to drive further efficiency from the current resource base. This is supported by the following observations:
>
> - The Tasmanian ODPP receives relatively less government funding per FTE
> - The number of prosecutions per FTE processed by the Tasmanian ODPP is three times greater than the average of the comparable jurisdictions
> - Cost per prosecution is just 20% of the average of the comparable jurisdictions, and
> - The Tasmanian ODPP is more effective than comparable Offices in securing convictions at trial.
>
> In summary, our additional analysis and consultations confirmed that ODPP Criminal is working at a level that is consistently in excess of capacity with barely adequate funding and there are signs emerging that the current workload is not sustainable with the current level of resources. We found the ODPP is under resourced in both salary and non-salary areas when workloads have increased and will continue to increase due to case complexity and the roles of the ODPP Criminal in the Tasmanian judicial system.

122. As a result of the review the office received a substantial increase in funding in the 2012-13 budget. Unfortunately the additional funding was taken from the Office in the 2013-14 and subsequent budgets. This was at a time when the demands in the criminal section of the office began to increase. Funding was subsequently given to the office for additional work to be undertaken by the Office, such as the Child Safety Group and

starting the Unexplained Wealth Unit. Prior to the last two budgets on occasions there have been small increases for the criminal section to account for increases in salaries, rent and for the Unit. In the 2021-22 budget approximately $1.4 million was provided to the Office for the new High Risk Offenders legislation which imposes significant obligations on this Office and the Sexual Assault and Family Violence Unit. In part, this funding extended funds that were previously given to the Office but were non ongoing.

123. This funding was used to employ additional counsel and additional WAS officers. I note that in recent years the Sexual Assault and Family Violence Unit has conducted more prosecutions, and provided more advice, in relation to incidents of family violence following the introduction of a the indictable offence of persistent family violence in section 170A of the *Criminal Code*. Further, the crime of stalking under section 192 of the *Criminal Code* now requires the authorisation of the Director to charge. The Office now conducts all prosecutions for offences of stalking, whether these are prosecuted summarily or on indictment. This is in addition to the increase in demand generally in relation to sexual abuse offences.

124. The Office struggles to keep up with the increase in workload, the expected level of output and the inevitable pressures arising from a backlog of cases in the Supreme Court. The effect of the increased work load and the resulting delays is significant for victims, accused, witnesses, the quality of justice and my staff. The ever-increasing work is relentless and it placing considerable strain on many staff, which is exacerbated by the nature of the work. The criminal backlog cannot be adequately addressed without a considerable increase to ongoing funding to this Office, and there being commensurate funding to increase funding to defence services.

125. Our in house file management system and record keeping methods need to be modernised to assist in recording data and automatically generating reports. We currently use a program Visual Files, which we moved to in 2017. Unfortunately we cannot use this program to generate reports in the way we were once able to. The Justice Department is currently undertaking a project Justice Connect to improve information sharing between the stakeholders. It is unclear how this system will be of benefit to the Office.

126. We do not have any staff that are "off the tools" in terms of prosecuting matters, nor do we have staff that are not already working at or over capacity. We do not have a practice manager, specialist IT or human resource officer solely for our Office. The Office relies on the Justice Department for IT and human resources. There has never been a practice manager. We have the equivalent of one full time Crown Counsel who conducts policy, general solicitor and some criminal work within the Office. This has an impact on our ability to do work outside of the core business of prosecuting.

Q 10. Describe whether there are any barriers unique to Tasmania to the implementation of the Royal Commission's recommendations.

127. One of the barriers unique to Tasmania is the size of jurisdiction generally. The volume and complexity of work has increased in all areas of criminal prosecutions, but in particular in prosecutions for sexual abuse offences. There is a relatively small pool of counsel, both crown and defence, who are able to conduct prosecutions for indictable sexual abuse offences. This causes issues with ensuring continuity of counsel and adds to delay. Further, during criminal sittings there are generally four criminal courts in three locations operating at one time. It is logistically difficult to list matters in each court to give appropriate priority to matters and ensure continuity of counsel.

128. There has been an increase in pre-trial directions hearings and special hearings under the *Evidence (Children and Special Witnesses) Act 2001*. Whilst the provisions under this Act are well used and of great benefit, inevitably they lead to delays and impact the backlog.

129. Delay is an issue in this State. The effects of delay and the large criminal backlog are significant. I summarised the impacts of the delay and large criminal backlog in my 2019/20 Annual Report as follows:

> The effects of such a large backlog has a deleterious effect on both the overall quality of justice and on individuals who come in contact with the justice system, victims, witnesses and accused alike. They include:
>
> - As cases become older witnesses' recollections are not as good and this can lead to a higher number of acquittals and discharges.
> - Victims who have been highly traumatised are having to wait significantly longer for their cases to be finalised often having to relive the trauma years after the event.
> - The discharge rate has increased significantly in recent years. In 2014/15 the discharge rate was 19.75%. The historic average has been approximately 20%. In the past two years it has been over 30%. The acquittal rate has also increased slightly. This is in part due to:
>   - Witness fatigue; that is, complainants becoming tired of waiting for their trial and wanting to get on with their lives. As a result they indicate a desire to lo longer co-operate with the prosecution. The problem of witness fatigue was extensively documented by the Royal Commission into Institutional Responses to Child Sexual Abuse. I have noted the discharge rate for sexual assault matters has increased significantly with the increase in the backlog.
>   - Witnesses become difficult to locate or no longer co-operate.
>   - Witnesses become unreliable, in that due to the passage of time their memories fade.
> - Persons in custody are having to wait longer for their trials and due to these longer waiting periods, accused persons who would not normally be granted bail are obtaining bail.

- Significant extra stress and pressure is being placed on my staff who are working long hours in an effort to meet the ever-increasing workloads. They are extremely dedicated and hard working. However, in some instances, it is affecting their general wellbeing.
- Other work (i.e. non trial work) in the criminal prosecution section has also increased. The sexual assault and family violence unit provided advice on 254 matters. In 2012-13 there were only 99 matters. These advice files are complex and time-consuming. The provision of early advice from the Office was one of the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The Office endeavours to have an advice completed within six weeks of referral. However, given the workloads in all areas of the Office and the sheer number of referrals, this time frame has not always been possible to meet, despite the considerable efforts of the staff involved. This obviously increases the anxiety for victims.

130. I have raised these general concerns with the Government on a number of occasions. The 2021-22 budget is the first time the Office was given sufficient funding to assist reduce the backlog and enable the Unit to be expanded. It will take years to reduce the backlog.

Q 11. In which, if any, areas do you think Tasmania should depart from the Royal Commission's recommendations (for example, due to its size, circumstances, culture or other factors)?

131. I am of the view that Tasmania should depart from the following recommendation:

Amendments to the tendency and coincidence provisions generally.

132. I would not support amendments similar to the recent amendments to the New South Wales *Evidence Act 2001*, namely: s 97A. In my view these amendments go "too far" and somewhat diminish the character of the evidence being evidence of a *tendency*. For example, an accused person is charged with sexual offences committed on a 6 year old child when he was a 50 year old male. If he had been convicted of unlawful sexual intercourse with a young person, when he was 21 and the complainant was 16 (in a consensual relationship) the evidence of the prior matter would be admissible. In my view this would not demonstrate a "tendency" on the part of the accused.

133. As a result of recent High Court decisions of *R v Bauer* [2018] HCA 40; *IMM v R* [2016] HCA 14 and *Hughes v R* [2017] HCA 20 together with amendments to the *Evidence Act 2001* (namely s 101(5)) and the *Criminal Code 1924* (namely s 326A) the position with respect to the admissibility of tendency evidence in this State is now more certain that it has ever been. Amendments would lead to a period of uncertainty, further litigation and increased delays. I would not support any reform specific to child sexual abuse proceedings. To do so would inevitably increase the complexity and lead to the development of different laws, creating inconsistencies. There is no rationale to having different rules of admissibility applying to different types of serious crime. Further amendments similar to those adopted in New South Wales would make it very difficult to determine what evidence would be ruled admissible and what evidence would not be. Also, there would be considerable disagreement amongst judges leading to successful appeals.

134. I would be supportive of an amendment to s 101(2) to remove the requirement that the probative value *substantially* outweighs the danger of unfair prejudice to the defendant.

Q 12. Are there gaps in what the Royal Commission considered or recommended that relate to the Office of the Director of Public Prosecutions that are relevant to Tasmania?

135. No, there are not gaps in what the Royal Commission considered or recommended. However, the recommendations apply equally to all Offices of the Director of Public Prosecutions. The resources in Tasmania are significantly less on a per capita basis than some mainland offices. Further, we do not have the benefit of economies of scale which allows for greater specialisation, nor do we have specialist IT, human resources, a practice manager or someone whose focus is on training and development within the Office.

Q 13. What do you hope will occur as a result of the Commission?

136. I hope the following will occur as a result of the Commission:

a. Increased resources across the board to allow for:

i. More practitioners (defence and crown counsel);

ii. Modernised systems for record keeping and data analysis within the Office;

iii. Identification of data that should be captured and by who;

iv. Improve facilities in Courts for video links and remote access generally (in particular in the Magistrates Court);

v. Improve the technical quality of video recorded interviews (consistency for facilities available state wide);

vi. A government owned "editing" facility, in particular to edit audio visual statements and pre-recorded evidence.

b. Incentives for accused persons to enter earlier pleas of guilty by introducing statutory discounts for pleas of guilty to encourage earlier resolution of matters. One of the difficulties with sexual abuse prosecutions is that often pleas of guilty come close to trial.

c. Provide an educative function to the community about the criminal prosecution process generally, and the role each of the stakeholders play. For example, there seems to be a general lack of understanding that prosecutors are independent, must assist the court, must protect an accused person's right to a fair trial, act with impartially and with objectivity, deal with all witnesses in a dignified, professional and proper manner, and serve and protect the public interest.

d. Encouragement for consistent profession wide training.

e. The development of standard jury directions and a Tasmanian Criminal Bench Book.

137. I also hope that there will be legislative amendments. See my response to question 32.

Prosecutor training and specialisation

Q 14. What training, guidance material or other resources is available to prosecutors in relation to:

(a) The effects of trauma or trauma-informed practices;

(b) The impacts of trauma (including on memory);

(c) Interviewing or questioning children;

(d) Identifying and responding to child sexual abuse, including grooming behaviour and boundary breaches, and

(e) Reporting requirements.

Is this training mandatory or optional and is it undertaken on a regular basis (for example, annually)? Have prosecutors participated in any training with prosecutors in other States or Territories?

138. Training and professional development is an important factor in improving and maintaining the service of the Office. Counsel generally attend two, two day in-house training days (Continuing Legal Education) per year. These sessions include lectures from experienced counsel in the Office and guest speakers, including expert witnesses. Counsel from the Office also attend the Law Society of Tasmania's annual Criminal Law Conferences and a selection of staff attend the Australian Crown Prosecutors conference (with prosecutors from other States and Territories). Counsel also have opportunities to attend conferences and training sessions that come up from time to time. A number of staff in the Office assist in the training of Police prosecutors.

139. In terms of specific training for the prosecution of child sexual abuse matters, much of the training is done "on the job". Prosecutors are allocated files appropriate to their level of experience. New prosecutors within the Office are given the opportunity to junior on contested matters prior to conducting a hearing or trial on their own. The level of responsibility the junior prosecutor will have will depend on the circumstances in which they are junioring, for example whether they assisting senior counsel with the prosecution of a complex matter, or if it their file and senior counsel is assisting them with the prosecution as a learning and development opportunity. The team structure within the office is structured to enable mentoring of staff, supervision of work and a knowledge of each practitioners workload and experience generally

140. Specific examples of training provided to all staff at Continuing Legal Education days include:

a. Self-care and trauma – Sexual Assault Support Service – June 2022

b. Interviewing complainants and leading evidence – in particular children in the context of sexual assault – Assistant Director (Summary Prosecutions) – June 2022

c. Learnings from training course attended in May 2022 including child protection, including expert evidence and advocacy involving children – Crown Counsel – June 2022

d. Choking and strangulation – issues arising in the aftermath of the offence – [redacted], Specialist Forensic Physician, ACT Health – June 2022

e. Child sexual abuse and trauma informed practice – Sexual Assault Support Service – December 2021

f. Child Exploitation Material – Crown Counsel - December 2021

g. Sexual assault advice files – drafting advice – Crown Counsel – December 2021

h. The role of the Children's Commissioner – Leanne McLean (Children's Commissioner) – June 2021

i. Victim Impact Statements – Deputy Director and Witness Assistance Service Manager – June 2021

j. General discussion (including *Backlog Bill,* intermediaries) - June 2021

k. The biological effects of stress – [redacted] Neurologist – August 2020

l. Leading expert evidence – Deputy Director – August 2020

m. Cross examination of expert witnesses – [redacted] – August 2020

n. Special witnesses – Crown Counsel – August 2020

o. Choking, suffocation and bruising, [redacted], State Forensic Pathologist – December 2019

p. Child exploitation material: The profile of the offender and the implications for the criminal justice system – [redacted], Associate Professor, Faculty of Law, University of Tasmania – December 2019

q. Section 66 of the *Evidence Act 2001* and "fresh in the memory" – Crown Counsel – December 2019

r. Tendency and coincidence evidence- Director – July 2019

s. Common Trial Directions in Sexual assault matters – Crown Counsel– August 2018

t. Investigative interviewing and training protocols – Sergeant [redacted] Tasmania Police – August 2018

u. Medical examination of complainants in sexual assault cases – [redacted], Specialist, Obstetrics & Gynaecology, Tasmanian Health Service – August 2018

v. Royal Commission and Updates to the Guidelines – Crown Counsel - August 2018

w. Keynote speaker – [redacted] (former Detective in Victoria Police who worked in investigating child abuse and sex offences), April 2018

x. Working with Vulnerable Witnesses – [redacted] – September 2017

y. Victim trauma –Victims of Crime - August 2016

z. Sexual Assault Guidelines and new mentoring program – Deputy Director – August 2015

aa. Injuries in children and presenting such evidence - [redacted] (paediatrician) – March 2015

bb. Vulnerable witnesses and the new Witness Assistance Guidelines – former Manager of WAS – August 2015

cc. Prosecutorial Guidelines – Director – August 2015

dd. Royal Commission into Institutional Child Sexual Assaults and the effect on the DPP – Director of the Royal Commissions Response Unit – August 2015

141. We have had many internal lectures on the *Evidence Act 2001*.

142. In addition to our Continuing Legal Education days a selection of Crown Counsel attend the annual Criminal Law Conference held by the Law Society of Tasmania. In particular, most of our level 1 and 2 practitioners attend these conferences. Further, approximately six Crown Counsel attend the annual Australian Association of Crown Prosecutors Conference. This conference is attended by Crown Counsel in other jurisdictions.

143. A number of staff, in particular more junior practitioners, have attended a two day course run by [redacted] a leading expert in training counsel from York University. These courses are generally held annually and cover topics such as Children and Vulnerable Witnesses and

Advocacy and Presentation Skills. There has been a gap in this training being available due to Covid-19.

144. Senior Crown Counsel have been involved in, and facilitated relevant training courses. Their skills, knowledge and experience is shared (informally) with the Office. We have Counsel who are incredibly experienced in prosecuting sexual abuse. The Director has over 30 years' experience, the Deputy Director over 25 years' experience and the Assistant Director of Summary Prosecutor over 20 years' experience. Our Principal Crown Counsel have many years' experience. All practitioners are encouraged to, and in fact do, regularly consult with these (and other senior practitioners) about the best way to approach a particular matter. The Office is collegial and senior practitioners assist more junior practitioners to improve their skills and knowledge.

Examples of training courses attended by and facilitated by the Deputy Director and Assistant Director

145. The Deputy Director was a member of the Providers of Sexual Assault Care from 1998-2006, and has been a member of the Sentencing Advisory Council of Tasmania (SACT) since 2013. The SACT has recently published three papers relevant to sexual offences, namely Sex Offence Sentencing in 2015, Mandatory Sentencing for Serious Sex Offences against Children in 2015, Sentencing for Serious Sex Offending Against Children in November 2018. Further the Deputy Director has attended the following professional development courses: *Child Witnesses, Best Practice for Courts Seminar* in Parramatta in 2004, the *Expert Evidence* at the Australian National University in 2011 and the *Truth testimony relevance – improving quality of evidence in sexual offences cases* at the National symposium of the Australian Criminology Institute in 2012.

146. The Deputy Director was involved in the development of a best practice course run by Tasmania Police with regard to interviewing techniques for vulnerable witnesses, with a focus on children; and assisted with the implementation of better practice models within the Office for the provision of advice to Tasmania Police and the production of the Office guidelines as it related to sexual assault prosecutions. Further, she has conducted literature reviews, including for the following: *Alternative Models for Prosecuting Child Sexual Offences* – Dr Annie Cousins; *Bench Book for Children Giving Evidence in Australian Courts* – AIJA; and Current Issues in Criminal Justice - *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions*- Karen Shead – July 2014.

147. The Assistant Director (Summary Prosecutions) has consulted on the University of Tasmania Expert Advisory Panel on Sexual Assault and Sexual Harassment (2018); facilitated workshops for medical practitioners at the Royal Hobart Hospital who give evidence in sexual assault trials and for the Education Centre against Violence (NSW) (2019). Further she has presented at in house Continuing Legal Education days on topics related to vulnerable witnesses and the use of the *Evidence (Children and Special*

Witnesses) Act 2001 and on the use of Interpreters in Criminal Trials with an emphasis on sexual assault trials. She has presented lectures at the Police Academy in relation to Sexual Assault Investigations and was part of a Focus Group involving Tasmania Police and the Griffith Criminology Institute looking at developing improvements in the taking of video statements from adult sexual assault complainants.

148. Three prosecutors (one of whom was employed by the Commonwealth Director of Public Prosecutions at the relevant time) have attended training on two occasions provided by Task Force Argos, a branch of the Queensland Police responsible for the investigation of online child exploitation and abuse. A paediatric psychiatrist from Northern Europe presented on vicarious trauma, how to deal with children and explained how children react and behave in response to child exploitation material.

149. One of our Crown Counsel in the Unit is on the Board of the Sexual Assault Support Service.

150. The Office undertakes a variety of different work, as such there is limited time to ensure training is offered in all areas.

Reporting requirements

151. The only reporting requirement for my staff relates to s 105A of the *Criminal Code* (see pages 30-31 of the Guidelines). Relevantly the Guidelines provide:

> In circumstances where a prosecutor become aware of evidence that a person may have committed the offence of failing to report the abuse of a child (either through witness briefings or following a review of the police file), the prosecutor is to seek advice from the Director or Deputy Director.

152. And further:

> If a complainant, during the prosecution process, discloses that a further alleged abuse offence was committed against them when they were a child, the prosecutor is to:
>
> - Consider whether an ex officio charge could be included in the indictment and prepare a memorandum to the Committee. (It will be necessary to obtain a supplemental proof of evidence or request police to obtain a further statutory declaration). In these circumstances, it is not necessary to disclose the information to a police officer unless further investigation is needed.
>
> - If the alleged abuse offence was committed by a person other than the accused, inform a police officer. The complainant should be informed that police will be notified.
>
> If a witness, other than the complainant, discloses to a prosecutor that an abuse offence was committed against them when they were a child, the prosecutor is to inform a police officer. The witness should be informed that police will be notified.

Q 15. Do you consider it desirable or necessary for prosecutors to receive additional training to support them to prosecute matters in relation to child sexual abuse in Institutional Contexts? If yes, describe the additional training that would be beneficial.

153. Yes, it is always desirable for prosecutors to receive ongoing training to support them to prosecute matters in relation to child sexual abuse generally, including abuse in Institutional Contexts. In particular the following training would be beneficial:

a. Specialist training on trauma informed responses;

b. Further instruction and lectures on the *Evidence (Children and Special Witnesses) Act 2001,* tendency evidence and complaint evidence;

154. Training from experts about impacts of trauma and how that may impact disclosures and their involvement in the criminal prosecution process generally.

155. Children giving evidence generally (issues that may be faced) and accommodations that can be made (for example with reference to the Bench Book for Children Giving Evidence in Australian Courts).

156. DNA evidence generally.

157. Training about what records may be available and how to disclose those records.

Q 16. Do you consider it desirable or necessary for all legal professionals working on matters in relation to child sexual abuse in Institutional Contexts (including Tasmania Police, judges, magistrates, legal practitioners, victims of crime commissioners) to receive additional training? If yes, describe the additional training that would be beneficial.

158. Firstly, I am only aware of some of the training that has been provided to Tasmania Police, judges, magistrates, legal practitioners and victims of crime commissioners. I expect to some degree the training that judges, magistrates and commissioners have participated in depends on the individual and their interests.

159. In general I believe it will always be desirable for anyone working in this area, regardless of their role, to have ongoing training. Training in the following areas would be useful:

a. Further instruction and lectures on the *Evidence (Children and Special Witnesses) Act 2001,* tendency evidence and complaint evidence;

b. Specialist training on trauma informed responses;

c. Training from experts about impacts of trauma and how that may impact disclosures;

d. Children giving evidence and recommended accommodations (for example with reference to the Bench Book for Children Giving Evidence in Australian Courts).

Q 17. Do you consider there is benefit in specialist prosecutors managing matters in relation to child sexual abuse in Institutional Contexts? If yes, what model do you think would be most effective within the Office of the Director of Public Prosecutions? If not, why not?

160. No. I do not think there is benefit in specialist prosecutors managing matters in relation to child sexual abuse that occurred in an Institutional Context. For the following reasons I do not believe that prosecutions for this specific type of offending should not be distinguished from sexual abuse generally for the following reasons. Firstly, the nature of this work is not significantly different from other prosecutions of child sexual abuse. Secondly, prosecutions for sexual abuse that has occurred in an Institutional Context represents only a small portion of sexual abuse prosecutions conducted by this Office, therefore we could not justify such specialisation. Finally some matters are extremely serious, like the prosecution against Harington which was prosecuted by the Deputy Director, see *DPP v Harington* [2017] TASCCA 4. Therefore a portion of prosecutions for sexual abuse in institutional contexts will always require prosecution by our most senior counsel who would not be in a specialist unit.

161. I consider there is benefit in specialist prosecutors managing matters in relation to child sexual abuse (and sexual abuse and family violence more generally). As a result I have developed a structure that enables this through the creation of the Sexual Assault and Family Violence Unit. I am of the view that this current model is the most effective for our Office. The model enables level 2 Crown Counsel to gain skills and experience in this area and more senior Crown Counsel to further their expertise in this area and share their knowledge.

162. Counsel rotate in and out of the Unit. There is a need for rotation, and to have general crime files whilst they are in the Unit. This is for the following reasons:

a. it recognises that this type of work is demanding and involves vicarious trauma. We must consider the health of practitioners who undertake this type of work: *Kozarov v State of Victoria* [2022] HCA 12

b. prosecutors need to gain a range of experience in all areas of criminal prosecutions both for their career progression and to improve their skills generally.

163. The issue with our current model is the lack of resources. The workload for this unit continues to increase and we simply do not have the resources to keep up with demand. Further, as mentioned earlier in my statement the Office is in a phase of rebuilding.

Relationship with Tasmania Police

Q 18. Describe the Operation of the advice service provided to Tasmania Police in relation to child sexual abuse offences. What are your reflections on this service?

164. For many years this Office has provided a pre-charging service to Tasmania Police for sexual assault crimes in circumstances where there may be a question as the appropriateness of charges or the sufficiency of evidence. The advice is provided for any sexual assault crime that could be prosecuted on indictment; crimes where the defendant may elect to have the matter prosecuted summarily (see s 72 of the *Justices Act 1959*); or where the defendant is a youth and the crime is not a prescribed offence (see s 161 of the *Youth Justice Act 1997*); or the crime of assault with indecent assault contrary to s 35(3) of the *Police Offences Act 1935*).

165. Advice is provided in writing upon receipt of a police file from the Inspector in Charge of the relevant division of Tasmania Police. Oral advice may be provided in exceptional circumstances where the advice required is urgent (i.e. where a complainant's safety may be at risk, a suspect is in custody, there is the possibility of scene or evidence contamination or there is a risk the suspect may flee the jurisdiction). Where advice is given orally it should be confirmed in writing.

166. The pre-charging advice service ensures:

a. That correct charges are laid at an early stage.

b. Early advice is given in respect to obtaining further evidence. Where evidence is gathered prior to charging there is less likelihood of discontinuance after proceedings have commenced.

c. That matters with no reasonable prospect of conviction do not proceed, thus preventing false expectations being raised with complainants. It is recognised that the charging of a person with sexual crimes creates an expectation in the complainant that such charges will be proceeded with and may cause disappointment and possibly further trauma if they are not.

167. The service is regularly used (see response to question 19).

168. The number of referrals increased following the establishment of the Royal Commission into Institutional Responses to Child Sexual Abuse in January 2013. In my 2013-14 Annual Report I said:

> The Office experienced a significant increase of 46% in sexual assault referrals to the Office. A total 146 referrals were made. (Referrals are made to this Office by Tasmania Police to advise that a person has been charged with a sexual offence, to request advice as to whether a person should be charged with an offence of a sexual nature or to request written authority to charge a person with maintaining a sexual relationship with a young person (see s 125A(7) of the Criminal Code)). This number is far higher than the national average for reported sexual offences which increased by only 8% in 2012-2013. It is unclear whether this is attributable to higher offending

> rates, increased reporting rates or Tasmania Police officers more readily seeking advice on whether a person should be charged, although I suspect a combination of the latter two is most likely. **Higher rates of referral do not necessarily mean that these crimes are more prevalent in the community. It is more likely to reflect a greater willingness by victims to come forward to report the crimes against them. Sexual assault, especially child sexual assault, has been a focus of attention in the community as a result of the Royal Commission into Institutional Child Sexual Abuse. The advent of the Royal Commission may have given victims the confidence to report such crimes.** Also, Tasmania Police have been encouraged to seek advice from this Office in an area that can often be legally complex. [**emphasis added**]

169. These advice files are complex and time-consuming. I do not believe this service is offered by any other Director of Public Prosecutions (it was not at the time of the Royal Commission into Institutional Responses to Child Sexual Abuse).

170. The Office endeavours to have an advice completed within six weeks of the referral. My Guidelines state:

> Ordinarily, the advice returned with the police file will be provided within a period of six weeks, unless the nature of the case is of some complexity.

171. However, it has not been possible to adhere to this time table despite the considerable efforts of staff. This is the result of an increase in the workload generally, the increase in the standard of advice that is provided and that advice being internally reviewed. Further, with the introduction of video statements, these files take significantly longer to review. It is the aim of the Office that this work is undertaken by staff within the Unit. However, more recently charging advice has been provided by Crown Counsel outside of the Unit as the Unit has been unable to service all of this work.

Charging advice – recommendation not to charge

172. In circumstances where a decision is made to recommend no charges, the prosecutor reviewing the matter (unless he or she is a Principal Crown Counsel) will have the advice reviewed by a member of the Committee before it is sent to the investigating officer.

173. The letter of advice is to provide an explanation to the investigating officer why it has been determined no charges are recommended. It is to provide sufficient information to enable the investigating officer to explain the decision to interested parties, including the complainant.

174. A complainant can request a review of a decision. If the original decision was not made by the Director, the complainant can also request the Director to review the decision. Where the Director has made the decision, the Director will listen to the complainant. If there is new evidence the decision will be reviewed.

175. It should be noted that pursuant to s 310(4) of the *Criminal Code* and consistent with the Guidelines no indictment will be raised unless there is a reasonable prospect of conviction based on reliable admissible evidence.

Generally the reason for advising that no charges should be laid in a particular case is that there is no reasonable prospect of conviction. Public interest factors would only have a bearing in exceptional circumstances in child sexual assault cases.

176. The Office provides advice to Tasmania Police for a number of matters, not only in relation to allegations of child sexual abuse.

Reflections on this service

177. I make the following general comments about this service:

a. The Office struggles to meet the deadline of six weeks. This is due to the length of time it takes to review these matters and provide advice, coupled with the general workload of practitioners within the unit.

b. Early in the relevant period the advice provided was generally in dot point form, or limited to a few paragraphs. Now advice is far more detailed. It summarises the evidence, sets out the relevant law, discusses the legal and factual issues and provides a recommendation. The current practice ensures transparency and accountability in decision making. It also focuses the mind of the person giving the advice on the relevant issues and ensures the correct advice is given. Further it improves the ability to review decisions. It also provides an educative function to Tasmania Police as the reasons for decision are detailed.

c. The introduction of audio-visual statements has greatly increased the time it takes to review files. It is far more resource intensive to review an audio-visual statement than a written statement. Tasmania Police do not prepare transcripts of statements (until a matter is a confirmed trial or there are exceptional circumstances). Therefore Crown Counsel routinely have to view video statements in their entirety in order to make a recommendation.

d. Audio-visual statements are often more difficult to follow than a written statement. Sometimes they include irrelevant or inadmissible material. Generally people do not describe events in a chronological or sequential order. In circumstances where there is more than one crime alleged it can be difficult to discern which incident is being described. These statements are not structured in the same way evidence in chief would be. I accept to a large extent these factors are unavoidable because the audio visual statement is obtained as part of the investigation, and officers are discouraged to speak to complainants prior to the interview. Further, it is difficult to avoid these issues without improperly leading the witness. In my view the benefits of audio-visual statements are not outweighed by these factors.

e. There is a process of internal review. If Crown Counsel recommend that no charges proceed, the advice must be reviewed and

approved by a Principal Counsel or above. In the past the vast majority of the advice was prepared by one practitioner (who was a level 3 or above) and was not routinely reviewed.

f. We proceed with more matters than we used to. This is due to changes in the law which has affected the admissibility of evidence, in particular tendency and coincidence evidence. Further, it is influenced by changes in community attitudes, which in turn impacts on the reasonable prospect of conviction and public interest considerations.

g. Due to changes in the law there are more things to be considered. For example:

    i. Tendency and coincidence evidence (similar fact)

    ii. *Hoch v The Queen* (1988) 165 CLR 292 and *Longman v The Queen* (1989) 168 CLR 79 have been abolished

    iii. "fresh in the mind" is more liberally determined (s 66 of the *Evidence Act 2001*)

h. Tasmania Police are more reticent to make decisions without input from this Office. This is in line with the recommendations of the Royal Commission.

i. The advice service provides Tasmania Police with clear guidance as to whether or not there is a reasonable prospect of conviction based on the available evidence. Further it provides Tasmania Police with direction for further avenues of enquiry. In this way evidence is obtained at an earlier stage (than if the requests for further evidence were made after the matter was committed for trial).

j. The advice service provides a level of oversight and accountability that allows Tasmania Police to share the responsibility for decision making.

Q 19.In relation to the advice provided by the Office of the Director of Public Prosecutions to Tasmania Police:

a) How many advices have been provided for each year of the Relevant Period?

178. The following table sets out the number of advice files the Office provided pre-charging advice to Tasmania Police involving allegations of sexual abuse from the period 2012-13 to 2020-21.

Year	Number of advice files
2012-13	99
2013-14	146
2014-15	140
2015-16	136
2016-17	163
2017-18	184
2018-19	254
2019-20	213
2020-21	123

179. Not all requests for advice result in charges being laid.

b) What is the average time taken to provide each advice?

180. Advice files provided between 1 January 2019 and 31 April 2022 were reviewed. The Office gave advice in 428 matters during this time. The average time spent on each advice was 5.1 hours. I suspect Counsel record time spent on these matters conservatively.

181. The six files with the shortest review times had completion times of:

a. 10 minutes x 1

b. 15 minutes x 2

c. 30 minutes x 3

182. The six files with the longest review times had completion times of:

a. 1300 minutes (21.6 hours) x 1

b. 1320 minutes (22 hours) x 1

c. 2040 minutes (34 hours) x 1

d. 2100 minutes (35 hours) x 2

e. 2400 minutes (40 hours) x 1

183. Between 1 January 2019 and 31 April 2022 the average time the file remained in our Office was 15.3 weeks.

184. At times the Office has requested further information from Tasmania Police to progress the advice and there is a delay in the further information being provided.

c) How does this meet any targets around timeframes the Office of the Director of Public Prosecutions may have?

185. At present, we struggle to meet this demand and are not meeting our targets.

186. The guidelines provide that ordinarily, the advice will be returned with the police file within a period of six weeks, unless the nature of the case is of some complexity (see page 24).

d) How many advice matters are outstanding at the date of this Notice?

187. As at 13 May 2022 there were 54 outstanding advice files. Based on the average time to prepare advice, this represents 270 hours of work. Based on a 38 hour week this is 7.1 weeks for one practitioner.

General comment

188. At present advice is provided by all staff within the Unit, and at times outside of the Unit. I believe we could better meet our targets if we had specialist prosecutors providing this advice, and not conducting criminal prosecutions generally. This is because urgent criminal work and court deadlines means at times that pre-charging advice is not given the priority it needs to have.

Q 20. In what circumstances would Tasmania Police not seek advice from the Office of the Director of Public Prosecutions on matters in relation to child sexual abuse? What are your reflections on Tasmania Police charging decisions, in matters where advice from the Office of the Director of Public Prosecutions is not sought?

189. I am not aware of matters that Tasmania Police do not seek advice from the Office in circumstances where charges do not proceed.

190. However, in my experience it is rare for Tasmania Police not to seek pre charging advice. Tasmania Police may not seek advice in the following circumstances:

a. If there was a need for charges to be laid urgency (for example if there was a risk of further offending or the offender was a flight risk);

b. If it is unequivocal that charges should or should not be laid;

c. Where the complainant makes a complaint but does not want the matter to proceed to a prosecution at that time;

d. If the matter involves charges under the Commonwealth *Criminal Code (1995)*.

Q 21. What are your reflections on the quality and timeliness of investigations and evidence gathered by Tasmania Police on matters in relation to child sexual abuse, including how this may (or may not) have changed, during the Relevant Period? In particular, discuss the quality and standard of interviews with victim-survivors (particularly children) or other key witnesses.

191. On average, the quality and timeliness of investigations by Tasmania Police is of a high standard. While there are always exceptions, it is rare that a file is not investigated fully or in a timely fashion. Where there are concerns about the investigation this will generally be raised in the letter of advice that is provided to Tasmania Police when the police file is returned. This advice letter goes to the Inspector and the Investigating Officer.

192. There has been an improvement in the quality of these interviews since their introduction. In general interviewing officers have become more aware of, and proficient at, having complainants identify with as much particularly as possible the instances of sexual abuse. There has been an increase, and improvement in, the use of open ended questioning and encouraging a "narrative" from the witness.

193. Of course, the standard of these interviews still varies. The difference can clearly be seen when the interviewing officer is experienced in conducting vulnerable witness interviews than when they are not.

194. As stated in my response to question 18:

> Audio-visual statements are often more difficult to follow than a written statement. Sometimes they include irrelevant or inadmissible material. Generally people do not describe events in a chronological or sequential order. In circumstances where there is more than one crime alleged it can be difficult to discern which incident is being described. These statements are not structured in the same way evidence in chief would be. I accept to a large extent these factors are unavoidable because the audio visual statement is obtained as part of the investigation, and officers are discouraged to speak to complainants prior to the interview. Further, it is difficult to avoid these issues without improperly leading the witness. In my view the benefits of audio-visual statements are not outweighed by these factors.

195. Further, at the time the interview is conducted it is often unclear what the charge or charge(s) may be. As such it is difficult for the interviewing officers to ensure that they have covered off on all of the elements of the offence.

196. Whilst it has improved over recent years, there are and have been issues with the technical quality of the audio-visual statements. For example there have been instances where the camera equipment has failed and the recording has not been available, or the quality of the audio has been insufficient. Further, at times it is difficult to discern the subtleties of a witness's demeanour due to the positioning of the camera equipment relevant to the subject. There would be benefit in reviewing the facilities in all interview rooms to ensure that they are appropriate for children and vulnerable witnesses, and to ensure that the visual image that will be captured will show a close up image of the complainant. It is worth

noting that not all interviewing rooms are alike, some are more informal (like a lounge room set up) whilst others are more sterile (with a table and chairs).

197. There has been an increase in the use of intermediaries at this stage. Whilst I believe generally that this has been beneficial care needs to be given that the presence of the intermediary, or any aides that may have provided to the witness, are not distracting. For example, on occasion witnesses are given fidget or stress toys that can detract from the veracity of the statement or distract those watching the recording.

Q 22. Do you consider there is benefit in specialist police to investigate and manage matters in relation to child sexual abuse? Why/why not? Include any reflection you may have on how such specialisation could work effectively in Tasmania.

198. With regards to investigations generally, provided police have a general understanding of tendency evidence and complaint evidence (which is not unique to prosecutions for sexual assault, although more prevalent than other crimes) I do not consider there to be any need to have specialist police to investigate and manage matters in relation to child sexual abuse. However, I consider there is great benefit to having specialist police interview complainants and vulnerable witnesses and maintain contact with these witnesses. Generally, this seems to be prioritised by Tasmania Police. Thus, I am of the view that an investigation could be appropriately managed by an officer in the Criminal Investigation Branch (without specialisation in sexual assault offences), but there is unquestionable benefit to the interview being conducted by an officer with specialist skills in this area.

199. It is a small jurisdiction, with a limited number of senior Detectives, it may be counterproductive to have a small unit running serious sexual assault investigations as there would be a dilution in in the amount of experienced Detectives to run these investigations. I suspect if such investigations were only to be done by a sexual assault unit, firstly it would be difficult to get experienced Detectives to staff this unit, secondly there would be a high turnover of staff and thirdly it would dilute the number of Detectives who could investigate other serious crimes.

Prosecuting offences in relation to child sexual abuse

Q 23. With reference to any relevant guidelines or documentation, describe how the Office of the Director of Public Prosecutions manages the conduct of matters involving offences in relation to child sexual abuse. In your answer, you should note any distinctions between victim-survivors who are children, compared to those who are now adults.

200. All prosecutions for sexual offences are prioritised by the Office. In particular priority is given to matters where there victim is a child, where there are child witnesses and where a pre-recording will be conducted under the *Evidence (Children and Special Witnesses) Act 2001*. In addition, where the victim is still a child there is a direction from the Chief Justice that we inform the Supreme Court. Once this occurs the matter is case managed by a judge.

201. The conduct of matters involving offences in relation to child sexual abuse are treated differently to other prosecutions. Firstly the Office has generally provided pre-charging advice to Tasmania Police prior to Committal. This means there is greater certainty in charges and evidence is gathered at an earlier stage. Secondly, it is the practice of this Office to have early and ongoing contact with victims of sexual offences.

Contact with complainant after charges are laid

**see also pages 26-29 of the DPP Prosecution Policy and Guidelines*

202. Within four (4) working days of an accused person being charged with a sexual assault offence Tasmania Police are required to notify the Office of the fact. Within two (2) days of that notification the Sexual Assault Liaison Clerk writes to the complainant to explain the usual course of proceedings. If the complainant is a young child, or there is a reason why making meaningful direct contact would be impractical or undesirable, or if any other exceptional circumstances exist, such contact will be with the parents or guardians of the complainant. In any other circumstance contact will be established directly with the complainant. A WAS officer is allocated the matter, and will make telephone contact shortly after. On occasions there can be difficulties changing their address or phone numbers.

203. It is recognised that complainants in sexual offence crimes are particularly vulnerable to the criminal justice system process. The Office recognises the importance of keeping the complainant informed of the decision to prosecute or to discharge. Complainants, where possible, are kept informed of developments in the progress of the matter. To ensure this occurs, following notification that charges have been laid, the Sexual Assault Liaison Clerk forwards a copy the notification to the Witness Assistance Service (WAS) Manager who allocates the matter to a WAS officer who then has the responsibility of contacting the complainant and is available to provide updates.

204. Police Prosecution Services retain carriage of the matter until an election is made or the matter is committed to the Supreme Court. Crown Counsel take carriage of matters whether they are prosecuted in the Magistrates Court or the Supreme Court (but for charges of assault with indecent intent charged under s 35(3) of the *Police Offences Act 1935* which are prosecuted by Police Prosecution). In 2015 the Office took carriage of indecent assault matters that are prosecuted summarily in circumstances where the accused elects (see s 72 of the *Justices Act 1959*). Prior to this, these matters were prosecuted by Tasmania Police. This came about from an agreement between myself and the Commissioner of Police. This was subsequently reviewed in an independent report prepared by Damian Bugg QC (former Tasmanian DPP) and [redacted] (former Police Commander). Following the review, the transfer became permanent. This transfer has the benefit of cases being conducted by trained and experienced prosecutors, and complainants and witnesses having access to our WAS.

205. Once the police file is received in the Office the Manager of the Unit reviews and allocates files to prosecutors within the Unit. Counsel are appointed at an early stage, including, reviewing matters where defence counsel indicate they will file a Preliminary Proceedings Application. Where possible we have continuity of counsel throughout the proceedings, however given our limited resources and the courts increase in listing times, we are unable to achieve this as often as we would like to.

Approach to evidence

206. Further, the support provisions in the *Evidence (Children and Special Witnesses) Act* are routinely utilised. My Guidelines direct Crown Counsel to consider the use of the support provisions within this Act for all sexual assault crimes. Where possible complainants' evidence is pre-recorded. Generally complainants give evidence via a remote witness room. Complainants are supported by a WAS during the proceedings, WAS generally being approved to be the support person for a child or prescribed witness under s 4. In circumstances where the office is considering whether or not there will be a re-trial, the views of the complainant are to be considered.

207. Prior to any trial or hearing prosecutors meet with the complainant. In most instances the first meeting will simply be to establish a rapport. In subsequent meetings the prosecutor will explore the complainant's memory of events (and where further incidents of alleged abuse are recalled arrange for a further statutory declaration to be obtained or prepare a supplemental proof of evidence). WAS (sometimes accompanied by the Prosecutor) will show complainants the Court and remote witness rooms prior to the trial or hearing should the complainant wish to see the Court room prior to the trial or hearing.

208. In relation to the provisions in the *Evidence (Children and Special Witnesses) Act* generally my Guidelines state at p 28:

> The prosecution of sexual assault crimes must not be undertaken without consideration of the provisions of the *Evidence (Children and Special Witnesses) Act 2001*. In appropriate circumstances, there should be a pre-recording of the evidence of child witnesses or sexual assault victims who are particularly vulnerable.

209. Further at pp 45-46:

> When dealing with a witness under 18 years of age, ... a victim of an alleged sexual offence, ... consideration must be given to whether the person is an "affected child" or a "special witness" within the meaning of the *Evidence (Children and Special Witnesses) Act 2001* (the Act). If these provisions are applicable, the witness should be advised of their options and consideration should be given, particularly with a child witness, to having their evidence pre-recorded. // The prosecutor with conduct of the case should make application notwithstanding any forensic advantage that is perceived in not making appropriate arrangements./// Regardless of whether any witnesses who may be declared a "special witness" will give evidence live in court, via closed circuit television or in a pre-recorded hearing, counsel should consider making an application to have the witness declared a special witness. The witness should be consulted in the decision; specifically a witness should be advised that they may be required to give evidence again in any retrial.
>
> The Act provides that where a witness is declared a special witness in any prescribed proceedings the court must (where facilities are available) make an audio visual record of the evidence (s7A). In the event of a subsequent trial or retrial this recording may be admitted into evidence (s7B).
>
> ...
>
> Please note that the Criminal Justice Report released following the Royal Commission into Institutional Response to Child Sexual Abuse identified recording a complainant's evidence in order to avoid the need for them to give evidence again if there is a subsequent trial as an important procedure in child sexual abuse prosecutions.
>
> Cases involving an alleged sexual offence or cases where there are vulnerable witnesses should be expedited. In such cases it is our aim to have one prosecutor maintain carriage of the matter from the time of committal to finalisation, noting however that sometimes changes in the prosecution team may be unavoidable due to staffing and court time tables.

210. Pre-recording the entire evidence of children and other special witnesses under the provisions in the *Evidence (Children and Special Witnesses) Act 2001* has resulted in some positive outcomes. In particular:

a. It lessens the stress on the witness in that the witness can come at an appointed time and have his or her evidence heard. The process is more streamlined than a trial, meaning the process of giving evidence is often less stressful. The ability to edit the evidence ultimately played to the jury allows children and special witnesses to be "eased into" the proceedings less formally, and, may mean more frequent breaks are taken.

b. It is recognised that substantial delay in the finalisation of a vulnerable witnesses role in a prosecution case can cause unnecessary trauma to the witnesses.

c. It reduces trauma and memory loss which are caused by substantial delay.

d. It, on occasion, has resulted in an earlier plea of guilty, a number of pleas have been entered shortly after the pre-recording has been conducted.

e. Judges are more likely to intervene and control questioning. "Ground rules" hearings are often held informally.

211. Further, my Guidelines refer prosecutors to the Australasian Institute of Judicial Administration Bench Book for Children Giving Evidence in Australian Courts (see p 46 of the Guidelines).

212. The Office does not distinguish between child and other complainants. All complainants are treated in accordance to their needs and individual circumstances. Of course, it is recognised that children generally need more time to become familiarised and comfortable with Crown Counsel and the criminal justice process generally. In respect to complainants who are still children WAS has considerable involvement, generally there is a pre-recording and the Supreme Court has regular case management listings for these matters (as determined necessary by the Supreme Court).

Q 24. With reference to any relevant data, identify what portion of the Office of the Director of Public Prosecutions' work relates to:

(a) Child sexual abuse, or

(b) Child sexual abuse in Institutional Contexts.

How have the answers to paragraphs (a) and (b) changed over the Relevant Period? What funding has been made available to support the prosecution of these matters and is it adequate to meet demand?

213. The following is relevant for the answers to questions 24-27.

a. On 16 August 2016 the Office moved to a new electronic in house file management system. Regrettably there was an issue with transferring data from our old system to our new system. Consequently we are unable to search by crime type prior to this date.

b. Further, we have limited ability to automatically generate reports from our system. The data that has been generated in this statement has predominantly been obtained from our "long lists", information that is manually recorded in an excel spreadsheet that is maintained by our Business Support Manager and the sexual assault and family violence liaison clerk.

Portion of work that relates to child sexual abuse

214. From 1 January 2017 to 31 April 2022 the Office has 725 active matters state wide. 126 of those matters, or 17.4% of those matters were for sexual assault offences.

215. From 1 January 2017 to 31 April 2022 the Office finalised 323 prosecutions for sexual assault. Of those 323 matters, in 231 matters the complainant was a child at the time of the offending.

216. In my Annual Report I report on the crime (type) major groupings by persons convicted. In 2020-2021 12-15% of people convicted were convicted for sex crimes, see Table 5 from my Annual Report 2020/2021.

Table 5: Crime (type) major groupings by persons convicted

Crime	2017-18 %	2018-19 %	2019-20 %	2020-21 %
Dishonesty (aggravated/armed robbery, stealing, burglary, receiving, fraud, etc)	20	19	21	23
Personal violence (murder, manslaughter, assault, wounding, grievous bodily harm)	32	37	32	31
Arson and injury to property	5	6	7	6
Sex crimes (rape, unlawful sexual intercourse/ relationship, indecency)	12	15	12	13
Perjury and perverting the course of justice	5	3	6	5
Drugs	18	15	13	12
Other ungrouped (includes indictable fisheries crime, conspiracy, causing death by dangerous driving, escape and abduction)	8	5	9	10

217. In my 2018/2019 report I reported that sexual assault and family violence referrals had increased by 250% in the past six years. It continues to increase.

218. In our 2016/17 Agency Budget Submission it was reported that:

> In the past two years there has been a 46% increase in sexual assault referrals for advice and a 5% increase in sexual assault prosecutions. This work is complex and requires pre-recording of children's evidence which is time consuming for our senior staff. Due to expectations created by the Royal Commission into Institutional Sexual assaults more rigour and accountability is expected. Therefore, each individual matter is more time consuming.

Portion of work that relates to child sexual abuse in institutional settings

219. In my response to NTP-DPP-001 I reported that there were 18 criminal prosecutions for incidents of child sexual abuse in Institutional Contexts. The following table was produced:

Year (date of finalisation)	**Number of prosecutions * (date of finalisation)**
2016	1

2017	1
2018	2
2019	3
2020	4
2021	1
2021 (pending)	6 *including 1 matter where a warrant issued on 22/2/21 and 1 matter that was committed after the *relevant period*

What funding has been made available and is it adequate to meet demand?

220. Specific funding has not been allocated for child sexual abuse. The Office gets an overall allocation of funds which is allocated by myself. Submissions for funding are made on the basis of where I intend to allocate the funding. Over the years funding has increased to enable the creation of the Unit and its expansion, and the introduction and expansion of WAS.

221. Current funding is insufficient to meet the increasing demands of this work.

222. There has been an increase in this work in terms of numbers of matters and complexity. This has coincided with more robust systems of internal review which take considerable time and resources.

Q 25. With reference to relevant data, how commonly does the Office of the Director of Public Prosecutions oppose bail in matters involving offences in relation to child sexual abuse? In what circumstances would prosecutors not oppose bail for these matters? Are there bail conditions which the Office of the Director of Public Prosecutions would normally seek in these matters?

223. The Office does not record this data. In 2020/2021 the office conducted 282 bail applications.

224. The number of bail applications in the Supreme Court for this type of offending would be small. Our office is only involved in applications for bail before the Supreme Court. The Supreme Court has jurisdiction to hear an application for bail if it is an appeal against a magistrates refusal to grant bail (s 21A of the *Bail Act 1994*) or if the accused person has been committed to the Supreme Court in respect of an offence and has appeared in that court in respect of the offence (s 7A of the *Bail Act*). Thus the majority of decisions regarding bail will be made by Tasmania Police or the Magistrates Court.

225. Prosecutors assess matters on a case by case basis, taking into consideration the relevant common law factors (see below). Although all sexual assaults of children are serious, generally bail will only be refused if the offending is a serious example of the crime, there is a strong prima facie case, there is a risk of a not insignificant period of imprisonment being imposed on a finding of guilt, a real risk that the offender will flee, or there is a risk that the accused is a risk to the current complainant or others.

226. Any decision not to oppose an application for bail must be agreed upon by a level 3 practitioner or above.

227. If bail is to be granted the Office would seek a condition that the accused not contact the complainant, directly or indirectly and any other condition depending on the complainants wishes.

228. My Guidelines provide comprehensive outline of bail guidelines within the Office (see pages 96-99). The *Bail Act 1994* does not prescribe any tests for the granting of bail. Except where the provisions of s 12 of the *Family Violence Act 2004* or the provisions of s 35(2) of the *Justices Act 1959* apply, the principles regarding the granting of bail are those of the common law. The common law is that an accused person is presumed to be innocent and therefore there is a general presumption that an accused person should be granted bail, with the onus being on the prosecution to show that a person should not be granted bail. The following factors, which were set out by Crawford J in *R v Fisher* (1964) 14 Tas R 12, in determining the question of bail are:

a. The probability or otherwise of the accused appearing at trial. In connection with this, there are three subsidiary factors:

    i. Seriousness of the crime

ii. Probability of conviction

iii. Severity of the punishment that may be imposed

b. His ties with his family

c. His character and antecedents

d. The likelihood of interference with witnesses

e. Whether the prosecution opposes the application

f. Whether a refusal of bail would prejudice the preparation of his defence

g. The delay before trial

h. The protection of the public

229. Thus, although the protection of the public is a factor the court takes into account, it is not the paramount factor (except where s 12 of the *Family Violence Act* or s 35(2) of the *Justices Act* applies).

230. The following matters, which are contained in my Guidelines, are relevant to considerations of bail where the offending involves allegations or incidents of child sexual abuse:

a. Prosecutors need to carefully consider whether specific individuals would be at risk if the person in custody is granted bail. If a prosecutor is of the view that a person poses a significant risk to the safety of a specific individual then the application for bail should be opposed (page 96).

b. Information concerning the outcome of bail applications should be promptly relayed to any concerned persons, such as the complainant (see page 96).

231. Generally WAS officer makes contact with a complainant of an alleged incident of child sexual abuse prior to any application for bail and notifies the complainant of the outcome of any such application. Where appropriate or necessary the prosecutor will speak with the complainant about the application for bail. If the application is to be opposed the prosecutor will make enquiries to determine whether any particular condition of bail can be imposed to ensure the safety of the complainant should bail be granted.

Q 26. With reference to relevant data, how often do you prosecute offences in relation to child sexual abuse against an accused who was under 18 years of age at the time of the alleged offending? What guides decisions to prosecute in these matters?

232. The Office does not record this data.

233. The Office prosecutes offences in relation to child sexual abuse against an accused who was under 18 years of age at the time of the alleged offending rarely. There may be a few of these prosecutions a year.

234. In addition to all the usual considerations, as set out in my Guidelines, the following would be considered:

a. the capacity of the accused (see s 18 of the *Criminal Code*);

b. the public interest generally, but in particular the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, and the alleged offender's antecedents and background; and

c. The youthful offenders' considerations as set out in my Guidelines (page 19).

> Youthful offenders
>
> Special considerations apply to the prosecution of persons under the age of 18 years. Prosecution action against youthful offenders should be used sparingly and in making a decision whether to prosecute particular consideration should be given to available alternatives to prosecution, such as a caution or reprimand, as well as to the sentencing alternatives available to the relevant Youth Justice Court if the matter were to be prosecuted.

Q 27. With reference to relevant data, describe any trends in how far matters involving offences in relation to child sexual abuse normally progress through the criminal justice system. How many matters reached different stages from charge to final appeal during each year of the Relevant Period? What factors contribute to this progress? Have there been any changes to this progress since the introduction of the Royal Commission reforms?

235. Firstly, Tasmania does not have contested committal proceedings. Instead, we have preliminary proceedings. These are a pre-trial procedure that allows parties to explore the evidence a witness can be expected to give before any trial. Matters cannot be dismissed, discontinued or withdrawn in the Magistrates Court (see generally ss 55-60 of the *Justices Act 1956.* See also *Tasmania v Finnegan* [2011] TASSC 74 and *Barnes v Omant* [2019] TASSC 38). Therefore, all charges for indictable offences are committed to the Supreme Court.

236. Between February 2008 and July 2021 applications for preliminary proceedings were made after an accused person had been committed to the Supreme Court for trial, see s 331B of the *Criminal Code Act 1924.* Thus accused persons were often committed to the Supreme Court very soon after being charged. They would then apply for preliminary proceedings and the matter would be returned to the Magistrates Court where those proceedings would be conducted. The time during which the proceedings were conducted would still count in the time of committal until finalisation. Thus time frames from committal to finalisation in Tasmania could not properly be compared with other jurisdictions.

237. Since July 2021 preliminary proceedings are generally conducted in the Magistrates Court prior to a matter being committed to the Supreme Court, see s 61 of the *Justices Act 1956.* There is still provision for the parties to make an application for preliminary proceedings in the Supreme Court, but this requires the leave of the court which can only be given if one or more the special circumstances set out in s 331B(2A) of the *Criminal Code* are satisfied.

238. We were unable to generate a report for this data. Therefore the records for all sexual assault offences when the complainant was a child at the time of the offending were reviewed from 1 January 2017 to 31 April 2022. A total of 231 matters were finalised during this time. On average these matters took 15.1 months to finalise. (Please note that this is a record from the date of committal, not the date of charge.)

a. 106 pleaded guilty (on average 10.2 months)

b. 50 were found guilty (on average 22.1 months)

c. 21 were found not guilty (on average 21.2 months)

d. 54 were discharged (on average 15.7 months)

239. The statistics do not tell the entire story. These are high proportion of trials that result in late pleas of guilty (where the matter has been prepared for trial). They are also more time consuming compared to some other offences, due to their complexity and the vulnerabilities of witnesses.

240. There was a conviction rate of 67.53% and a discharge rate of 23.3%. The conviction for sexual assault cases was higher than the conviction rate for all crimes finalised between 2017-2018 and 2020-2021. The discharge rate for sexual assault crimes is significantly lower than the general discharge rate.

Year	Presented	Convicted	Conviction rate (%)	Discharged	Discharge rate (%)
2017-18	485	313	64.54	145	29.9
2018-19	457	288	63.02	138	30.2
2019-20	594	363	61.11	203	34.18
2020-21	514	312	60.7	179	34.82

241. The above figures are likely to have been impacted and skewed by the impacts of Covid-19, in particular the consequent uncertainty and delay. For example, by comparison in 2015-16 Annual Report that year an audit was conducted of 160 child sexual abuse matters between 2010 and 2014 showing a conviction rate of 71% which compared with the conviction rate of completed child sexual abuse matters of 65.9% in 2013 and 75.75% in 2014. The discharge rate was less than the discharge rate for other crimes.

242. In my view the reasons for discharge are indicative of the factors that affect the progress of these types of matters. Of the 54 matters that were discharged in 10 of matters the complainant was unwilling to proceed. The primary reasons (often there is more than one reason for discharge) recorded for discharge were: no reasonable prospect of conviction (for example due to new evidence, witnesses did not come up to proof, inconsistencies in evidence, witnesses changed their evidence or witnesses deceased) (x 19); there were 5 matters where charges laid without advice from the Office and upon review it was determined that there was no reasonable prospect of conviction; the accused was deceased (x 4); the matter did not proceed due to the age and health of the accused (including fitness issues), delay in charging and public interest considerations (x 5); alternative summary charges proceeded (x 3); the offender was charged as an adult but was a youth at the time of offending – youth complaints were substituted (x 3); the evidence was inadmissible (cases of entrapment) (x 2). In only 1 matter was it determined that the initial advice to charge was incorrect and there was no reasonable prospect of conviction.

243. Thus there is a low discharge of matters due to the complainant being unwilling to proceed. In my view, this can be attributed to the office policy

(and Guidelines) that contact will be established with a complainant shortly after charging and that contact being maintained throughout the prosecution process. It is also the policy and practice of the Office that these matters are conducted by experienced practitioners. Further, the pre-charging advice service means that correct charges are laid and appropriate evidence is obtained at an early stage.

244. During the relevant period there were 37 appeals for matters that involved sexual offences committed against children. (See my response to question 40).

245. I do not believe that there have been any changes to the progress of matters since the introduction of the Royal Commission Reforms. The majority of the recommendations that could have had an impact (for example pre-charging advice, contact with complainants and continuity of counsel) were already procedures within this Office.

246. Anecdotally during the relevant period, in my view a higher portion of matters proceed to prosecution, and less matters result in a discharge than they did during the early years of the relevant period. The reason a higher portion of matters proceed to prosecution is due a number of reasons, including but not limited to:

a. Pre charging advice

b. Early and ongoing contact with complainants

c. Legislative reform, in particular:

i. The introduction of the *Evidence Act 2001* and the evolution of the exclusionary provisions generally.

ii. The following amendments to the *Evidence Act 2001* in particular have had an impact on the prosecution of child sexual abuse cases, namely:

1. New section 13, competence: lack of capacity. The truth and lies distinction was replaced with a general test of competence and witnesses are able to give unsworn evidence.

2. Section 41, improper questions, was amended. The court is required to disallow improper questions.

3. Section 66(2A) was inserted so that it is not just the temporal relationship between the event and representation that is determinative of "freshness".

4. Section 165A warnings in relation to children's evidence was inserted. This provision clarified that child witnesses are not to be considered inherently less reliable than adult witnesses.

iii. The development of tendency and coincidence evidence pursuant to sections 97 and 98 of the *Evidence Act 2001*. In particular –

1. In assessing the probative value of the evidence the judge must assume the evidence will be accepted and that any inference open to the jury and favourable to the Crown will be drawn and that credibility and reliability is irrelevant in determining admissibility, see *IMM v R* (2016) 257 CLR 300, *Tasmania v L* [2013] TASSC 47 and *KMJ v Tasmania* (2011) 218 A Crim R 87;

2. Tendency evidence does not have to be strikingly similar or even closely similar to have significant probative value. It just has to have some feature between the tendency evidence and the alleged offending that links them, see *Hughes v r* (2017) 263 CLR 338, *Bauer v R* (2018) 266 CLR 56, *Brown v Tasmania* (2016-2020) 31 Tas R 288;

3. Evidence of more than one sexual act on the one complainant will always have significant probative value, see *Bauer v R* (2018) 266 CLR 56.

4. Section 98 was amended to allow coincidence evidence to be admitted where there are similarities in the events *or* the circumstances (prior to the amendment it was the events *and* the circumstances).

iv. The abolishment of *Hoch v The Queen* (1988) 165 CLR 292 (see s 101(5) of the *Evidence Act*), so that the possibility of concoction or contamination between complainants is no longer a basis to exclude tendency evidence. Section 101(5) provides:

> The possibility that tendency evidence about a defendant, or coincidence evidence about a defendant, adduced by the prosecution may be the result of collusion, concoction or suggestion is to be disregarded when considering both the probative value of the evidence and the prejudicial effect it may have on the defendant.

The amendment to s 101(5) followed my requests to the Attorney-General on 10 March 2015 and 12 April 2016 to amend this provision in order to overcome the decision in *Hoch v R* (1988) 165 CLR 292. As a result of the High Court decision in *Bauer* [2018] HCA 40 it is likely that concoction and contamination does not apply to the Uniform Evidence Act although this has not been conclusively determined.

v. The abolishment of *Longman v The Queen* (1989) 168 CLR 79. This has been replaced by s 165B of the *Evidence Act.* The judge must not warn that it is dangerous to convict on

the uncorroborated evidence of the complainant due to delay (see section 165B(4) of the *Evidence Act*).

vi. Section 192A was inserted into the *Evidence Act*. This provision, advance rulings and findings, allows a court to give a ruling or make a finding in relation to a question about the matters listed in s 192A(a)-(c) before the evidence is adduced.

vii. The introduction of the *Evidence (Children and Special Witnesses) Act 2001* and the evolution of the provisions generally.

viii. The introduction of, and subsequent amendments to s 125A persistent sexual abuse of a child or young person.

ix. Legislative presumption in favour of joint trials in sexual offence matters, see s 326A of the *Criminal Code Act*.

x. The definition of consent in s 2A of the *Criminal Code* which is an affirmative model of consent.

xi. Section 14A of the *Criminal Code,* mistaken belief in consent. This provision does not apply if an accused did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting. In proceedings for offences against ss 124, 125B, 125C, 125D and 127 a mistaken belief by the accused as to the age of the person, if that person is under the age of 13 years, does not excuse the accused from criminal responsibility for any act or omission done or made under such a mistaken belief, s 14B.

xii. Limitations on victims of sexual assault being cross examined at preliminary proceedings, s 62(2)(b) of the *Justices Act 1959* and s 331B(3)(b) of the *Criminal Code*.

247. In addition there has been a gradual change in the communities' attitude to, and understanding of, sexual offences against children. For example, there seems to be greater understanding that these crimes are rarely "witnessed" and cases are often "word on word". This in turn has had an impact on the assessment of whether there is a reasonable prospect of conviction where the evidence is limited to a complaint by complainant. (For example the mere fact that there is no corroboration is insufficient reason not to charge. The credibility of the whole complaint must be considered and if the complaint, even though not corroborated, is considered credible it is proper to charge. Although of course on occasions where there is a lack of other evidence it may be a considerable consideration in determining whether there is sufficient evidence to proceed.)

Q 28. In what circumstances, if ever, are child or adult victim survivors required to be recalled to give evidence in matters involving offences in relation to child sexual abuse?

248. This may occur:

a. Due to an equipment failure the evidence has not been recorded (in particular if the recording was made at a special hearing for the purpose of forming the evidence in chief at trial); or

b. If new or fresh evidence comes to light after the witness has given pre-recorded evidence.

249. However, although the circumstances may occur causing the complainant to be recalled it is relatively rare.

Q 29. What is the average time taken from charging an alleged offender to the resolution of their prosecution for matters involving offences in relation to child sexual abuse? Is delay a problem?

250. As stated above in the answer to question 27, the records for all sexual assault offences when the complainant was a child at the time of the offending were reviewed from 1 January 2017 to 31 April 2022. A total of 231 matters were finalised during this time. On average these matters took 15.1 months to finalise. (Please note that this is a record from the date of committal, not the date of charge.)

a. 106 pleaded guilty (on average 10.2 months)

b. 50 were found guilty (on average 22.1 months)

c. 21 were found not guilty (on average 21.2 months)

d. 55 were discharged (on average 15.7 months)

251. Matters take longer to prosecute now than they did in the earlier years of the relevant period. This is due to a variety of reasons. Prosecutions of sexual offences, particularly with the increase in historical cases, are legally and factually complex and take considerable court time and resources. It is not uncommon for there to be joint criminal trials. Statements from child complainants and other vulnerable witnesses are routinely audio visually recorded, and the evidence of these witnesses is routinely pre-recorded at a special hearing. Continuity of counsel is prioritised. There is a lack of experienced counsel, both crown and defence, to conduct these matters. The intermediary scheme has created additional steps in the prosecution process. Further, there is a more robust system of internal review. Whilst all of the special measures in place for vulnerable witnesses are of great assistance to complainants and the court process generally, ultimately it requires extra resources of the Office and the courts and inevitably contributes to delay.

252. Further, for a significant period of time in 2020 and 2022 (which falls in the period reviewed) the Supreme Court did not sit due to Covid-19.

253. There is a back log generally. Other matters are also must be prioritised. For example, accused persons who are in custody awaiting trial, other serious offences against the person where there is a vulnerable and traumatised complainant, or in the case of a death where the family members are distressed.

254. Delay is a problem. It affects all aspects of the criminal practice within the Office. I addressed this in some detail in my response to question 4 of NTP-DPP-001. The impact of delay are significant. I summarised the impacts of the delay and a large criminal backlog in my 2019/20 Annual Report as follows:

The effects of such a large backlog has a deleterious effect on both the overall quality of justice and on individuals who come in contact with the justice system, victims, witnesses and accused alike. They include:

- As cases become older witnesses' recollections are not as good and this can lead to a higher number of acquittals and discharges.

- Victims who have been highly traumatised are having to wait significantly longer for their cases to be finalised often having to relive the trauma years after the event.

- The discharge rate has increased significantly in recent years. In 2014/15 the discharge rate was 19.75%. The historic average has been approximately 20%. In the past two years it has been over 30%. The acquittal rate has also increased slightly. This is in part due to:

    - Witness fatigue; that is, complainants becoming tired of waiting for their trial and wanting to get on with their lives. As a result they indicate a desire to lo longer co-operate with the prosecution. The problem of witness fatigue was extensively documented by the Royal Commission into Institutional Responses to Child Sexual Abuse. I have noted the discharge rate for sexual assault matters has increased significantly with the increase in the backlog.

    - Witnesses become difficult to locate or no longer co-operate.

    - Witnesses become unreliable, in that due to the passage of time their memories fade.

- Persons in custody are having to wait longer for their trials and due to these longer waiting periods, accused persons who would not normally be granted bail are obtaining bail.

- Significant extra stress and pressure is being placed on my staff who are working long hours in an effort to meet the ever-increasing workloads. They are extremely dedicated and hard working. However, in some instances, it is affecting their general wellbeing.

- Other work (i.e. non trial work) in the criminal prosecution section has also increased. The sexual assault and family violence unit provided advice on 254 matters. In 2012-13 there were only 99 matters. These advice files are complex and time-consuming. The provision of early advice from the Office was one of the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The Office endeavours to have an advice completed within six weeks of referral. However, given the workloads in all areas of the Office and the sheer number of referrals, this time frame has not always been possible to meet, despite the considerable efforts of the staff involved. This obviously increases the anxiety for victims.

Q 30. How often can the continuity of prosecutor be maintained in matters involving offences in relation to child sexual abuse? Is continuity in these cases prioritised?

255. Generally continuity of the prosecutor is maintained in prosecutions of offences in relation to child sexual abuse. Continuity of counsel is prioritised. The benefits to the complainant and other witnesses is well understood and valued. In addition, it is more efficient to have one counsel maintain carriage of a matter from start to finish.

256. There are circumstances in which a matter is prepared by one counsel, and it is determined that it is too complex for that prosecutor, and then will be reallocated to a more senior counsel. In these circumstances efforts are made to ensure the initial counsel can act as junior counsel. Further, there are circumstances in which a matter needs to be reallocated for example due to Counsel with carriage of the matter being unavailable for an extended period of time or other competing priorities (for example one Crown Counsel may have carriage of a number of these matters at any one time).

Q 31. How have reforms relating to child sexual abuse impacted the prosecution of related offences (for example, evidentiary reforms or new or reworded offences) during the Relevant Period?

257. For a summary of reforms which have resulted in a higher portion of matters proceeding to prosecution, see paragraph 246 in my response to question 27 above. The reforms discussed in my response to question 27 have had a positive effect on the prosecution of child sexual abuse offences.

258. In particular the introduction of, and amendments to, the *Evidence Act 2001* and *Evidence (Children and Special Witnesses) Act* have had a positive impact on complainants and vulnerable witnesses. For example the introduction and increased allowance for audio-visual statements and pre-recordings and the intermediary scheme is generally of great assistance to complainants and vulnerable witnesses.

259. Whilst the reforms are positive, many of the reforms, in particular the provisions in the *Evidence (Children and Special Witnesses) Act 2001,* have increased the time it takes to prosecute matters and thus have contributed to delay.

260. Amendments to the *Sentencing Act 1997* have had an impact on sentencing for offences of child sexual abuse. In particular, the following amendments:

a. Section 11(3), court may impose single, general or mixed sentence, was inserted in October 2019. This requires a court who imposes a single sentence on an offender for more than one child sexual offence to identify the sentence that would have been imposed for each child sexual offence, had separate sentences been imposed.
b. Section 11A, matters to be taken or not taken into account in sentencing certain sexual offenders, was inserted in October 2016. This section sets out matters to be, or not to be, taken into account in sentencing certain sexual offenders (including that the court is not to take into account an offenders good character or lack of previous convictions if the court is satisfied that the offender's alleged good character or lack of previous convictions was of assistance to the offender in the commission of the sexual offence, s 11A(2)(b)). In 2019 subsection (3) was inserted, this amendment provides that in determining the appropriate sentence for an offender convicted of a child sexual offence, the court is to take into account the sentencing patterns and practices *at the time of* sentencing.

c. Section 81A, court may receive victim impact statement, was inserted in 2004. Victim impact statements for complainants of child sexual abuse are routinely furnished to the court following a plea of guilty or finding of guilt.

261. Further, the *Community Protection (Offender Reporting) Act 2005* has been enacted. This enables the court to impose reporting obligations on persons convicted of specified classes of offences, and to order that those

persons names be placed on the Community Protection Offender Register, which imposes further restrictions and obligations on offenders.

262. The following amendments have caused difficulties:

a. The removal of aggravated sexual assault from the *Criminal Code* in 2017 (formally s 127A). This has had a negative upon impact prosecutions under s 125A where the alleged conduct spanned the period where aggravated sexual assault was a separate crime and the period when this conduct was captured by the amended definition of sexual intercourse. In 2017 the definition of sexual intercourse was amended to include digital sexual intercourse. That the amended definition is not retrospective causes difficulties. I am of the view that the current definition of sexual intercourse could be retrospective because it would not make conduct unlawful that was not already unlawful. It would simply change the name of the crime charged. I have written to the Attorney-General about this issue. I am not aware of any active review of this provision.

b. The *Criminal Code Amendment (Sexual Assault) Bill 2017* broadened the definition of "sexual intercourse" and made other amendments to modernise the language of the Code. Section 122 was retitled "bestiality" (replacing "unnatural crimes") and removed the reliance on the definition of "sexual intercourse". However, the definition of bestiality in the Code was wider than the original common law definition. This created issues in prosecution, see *Elnami v Tasmania* [2020] TASSC 54. I understand this is currently being reviewed.

263. I had concerns that renaming sexual offences, in particular penetrative sexual abuse of a child or young person (s 124 of the Code) and persistent sexual abuse of a child or young person (s 125A of the Code) would reduce the number of pleas of guilty that are entered to this offence. I am unable to say whether this has had an impact on pleas to these offences.

Q 32. Do you consider there is need for further reforms (legislative or otherwise) to improve the prosecution of offences in relation to child sexual abuse? If yes, describe.

264. Yes.

265. I am of the view that the following legislative reforms would be beneficial:

a. re-drafting the *Evidence (Children and Special Witnesses) Act.* See my response to question 33.

b. Consideration be given to removing preliminary proceedings process from sexual assault prosecutions;

c. Amendment to s 361A. Argument before jury is sworn (*Criminal Code Act 1924*)

This section enables a judge to make a ruling about the matters listed in subsection (1)(a)-(e) before a jury is sworn. In prosecutions for sexual offences this section is most often used to determine the admissibility of tendency evidence. Generally the determination is made by reference to the contents of the Crown papers as if proved. The difficulty, or limitation, with this provision is that it is only enlivened after an accused person is called upon to plead to the indictment pursuant to s 351(1) of the Code, see s 361A(1). The trial is deemed to begin at this time (when the accused is called upon to plead, s 351(6)).

Section 361A(2) provides:

> (2) If –
>
> (a) an admission, determination or direction is made or given under subsection (1) ; and
>
> (b) a new trial of the indictment is had at the same or any future sittings of the court, whether before the same or a different judge –
>
> the admission, determination or direction has the same status for the purposes of the new trial as if it had been made or given, between the arraignment of the accused and the empanelment of the jury, during that new trial.

Section 361A(2) cannot be utilised until the accused has pleaded. One judge will not utilise s 361A(2) unless he is to be the trial judge because he does not believe it is proper under a provision of the *Criminal Code* to abort the trial for convenience. This causes considerable scheduling difficulties and delays because judges preside over criminal and civil cases, sit on the Court of Criminal Appeal and Full Court. Further all judges sit in Hobart, Burnie and on occasion Launceston. If a pre-trial ruling is required for a matter listed in Burnie, and there is insufficient time for the trial proper to immediately follow the ruling, it may be a number of months (perhaps over a year) before the judge who made the ruling is

sitting in Burnie again. It would be beneficial to amend s 361A to avoid this situation.

d. Consideration be given to inserting a new provision into the *Criminal Code* on the effect of failure to submit evidence. It would be useful to have a provision similar to s 13B of the *Family Violence Act 2004* inserted into the *Criminal Code.* Section 13B of the *Family Violence Act* provides:

> **13B. Effect of failure to submit evidence**
>
> (1) If –
>
> (a) a person is charged with a family violence offence (the ***first charge***) in a court of summary jurisdiction but is acquitted because the prosecution has informed the court that it will not be offering any evidence in support of the charge; and
>
> (b) the person is charged with another family violence offence (the ***second charge***), whether in a court of summary jurisdiction or on indictment –
>
> that acquittal does not prevent the admission, in a hearing on the second charge, of first charge evidence as evidence of the relationship between the person and another person, tendency evidence or coincidence evidence.
>
> (2) In this section –
>
> ***coincidence evidence*** has the same meaning as in the Evidence Act 2001 ;
>
> ***first charge evidence*** means evidence that could have been offered by the prosecution in a hearing on the first charge;
>
> ***tendency evidence*** has the same meaning as in the Evidence Act 2001 .

e. There should be some guidance or limitation on the circumstances in which the "*Murray* direction" can be given and/or a requirement to make further explanatory comments in combination with the direction in trials for sexual offences.

f. It is not uncommon for the evidence of a complainant in a sexual offence matter to be uncorroborated. In such circumstances it is common in this State for judges to give a warning pursuant to s 136 of the *Evidence Act 2001* which provides:

> **136. Warning relating to uncorroborated evidence**
>
> (1) At the trial of a person accused of a crime under chapter XIV , XIVA or XX , no rule of law or practice shall require a judge to give a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of a person against whom the crime is alleged to have been committed.
>
> (2) A judge shall not give a warning of the kind referred to in subsection (1) unless satisfied that the warning is justified in the circumstances.

In trials for sexual offences this warning coupled with a "*Murray* direction" (derived from *R v Murray* (1987) 11 NSWLR 12) that the evidence of that witness must be scrutinised with great care before convicting, can lead to the perception that the reliability of complainants should be called into question. In *Ewen v R* [2015] NSWCCA 117 at [140] Baten JA said: "A *"Murray* direction", based only on the absence of corroboration is, in my opinion, tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant."

Consideration could be given to including a provision similar to s 294AA of the *Criminal Procedure Act 1986* (NSW) or stipulating that judges in this State tell the jury:

- That it is the circumstances of the case generally, and not the complainant, that require the direction; and
- That it is not unusual in cases of sexual assault that the conduct is not witnessed.

At least one judge in this State will give a "*Murray* direction" even where there is other evidence, his reasoning being that the jury might reject the other evidence.

g. Introduction of statutory discounts for pleas of guilty (page 28-29)

Early pleas of guilty would assist to reduce the delay. I am of the view that statutory discounts of varying amounts depending on the time the plea is entered should be considered.

A significant number of pleas of guilty are entered after a matter is listed for trial. For example, from February 2017 to 27 June 2018 the Office kept records to identify late pleas of guilty that occurred during a concentrated trial period that was held in Hobart. The records were kept to assist the Sentencing Advisory Council with their research regarding Statutory Sentencing Reductions for Pleas of Guilty.

During the concentrated trial period 47 matters were listed for trial. 18 (38.3%) of those matters resolved by plea of guilty after being listed for trial. Prior to these matters being allocated a trial date the matters were listed for case management. On at least two occasions counsel were asked to identify issues that could be resolved by agreement and to indicate whether a matter was a definite trial prior to the matters being allocated a trial date.

The results were published in the *Statutory Sentencing Reductions for Pleas of Guilty: Final Report*.
A late plea of guilty also increases the trauma on complainants. Where there is a late plea the matter takes longer to finalise and complainants are prepared for trial, being briefed by counsel and having their memories refreshed from statements or video

interviews: *DPP v Harington* (2017) 27 Tas R 128 per Pearce J at [84].

h. Interlocutory appeals

The law should be changed to grant the Attorney-General, represented by the DPP, the right to appeal against interlocutory rulings in indictable criminal matters. This should be a general right which does not require leave. It would be appropriate to limit interlocutory appeals against rulings on the admissibility of evidence to cases where the exclusion of the evidence eliminated or substantially weakened the prosecution case. This would ensure that interlocutory appeals do not become common place.

It would not be advisable to give an accused a right to an interlocutory appeal as an accused has substantial rights at the end of a trial. Further, if this right were given it would be likely to be used liberally. In contrast, the Crown would use this provision rarely. If such a provision was overused it would fragment the criminal process and delay matters.

Further, as Tasmania does not have a permanent Court of Criminal Appeal, and has a relatively small pool of judges, there is limited ability for interlocutory appeals to be heard expediently.

i. The introduction of model trial directions. In particular, a direction about the effects of sexual abuse on a child (such as it is known that children often do not complain for many years and it is not uncommon for a complainant to maintain ties with the accused many years after sexual abuse).

266. Further, I am of the view that the audio-visual recording facilities in the Supreme and Magistrates Court should be modernised and consistent state wide.

267. In conclusion, I am of the view that the matters outlined above would assist in the prosecution of child sexual assault cases. However, it must be borne in mind that such prosecutions are always going to be difficult. They are traumatic for the complainant. There are often no witnesses and no physical injuries. Accused persons generally deny the alleged conduct. The combination of these factors makes it difficult for juries to be satisfied beyond reasonable doubt of the guilt of the accused. Further, given the nature of these types of offences complainants often do not complain until many years after the offence. Although this very understandable and often a direct result of the offending it adds to the difficulty and complexity of prosecutions.

Q 33. Should the accommodations in the *Evidence (Children and Special Witnesses) Act 2001* (Tas) for child witnesses be extended to victims of child sexual abuse who are now adults without the requirement for an order?

268. There are a number of accommodations in the *Evidence (Children and Special Witnesses) Act 2001* for child witnesses. This include:

a. Special hearings to pre-record the whole of an affected child's evidence, which then excuses the affected child from attending at the trial. Section 6 enables the application to be made, and s 6A enables a judge to make the order upon hearing the application. Therefore, an order is required prior to the special hearing being held.

b. A child victim is to give evidence via audio-visual link unless otherwise ordered, see s 7. As a result this is essentially the only "accommodation" that does not require an order from the judge.

c. A prior statement, such as an audio-visual interview, may be admitted into evidence. This requires certain pre-conditions to be met and an order from the judge, see s 5.

d. A child is entitled to have a support person near them. While this is a legislative entitlement, the support person needs to be approved by the judge, see s 4.

e. A child victim's evidence at trial is automatically recorded and can be used again if there is a re-trial. The admittance of the recording on a future trial is dependent on an order from a judge, see ss 7A and 7B.

269. The following accommodations currently exist for adult victims (as defined by the question):

a. If an adult victim is the subject of an intermediary order under s 7J that adult victim becomes a "prescribed witness." Therefore sections 4, 5 and 6B apply to both affected children and "prescribed witnesses".

b. A special hearing to pre-record evidence can be applied for under s 6 and ordered under s 6A in relation to an "affected person". An "affected person" is a child victim or a victim of child sexual abuse who has since become an adult. Technically, under s 6A a judge can make such orders as he or she sees fit upon the hearing of an application for a pre-recording. Thus the judge could make orders concerning the presence of support persons, giving evidence by audio-visual link at the special hearing.

c. An "affected persons" evidence is automatically audio visually recorded at trial and may be admitted on a future trial, see s 7A and 7B.

d. If any further orders are required to assist the witness, and they can satisfy the pre-conditions of s 8, an adult victim can be declared a special witness and orders can be made pursuant to this section.

270. The only "accommodation" that is provided to victims who are children without the need for an order is the ability to give evidence via the video link pursuant to s 6B. The "accommodations" contained in sections 6, 6A, 7A and 7B extend to adult victims of child sexual abuse by way of the definition of "affected persons". If an intermediary order is made pursuant to the definition of "prescribed witness" further accommodations are provided. Further, if the adult witness satisfies the pre-conditions of s 8 they are capable of being declared a "special witness".

271. In my view it is appropriate that orders are required for the majority of the accommodations that apply to child witnesses. However, it would be beneficial to have a presumption in favour of admitting prior statements (audio-visual statements) and pre-recording for specified witnesses. This could be supported by a non-exhaustive list of factors to determined when a pre-recording should be made and when a video statement can be played.

272. The provisions could be extended by replacing the requirements of being an "affected child" with being an "affected person" in ss 4, 5 and 6B. This would ensure that adult victims of child sexual abuse are afforded the same accommodations as children victims (subject to orders being made).

273. Often adult victims experience the same issues as children when it comes to being in the same room as the accused. Technology is advanced to a point where giving evidence via audio visual link does not detract from the juries ability to assess their evidence. Further, this type of technology is prevalent in the community and thus it would be difficult to argue it creates any prejudice to the accused. In relation to the admittance of prior statements, adults are often interviewed in the same way as children. Admitting pre-recorded statements as part of the evidence in chief assists in avoiding re-traumatisation. Further, it assists in cases where the complainant was interviewed close in time to the actual allegations occurring (and there has been some delay to the trial commencing). There would be some benefit to the jury seeing the complainant as they were at the time of making the complaint.

274. Though not specifically relevant to this question, I am of the view that the introduction of a non-exhaustive list of special measures / accommodations that can be made during a trial, such as a screen being erected between the complainant and accused when the complainant gives their evidence in court (should they wish to do so) should be inserted into the Act.

Q 34. Do you consider the current requirements for authorisation to be provided to prosecute certain offences in relation to child sexual abuse to be appropriate?

275. Yes, I am of the view that the current requirements for authorisation to be provided to prosecute certain offences in relation to child sexual abuse are appropriate. The DPP's authorisation is required for the following child sexual abuse offences:

a. Persistent sexual abuse of a child or young person, s 125A of the *Criminal Code*;

b. Failing to report the abuse of a child, s 105A of the *Criminal Code;*

276. Prosecutions for these offences are complex. It is important to ensure that sufficient evidence exists to substantiate the charges. Often the act of seeking authorisation has the effect of investigating officers turning their mind to what is required and obtaining that evidence. In addition, a prosecution for failing to report the abuse of a child requires public interest considerations. As this is not a common offence (and has not been charged to date) it is appropriate that there is some level of oversight.

277. Further the requirement for authorisation ensures consistency in charging.

278. In circumstances of urgency authorisation can be given quickly (indeed it has been given in under 24 hours in recent years), or alternative charges can be laid.

Q 35. Are there any particular challenges in prosecuting offences in relation to child sexual abuse that occurred in an Institutional Context (as opposed to a familial or other setting)? Are there particular offences that are difficult to substantiate (for example, related to grooming)? Are there efficiencies or improvements in trial processes that could be explored?

279. Interrogating business records and ensuring appropriate disclosure of those records is a challenge in prosecuting offences in relation to child sexual abuse that occurred in an Institutional Context (as opposed to a familial of other setting). These records are often voluminous and contain personal and irrelevant material.

280. In my view there are no offences that are unnecessarily difficult to substantiate.

281. The legislative amendments outlined in my response to question 27 would assist in the trial process, as would overall improvement of video link and audio-visual recordings in the Courts.

Q 36. Do you have any reflections on how defence counsel acquit their role in defending those accused of offences in relation to child sexual abuse?

282. There is a relatively small pool of defence counsel who conduct trials or hearings for offences in relation to child sexual abuse. There is a vast range of skills, knowledge and experience between those practitioners. I believe counsel act to the best of their abilities, within the constraints upon them. The criminal defence bar, like my office, is overworked.

283. I am of the view that to ensure efficiency and justice in the criminal prosecution process we need greater numbers of practitioners to practice in this area. I suspect the reasons few counsel practice in this area are varied, it may be that the remuneration is not good, that there are limited opportunities for development (few private firms have a criminal practice group), and this type of work is generally not liked.

Q 37. How does the Office of the Director of Public Prosecutions define a 'historical' matter involving offences in relation to child sexual abuse? Are these treated differently from those which are not considered to be historical matters?

284. The Office does not define a 'historical' matter involving offences in relation to child sexual abuse. Each matter is considered based on its circumstances and merits. The following factors are considered:

a. The credibility of the complaint

b. Whether there is evidence of recent complaint, and whether that evidence is admissible (see s 66 of the *Evidence Act 2001*)

c. Whether directions will be given under s 165 of the *Evidence Act 2001* and the impact of those directions

d. Whether there is a need to obtain expert evidence

e. What, if any, corroborative evidence exists

285. These matters may not depend on the age of the matter in years, but the nature of the evidence in the particular case.

Q38. What systems are used to monitor, track, report or evaluate matters relating to the prosecution of offences in relation to child sexual abuse? Are there any performance measures related to these matters? How robust is your data?

286. The following systems are used to monitor, track and evaluate matters relating to the prosecution of offences in relation to child sexual abuse:

a. The process of internal review for indictments, discontinuances, recommendations to Tasmania Police not to charge and unopposed bail applications means that level 1, 2 and 3 practitioners work is regularly reviewed by the Committee (Principal Crown Counsel, the Assistant Director (Summary Prosecutions), the Deputy Director and the Director). In this way the Committee oversee the quality of the work. See generally my response to question 2 in NTP-DPP-001, in particular pages 8-12.

b. We have a Principal Solicitor in charge of listing matters. There are regular meetings between the Principal Solicitor, Deputy Director and Principal Crown Counsel to discuss listing of matters and trial grids generally.

c. Matters are prosecuted in court, and in this way are supervised by the Court. Being a small jurisdiction it is not uncommon for me to receive 'informal' feedback on the performance of counsel by judges.

d. An annual audit is conducted to measure compliance with my Guidelines. Following each audit an email to all staff is sent to remind them of the discharge procedures and identifies any deficiencies in current practices. If there was a particular or systemic issue with a practitioner this would be raised with them directly, and their supervisor if necessary.

287. The matters I report on in the Annual Report also assist monitor, track, report and evaluate performance. In particular I report on the number of committals to the Supreme Court, the number of persons presented in the Supreme Court, the number of active matters, the crime (type) major groupings by persons convicted, disposal of criminal matters, persons tried (by result), bail applications, witness assistance services provided and child safety matters.

288. Our internal data collecting systems would benefit from modernisation. It would be useful to be able to automatically generate a number of reports such as the average time between committal and finalisation, and the time taken between key events.

Q 39. With reference to any relevant sentencing data, what are your reflections on sentencing trends in relation to child sexual abuse during the Relevant Period?

289. In my view sentences have increased significantly during the relevant period.

290. The following cases, demonstrate an increase in sentencing ranges for historical sexual abuse of children (some of which pre-date the above amendments) may be of interest to the Commission:

a. *Director of Public Prosecutions v Harington* [2017] TASCCA 4

b. *JWM v Tasmania* [2017] TASCCA 22

c. *CJP v Tasmania* [2015] TASCCA 9

d. *State of Tasmania v PGT,* Comments on Passing Sentence, Wood J, *22 December 2020*

e. *State of Tasmania v CJW,* Comments on Passing Sentence, Pearce J, *14 August 2019*

f. *State of Tasmania v PJS,* Comments on Passing Sentence, Geason J, *31 August 2021*

291. The relevant sentencing data is reported by the Sentencing Advisory Council on their website

< https://www.sentencingcouncil.tas.gov.au/statistics/supremecourt >.

The Sentencing Advisory Council Report "Sentencing for Serious Sex Offences against Children", November 2018, reported a clear upward trend in sentencing in Tasmania for serious child sex offences when comparing the period 1 January 2015 to 30 September 2018 with the period 1 January 2008 to 31 December 2014.

Q 40. With reference to any relevant appeals data, what are your reflections on appeal trends in relation to child sexual abuse during the Relevant Period? In what circumstances does the Director of Public Prosecutions seek leave to appear in matters involving child sexual abuse?

292. Over the relevant period there has been an increase in sentences for offences of child sexual abuse. In particular, since *JWM v Tasmania* [2017] TASCCA 22 sentences imposed for conduct which occurred many years prior to the sentence date apply the sentencing standards at the time of sentence (not at the time of the commission of the offence). See also the comments of Blow CJ in *CJP v Tasmania* [2015] TASCCA 9 at [2] where an appeal against sentence of six years for a crime under s 125A of the *Criminal Code* which was considered very high by reference to earlier sentences was rejected.

293. The Director can appeal to the Court of Criminal Appeal pursuant to s 401(2)(c) of the *Criminal Code.* Appeals are determined pursuant to s 402 of the *Criminal Code*. The authorities state that Crown appeals are to be rare. The principles to be applied in Crown appeals against sentence in this State are settled: *DPP v Swan* [2016] TASCCA 9 per Pearce J at [24] and following, *DPP v Harington* [2017] TASCCA 4 at [95]-[96]. The primary purpose is to identify principles for the governance and guidance of sentencing courts and to ensure public confidence in the administration of justice. In those circumstances appellate intervention is appropriate if the sentence is manifestly inadequate: *DPP (Vic) v Dalgliesh* [2017] HCA 41 per Kiefel CJ, Bell and Keane JJ at [63].

294. I can only appeal if I consider there to be an appealable error in the exercise of the judge's discretion, and where the Crown can negate any reason why the Court's residual discretion not to interfere should be exercised, *DPP v Harington* [2017] TASCCA 4 at [95].

295. It should be noted that Crown Appeals are not the only way that sentences are increased. Sentences can also be increased generally in response to submissions made to a single judge and providing information about the long term effects on sexual abuse, and making submissions when responding to defence appeals against sentence.

296. In recent years submissions have been made about the serious harm, both physical and physiological, caused by sexual abuse, see *DPP v Harington* (supra) at [23] and [75].

297. A complainant's view will be taken into consideration when determining whether or not to lodge an appeal. It is my experience that many complainants of child sexual abuse do not agitate for more severe sentences.

298. I have attached a list of child sexual abuse cases that have been appealed to the Court of Criminal Appeal during the relevant period at **Annexure C.** This list sets out the crimes convicted of, age of the complainant and outcome of the appeal.

Model Litigant Guidelines

Q 41. Describe the steps taken in the Relevant Period to implement or operationalise the Model Litigant Guidelines dated 14 May 2019 (TDOJ.0002.0008.0002) in relation to child sexual abuse in Institutional Contexts.

299. The Director is an independent statutory officer, as such the Model Litigant Guidelines do not apply to the Director of Public Prosecutions or my staff. Indeed the Model Litigant Guidelines state they only apply to civil proceedings.

300. The *Director of Public Prosecutions Act* allows me to employ persons to enable me to perform my functions under this Act, s 14. All prosecutors are bound by the prosecutor's duties which are set out pages 11 to 14 of my Guidelines, which are more proscriptive than the model litigant guidelines.

301. The duties in general are as follows:

> Prosecutors shall at all times:
>
> - maintain the honour and dignity of their profession
> - conduct themselves professionally, in accordance with the law
> - exercise the highest standards of integrity and care
> - keep themselves well informed and abreast of relevant legal developments
> - strive to be, and be seen to be, consistent, independent and impartial
> - protect an accused person's right to a fair trial and, in particular, ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial. Where, in rare circumstances, there is evidence that should not be disclosed to an accused, that is favourable to an accused, for lawful reasons such as public interest immunity (s130 of the Evidence Act 2001) the Director must be informed in order to determine whether the evidence will be disclosed, or whether the fact that material is being withheld from the accused and the reasons for that will be disclosed and, finally, the public interest in continuing with the prosecution in light of the undisclosed evidence (refer Disclosure).
> - serve and protect the public interest (refer Prosecution guidelines on the discretion to prosecute)
> - maintain professional confidentiality
>
> The use of prosecutorial discretion should be exercised independently and be free from interference, political or otherwise.
>
> Prosecutors shall perform their duties without fear, favour or prejudice. In particular, they shall:
>
> - carry out their functions impartially

- remain unaffected by individual or sectional interests and public or media pressures and have regard only to the public interest
- act with objectivity
- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the accused

At all times prosecutors' duties are to the court and they must not deceive or recklessly mislead the court.

302. The following extract from pages 47-48 of my Guidelines sets out the duties that apply to witnesses

Witnesses

Prosecutors will deal with all witnesses in a dignified, professional and proper manner.

At the earliest opportunity, consideration should be given as to whether a witness should be referred to the Witness Assistance Service (refer WAS guidelines).

In accordance with the principles governing the treatment of victims set out in the Tasmanian Charter of Rights for Victims of Crime, a victim who is to be a witness for the prosecution is to be informed about the trial process and his or her rights and responsibilities as a prosecution witness. They are also to be informed of the progress of the prosecution and if charges are likely to be discontinued or altered they are to be consulted in accordance with the indictments, nolles prosequi and discharge guidelines and, where applicable, the sexual crimes guidelines.

Children and special witnesses

When dealing with a witness under 18 years of age, a person with intellectual disabilities, a victim of an alleged sexual offence, family violence or other crime of violence, or a person who is at some special disadvantage, consideration must be given to whether the person is an "affected child" or a "special witness" within the meaning of the Evidence (Children and Special Witnesses) Act 2001. If these provisions are applicable, the witness should be advised of their options and consideration should be given, particularly with a child witness, to having their evidence pre-recorded.

The prosecutor with conduct of the case should make application notwithstanding any forensic advantage that is perceived in not making appropriate arrangements.

Regardless of whether any witness who may be declared a "special witness" will give evidence live in court, via closed circuit television or in a pre-recorded hearing, counsel should consider making an application to have the witness declared a special witness. The witness should be consulted in the decision; specifically a witness should be advised that they may be required to give evidence again in any retrial.

The Act provides that where a witness is declared a special witness in any prescribed proceedings the court must (where facilities are available) make an audio visual record of the evidence (s7A). In the event of a subsequent trial or retrial this recording may be admitted into evidence (s7B).

In situations where an audio visual recording of the evidence will be made, please liaise with court staff to ensure that the recording settings are modified so that only the image of a witness is recorded during the evidence and that any recording is at highest possible resolution.

Please note that the Criminal Justice Report released following the Royal Commission into Institutional Responses to Child Sexual Abuse identified recording a complainant's evidence in order to avoid the need for them to give evidence again if there is a subsequent trial as an important procedure in child sexual abuse prosecutions.

Cases involving an alleged sexual offence or cases where there are vulnerable witnesses should be expedited. In such cases it is our aim to have one prosecutor maintain carriage of the matter from the time of committal to finalisation, noting however that sometimes changes in the prosecution team may be unavoidable due to staffing and court time tables.

Special measures for children giving evidence in court

The Australasian Institute of Judicial Administration has developed a Bench Book for Children Giving Evidence in Australian Courts. The Bench Book outlines sexual abuse of children and their experience of the justice system, communicating with children, children's evidence and coping skills, suggested procedures for children giving evidence and a suggested script for use in special hearings with children or cognitively impaired witnesses. Prosecutors with proceedings involving children or cognitively impaired witnesses are strongly encouraged to review the relevant portions of the Bench Book in preparing the matter for trial. The Bench Book can be accessed here https://aija.org.au/wp-content/uploads/2017/07/Child-Witness-BB-Update2015.pdf

Witness Intermediary Scheme

If a witness is giving evidence in relation to a specified offence within the meaning of the Evidence (Children and Special Witnesses) Act 2001, consideration must be given to whether the Witness Intermediary Scheme ("the Scheme") applies ...

303. The following extract from pages X to X of the Guidelines sets out the duties in the trial process.

Duties in the trial process

Prosecutors are to present the case against an accused person fairly and honestly and to seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

Prosecutors must not press the prosecution's case for a conviction beyond a full and firm presentation of that case. Of course, the manner in which a prosecution is conducted will often depend on the nature and character of the case.

Prosecutors must not, by language or other conduct, seek to inflame or bias the court against the accused (see McCullough v R [1982] Tas R 43). However, prosecutors are not obliged to "pander to the idiosyncratic or hypercritical sensibilities of defence counsel". Prosecutors "are not required to reduce their rhetoric to dull and lifeless factual propositions. They are advocates, albeit their role is special in that they should not fight for a conviction at all costs". (see Lyons v R (1992) 1 Tas R 193 per Wright J at 199).

Prosecutors should only exercise the right to stand a juror aside, pursuant to s34 of the Juries Act 2003, if there is a reasonable cause to do so. This right should never be exercised in an attempt to select a jury that is not representative of the community as to age, sex, ethnic origin, religious belief, marital status, economic, cultural or social background, nor should a juror be stood aside merely because he or she has been on a jury that acquitted an accused person. Please note, in certain circumstances, prosecutors may be required to show cause as to why a juror has been stood aside (see s34(4) of the Juries Act 2003).

Prosecutors who have reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

- inform the defence if they intend to use the material
- make available to the defence a copy of the material if it is in documentary form
- inform the defence of the grounds for believing that such material was unlawfully or improperly obtained

Prosecutors must not confer with, or interview, an accused except in the presence of the accused's representative.

In cases where an accused is unrepresented, prosecutors should not communicate with the accused other than in the presence of a third party. Conversations should be noted. Prosecutors must not advise an unrepresented accused on legal issues or the general conduct of the defence. In the event that there is evidence the prosecutor intends to lead that is arguably inadmissible this should be raised with the trial judge prior to the evidence being called.

All materials and witness statements must be provided in the usual manner and the accused should acknowledge receipt in writing. Telephone communications should be kept to a minimum and recorded in writing immediately. The notes should be kept on the file. In the event of a trial, the witnesses should be advised that the accused is unrepresented and informed of the procedures that will be adopted in the court.

Prosecutors must not inform the court or the defence that the prosecution has evidence supporting an aspect of its case unless they believe on reasonable grounds that such evidence will be available from material already available to them. Prosecutors who have informed the court of matters referred to in the paragraph above, and who later learn that such evidence will not be available, must immediately inform the defence of that fact and must inform the court of it when the case is next before the court. Prosecutors have a duty to call all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, unless they form the view that the interests of justice would be prejudiced rather than served by calling a witness. The fact that a witness will give an account inconsistent with the prosecution case is not sufficient reason for not calling that witness. In those circumstances, a witness should only not be called where there is clear, objective material that all admissible accounts by that witness lack any credibility (see R v Ashton, Farmer & Randall [2003] TASSC 140 at [29]). Where a prosecutor decides not to call a witness in these circumstances, the reasons should be recorded in writing and placed on the file. Without limiting the circumstances where a witness will not be called, they may include where an issue is not in dispute and other witnesses have already given evidence regarding that issue, the failure to call a witness is consented to by counsel for the accused, or where a witness is unavailable. Other considerations may include the physical and mental health of a witness. Where possible when a decision has been made not to call a witness that witness should be made available to the defence.

Prosecutors must not coach a witness prior to them giving evidence, in that they should not direct them as to what they should say. However, it is perfectly proper to ask a witness what their evidence would be on a point. It is also proper to point out any inconsistencies or prior inconsistent statements and request an explanation but care should be taken not to suggest answers to a witness.

Prosecutors must fairly conduct the cross-examination of an accused as to credit. Material put to an accused must be considered on reasonable grounds to be accurate and its use justified in the circumstances of the trial.

Prosecutors have a duty to acquaint the judge and jury in ordinary language with those aspects of an expert's discipline and methods necessary to put the court in a position to make an evaluation of the opinion that the expert expresses, to

demonstrate the scientific reliability of the opinion expressed, and to strip forensic evidence of its mystery so far as is possible.

An accused person cannot be put on trial unless a Crown Law Officer forms the view that on the available relevant and admissible evidence there is a reasonable prospect of conviction. If at any stage during a trial a prosecutor forms the view that there may no longer be a reasonable prospect of conviction, e.g. due to loss of evidence or new evidence becoming available, he or she must consult with the Director, or in his absence the Deputy Director, as to whether the trial should continue.

304. The following extract from page 14 sets out the duties that apply during the sentencing process.

Duties in the sentencing process

Prosecutors shall present the facts in a fair and balanced way, identifying relevant aggravating and mitigating factors where appropriate.

Prosecutors should provide victims, as defined by the Sentencing Act 1997, with the opportunity to submit, provide and/or read a victim impact statement (VIS). All statements should comply with the VIS guidelines (refer Witness Assistance Service guidelines).

Prosecutors should refer the sentencing judge to any relevant legislation, authorities or sentencing principles applicable to the particular case, including (where necessary) the appropriateness of different types of sentences or the general range of sentences (if any) for a particular type of crime (s 80(2) of the Sentencing Act 1997). Care should be taken not to suggest a particular sentencing range within which the court could sentence an individual before it in the exercise of its discretion (see Barbaro & Zirilli v R [2014] HCA 2).

Where an accused person relies on expert evidence, e.g. psychiatric evidence, the prosecutor should scrutinise it with care and where appropriate challenge the report as to the adequacy of the material contained in it or its conclusions (see DPP v O'Neill [2015] VSCA 325 at [8]).

Witness support

Q 42. Please describe how the Witness Assistance Service works with victim-survivors of child sexual abuse, including information about budget and staffing. Is there adequate resourcing to meet demand?

305. The Tasmanian Witness Assistance Service (WAS) was established in 2008. Its role is to provide support for witnesses, victims and their families while they are engaged in criminal justice processes

306. Priority is largely given to the most vulnerable witnesses as follows:

a. Children and adults in sexual assault matters;

b. Matters involving family violence;

c. Matters involving witnesses with a disability;

d. Matters involving deaths;

e. Crimes of serious violence; and

f. Witnesses who fall within the definitions of affected child and affected person in the *Evidence (Children and Special Witnesses) Act 2001*, or witnesses who may have a communication need as defined in that Act. In addition, witnesses who may need additional assistance to participate in the trial process, for example witnesses from a non-English speaking background, immediately family members of a deceased, indigenous witnesses.

307. Sexual assault matters have been automatically allocated a WAS Officer since 2010. This applies irrespective of whether the matter is current, historical or institutional. The Guidelines provide, at page 43:

> WAS will have automatic involvement in all sexual assault matters. In these matters WAS will maintain regular communication with complainants to keep them informed of the status of the prosecution unless they have been asked not to be kept informed. The initial notification from police is forwarded to the WAS manager who will allocate the matter to a WAS officer. The WAS officer then has the responsibility of contacting the complainant and will act as the point of contact for any inquiries.

308. The Office receives notifications of sexual assault charges within four days of them being laid by police. These notifications are sent to the WAS Manager, who in turn allocates the matter to a WAS Officer to make contact with relevant witnesses at the earliest opportunity. Generally this contact occurs via telephone. The nature and frequency of the contact will often depend on the complainant and their needs. As a general rule the WAS officer will contact the witness to update them after court appearances and if the prosecutor wants to meet with them to discuss key decisions or meet with them to brief them prior to trial.

The nature and level of assistance provided by Witness Assistance Services

309. WAS services include:

a. assisting witnesses to understand the court and legal processes

b. provision on information on court dates and outcomes

c. support during charge selection, negotiation or discontinuance

d. arrangement of and support of witnesses in meetings with the Prosecutor, including pre-trial briefings

e. showing witnesses the court facilities before they are expected to give evidence

f. supporting clients in court or on video link, or while waiting to give evidence

g. post court de-briefing

h. informing prosecutors and/or court staff as to witnesses' special needs

i. referring witnesses to appropriate welfare, health, counselling or other services

j. providing victims with information about referral for compensation or damages

k. liaising with the court about the location and engagement of interpreters

l. identifying who can make victim impact statements (VIS) and assisting in their preparation

m. post-court debriefing and assisting to organise ongoing support

n. collection of medical documentation for special witness applications

Is there adequate resourcing to meet demand

310. The Witness Assistance Service (WAS) employs a total of seven, full time staff. This includes a Manager and six Witness Assistance Officers. Witness Assistance Officers are located throughout Tasmania as follows:

a. Hobart - three Witness Assistance Officers;

b. Launceston – two Witness Assistance Officers (including the Manager); and

c. Burnie – two Witness Assistance Officers.

311. All WAS staff are degree qualified in a field relevant to the service. Qualifications held by WAS staff include a mix of Legal, Psychology,

Criminology, Social Science and Social Work degrees. Staff also hold previous work experience in a diverse range of occupations including Child Safety Services, Police, Social Work and Law.

312. The number of personnel employed within WAS has increased steadily since its establishment in 2008. The service commenced with the employment of two staff in Hobart - the Manager of the Witness Assistance Service and one Witness Assistance Officer. Witness Assistance Service positions were subsequently created as follows:

Year	Position	Employment Type		Location	Progressive Total
2008	Manager	FT	Permanent	Hobart	2
	Witness Assistance Officer	FT	Permanent	Hobart	
2009	Witness Assistance Officer	FT	Permanent	Launceston	3
2010	Witness Assistance Officer	FT	Permanent	Burnie	4
2017	Witness Assistance Officer	PT	Contract	Hobart	6
	Witness Assistance Officer	PT	Contract	Launceston	
2019	Witness Assistance Officer	FT	Contract	Hobart	6
	Witness Assistance Officer	FT	Contract	Launceston	
2022	Witness Assistance Officer	FT	Contract	Burnie	7

313. Five of the seven WAS Officers are now employed on a permanent basis, whilst two are employed on contracts. The two contract positions are funded for two years after which the Director of Public Prosecutions will likely apply for permanent funding in the State Budget.

314. Contract positions make it challenging to retain qualified and suitable staff. I have previously applied to the Tasmanian State Government for funding to alter contract positions to permanent ones. As can be seen from the Annual Reports the demand for WAS services over time has increased substantially. The service has to be limited and matters prioritised as described in my response to question 42. The number in the unit has steadily increased. It is hoped the additional WAS officer employed in 2022 will help with the demand. Further, it would be of great benefit for each of these positions to remain permanent.

315. As priority is given to sexual abuse matters generally, and matters involving children, the service is currently sufficiently funded to meet this demand. However, it limits WAS ability to assist other vulnerable complainants and witnesses.

Q 42. How often can the continuity of worker be maintained in child sexual abuse matters? Is continuity in these cases prioritised?

316. The continuity of WAS staff on all child sexual abuse matters is prioritised. Generally continuity is maintained. A WAS officer will only be reallocated if the officer leaves the department, becomes ill or other such significant factors.

Q 43. What training do Officials in this team receive particularly in engaging with children?

317. WAS officers have a background in employment areas that specialise in engaging with children. Further WAS Staff have Bachelor Degrees and employment history in a range of areas including; Family Law, Psychology, Social Work, Child Safety Services and Investigative Policing - Family Violence Unit. In that way their knowledge and skills complement one another.

318. The WAS team participate in ongoing annual training to improve their professional workplace knowledge base. This includes attending the Offices Continuing Legal Education (CLE) two to three times a year and WAS specific training. This in turn informs their interactions with sexual assault complainants. In the last year WAS specific training has included briefings on specialist areas such as the Community Protection Offender Register (the register for convicted sex offenders), the Community Forensic Mental Health Service and sessions on Preventative Self Care. Each of these areas are directly relevant to sexual assault matters and their complainants.

319. Witness Assistance Staff regularly participate in further Professional Development courses in order to improve their interactions with complainants, particularly those in sexual assault matters.

320. In 2020 the WAS Team completed a course through Griffith University *Communicating with Vulnerable People in the Legal Setting*. This course focused on improved support, understanding and communication with vulnerable people, including those who are victims of sexual assault. A large section of the course focused on engaging with children.

321. In 2021 the WAS team completed a two day course in *Easy English*. Easy English is a writing style that helps people who find it hard to read and understand English – such as children.

322. In 2022, the WAS team are completing a Nationally Accredited Family Violence course that includes interpersonal skills training, developing rapport, client contact, sensitivity to a client's needs and the accurate and relevant exchange of information. All of this is directly relevant to children within the Criminal Justice System.

323. WAS Officers also periodically enrol in courses that they have a vocational interest in. For example, in May 2022 a Hobart based WAS Officer completed a workshop with SAMSN - The Survivors and Mates Support Network (an organisation for male survivors of child sexual abuse).

Q 45. What information and guidance is provided to victim-survivors or other witnesses about what they can expect in a criminal justice process?

324. Upon receipt of the sexual assault notification the Office sends a letter out to complainants outlining the charges that have been laid, along with a WAS brochure and contact phone numbers. The WAS Manager allocates the matter to a WAS Officer for action. The WAS Officer makes contact with the complainant, or the complainants parents/guardian, in the case of a young child. The WAS officer outlines the process to the complainant, and maintains continuous contact updating the complainant of the matter until its conclusion.

325. WAS facilitates meetings with the prosecutor, of which they may be a number of meetings. They outline the procedure, the evidence and what they should expect in court.

326. Children are familiarised with court proceedings in various ways including through discussion, pictures, demonstration of items such as court robes and court tours of the court and remote witness facilities. When children attend court, WAS will also arrange the best method for the child witness to arrive and depart the premises. This is not only a safety issue but aimed at preventing them from seeing the accused or any other parties involved in the trial.

327. A WAS officer is normally the court nominated support person in a video link room with a child witness whilst they give evidence.

328. WAS are not counsellors, however, they liaise with and refer complainants to formal counselling support services where appropriate (and consented to). It is often beneficial for a child complainant to be receiving counselling throughout the period they are waiting to go to court, when giving evidence and beyond.

Q 46. What referrals or other supports does the Witness Assistance Service facilitate?

329. The WAS works with a wide range of services and agencies. These include but are not limited to the Police, Child Safety Services, Victims Support Services, Counsellors, Advocates, Disability Support Workers, Disability Providers, Legal Aid, the Magistrates Court, the Supreme Court, Safe at Home, The Intermediary Pilot Scheme and the Tasmania Prison Service.

330. WAS works particularly closely with the Victims Support Service (VSS) which is another organisation within the Tasmanian Justice Department. VSS provides a range of services including assistance with the Eligible Person Register, Victims of Crime Service (VOC), Court Support Liaison Service (CSLS) and Criminal Injuries Compensation Claims. WAS frequently refer complainants in sexual assault matters to VOC for counselling and compensation claims assistance.

331. WAS refers a complainant back to police when they wish to report new allegations, breaches of bail or provide any other investigative type material.

332. WAS liaises with and refers complainants to formal counselling support services where appropriate (and consented to).

Q 47. What are your early impressions or reflections of the pilot Witness Intermediary Scheme?

333. The Intermediary Scheme is beneficial to the court process, however there are some issues.

334. Every Intermediary Report so far has recommended that an Intermediary is required during the court process. At times this would appear to be contradictory to the witnesses own viewpoint or their communication capability.

335. Further, all Intermediary reports have recommended that in every indictable court matter with a special witness that the Intermediary is required in the remote witness room with the complainant. Intermediaries should be impartial and they are there to assist prosecution and defence to frame their questions. This is best achieved from being in the Court rather than the remote witness room.

Q 48. Describe any information routinely provided to child or adult victim-survivors of child sexual abuse in Institutional Contexts in relation to judicial proceedings or sentencing during the Relevant Period.

336. The following information is given:

a. A letter outlining the process

b. Contacted by WAS

c. Meeting with the prosecutor who outlines the process of giving evidence

d. Referral to the intermediary Pilot Scheme as required.

e. Court Tours.

f. Collation of specialist documentation for Special Witness Applications.

g. Safe and discreet entrance to the court building.

h. Safe and discreet waiting areas.

i. Set up of Audio Visual Link environs.

j. Referral to counsellors if appropriate.

337. After a complainant has given evidence, they are provided information on Victim Impact Statements and Sentencing procedures. WAS can assist a complainant in writing a Victim Impact Statement and facilitate the delivery of these (for example if the complainant wishes to read their impact statement in court). WAS will also provide information in the sentencing process and prepare a complainant for such. This is achieved through explanation, in person, phone calls, emails and through sentencing documents such as those written by the Sentencing Advisory Council. WAS will provide support and information throughout the Sentencing process.

338. In addition to the information that is routinely provided by WAS, prosecutors will advise complainant on areas that they will likely be cross examined on, and prior to sentencing will be told what the likely sentencing range is.

Complaints handling and auditing

Q 49. What is your sense of the satisfaction of victim-survivors of child sexual abuse with the Office of Director of Public Prosecutions?

339. In my view most complainants are satisfied with the Office. We receive very few complaints. When complainants become frustrated it is often with the justice system generally (our Office bears the brunt of this frustration), as opposed to a complaint about the Office itself. In circumstances where charges are discontinued or substantially downgraded some complainants are distressed and disappointed, but generally understand the reasons for decision, and others are satisfied with this decision.

Q 50. Describe any rights of review available and the process by which a review occurs in relation to the Office of the Director of Public Prosecutions. What if a person is dissatisfied with the outcome of a review (or a final decision of the Director)? In what circumstances can a Director reopen or reconsider a decision including one made by a previous Director, (for example, if new or additional information comes to light)? Explain why these policy settings are in place and outline what, if any, changes you consider would be desirable

Rights of review

340. Every decision to prosecute or to discharge a matter is internally reviewed. The prosecutor with carriage of the matter must write a detailed memorandum to the Criminal Committee (comprising of the Deputy Director, Assistant Director and four Principal Crown Counsel) with a recommendation. The DPP Prosecution Policy and Guidelines ("the guidelines") at pp 15-16 state:

> The memorandum needs to set out the facts essential to the charges to be considered which can or cannot be established to the requisite degree, strengths or difficulties with the evidence including with witnesses, possible legal arguments and the author's thoughts on their likely resolution. Where it is recommended that a matter should not proceed or that it should be substantially downgraded due to an assessment of the credit of a complainant or a witness, the complainant or witness should be interviewed to assess his or her credit. Assessments of credit should be clearly stated in objective terms. It should also be remembered that what is to be assessed is not the credit of a person generally but the credibility of the allegation made which is the subject of the charge.
>
> In respect of important witnesses whose credibility is likely to be in issue, any prior or pending charges of those witnesses will need to be obtained and the impact of those prior convictions discussed in the memorandum.
>
> If recommending an indictment, the best memoranda serve as an outline of the case and even a reliable aid to an opening address. Memoranda recommending a discharge (absolute or to summary charges) are likely to be read by the investigators, and also need to convey sufficient information for prosecutors, WAS officers and/or police to explain the reasons for discharge or reduction to properly interested parties. Needlessly offensive characterisations of the investigation or witnesses should be avoided, although frankness and identification of deficiencies are required.

341. In respect of the Committee, the following rules apply:

> If an indictment of practically the same or similar charges for which the accused has been charged and/or committed is sought, the agreement of only one member of the Committee is required. In the case of any member of the Committee making the recommendation, the agreement of another member is required.

> If a discharge (as defined above) is recommended, the agreement of two Committee members is required unless the recommendation is that of a Committee member, in which case the agreement of another Committee member is required.
>
> If the recommendation to the Committee is to prosecute on the same or similar charges but one member of the Committee recommends a discharge or a substantial downgrading of the charges then two other Committee members must also agree with such a discharge or downgrading of the charges.
>
> Where the Director has personally authorised a prosecution only the Director has authority to discontinue the prosecution.
>
> Only the Director has the authority to authorise the prosecution or the discontinuance of a prosecution of a police officer.
>
> Where the Committee cannot agree in the above terms, the matter is to be forwarded to the Director.
>
> The same procedure will apply if an indictment has been filed but the prosecutor with conduct of the case believes proceedings should be discontinued and a nolle prosequi entered because there has been some change in circumstances since the indictment was filed which render the prosecution no longer viable.
>
> (DPP Guidelines, pp 16-17)

342. Thus, where a decision is made to discharge or substantially downgrade the charges three counsel in the Office have to agree to the discharge. If there is a disagreement between counsel, the matter will automatically be sent to the Director to review. In this way, every case is reviewed. Often the Committee will return the police file for further investigation before a decision is made.

343. The guidelines also state that when it has been decided that a matter is to be discharged:

> A complainant should be advised that they may apply to have the decision reviewed by the Director (unless the decision was approved by the Director). Requests for review must be made within seven days of notification of the decision. Ordinarily, a letter should be sent confirming that the charges will not proceed and that the complainant has the right to request the Director to review the decision.
>
> (DPP Guidelines, pp 17-18)

344. In regard to advice files the guidelines state, at p 26:

> In circumstances where a decision is made to recommend no charges, the designated senior prosecutor (unless he or she is a Principal Crown Counsel) will have the advice reviewed by a member of the Committee before it is sent to the investigating officer.

345. A complainant can request the Director to review the decision: p 26 of the DPP Guidelines.

What if a person is dissatisfied with the outcome of a review (or final decision of the Director)?

346. The Director will always listen to a complainant's views and take them into account. However, generally, once a decision is made it will not be reconsidered. It is unfortunate that sometimes a person is dissatisfied with a decision. However, in my experience, generally most complainants accept the decision and the reasoning process behind it.

In what circumstances can a Director reopen or reconsider a decision including one made by a previous Director?

347. The guidelines state at p 18:

> Once a final decision has been made to discharge an accused, the decision will not be changed unless it is plainly wrong, i.e. it was based on incorrect or irrelevant material, or was plainly unreasonable, or unless new evidence becomes available.

348. In addition, I would add that I would also reconsider a previous decision if there had been a change of law in the area that is likely to have a significant impact on the case.

349. In particular, in sexual assault cases where there is not enough evidence when first considered, however, subsequently, further evidence is brought forward. For example, there may be further complainants and, therefore, the decision is reviewed. Also, due to substantial changes in the law, evidence that may have been previously inadmissible may become admissible and thus will effect the decision.

Explain why these policy settings are in place and outline what, if any, changes you consider would be desirable.

350. The review system we have in place is to ensure that the decisions are made by the most senior, experienced counsel in the Office and the requirement that there must be agreement ensures the correct decision is made.

351. The right of review to the Director provides the complainant a final opportunity to be heard and the knowledge that the most senior person in the Office has considered the matter. The policy allows not only for victim input but also for police input.

352. However, once a decision has been made the Office cannot continually review matters where there has been no change in circumstances. There has to be some finality to a matter unless one of the exceptions outlined above occurs.

Q 51. Do you consider that decisions of the Director of Public Prosecutions should be reviewable? If yes, how should this be done? If not, why not?

353. I do not think the decisions of the Director of Public Prosecutions should be reviewable. The purpose of having a Director of Public Prosecutions is to have a skilled, experienced decision-maker, independent of all other interests.

354. As Kirby J (as he then was) said in *Price v Ferris* (1994) 34 NSWLR 704 at 707-8, the object of having a Director of Public Prosecutions:

> ... to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretions. Its purpose is illustrated in the present case. The Court was informed that, in the prosecution of a police officer, it is now normal practice in this State for the prosecution to be "taken over" from a private prosecutor or informant and conducted by the DPP. The purpose of so acting is to ensure that there is manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour. ... It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence.

355. In 2004 the former Tasmanian and Commonwealth Director of Public Prosecutions Mr Damian Bugg AM QC said:

> The decisions to prosecute, to not prosecute, to discontinue a prosecution, to appeal a sentence, to indemnify a witness or give a witness an undertaking or assurance and, in other jurisdictions decisions pursuant to specific statutory provisions ... all involve the exercise of a discretion, which is commonly referred to as the prosecutorial discretion ...
>
> In exercising their discretion prosecutors should be independent of influence, pressure or persuasion from those who have an interest in the outcome of that decision. It is not just governments but police services, any other investigative agency, the court, and victims or the families of victims from whom the prosecutor should be not only independent but seen to be independent.

356. Extensive internal review already exists within the Office. Decisions to prosecute or discharge are made by the most senior prosecutors who have many years of prosecuting experience. A discharge cannot occur unless three prosecutors (including two senior counsel) have agreed to the discharge. Complainants have the right of review by the Director.

357. If there was to be a review, which decisions would be reviewed externally? The Office makes numerous decisions during the prosecution process, such as the number and type of charges, what evidence to call and what facts to state in a plea. Whether to have more than one complainant on the indictment. Whether to indict co-accused together or separately. All these decisions have a significant impact on the final outcome. Which of these decisions are to be reviewed?

358. There is a difficulty as to who would actually conduct the prosecution if the Director of Public Prosecutions was of the view that no prosecution should take place, i.e. who would sign the indictment and who would prosecute the matter.

359. A further problem is who would conduct the review?

360. *Judicial review*

361. The courts have made it abundantly clear that it is not appropriate for them to decide who is prosecuted. In *Maxwell v R* (1996) 184 CLR 501, Gaudron and Gummow JJ said at 534:

> It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.

362. In *Magaming v R* (2013) 252 CLR 381, French CJ, Hayne, Crennan, Kiefel and Bell JJ said at [20]:

> It is well established that it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences.

363. Whilst Gageler J raises the matter as a constitutional issue and says at [67]-[68]:

> Chapter III of the Constitution therefore reflects and protects a relationship between the individual and the state which treats the deprivation of the individual's life or liberty, consequent on a determination of criminal guilt, as capable of occurring only as a result of adjudication by a court. That adjudication quells a controversy, to which the individual and the state are parties, as to the legal consequences of the operation of the law on the past conduct of the individual. The adjudication quells that controversy by the application of the relevant law and, where appropriate, of judicial discretion to facts ascertained in accordance with the degree of fairness and transparency that is required by adherence to judicial process.
>
> That understanding of the nature and incidents of the determination and punishment of criminal guilt underlies the reasons which have generally been given in Australia for treating executive decisions made in the prosecutorial process as ordinarily insusceptible of judicial review, an insusceptibility recently described as having "a constitutional dimension". Thus, "[i]t has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced". The same general perception of undesirability of close curial involvement in prosecutorial processes has applied to a question about whether a particular charge is to be laid, as well as to a question about whether a particular charge, having been laid, is to be proceeded with. The main reason generally given is that the court's review of such an exercise of prosecutorial discretion would compromise the impartiality of the judicial process by involving a court in an inquiry into a forensic choice made by a participant in a controversy actually or

> potentially before the court. A complementary reason often given is that a court's control over its own hearing and determination of whatever charge might in fact be laid and proceeded with in the exercise of prosecutorial discretion means that "the court has other powers to ensure that a person charged with a crime is fairly dealt with".

364. The problem is magnified in a small jurisdiction like Tasmania where there are only seven Supreme Court judges. If there was to be an appeal from a judicial review of a decision not to prosecute this would significantly threaten the independence of the court for any criminal proceedings. Further, if complainants were to be given the right of review it would be difficult to justify not giving accused persons the same right, causing delay and further fragmentation of the criminal process.

External oversight body

365. This issue was considered by the Royal Commission into Institutional Responses to Child Sexual Abuse and it was acknowledged that a review process such as that set up in the United Kingdom by the Crown Prosecution Service was inappropriate in an Australian setting due to the fact that decision-making by Australian Directors of Public Prosecution occurred at a higher level of seniority that in the Crown Prosecution Service.

366. Further, in Tasmania all decisions to discharge are automatically reviewed by a committee of senior prosecutors before a final decision is made, with complainants allowed a further merit-based review by the Director before an accused is discharged. Also, if the committee disagree, the matter is automatically reviewed by the Director. Thus, the prosecutorial discretion is being exercised at a very high level.

367. As previously stated, another issue will be what decisions are to be reviewed? What will occur if the charges are to be reduced or some aggravating factor cannot be proved or there are multiple complainants and the decision only effects one of them, or we decide to try the accused separately in regards to the conduct alleged by each complainant? All of this can significantly affect the outcome of the case. How are such external reviews to be conducted quickly?

368. The comments made by the High Court in *Maxwell v R* are equally apt to an external oversight body. In a small state like Tasmania such an officer would become a de facto DPP, with people who are unhappy with decisions saying they will ask for a review by the external oversight body. Then what occurs when the review officer and the Director of Public Prosecutions do not agree? It will add to the controversy and undermine the independence of the Director of Public Prosecutions and public confidence in the Office.

369. Further, in the case of a disagreement, who will sign the indictment and prosecute the matter?

370. Who would make up this external oversight body? In Tasmania all criminal prosecutors are employed by the Director of Public Prosecutions. There are no senior counsel at the bar or in the private profession who have any extensive prosecuting experience. The defence bar is small, they would

generally have a conflict and, in any event, (apart from one exception) they do not have the experience of the senior counsel in the Office of the DPP. There is no person at the private bar with the seniority and experience of the criminal law as the Director of Public Prosecutions.

371. Section 12(2) of the *Director of Public Prosecutions Act 1973* provides:

> The Director may not take over, continue or discontinue proceedings that have been instituted or undertaken by the Attorney-General or the Solicitor-General except with the approval of the Attorney-General or the Solicitor-General, as the case requires.

372. Therefore, in the Act, if the Director of Public Prosecutions makes a decision with which the complainant disagrees and the Attorney-General or the Solicitor-General form the view that the Director of Public Prosecutions is plainly wrong, then they can prosecute the matter. I note this has occurred (without any actual success) in some mainland States.

373. I also note the Tasmanian Government's submission to the Royal Commission on the issue which said at p 9:

> The Tasmanian Government does not consider that formal oversight and accountability processes such as those introduced in the United Kingdom (Victims Right to Review scheme and Crown Prosecution Service Inspectorate) are appropriate for Tasmania. The establishment of such oversight bodies involves significant financial impact and identifying specific expertise.
>
> The Tasmanian Government notes that while the UK's oversight mechanisms were not established in response to particular controversies, one of the significant drivers for the introduction of oversight bodies was an identified need for robust internal and external review processes to guarantee the quality of prosecutorial decisions of the Crown Prosecution Service. This was in light of the large and widespread jurisdiction that resulted in significant prosecutorial decisions being delegated to relatively junior prosecutors in regional offices.
>
> In Tasmania prosecutorial decisions are made by the Director of Public Prosecutions or a Review Committee consisting of three senior prosecutors (Deputy Director and Principal Crown Counsel), thereby providing internal oversight of prosecutorial decisions by experienced prosecutors. As a result of the difference in scale, Tasmania does not have the same identified need for extensive and independent review processes as the United Kingdom.
>
> The Tasmanian Government also considers review of the decisions of the Director of Public Prosecutions by a member of the bar to be potentially problematic. In Tasmania, the 'criminal bar' is not large. Barristers who possess the appropriate expertise to undertake such a role are limited. There is a risk that the credibility and confidence in the Office of the Director of Public Prosecutions may be undermined because of the size of the jurisdiction and the intimacy of the legal fraternity.
>
> The Tasmanian Government does not consider judicial review of the Director of Public Prosecution's discretion an appropriate oversight mechanism. In Tasmania there are only six judges which would limit the capacity for the judiciary to undertake such a role because of the resulting limitation to the judges who could ultimately undertake the trial of the matter. This may result in additional court delays.

> In addition, the Tasmania Government considers that there are good reasons why most prosecutorial decisions are not susceptible to judicial review.

374. In a State like Tasmania, the Office of the DPP has very limited resources. Such an oversight body would take resources that would be better used for the actual prosecution of offences. It would also take up the resources of the offices dealing with such an oversight body.

375. The considerable reforms that have been made by this Office, such as early advice to police, early engagement with complainants, interval review and a complainant's right to request a review by the Director of any decisions means that it is unnecessary to have an external oversight body.

376. No other jurisdiction in Australia have a review body.

377. The Royal Commission considered this issue extensively. They conducted a round table discussion involving all the Directors of Public Prosecutions in Australia, the private profession and victims groups. The Commission also heard evidence from the Directors and took submissions on the issue. They decided no oversight body was necessary, particularly if the Directors implemented guidelines, audited compliance with the guidelines and published the results of such audits, have internal reviews and a complaints system, all of which this Office does. It should also be noted that all these safeguards have been implemented voluntarily by this Office. All counsel in the Office take their responsibilities towards complainants very seriously.

378. Finally, as the Royal Commission noted:

> Prosecutors do not take a decision to discontinue proceedings lightly. A study of prosecutorial decisions in adult sexual offence proceedings found that prosecutors tended to be conservative about decisions to discontinue, recognising increased pressure from both the public and victims to proceed to trial, even though prosecutors may not always feel that to proceed is in the victim's interest.
>
> (see Royal Commission Criminal Justice Report Parts III-VI at p 350)

379. As can be seen from the procedures that have been put in place this Office takes all decisions, but particularly those involving sexual assault cases, very seriously. It would be detrimental to have an external review mechanism.

Q 52. How many complaints or requests for reviews of decision relating to child sexual abuse have occurred within the Relevant Period?

380. Prior to receiving this request for statement I have not kept statistics for the number of complaints or requests for reviews of decision relating to child sexual abuse. I simply had not thought to keep that statistic. However, I acknowledge to keep a separate record of the requests and the review would be advantageous for a number of reasons. Firstly to have an accurate number of how many requests have been made when the complainant gives reasons for asking for a review there is a record of the review. Finally to show consistency in decision making.

381. I have now created a file to record these statistics (in the past requests for review have been saved to the criminal file, and therefore we can only search by name).

382. However, in my estimation (and following consultation with my Executive Assistant) over the past few years I have received between 5 to 10 requests for review each year. Of those matters half or less would relate to decisions relating child sexual abuse matters. I estimate that there has been an increase during the relevant period, but that increase is proportionate to the increase in the number of requests for advice and criminal committals.

Q 53. What information, files or records (for example, reasons for decision) is a victim-survivor entitled to receive and in what format?

383. In line with the Royal Commission's recommendations complainants are able to obtain written reasons for key decisions. When giving reasons, as acknowledged by the Royal Commission, it has to be done in a manner not to contaminate evidence if a prosecution were to proceed at any stage, the privacy of other complainants and witnesses must also be considered.

384. Written reasons are regularly provided when requested. However, most complainants do not request written reasons, presumably because the prosecutor with conduct of the matter will give outline the reasons the decision has been made and seek the complainants views at that stage (these meetings are attended by WAS). Generally this conduct is done in person or via telephone.

385. When written reasons are prepared, they are prepared specifically for that purpose. In addition to communicating the key reasons for the decision these reasons explain what is meant by reasonable prospect of conviction and other important aspects of the criminal trial process. These matters are not formally explained in crown counsels memorandum when recommending whether to indict, discharge or downgrade. It is important that, when preparing a recommendation as to how a matter is to proceed prosecutors can be candid. Further, the memoranda may contain sensitive issues relating to the privacy of other complainants or witnesses. It may also include a discussion of issues regarding the manner in which the matter was investigated. These memoranda are prepared for a specific purpose, and are not intended to be reviewed by the complainant.

Q 54. Describe any audits (internal or external) undertaken to assess the quality and appropriateness of prosecutions of child sexual abuse matters? Are the results of these audits published?

386. Since 2017/2018 the Office has conducted annual internal audits to ensure compliance with our discharge guidelines. Each year the audit looks at 30% of discharged cases[1] and benchmarks them against compliance with the Guidelines concerning discharge. In particular, the following factors are considered:

a. Correct authorisation for the discharge.

b. Notification of the complainant.

c. Notification of the Assistant Commissioner of Police.

d. The timely discharge of the accused.

e. In matters where only the Director could authorise a discharge, that such discharges were, in fact, authorised by the Director.

387. Audits have revealed a high compliance with all criteria. The results are published in my Annual Reports. I do not believe any other Australian Office of the Director of Public Prosecutions audits a portion of their discharge files and reports on the outcome of that audit.

388. As reported in my 2015-16 Annual Report that year an audit was conducted of 160 child sexual abuse matters between 2010 and 2014 showing a conviction rate of 71% which compared with the conviction rate of completed child sexual abuse matters of 65.9% in 2013 and 75.75% in 2014. The discharge rate was less than the discharge rate for other crimes. In particular, there was a low discharge of matters due to the complainant being unwilling to proceed. In my view, this can be attributed to the policy of contact being established with complainants by a WAS officer shortly after charges have been laid. It is also the policy of the Office that these matters are conducted by a senior practitioner. Further, the early advice offered by the Office to Tasmania Police contributed to such a positive outcome.

389. The quality and appropriateness of prosecutions of child sexual abuse matters generally is ensured by the continuous level of oversight and internal review within the Office. All decisions to indict or discontinue or advice to Tasmania Police not to charge are reviewed by Level 4 practitioners or above. This ensures consistency in decision making, and that that appropriate charging decisions are made. My response to question 27, above, addresses this further.

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[1] Which include matters that the Supreme Court has remitted for trial in the Magistrates Court pursuant to s 308 of the *Criminal Code* and in cases where alternative summary charges have proceeded

Specific Prosecutions

Q 55. Describe the Office of the Director of Public Prosecutions' management of the matter of John [redacted], including all relevant decisions relating to that matter and how these were communicated to the complainants involved. In your response you should specifically address:

(a) any communications with Kerri Collins;

(b) identify any advice in relation to the prospects of the prosecution of John [redacted]; and

(c) state whether the decision not to proceed with the prosecution of John [redacted] would be made today. Provide reasons for your response.

Communications with Kerri Collins (nee Munro)

390. The following communications were had with Kerri Collins (nee Munro):

a. [redacted] February 2004 – Principal Crown Counsel [redacted] spoke to Ms Munro via telephone. The evidence of this is as follows:

i. There is a handwritten file note dated [redacted] February 2004 in [redacted] handwriting regarding three telephone attendances he had with [redacted] Mr Munro and Ms Munro. In that file note it appears there was an invitation to call the Director ("TJE") after 1 pm.

ii. Ms Munro in her letter to Tim Ellis SC dated [redacted] February 2004 refers to a conversation she had with [redacted] She wrote "[redacted] *stated to me on the phone on Friday the 26th February ...*"

b. The Director, Tim Ellis SC, spoke to Ms Collins. In his letter to the Attorney-General dated [redacted] March 2002 he said: "*I spoke at length by telephone to Mss Munro. However, she was not inclined to listen. She subsequently wrote to me a letter, copy of which I enclose. All aspects of that letter were covered in our telephone conversation or my letter to her and I had though to date that there was very little point in replying further to it.*"

c. [redacted] February 2004 - The Director, Tim Ellis SC, wrote to Ms Collins (and the other complainants). I infer Ms Collins received that letter as she specifically refers to it in her letter to Mr Ellis SC of [redacted] February 2004. Further Judy Jackson MHA, the former Attorney-General, in her letter to Tim Ellis SC dated [redacted] March 2004 states "Mss Munroe [sic] has provided me with a copy of the letter you sent her on the [redacted] February 2004 ..."

d. [redacted] January 2004 - File note prepared by [redacted] records that he met with Ms Munro and others to discuss the date the trial would proceed.

e. [redacted] January 2003 - [redacted] wrote to Ms Munro and the other complainants to explain the reasons for delay.

f. [redacted] June 2003 - [redacted] wrote to Ms Munro and the other complainants to explain the reasons for delay.

g. [redacted] June 2006 - File note prepared by [redacted] dated records that he met with Ms Munro and others to explain the decision of *Lockley v Farmer.*

h. [redacted] November 2002 - File note prepared by [redacted] records that he met with Kerri Munro and [redacted] regarding her proof. It states "3 matters".

i. [redacted] November 2002 - File note prepared by [redacted] records that he met with Ms Munro, "proofed" them.

j. [redacted] November 2002 - File note prepared by [redacted] records that he spoke with Mrs Munro about "yesterday" and provided an explanation why the case was unable to go on at that time.

k. [redacted] November 2002 - File note prepared by [redacted] dated records that he spoke with Kerri Munro. The note states "she has little specific recall. She is very tense. I exp'd Hoch/ S Case and need for some detail. I exp'd need s 125A to get matter up to the Supreme Court. She told me incident at ..., incident with [redacted] that she refused go to [redacted] learned long distance – but scared of him."

l. [redacted] June (2002) - File note prepared by Crown Counsel [redacted] records that he spoke to Mrs Munro about the progress of the case.

391. The communication with Ms Munro in relation to the prosecution not proceeding included a telephone conversation between Ms Murno and [redacted] a subsequent telephone conversation between Ms Munro and the Director and a detailed letter from the Director to Ms Munro setting out the reasons for the decision.

392. A copy of the relevant correspondence and file notes is attached at **Annexure D**

Advice in relation to the prospects of the prosecution of John [redacted]

393. The following documents were prepared in relation to the prospects of the prosecution of John [redacted]:

a. [redacted] October 2001 – Letter to Acting Detecting Inspector from [redacted]

b. [redacted] November 2002 – Memorandum from [redacted]

c. [redacted] November 2003 – Memorandum from [redacted] to Director of Public Prosecutions

d. [redacted] December 2003 – Memorandum from [redacted] to Director of Public Prosecutions

e. [redacted] January 2004 – Memorandum from Director to [redacted]

f. [redacted] January 2004 – Memorandum from [redacted] to Criminal Committee

g. [redacted] January 2004 – Memorandum from [redacted] to Criminal Committee

h. [redacted] January 2004 – Memorandum from Daryl Coates SC to [redacted]

i. Undated – [redacted] response to Daryl Coates SC

j. [redacted] February 2004 – Memorandum from Daryl Coates SC to Director of Public Prosecutions

k. [redacted] February 2004 – Letter to Assistant Commissioner from Director of Public Prosecutions (enclosing letter to the four complainants dated [redacted] February 2004)

l. [redacted] November 2018 – Letter to Detective Inspector from Director of Public Prosecutions

394. A copy of any advice in relation to the prospects of the prosecution of [redacted] John is attached at **Annexure E**.

Would the decision not to proceed with the prosecution of John *be made today?*

395. The basis of the decision not to proceed with charges against John was articulated by the then Director, Mr Ellis SC, in his letter to the complainants dated 25 February 2004, where he wrote:

> You may have assumed that there would be one trial, with all charges heard at the same time and all complainants giving evidence at the trial. However, due to certain rulings of the High Court, that would not be likely to be the case. The High Court has held that if the evidence of one complainant is not admissible on the other's trial, they cannot be tried on the same indictment, i.e. at the same trial (refer *De Jesus v R* (1986) 61 ALJR 1). Evidence of one is only admissible in respect of another if there is:
>
> 1. some quality about the evidence which make the events described substantially and relevantly similar (that is, more than other examples of the same type of crime. This is sometimes referred to as a "striking similarity"); and
>
> 2. no reasonable possibility that the evidence might be concocted. Here complainants B, C and D talked together and went together

to make their initial complaints. They, or at least some of them were, apparently aware of the earlier complaint of complainant A (c.f. *P v R* 61/2002 per Evans J., *BRS v R* (1997) 191 CLR 275 at 301). To raise the "possibility of concoction" test does not mean I take the view, or think that a Judge would take the view, that anyone has **in fact** concocted anything. However, especially given your young ages at the time and the other circumstances I have referred to, if there is some possibility of that – on even one complainant's part – it is extremely likely that a Judge would rule that the evidence of one complainant would not be admissible on the trial concerning another.

Other difficulties include that:

(a) Complainant A retracted her complaint. I quite understand how a little girl (as she was then) might be overwhelmed and take the "easier" path. However, it would be very difficult to have a jury accept her evidence beyond reasonable doubt (as is required) in light of that and the cross-examination which would flow from it.

(b) Complainants B and C appear to corroborate each other, although to a limited degree only. Complainants A and D have no corroboration. Although it is not a requirement of law that there be corroboration, juries invariably look for it in "word on word" cases as these would be.

(c) Only Complainant A made what would be viewed as a "recent" complaint – that is, one which is made as soon as is reasonable after the conduct complained of. Usually, only the making of a "recent" complaint is admissible in evidence. Complainant D made a "recent" complaint but it appears to have been (or have been perceived to be) of a different type of conduct, namely an indecent touching on the outside of her clothing. The lack of recent complaint will be something which might raise doubt with the jury, or might be the subject of effective cross-examination to undermine the credit of the complainants.

In addition to the above concerns, there are significant other difficulties arising from the lapse of time since the offences. It is inevitable that your recollection of events, and the detail of them, will have diminished after such a long passage of time. It has been said, "*Our system depends on the recollection of witnesses, conveyed to a jury by oral testimony. As the months pass, this recollection necessarily dims, and juries who are correctly directed not to convict unless they are assured of the reliability of the evidence for the prosecution, necessarily tend to acquit as this becomes less precise, and sometimes less reliable.*" (*R v Lawrence* [1982] AC 510 – the delay in that case was 11 months). The long delay will also mean that it is obligatory for the Judge at trial to give the jury a warning of the dangers of convicting based on a recollection of years ago, how such evidence needs to be scrutinised with great care, and the difficulties and possible prejudice for the accused in losing those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. "*Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the (accused's) denial.*" (*Longman v The Queen* (1989) 168 CLR 79).

> All the above matters have led me to be unable to conclude there would be a reasonable prospect of conviction.
>
> There are also other considerations which make me conclude that it is not unlikely that if he applied for a stay of proceedings John could well be granted it, and even if not it would not be just and fair to continue now against him. (In considering justice and fairness, I do not for a minute look at it only from his point of view. I have to make a decision which also takes into account justice and fairness to you, and the interests of society.)
>
> The complaints were already old when Police first confronted John with them in 1991. He denied them. Nothing having eventuated, he would be entitled to think nothing would (even if Police had not at the time advised him charges would not be laid. I expect that he would have been told or found out).
>
> From then to 2001 nothing changed. There was no new evidence. He did not come under Police attention. Police, who decided in 1991 there was insufficient evidence to proceed (I don't believe this Office was contacted concerning that decision), re-opened the investigation in October 2001 on the basis that there was no longer any requirement for corroboration. That is not correct. There was no such requirement in 1991 unless complainants were so young they could not understand the nature of an oath and so be sworn to give evidence. It is likely that you would have been able to be sworn then. If charges had proceeded in 1991 John would have had the right to cross-examine you in committal proceedings before trial. Now he does not have that right, due to changes in the law and may therefore say he has suffered prejudice in the preparation of his defence not only by the lapse of time generally but also by the change in the law. All the above factors make it quite foreseeable that he would obtain a stay of proceedings, but in any event they are of such significance to me to reinforce my view that it is not appropriate that I continue these charges to trial. I am not satisfied there could be a fair trial.

396. Thus, in summary, Mr Ellis's reasons for not proceeding were:

a. Generally speaking, sexual offence crimes should be tried separately unless they are cross-admissible: *De Jesus v R* (1986) 61 ALJR 1.

b. The evidence of one complainant would only be admissible in respect of another complainant (cross-admissible) if the two complainants were strikingly similar.

c. The evidence of one complainant is not admissible in the complaint of another if it cannot be shown that there is no real possibility or explanation that the evidence was a result of collusion (even at a subconscious level) or concoction by one of the complainants: *Hoch v R* (1988) 165 CLR 292 per mason CJ, Wilson and Gaudron JJ at 297:

> Thus, in our view, the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that it is not reasonably explicable on the basis of concoction. That is a matter to be determined, as in all cases of circumstantial evidence, in the light of common sense and experience. It is not a matter that necessarily involves an examination on a voir dire. If the depositions of witnesses in committal

> proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, common sense and experience will indicate that the evidence bears that probative force which renders it admissible. On the other hand, if the depositions or the statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible. Of course there may be cases where an examination on the voir dire is necessary, but that will be for the purpose of ascertaining the facts relevant to the circumstances of the witnesses to permit an assessment of the probative value of the evidence by reference to the consideration whether, in the light of common sense and experience, it is capable of reasonable explanation on the basis of concoction. It will not be for the purpose of the trial judge making a preliminary finding whether there was or was not concoction.

d. In *BRS v R* (1997) 191 CLR 275 Gaudron J said, at 301:

> In the circumstances of this case, if W's evidence could otherwise be led as direct proof of the appellant's guilt of the offences charged, it would be admissible only if there was no possibility of joint concoction and no possibility that H became aware of the events to which W deposed before complaining of the events giving rise to the offences charged.

e. In *P v R* [2002] TASSC 61, at [10] Evans J said:

> In my view, the appeal must succeed. Consistent with *Hoch*, the similar fact evidence of B and D should not have been left to the jury unless there was no reasonable possibility that the similarities between their evidence resulted from concoction. In the course of D's trial evidence, it emerged for the first time that it was possible that the content of her evidence had been concocted to reflect what she had been told by R. Whilst D denied a suggestion put to her that R had put D up to making allegations against the appellant, the possibility that D's evidence had been influenced to the point of concoction by what R said to D was not fully explored or tested and D was not asked any questions about the differences between the evidence she gave on the *voir dire* about her conversation with R and the evidence she gave on the trial about that conversation. The evidence, so far as it goes, could not support a conclusion that there was no real possibility that D's evidence was the result of concoction.

f. See also *Tasmania v S* [2004] TASSC 84.

397. In light of the authorities and the evidence in the case, Mr Ellis SC was of the view that the reasonable possibility of collusion or concoction on the part of at least one person could not be excluded. As he said in his letter this did not mean the evidence was, in fact, concocted. However, this meant if John [redacted] was to be prosecuted in 2004 separate trials would be required in relation to each complainant. In other words each jury would only have heard the evidence of one complainant.

398. Inconsistencies, retractions of evidence and delay would adversely effect the complainants' credit which may have an effect in respect to admissibility but given that separate trials would be ordered the likely impact on conviction given a direction in accordance with *Longman v R* (1989) 168 CLR 79 would be required. At 91 Brennan, Dawson and Toohey JJ said:

> But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them: see Reg. v. Spencer (25). That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than twenty years that opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay (see Jago v. District Court (N.S. W) (26)) and it was imperative that a warning be given to the jury. **The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy**. To leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice. The jury were told simply to consider the relative credibility of the complainant and the appellant without either a warning or a mention of the factors relevant to the evaluation of the evidence. That was not sufficient.

399. Given the above direction, some inconsistencies in the complaint and the decision that would require separate trials for each complainant. As a result the jury would only have the evidence of one complainant to consider. Thus there was no reasonable prospect of conviction.

400. As a result of the delay, John [redacted] lost the right to cross-examine the complainants at committal because of a change of the law. Therefore the then Director was concerned that it may be an abuse of process to then proceed.

401. The decision to discharge was made after it had been considered by the most senior prosecutors in the Office. They included Principal Crown Counsel [redacted], the Assistant Director (now Director) and Principal Crown Counsel Catherine Geason (now the Chief Magistrate).

402. However, since 2004 there have been substantial changes in the law which would relate to this case, which include:

a. There is now a presumption of joint criminal trial where charges of sexual offences are joined in the same indictment. This presumption is not rebutted merely because the evidence in one charge is inadmissible on another charge: s 326A of the *Criminal Code*.

b. Now tendency evidence pursuant to s 97 of the *Evidence Act 2001* does not have to be strikingly similar, there only has to be some feature between the tendency evidence and the alleged offending that links them: *R v Bauer* (2018) 266 CLR 56 at [56]; *McPhillamy v R* [2018] HCA 52.

c. The possibility of concoction, contamination or suggestion is no longer a basis to rule tendency evidence inadmissible: s 101(5) of the *Evidence Act 2001*.

d. When determining admissibility, the evidence of the witness must be taken at its highest and credibility cannot be taken into account by the trial judge: *KMJ v Tasmania* (2011) 218 A Crim R 87; *IMM v R* (2016) 257 CLR 300.

e. The direction in *Longman v R* has been abolished: s 165B(4) of the *Evidence Act 2001*.

f. Delay leading to an accused person being deprived of the right to cross-examine a complainant at committal does not make a trial unfair: *Tasmania v C* [2022] TASSC 23.

403. Thus, the law has now significantly changed on all the bases for the 2004 decision. If the complainants had complained now, I would proceed with the charges as they would all be cross-admissible and would be able to be heard together.

404. In 2018, when considering charges concerning a fifth complainant who came forward, in my advice to police (see **Annexure E**) I said:

> Since the time of Mr Ellis' decision the law has substantially changed. There is now a presumption of a joint trial in relation to complaints against the accused by different complainants in relation to offences of a sexual nature. See s 326A of the *Criminal Code*. The possibility of concoction or contamination between complainants is no longer a basis to exclude tendency evidence. See s 101(5) of the *Evidence Act 2001*. The so-called Longman Direction has been modified. It is also difficult to obtain a stay for delay. There is also now no requirement for tendency evidence to be strikingly similar to be admissible. See *Hughes v R* [2017] HCA 20.
>
> In my view, if each complaint had been made now for the first time there would be sufficient evidence to charge the accused with indecent assault with respect of the complaints made by [redacted] aggravated assault with respect of the complaint made by [redacted] and maintaining a sexual relationship with respect to the complaint made by Kerri Munro. Each complaint would be cross-admissible as tendency evidence in respect of the other complainants' complaint. The evidence shows that he has a sexual interest, which he acts upon, on young girls aged around [redacted] years old, who are in his care, where he takes them to sports room and places his hands down their pants. Undoubtedly, if there was a trial the complainants' credibility would be strongly contested, given they had spoken to each other and made some inconsistent statements. However, that now would be a question of fact for the jury to consider and not a question of admissibility.
>
> This does not mean that the decision in 2004 was incorrect at that time. As stated above, the law since 2004 has been substantially altered in this area making it easier for such prosecutions to proceed. However, the decision in 2004 presents significant complications if we were to proceed with the prosecution now.
>
> As Detective Senior Constable [redacted] states in her excellent, comprehensive report the complainant [redacted] is now the fifth person to have complained about being sexually abused by the accused at [redacted] in the late 1980's. They are entitled to feel a sense of injustice. If they all had first complained recently there is no doubt a prosecution would have been launched as the evidence of one would be admissible in respect of the charges of the others.

> However, a series of complex legal issues that arose at the time of the charges in respect of the first four complainants, most of which now do not exist, meant the charges were never proceeded with at that time. The problems with autre vie acquit mean they cannot be revived.

405. Thus, the decision in 2004 was based on law that no longer exists and the outcome of the prosecutorial decision would be different if they had come forward now for the first time. This demonstrates how prosecutions were hampered in the past by the law that applied at the time. A prosecution cannot now be instituted because the charges of indecent assault (at the time being that which underpinned any indictable charges of persistent sexual abuse of a child) being dismissed in the Magistrates Court (see advice of 29 November 2018; *Tasmania v Finnegan* [2011] TASSC 74).

Handling of the John *matter generally*

406. In my view, the major problem concerning the handling of the John matter was the decision to lay complaints in the first place. No comprehensive advice outlining the law and the evidence was given prior to the laying of the complaint. This led to a lengthy process and an analysis with the legal difficulties not be recognised until just prior to the prosecution being discharged. This fact was recognised by Mr Ellis SC in his abovementioned letter to the complainants when he said:

> I expect you will be disappointed by this decision. To an extent, I accept that my Office's involvement may well have led you to expect a trial would proceed and for the creation of that expectation I apologise.

407. Detailed advice was not routinely given at the time. This is not meant as a criticism. Given sexual assault offences were overseen by one person, detailed written advice was not practical. Nor was early charging advice a feature of interstate DPP offices.

408. In order to avoid such a situation my Office now provides detailed advice after viewing a relatively complete police file. The DPP Prosecution Policy and Guidelines state, at pp 23-24:

> **Charging advice to Tasmania Police**
>
> The Office of the Director of Public Prosecutions provides an advice service to Tasmania Police prior to charging a person(s) with sexual assault crimes in circumstances where there may be a question as to the appropriateness of charges or the sufficiency of evidence.
>
> The advice is provided for any sexual assault crime that could be prosecuted by indictment but also includes crimes where a defendant may elect, pursuant to s72 of the Justices Act 1959, to have the matter prosecuted summarily or where the defendant is a youth and the crime is not a prescribed offence (s161 of the Youth Justice Act 1997).
>
> Advice will only be provided upon receipt of a police file from the inspector in charge of the relevant division of Tasmania Police.
>
> The request for advice is to be made to the Office and marked to the attention of the Sexual Assault Liaison Clerk (SALC) (a person

nominated by the Director to manage sexual assault and family violence offence referrals).

The police file must contain all the available evidence including a covering letter outlining the nature of the request for advice and, where possible, a summary of the material.

The request for advice and the police file is assigned to a designated senior prosecutor who possesses sufficient relevant experience to review the file in order to make a determination as to whether the laying of charges ought be recommended.

Once the police file is reviewed, the advice is provided to Tasmania Police in writing. The police file will ordinarily be returned with the letter of advice.

All advice is provided upon consideration of whether there is a reasonable prospect of conviction and is based on all the available evidence, including that unfavourable to the prosecution. Where appropriate, the advice will refer to any legal principle or authority that would impact on the admissibility of evidence or the likelihood of conviction.

Ordinarily, the advice returned with the police file will be provided within a period of six weeks, unless the nature of the case is of some complexity.

The letter of advice will identify the evidence considered, including not only the witness statements and references to the subject report prepared by the investigating officer but also any other sources of relevant information.

Ideally, where the statement of the complainant comprises an audio and/or visual record of interview they will be viewed. However, recourse will sometimes be had to the summaries provided in the subject report (or similar) without recourse to the actual interview. In these circumstances, this will be stated in the letter of advice. Similarly, if an accused has participated in an audio and/or visual record of interview, recourse may be had to the summary provided in the subject report. Again, if so, this will be stated in the letter of advice.

If further investigations are considered appropriate before providing the final advice, the file will be returned with an interim opinion. The investigating officer will be invited to resubmit the file once those investigations have been carried out. In most cases, the decision whether or not to charge is based upon the complainant's account and an assessment of the weight of any corroborating evidence.

In most cases, it is sufficient to base the assessment of the evidence upon the written statement of the complainant or upon review of the video statement of the complainant.

However, in some circumstances, it may be desirable to meet with the complainant prior to providing charging advice to police in order to clarify aspects of their statement, particularly if there are internal or external inconsistencies in their account. In such cases, an assessment of the credibility of the complaint may have an impact upon the decision to charge.

> A physical meeting with the complainant need not be undertaken, especially if he or she resides in another jurisdiction. It is sufficient for video link facilities to be used or contact made via other audio and/or visual means. Consideration should be had as to whether or not a Witness Assistance Service (WAS) officer should be involved to provide support for the complainant during the briefing.

409. Thus, by conducting a detailed consideration of the evidence and the applicable law, incorrect charging decisions are avoided. Further, for example, when I am asked to authorise charges pursuant to s 125A of the *Criminal Code* and it is planned to use tendency evidence, I ask to see a draft tendency notice. The Tasmanian DPP was the first DPP Office to initiate such an advice service and it was subsequently recommended by the Royal Commission

410. Having made the decision in 2004, Mr Ellis wrote to the complainant, as detailed above, outlining his reasons for not proceeding with the matter. [redacted] spoke with the complainant on [redacted] February 2004 (see Ms Munro's letter dated [redacted] 2004 at p 2) and to her father on [redacted] February 2004 at 11:42 am (see file note dated 27 February 2004). It would appear that sometime between [redacted] February 2004 Mr Ellis also spoke to the complainant according to his letter to the Attorney-General dated [redacted] March 2004 where he said, "*I spoke at length by telephone to Ms Munro ... she subsequently wrote to me*". Mr Ellis's letter also invited the complainant to speak to him about the decision. It is unclear whether [redacted] spoke to the complainant before or after she received Mr Ellis's letter. The procedure now when informing a complainant that matter is to be discharged is outlined in the DPP guidelines at pp 17-18:

> **Procedure upon approval of discharge or substantial downgrading of charges**
>
> Where practicable, when there is a complainant of the crime originally charged, he or she should be informed of any proposed discharge or reduction in charges before the accused, police and court are informed. This is the task of the prosecutor with conduct of the case. Where the complainant is under 18 years of age or has a disability, a parent, guardian or spokesperson of the complainant should be informed. Where the alleged criminal conduct has caused the death of a person the next of kin or an immediate family member should be informed.
>
> Informing the complainant of the proposed discharge or reduction in charges is an important step in the process. It is important that the complainant understands the reasons why the decision has been made. It is preferable that the complainant be informed of the reasons in person. However, if this is not possible, it should be done by telephone. When informing a complainant of the decision the prosecutor should advise how decisions are made, provide a brief history of the matter and brief reasons for the decision. The complainant should be given an opportunity to provide his or her views about the decision.
>
> A complainant should be advised that they may apply to have the decision reviewed by the Director (unless the decision was approved by the Director). Requests for review must be made within seven days of notification of the decision. Ordinarily, a letter should be sent confirming that the charges will not proceed and that the complainant has the right to request the Director to review the decision.

Where practicable the memorandum, together with a brief covering letter, should be emailed to the Assistant Commissioner (Operations). The police file should be returned to the Detective Inspector of the originating location, with a copy of the covering letter and memorandum sent to the Assistant Commissioner.

Once the complainant and police have been advised that a matter will not proceed and the prosecutor has confirmed that the complainant has not sought a review of the decision, one of the following steps should be taken to discharge the accused as soon as possible:

• Where the accused is before the court on complaint only, the court should be informed that an indictment will not be filed and the accused should be discharged in relation to that complaint

• Where an indictment has been filed, a nolle prosequi should be filed, or alternatively where instructed by a Crown Law Officer, a prosecutor can inform the court that the State will not proceed further on the indictment and the accused should be discharged (s350 of the Criminal Code).

Once a final decision has been made to discharge an accused, the decision will not be changed unless it is plainly wrong, i.e. it was based on incorrect or irrelevant material, or was plainly unreasonable, or unless new evidence becomes available. **Complainants have the right to request written reasons for key decisions. Any requests for written reasons will be considered on a case by case basis, bearing in mind the considerable privacy issues, by the Director or Deputy Director**. (Emphasis added)

Any decision made by the Director will not be reviewed. However, a complainant may request to meet with the Director or Deputy Director to have the reasons for the decision explained.

411. Further, specifically when discharging an accused charged with sexual offences, the DPP guidelines state, at p 28:

The decision to prosecute or recommend discharge is considered in the same way as for any indictable crime (refer Indictments, nolles prosequi and discharges). In most instances, it will involve a discussion with the complainant before a final determination is made.

In the event it is determined that an indictment should not be filed, the complainant will be informed of that decision as early as possible. This is conducted by inviting the complainant into the Office to enable those reasons to be explained to them by the prosecutor. Where possible, a WAS officer will be present when this takes place. If this is not possible, the notification may be communicated in writing by the prosecutor. Again, the complainant can request the Director to review the decision and they should be informed of this right.

The Assistant Commissioner (Operations) is also notified in writing of the decision not to file an indictment. The notification will explain the reasons why there is no reasonable prospect of conviction or why the matter will not be prosecuted.

Once a final decision has been made to discharge an accused, the decision will not be reviewed unless it is plainly wrong, i.e. it was based on incorrect or irrelevant.

412. Thus, in summary, today when discharging a charge involving a sexual offence, the following procedure would take place:

a. The prosecutor and a WAS officer would meet with the complainant to inform them of the decision and the basis of the decision and the right of a review at that time we did not have a Witness Assistance Service.

b. A letter is provided to the complainant confirming that the matter is to be discharged, that the decision had been explained to them and that they have a right to have the decision reviewed by the Director.

c. Reasons for the decision are provided and a review conducted, on request.

413. This procedure is in line with recommendation 40 of the Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report Parts III-VI p 408.

414. It should be noted that in 2004 there was no Witness Assistance Service.

415. In conclusion, it can be seen the matter was given careful consideration by the most senior members of the Office. The decision was conveyed both orally and in writing. Today the pre-charging advice would, hopefully, overcome the delay in the ultimate decision and communication of the decision would be slightly different, with a witness assistance officer present in accordance with the Royal Commissions recommendations. However, the case also demonstrates how difficult the law made it at the time to prosecute these types of offences and the future perils of prosecuting a matter if the matter is inappropriately charged, discontinued and then further evidence is discovered.

Conclusion

416. The Office has put considerable systems in place to assist complainants when involved in the criminal justice system. This includes the creation of the Sexual Assault and Family Violence Unit, the Witness Assistance Service, having early engagement with complainants and providing pre-charging advice to Tasmania Police. The office has also advocated for significant law reform in relation to child sexual abuse.

417. The introduction of the DPP Guidelines, the process of detailed memorandums and internal review, and the directors review ensures accountability and transparency of decision making.

418. It should be recognised that although Crown Counsel deal with each complainant in an empathetic manner they must consider each case in an objective and impartial manner. Prosecutors have duties to complainants, the court, the accused and duties imposed under the *Criminal Code*. In carrying out these duties it will not always be possible to commence with a prosecution. Crown Counsel carry out their duties in public and often face unfair public criticism.

419. During the relevant period there have been many changes in the law that assist in the prosecution of child sexual abuse offences. They include the development of tendency and coincidence evidence, the *Evidence (Children and Special Witnesses) Act*, pre-recording of evidence, expert evidence and witness intermediaries to name a few. All of this has been beneficial. However, many of these changes have added to the time taken to conduct these prosecutions and added responsibilities to the prosecution in an already difficult and complex area. At present it is difficult to attract and retain practitioners to work in this area, both in prosecution and defence. I would ask the Commission to bear this in mind and not add to the difficulty.

420. Finally, it should be always borne in mind that prosecuting child sexual abuse cases will always be difficult no matter what legislative or other reforms are bought in. The matters are serious, and by their very nature the conduct occurs in private with no witnesses and there is often a delay in reporting. This has an impact on the reasonable prospect of conviction, and the conviction rate. As the criminal standard of proof is properly very high. All of this makes these difficult prosecutions.

[redacted]

D G Coates SC
DIRECTOR OF PUBLIC PROSECUTIONS
6 June 2022