

ROYAL COMMISSION INTO INSTITUTIONAL
RESPONSES TO CHILD SEXUAL ABUSE

Public Hearing - Criminal Justice Roundtable
(Day 1 - Reporting Offences)

Hearing Room 2
Level 17, Governor Macquarie Tower
Farrer Place, Sydney

On Wednesday, 20 April 2016 at 10am

Before

The Chair:	Justice Peter McClellan AM
The Presiding Member:	Justice Jennifer Ann Coate
Commissioner:	Mr Bob Atkinson AO APM

1 THE CHAIR: Good morning, everyone, thank you for coming.
2 I would firstly like to acknowledge the traditional
3 custodians of the land upon which we meet today, the
4 Gadigal people of the Eora Nation, and pay my respects to
5 their elders, both past and present.
6

7 This is yet another important step in our development
8 of our work in relation to criminal justice. It is the
9 first public roundtable discussion we have convened on the
10 criminal justice issues, but many of you are now, for one
11 reason or another, very familiar faces, and I know that
12 many of you have participated in both roundtables and
13 public hearings, and I thank you again for the
14 contributions you will all make today.
15

16 Our subject today, of course, is issues which relate
17 to third parties - that is, not the victim of the abuse
18 himself or herself, but issues surrounding the reporting of
19 abuse to police and the outcomes in terms of the criminal
20 justice system are the concerns we have today.
21

22 As you can see, Justice Coate and
23 Commissioner Atkinson are with me today. We three, for
24 better or worse, have been tasked with developing the
25 Commission's work in relation to criminal justice, but,
26 ultimately, all six Commissioners have to sign off on
27 anything that we report, and there will be a public hearing
28 on which all of the Commissioners will sit in November to
29 try to bring all of the issues together.
30

31 Our terms of reference require us to look at justice
32 for victims and make plain that the criminal context is to
33 be part of our work, and it is in that area that we, of
34 course, are conducting a process of consultation and
35 investigation.
36

37 There are issues ranging well beyond today's
38 discussion which we have to look at, including issues
39 relating to the admissibility of evidence in sexual assault
40 trials; issues turning upon the joint hearing of
41 allegations or victims who come bringing similar
42 allegations to criminal trials. We are also looking at the
43 role of the DPP. We are looking at processes, if any, that
44 might be justified in terms of supervision or
45 inspector-type issues in relation to DPPs, and those
46 matters will be discussed later this week.
47

1 Our terms of reference require us to consider what
2 institutions and governments should do to better protect
3 children against institutional child sexual abuse in the
4 future and what should be done to achieve best practice in
5 encouraging reporting and responding to reports of
6 allegations of institutional child sexual abuse.

7
8 I should make plain that it is not our task to inquire
9 into the courts. Our consideration of institutional
10 responses requires us to examine the institutional
11 responses by State and Territory police, public prosecutors
12 and others involved in the criminal justice system.

13
14 We, of course, ultimately will consider what
15 governments may do or should do in relation to legislative
16 change, including legislation in the criminal justice area.
17 We have already recommended some changes in the civil
18 justice area and some States, you probably know, have
19 responded to those recommendations, and we are hopeful that
20 others will soon respond as well.

21
22 Criminal justice, as you know, has already been raised
23 in public hearings, and it arises in many contexts for
24 survivors and the outcomes that they might expect or that
25 would be appropriate from the criminal justice system.

26
27 Now, issues relating to whether third parties should
28 report child sexual abuse to police and criminal offences
29 for third parties who fail to report child sexual abuse
30 have particular significance in relation to abuse in an
31 institutional context. Third-party reporting of abuse may
32 be important to protect other children, particularly where
33 victims themselves are unlikely to disclose or report
34 quickly.

35
36 We have seen through our work that perpetrators in
37 institutional contexts may, and indeed often do, offend
38 against a number of children. We learn continually of
39 offenders who have repeated, sometimes over many years,
40 offending in relation to different children.

41
42 We have also seen that a feature of child sexual abuse
43 is that it leaves many victims unable to disclose or report
44 abuse, and many will not disclose sometimes, or very often,
45 for decades.

46
47 This may also be the case for victims of child sexual

1 abuse in familial and other settings, but that, of course,
2 is not in our remit. However, the research that we have
3 suggests that the time taken to report is particularly long
4 where the perpetrator is a person in a position of
5 authority.
6

7 We also know that those associated with institutions
8 may receive complaints or allegations of child sexual abuse
9 either close to the time when the abuse occurs or, other
10 times, many years later. If an institution offers redress
11 and support to survivors, it is likely to receive
12 allegations of child sexual abuse.
13

14 The question then becomes what should the institution
15 do with these allegations. Should they report the
16 allegations to police? Should this depend upon whether the
17 victim or survivor wants or does not want the allegations
18 reported to police? Should it depend upon whether the
19 alleged perpetrator is still working with children? Should
20 it depend upon whether the institution is able to
21 investigate the allegations and determine whether or not to
22 accept them as true?
23

24 There is a further set of questions beyond discussing
25 what the institution should do. These relate to what
26 conduct should be required of the institution and be
27 subject to a criminal sanction if not carried out.
28

29 What should be done, of course, is not necessarily the
30 same as what must be done under the criminal law. Many of
31 us may consider that if we were an eyewitness to a serious
32 car accident and were in a position to offer help, we
33 should do so. But, at least in New South Wales - and
34 I suspect it is true of the other States - it is not
35 a crime if the bystander chooses not to become involved in
36 that circumstance. Those of you who have some familiarity
37 with the law will understand how the common law grappled
38 with these subjects many, many years ago.
39

40 The criminal law generally imposes negative duties
41 which require a person to refrain from doing an act. It is
42 unusual, although by no means unprecedented, for the
43 criminal law to impose a positive duty which requires
44 a person to act, which requires a person to do something.
45

46 All Australian States and Territories have imposed
47 a positive obligation on some third parties to report some

1 allegations of child sexual abuse to their child protection
2 agencies under mandatory reporting laws. Although there is
3 a different test in the different States, most
4 jurisdictions provide for the imposition of a fine for
5 failure to comply with these mandatory reporting
6 obligations. These regulatory offences, though important,
7 are not our focus today. However, we need to be aware and
8 keep in mind that they exist, because they provide
9 a significant contribution to the context for considering
10 whether there should be more serious criminal offences to
11 require third-party reporting.
12

13 Now, I don't pretend that today's discussion is an
14 easy subject, and I'm aware of the views, of course, that
15 have been publicly expressed by some of you, and it is
16 important that we hear those views and that we have an
17 opportunity to understand what the different perspectives
18 might be.
19

20 There are, reflected in the views that come forward,
21 a number of potentially competing objectives, and it may
22 not be clear as to whether a criminal offence will
23 encourage or discourage desired outcomes. Criminal
24 sanction is, of course, a very severe way of disciplining
25 conduct of individuals or institutions, and the question is
26 whether or not it is appropriate and, if so, to what
27 extent, to impose a criminal obligation in the context that
28 we are discussing.
29

30 I suspect we would probably all agree that it is
31 desirable to encourage victims and survivors of child
32 sexual abuse to disclose their abuse, including,
33 importantly, because it may enable them, or should enable
34 them, to receive necessary support services. The first
35 step in the process must be to care for the survivor.
36

37 We may also agree that it is desirable to maximise
38 reporting to police of child sexual abuse so that criminal
39 investigations can be conducted and offenders prosecuted.
40 However, this might need to be balanced against a desire to
41 recognise and respect the wishes of victims and survivors
42 so that it is their decision whether and to whom their
43 abuse is disclosed, and that in one sense philosophical
44 issue is at the heart of some of the discussion. As we
45 know, views differ as to how these competing concerns
46 should be resolved.
47

1 This morning we will bring into focus in our
2 discussions the issue of what is referred to as "blind
3 reporting", which refers to the practice of reporting to
4 police information about an allegation of child sexual
5 abuse other than notifying the police of the victim's name
6 or any other identifying details of the victim.
7

8 The information reported typically would include the
9 identity of the alleged offender and the circumstances of
10 the alleged offence, to the extent they were known, but one
11 obviously accepts that there will be probably significant
12 variability of the amount of information that might
13 accompany a blind report.
14

15 Blind reporting attracts controversy, as we understand
16 it, particularly in New South Wales because I suspect in
17 part of the statutory offence contained in Section 316 of
18 the New South Wales Crimes Act. If a person is obliged to
19 report an offence and they report the offence but withhold
20 the victim's details, it could be argued they may be
21 committing an offence under Section 316. When I say it
22 could be argued, it has been argued to that effect. I do
23 think there is another perspective on that argument and
24 that's one that we need to tease out a little today.
25

26 At the end of the day, if the section is considered to
27 be the right way to go then it may be that the section
28 would need to be itself refined to make more clear the
29 circumstances in which the offence will be committed.
30

31 As I understand it, the prosecution of
32 Archbishop Wilson in relation to Newcastle-Maitland is
33 occurring pursuant to Section 316 of the Act, but I don't
34 know of any other previous prosecutions under that section.
35 There may be but I don't know of them.
36

37 The issue came into focus in the NSW Police Integrity
38 Commission in 2015 which reported on Operation Protea,
39 which considered suggested police misconduct in relation to
40 accepting blind reporting of child sexual abuse in the
41 context of Section 316 of the Crimes Act.
42

43 Blind reporting may increase the information given to
44 police about child sexual abuse and it may respect the
45 wishes of victims and survivors as to whether they want
46 their details provided to police. However, it must also
47 mean that the police do not have the information necessary

1 to pursue a criminal investigation in relation to the
2 allegation which lies within the blind report.

3
4 Some may not consider it relevant, but it is necessary
5 to consider, I think, whether or not in the circumstances
6 where a survivor says they don't want their name reported
7 to the police because they don't want the allegation to
8 result in a criminal prosecution, whether in that
9 circumstance one should assume that there will never be a
10 prosecution because you would need the survivor to give
11 evidence whether it is a profitable use of police time to
12 pursue an investigation which at the beginning would
13 indicate that it won't result in a criminal trial.

14
15 Of course the counterpoint for that is that may not at
16 the end of the day be of the greatest concern because it
17 may be that the investigation itself will enable the police
18 to uncover more material and it may of course serve to
19 protect other children who might be vulnerable to abuse
20 from the same alleged perpetrator.

21
22 All I am seeking to do at the moment is open up some
23 of the issues, but when you start to talk about them you do
24 realise how complex the issue actually is and how there are
25 lots of different issues that need to be weighed in the
26 balance.

27
28 In the second part of today, which will be after lunch
29 really, we will have a look at how a reporting offence
30 targeting the reporting of child sexual abuse could be
31 framed. In particular, what we want to do is have a look
32 at the Victorian offence, which was created in 2014,
33 I think, which is framed in terms of failure to disclose a
34 sexual offence committed against a child under 16 under
35 section 327 of the Victorian Crimes Act.

36
37 This followed a recommendation from the parliamentary
38 inquiry down in Victoria which did very significant work
39 and which has resulted in a very significant response from
40 government and if any of you don't know Marisa and Greg,
41 there's much to be said. Marisa, from the work that you're
42 doing all of us are benefiting from the effort that the
43 Victorians are putting into not only this work but other
44 aspects of the response to the Royal Commission's work, for
45 which we are very grateful.

46
47 We will look at the Victorian issue this afternoon.

1 One issue that is immediately raised by the Victorian
2 legislation is whether an obligation to report, with a
3 criminal sanction if you don't, should depend upon whether
4 the victim is a child or an adult and at what level of
5 knowledge a third party's obligation to report should
6 arise.

7
8 There is a sophistication on the question of the age
9 of the victim or survivor and that is whether they're still
10 a child, abused when a child but remain a child when they
11 bring forward the allegation, or whether the Victorian
12 legislation contemplates a different approach will occur
13 once that person has ceased to be a child and goes into
14 adult life.

15
16 There is also an issue behind that as to whether, if
17 you do create that two-levelled arrangement, the age is
18 appropriate to be 18 or whether it should drop to 16, but
19 these are all issues that need to be discussed.

20
21 Leigh has asked me to make plain that although we'll
22 be discussing New South Wales and Victoria, we haven't
23 forgotten the other States and Territories, but you don't
24 presently have relevant reporting offences and therefore
25 the discussion really has to focus upon what has been done
26 in both States.

27
28 I should have introduced Leigh to you. I think all of
29 you probably now know Leigh. Leigh has had charge within
30 the Commission for our work in both the civil justice and
31 redress areas and now the criminal justice area. Her
32 contribution is intense on a daily basis and I'm sure most
33 of you have now engaged with her in relation to this and we
34 all thank Leigh for her very significant contribution.

35
36 We are making a transcript of today's proceedings:
37 they're behind us. If you weren't aware, you're also in
38 public, we're live streaming, and I am told that as each of
39 you speak, the cameras can be adjusted to make sure that
40 your image goes through the live stream. We consider this
41 work to be so important and of course reaches across so
42 many communities that we believe that it was appropriate
43 for it to be live streamed so that as many as possible have
44 the opportunity to participate in a remote sense and
45 understand what people have been saying.

46
47 Throughout the work of the Commission, as you all

1 know, we have been live streaming our public hearings.
2 We have also live streamed some roundtable discussions
3 previously. It has proved an immensely important way of
4 bringing the work of the Commission to the knowledge of a
5 great many people throughout Australia, but also in
6 relation to some issues throughout the world because we are
7 aware of the interest that has come through our
8 live streaming in different parts of the world.
9

10 Can I ask you, but in that context, when you talk can
11 you just identify yourself and your organisation so that
12 those who might be watching in some other place can work
13 out who you are because I am not sure if the camera can
14 pick up your nameplate effectively, as well as your face.
15

16 There are some other people here today and you're
17 welcome, but we won't be able to take live questions from
18 members of the public. If there is a matter you want to
19 raise can you speak to Leigh at morning tea perhaps, or
20 lunchtime, and we will do what we can to make sure that any
21 significant issue is at least known to all of us here
22 today.
23

24 With those introductory remarks can I then turn in
25 detail to the issue of blind reporting. What I am going to
26 do, for those who have been at roundtables previously, is,
27 at least in the early part of the process, I ask different
28 people to proffer their views, I know what some of those
29 views are, I don't know about all of your views, as a way
30 of opening up the discussion and we will seek to then
31 control our dialogue but make sure that everyone has an
32 opportunity to explain their own position and also proffer
33 any considered comment about the position of any other
34 person around the table.
35

36 Before we do that, Tony Giugni, who is to my left, is
37 the chief solicitor for the Commission. He also, as you
38 can see, is a very bad rider of bicycles. We are very
39 grateful that his crash helmet worked and at least we've
40 got his brain back but he's got a bit of a problem with his
41 arm. We thought it might be appropriate to start the
42 discussion by looking at New South Wales Section 316 and
43 Tony is going to talk about that and I think you'll find
44 316 is in the appendices. It is behind tab 4 where I think
45 it is the second document. Tony, would you like to open
46 the discussion by just outlining your understanding of
47 Section 316 and how it works?

1
2 MR GIUGNI: Thank you, your Honour. I am not so sure
3 about the brain but we'll wait and see. I will only need
4 five or 10 minutes. What I intend to do is outline the
5 state of law in this State concerning what we know
6 colloquially as a concealment offence. What I would like
7 to do is consider the historical context for this type of
8 offence both because it is actually quite interesting, but
9 it is also I think relevant to an understanding of its
10 intended scope and operation.

11
12 I will then step through the elements of the offence
13 now codified in statute in this State and for the purposes
14 of today's agenda I was going to consider the issue of
15 blind reporting in that legal framework, although the Chair
16 has really done that, so I can probably curtail that.

17
18 The concealment offence I think is best seen as one of
19 or a member of the family of offences that have developed
20 over centuries in the common law protective of the
21 effective administration of justice. The courts, I have
22 inferred from some cases I've read, although, as the judge
23 did mention, there aren't all that many, have tended to
24 recognise two types of these offences, active interference
25 with the administration of justice and then inactive or
26 passive interference, the first type which carries heavier
27 penalties or offences well known I think to all of us,
28 including destruction of records, doctoring of evidence,
29 threatening or even murdering a witness or bribing a
30 witness, any positive activity designed to thwart a police
31 investigation.

32
33 I think perjury sits in this line and probably many of
34 the criminal contempt offences such as approaching jurors
35 and so forth, all of which tend to pervert the course of
36 justice.

37
38 The second passive form of these offences is what
39 we're dealing with here where a person knows about a
40 serious offence and takes no action but they're not
41 involved in any way in the commission of the crime, they
42 might be an entirely innocent bystander or a witness or a
43 person to whom an allegation is made, but it is the failure
44 of that person to report that might prejudice the
45 administration of justice.

46
47 That second offence or type of offence in the common

1 law was termed misprision of felony. It is a very old
2 offence thought to have emerged some 700 years ago in
3 England. If the king found that someone had committed a
4 treason, you were sent off to be beheaded and that included
5 anyone not involved in the crime but happening to have
6 known of it and failing to report it.

7
8 However, the king might have thought from time to time
9 that such a bystander did not deserve the death penalty and
10 that person then was indicted only with misprision of
11 treason carrying a lesser but still significant penalty.
12 In the community, meanwhile, this type of offence took on a
13 different form and that is there developed the practice of
14 hue and cry. It was then the duty of a person who knows a
15 felony to have been committed to raise hue and cry, report
16 it to the Sheriff who would then call on all able-bodied
17 men over the age of 15 to pursue the offender, arrest him,
18 and those able-bodied men were duty bound to do so, it was
19 an offence not to. It was also an offence for that first
20 person to fail to raise the hue and cry in the first place.

21
22 Over time this offence came to be defined and limited
23 largely by two factors: one, the seriousness of the
24 offence not reported, and secondly, whether the accused
25 could be said to have had proper knowledge or belief of
26 that crime. A third and later factor, which I'll come to,
27 is whether in any event there was a reasonable excuse not
28 to report.

29
30 In our briefing paper we set out a more recent
31 explanation of the policy rationale for this crime which
32 I will just read out. It was a comment of a
33 South Australian judge at page 4 of our brief. You need
34 not pick it out. He said:

35
36 The policy that underlies the existence of
37 a crime of misprision of felony is that
38 serious crimes should be discovered to the
39 authorities and not regarded as a private
40 matter that may acceptably be kept from
41 public view.

42
43 And you can see that lineage to the practice of hue and
44 cry, a very public practice.

45
46 In New South Wales the common law crime of misprision
47 of a felony was abolished in 1990 and was replaced with

1 Section 316(1). It is often described as a very broad
2 offence and I think it is. I will read it out. It is as
3 follows:
4

5 If a person has committed a serious
6 indictable offence and another person who
7 knows or believes that the offence has been
8 committed and that he or she has
9 information which might be of material
10 assistance in securing the apprehension of
11 the offender or the prosecution or
12 conviction of the offender for it, fails
13 without reasonable excuse to bring that
14 information to the attention of a member of
15 the police force or other appropriate
16 authority, that other person is liable to
17 imprisonment for two years.
18

19 There are really then three elements: one, what is a
20 serious indictable offence; then what does it mean to have
21 knowledge and belief of that information that might be of
22 material assistance to authorities; and then the question
23 of whether there's a reasonable excuse in any event not to
24 report it.
25

26 Stopping there, in relation to knowledge or belief,
27 the question within our Terms of Reference is the
28 application of those states of mind in an institutional
29 context. The sorts of questions that arise case by case,
30 is receipt of the complaint or allegation enough? A mere
31 suspicion is probably not enough, but even if a person has
32 a suspicion, I think we would all agree, for example, a
33 teacher would raise the alarm with the principal and that's
34 a separate body of policy that we're looking at in our
35 complaint handling work, but is there some internal
36 investigation that's required by the institution before a
37 state of knowledge or belief is reached that triggers the
38 reporting requirement in this statute?
39

40 These cases will turn on their own facts. It is
41 unlikely though, in my view, that every allegation or
42 complaint in all circumstances of child sexual abuse will
43 be caught by the section. That might be something that is
44 open to debate. Knowledge may not arise in every case on
45 receipt of an allegation. The question is what is
46 knowledge or belief.
47

1 In terms of blind reporting, I think we can say - and
2 I have noticed a consensus here - that the identity of the
3 victim will be a factor that's material to any police
4 investigation, so it is important information.
5

6 It is important I think to bear in mind that the
7 concepts of knowledge and belief are factors that limit the
8 severity of the offence. If the knowledge or the belief do
9 not rise to the requisite standard then no offence has been
10 committed in simply providing police with information by
11 way of blind reporting.
12

13 Finally, even if there is knowledge or belief, no
14 offence will be committed if there be a reasonable excuse.
15 That's the type of expression that abounds in legislation,
16 as many of you will be aware, but the courts are clear, it
17 is not an expression with a fixed meaning applicable
18 wherever it arises. It will depend on the scope and
19 purpose of the Act and the context within the Act in which
20 that expression is deployed. For example, I have noticed
21 one case in which a reasonable excuse has exonerated the
22 conduct of a person where they remained silent for fear of
23 self-incrimination.
24

25 A confidential relationship, however - and again, it
26 is case by case - probably does not constitute a reasonable
27 excuse. The Supreme Court in a recent case, in 2014,
28 before Justice Slattery in the Equity Division in this
29 State, declined to grant an injunction on that ground to
30 prevent the conveyance of information from a relevant child
31 protection agency to police in relation to an allegation of
32 incest. It is the case of re David in 2014.
33

34 The Chair has already mentioned the work of the
35 Police Integrity Commission and the Protea report
36 considering this aspect. They consider it by tracing the
37 development of the statutory offence which has since 1990
38 undergone some revision, including to carve out particular
39 professions, although I think significantly still leaving
40 open the possibility of prosecution even for those
41 particular categories given the Attorney-General's approval
42 and bearing in mind that legislative development, the
43 Protea report concluded that blind reporting is probably
44 not permissible under Section 316 by reference to
45 reasonable excuse. It also recommended that there be an
46 urgent review of blind reporting in the context of the
47 crime.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

I will just conclude by noting, as many of you will be aware, that in 1999 the New South Wales Law Reform Commission recommended that the provision be abolished altogether.

The report does make a comment about informal confidential relationships and makes this comment, that in the Commission's view the value of these confidential relationships, together with the other confidential relationships discussed above, and they were things like relationships between doctors and patients, lawyers and clients and so forth, is an additional reason for repealing 316 at least where the victim desires confidentiality. Unless, Chair, there's anything I can assist you with, that's all I have.

THE CHAIR: No, thank you, Tony. What I would like to do, just to start off the discussion, is just to ask a few of you who may be in a position to be reporters what your practice might be and no-one should think that by reason of their being asked early in the process that they have any special place in my consideration or the Commission's consideration of these issues, but we do want to find out what's presently happening.

Cathy, because you're straight ahead of me, perhaps you can tell us what the practice of your organisation is in relation to allegations and its reporting practices.

DR KEZELMAN: Most of this activity would occur through out our Blue Knot Helpline and most of our callers are adult survivors and we would not see the reporting of historical abuse as our core business, but always is the choice of the survivor unless there's a current risk to children from an alleged perpetrator; for example, if they're still working with children.

We don't actively encourage victims to report but we certainly explore possibilities around reporting if they indicate that they're considering it and want more information. We let them know what reporting may look like and provide information about how reporting can proceed.

We would like to make the point that obviously everyone is an individual and we acknowledge that for some reporting can be very re-traumatising and the whole process

1 of the system, but for others it can be quite empowering
2 and part of the healing process. We help survivors to
3 explore their motivation in reporting and their
4 expectations from doing so, as well as providing
5 information regarding the challenges of reporting that may
6 not lead to prosecution, that prosecution may not lead to a
7 conviction and that the sentence being handed down may not
8 meet their expectations.

9
10 Most of our calls are actually about supporting
11 survivors in the present and what do they need for their
12 health and wellbeing.

13
14 We do support survivors in various stages of the
15 reporting process but given our model of service, which is
16 often just a single occasion of service, we're unable,
17 obviously, to provide ongoing support, but we encourage
18 survivors to seek face-to-face support with health
19 professionals who can help them in that process and we also
20 make referrals to other relevant organisations such as
21 Community Legal Service, Legal Aid, Victim Services, to
22 help them in that process.

23
24 In situations if there is current or ongoing abuse the
25 caller is approached differently. When the caller is an
26 adult and the counsellor has established that the caller is
27 calling for support about their current abuse, we first
28 assess their safety. We then explore and provide what the
29 person needs right now in terms of safety and stabilising
30 their situation and explain what we can assist with and
31 what we can't do and refer them on to perhaps a local
32 sexual assault service or 1800Respect.

33
34 Sometimes callers seeking assistance about current
35 abuse may have experienced prior childhood trauma and we
36 welcome them to call back when their current situation has
37 been stabilised. If we're made aware of ongoing sexual
38 abuse of an adult then this would be reported to the police
39 if the caller was unable or unwilling to do so and we had
40 sufficient information to make the report.

41
42 Our callers generally are able to remain anonymous
43 when they call our line and many choose to do so. If the
44 caller is calling about concerns about risk of significant
45 harm or abuse to a child now, we undertake an assessment
46 and gather information where we can using the policies and
47 procedures which guide this.

1
2 We always report risk of significant harm or abuse to
3 a child to the relevant State agency and we encourage
4 callers to make a report and provide them with background
5 information as to what will help when they do so. We
6 encourage that it can be difficult for them to be holding
7 concern about the safety of a child, making a call to us,
8 making a report to a child protection agency, and we
9 explore supports available to the caller to do this and to
10 care for themselves in the process, so we may refer to
11 another service such as Child Abuse Prevention Service,
12 Bravehearts, Parent Line.

13
14 As regards making blind reports, counsellors endeavour
15 in the first instance to make all reports with the consent
16 and cooperation of the caller. Counsellors are obviously
17 obliged to make a report if there's a belief that a child
18 is at risk of significant harm or abuse. They use their
19 discretion, however, when made aware of ongoing sexual
20 abuse of an adult. This would be reported to the police if
21 the caller couldn't do so or is unwilling to do so, but
22 encouraging the caller is always our preferred option and
23 they are certainly always able to remain anonymous if they
24 choose to, although we obviously see the limitations of
25 providing information which lacks detail related to the
26 victim, such as the identity and the context of the crime.

27
28 We would like to draw a parallel here between the
29 therapeutic and counselling guidelines when a counsellor
30 and therapist sees the client as at risk of harm to
31 themselves or to others, at which time safety of self or
32 others is privileged over client confidentiality and
33 sometimes the client's wishes and obviously when children
34 are at risk of harm, reporting always takes precedence over
35 the wishes of the survivor in that circumstance.

36
37 THE CHAIR: Could I just then make sure that we all
38 understand the position?

39
40 DR KEZELMAN: Yes.

41
42 THE CHAIR: If someone make contact and they're presently
43 a child, so they're under 18, reporting that they are
44 presently or have been abused, will you tell the police?

45
46 DR KEZELMAN: Yes. We would make a mandatory report to
47 the appropriate agency, yes.

1
2 THE CHAIR: But would you tell the police?
3
4 DR KEZELMAN: We would report it to the FACS Helpline,
5 yes.
6
7 THE CHAIR: And provide the name of your caller?
8
9 DR KEZELMAN: Yes, absolutely.
10
11 THE CHAIR: Irrespective of whether they wanted that?
12
13 DR KEZELMAN: Absolutely.
14
15 THE CHAIR: If they are over 18 and an adult and they ring
16 up and say that they were abused when a child, do you
17 always report that to someone?
18
19 DR KEZELMAN: No, we don't. If we are aware that the
20 perpetrator is still alive and may pose an ongoing risk
21 then we would report it.
22
23 THE CHAIR: So if, for example, it was a report in
24 relation to a school teacher and it's reasonable to assume
25 that the teacher is still teaching --
26
27 DR KEZELMAN: Yes, absolutely.
28
29 THE CHAIR: -- you would report.
30
31 DR KEZELMAN: Absolutely.
32
33 THE CHAIR: And would you report the name of your caller?
34
35 DR KEZELMAN: We would encourage the caller to do so.
36
37 THE CHAIR: But if they said, "No, we don't want to"?
38
39 DR KEZELMAN: If they said no and we thought there was
40 a significant risk, yes, we would. We would. So that
41 would be a time at which we would override the client's
42 wishes.
43
44 THE CHAIR: So if the counsellor is told, "I was abused
45 when I was 12 at so-and-so high school", and the teacher
46 was identified as, say, having been likely to have been
47 25 years of age and it occurred, say, 10 years ago, you

1 would report the name of the alleged offender and also the
2 name of the caller; would that be right?
3
4 DR KEZELMAN: Correct.
5
6 THE CHAIR: With the expectation that the authorities
7 would intervene and would speak to the caller?
8
9 DR KEZELMAN: Yes, correct.
10
11 THE CHAIR: And that's irrespective of whether the caller
12 wants you to report his or her name?
13
14 DR KEZELMAN: That's right.
15
16 THE CHAIR: Now, if that person calling is an adult, but
17 reporting an alleged offence 25 years ago when the teacher
18 was allegedly, or thought to be, say, 50 years of age, what
19 would you do in those circumstances?
20
21 DR KEZELMAN: Sorry, just --
22
23 THE CHAIR: Your caller reports having been abused as
24 a child in a high school when they were 12, but the teacher
25 was thought to be, by your caller, 50 or so years of age,
26 so would now be 75, say, and unlikely to be teaching. What
27 would be the position then? Would you report? And would
28 you report the name of the caller?
29
30 DR KEZELMAN: That would often be at the discretion of the
31 counsellor. That's sort of a value judgment, isn't it, and
32 probably not ideal, but - yes.
33
34 THE CHAIR: What elements would inform the value judgment?
35
36 DR KEZELMAN: I suppose an assessment of whether someone,
37 a child, is at risk. But, I mean, that should be
38 a decision by police making an investigation, rather than
39 the counsellor.
40
41 THE CHAIR: Yes. And if any of these callers had said,
42 "I just want to talk to you people, but I absolutely don't
43 want you to tell the police", do you tell your caller that
44 you are going to tell the police anyway?
45
46 DR KEZELMAN: Look, if there is a child at risk of harm,
47 yes, we would.

1
2 THE CHAIR: You would say, "I'm sorry, we're going to
3 report it".
4
5 DR KEZELMAN: Yes, "We're going to report it to the
6 police."
7
8 THE CHAIR: Okay. When you do that, do you know if you
9 get people who are upset by your taking that position?
10
11 DR KEZELMAN: Yes, look, I mean obviously we explain the
12 reasons for it, and certainly we know that people who have
13 come forward to the Commission are very interested that
14 their testimony may make a difference to the safety of
15 other children, and so we would use that as a way of
16 helping to explain the reasons and the motivation behind it
17 and, you know, acknowledge that the impact on them of their
18 own sexual abuse has been very substantial and that our
19 motivation is to make sure that that's not a situation for
20 others, yes.
21
22 THE CHAIR: Carol, from Bravehearts - you are in front of
23 me, too. Bravehearts obviously has done a lot of work in
24 this space as well. What is Bravehearts' position in
25 relation to this blind reporting question?
26
27 MS RONKEN: We work with children, young people and adult
28 survivors. Obviously with children and young people we are
29 mandatory reporters, so we make it very clear with anyone
30 who makes contact with our service, when they are reporting
31 or talking to us around sexual assault of a child or young
32 person, that we will report, that we are mandatory
33 reporters and we will do that.
34
35 For adult survivors, we've long encouraged adult
36 survivors to speak out, recognising that the only way we
37 will know who offenders are is if adult survivors or others
38 speak out around who the offenders are.
39
40 Back in 2000 we developed an anonymous scheme with
41 Queensland Police. We sort of sat around with the
42 Queensland Police, the DPP, the Public Defenders, the then
43 Crime and Misconduct Commission, and developed what we have
44 termed the Sexual Assault Disclosure Scheme, or "SADS". It
45 is an anonymous way that adult survivors can report to the
46 police in an official manner.
47

1 So the information initially - we've now made it
2 online, but we initially had two forms that we just sent
3 out to survivors. Form A had all of the information about
4 the victim or the person who was making the disclosure, and
5 form B had all the information about the alleged offender
6 or offences. Form B initially just went straight to the
7 police: we never saw it, so we knew nothing about the
8 offender or offence, and we just received information about
9 the victim, and the forms were of course linked with an
10 identifying number.

11
12 We have now made it online, so Bravehearts now gets
13 both forms and we immediately forward Form B to the police.

14
15 We give victims the choice - they can tick a box to
16 say whether they would like to stay anonymous and not have
17 their details provided to police, in which case we make it
18 clear that it has been given to police for intelligence
19 purposes only. They can also tick to be contacted directly
20 by police or through Bravehearts by police.

21
22 The scheme has now been running for about 15 years,
23 and we've seen quite a number of people who have been
24 arrested from the scheme - there was a paedophile ring in
25 Queensland that was uncovered through the scheme. And we
26 have opened it up to all jurisdictions now, so it's not
27 just with Queensland Police.

28
29 THE CHAIR: So, effectively, you are aiding blind
30 reporting?

31
32 MS RONKEN: We are, yes. We are sort of acting as
33 a conduit for information from the victim to police.

34
35 THE CHAIR: But the effect of it is that, if you want to,
36 you can require that you blind report. Now, do many people
37 tick the anonymous box?

38
39 MS RONKEN: They do, they do. And what we do, as soon as
40 we receive the forms we phone them immediately. If they
41 have ticked the "anonymous" box, we talk through with them
42 about the possibility of us being able to support them
43 through speaking to police, because obviously it is ideal
44 if they do, so that police can do an investigation. So we
45 make it very clear that we will be there and we will have
46 case managers who will support them and be with them
47 through that process.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Very rarely have we had anyone who has refused to speak to police. So when we do receive a call from the police saying that they would like to speak to a victim, we will contact them, let them know that that has occurred, and I think only twice that I'm aware of the victim has sort of said that they didn't want to speak to the police.

THE CHAIR: In the circumstances where someone has ticked the "anonymous" box but they end up talking to the police, do they do so with any condition as to whether or not they would be prepared to give evidence?

MS RONKEN: No, we make it really clear that at any time they can sort of say to the police that they don't want an investigation to go forward. So the choice is always with them, yes. We just make it clear that we're there to support them right throughout the process.

THE CHAIR: And do many decide that they will talk to the police but refuse to give evidence in a trial?

MS RONKEN: Yes, there have been a few that have said they are happy to talk to the police and give them further information but they don't want for their case to proceed. They are not interested in going forward with an investigation for their own particular matter.

THE CHAIR: So the sense that I think you are giving all of us is that your discussion with a survivor, in those circumstances, almost always facilitates the police being able to speak to the survivor?

MS RONKEN: Yes.

THE CHAIR: Even if it doesn't result in a criminal prosecution?

MS RONKEN: Yes, that's right. And I think as Cathy mentioned, for many of the survivors it's about protecting other children. So they're sometimes not too concerned about their own matter being investigated and having justice for themselves - sometimes they have moved on, they have been able to go through counselling and to heal - and their focus is then on protecting other children.

THE CHAIR: All right. Well, I will just keep moving left

1 at this stage. Julian?

2
3 MR POCOCK: Well, Berry Street comes at this issue mostly
4 through our recently established independent redress
5 scheme. I suppose the starting point for that, and redress
6 generally, as the Commission has looked at, is that
7 institutional-run redress schemes have I think had elements
8 of concealment within them, and that institutional
9 arrangements for redress have at times sought to, in their
10 engagement with survivors and victims, keep things within
11 the institution. I'm not suggesting that's what
12 Berry Street's approach has been or is, but that has been
13 the starting point for our thinking about how we construct
14 a redress scheme which is open and transparent and has the
15 effect of ensuring that survivors of any form of harm or
16 abuse through Berry Street are encouraged to come back to
17 Berry Street and access redress. So that's what we are
18 wanting to do.

19
20 As part of that process of encouraging people to come
21 back to us, it has been important that we have an open and
22 transparent approach, including that we will always
23 encourage people, when they come back to us, to report
24 matters to the police; that there's no deed of release and
25 that they don't face, I suppose, unhelpful choices about
26 the way they disclose what has happened to them.

27
28 I think it is important to note that disclosure is
29 a process, it's not an event, and it happens over time and
30 different elements of people's experiences of abuse can be
31 disclosed to different people at different times.

32
33 So in establishing what we refer to as our "interim"
34 redress arrangements - we are hopeful that there will be
35 a national redress scheme; perhaps not overly hopeful, but
36 we're strongly encouraged that there will be a redress
37 scheme in Victoria - in developing our interim arrangements
38 we have made it clear that we will pursue a policy of blind
39 reporting. So we encourage people, when they come back to
40 us, to consider making disclosures to the police. We
41 provide the types of support and assistance that Cathy
42 outlined to people, should they choose to do so. But we
43 also make it clear to people that the information that they
44 reveal to us may, alongside other information we have about
45 events that have taken place at Berry Street, mean that we
46 form a reasonable belief that some children and young
47 people may still be at risk, or that we form a reasonable

1 belief that even if children aren't currently at risk, that
2 someone implicated in an allegation that has come to us may
3 be guilty of an indictable offence, and that's a matter
4 that we would want to bring to the attention of the police.
5

6 So we make it very clear to people through our redress
7 scheme that we will pursue blind reporting and we will, if
8 we form that reasonable belief, pass on all the relevant
9 information that we can, with the exception of the
10 identifying details of the survivor, unless the survivor
11 has consented to that. So that's essentially what we do.
12

13 THE CHAIR: Thank you. Denis?
14

15 MR O'BRIEN: Thank you, your Honour. As you know, both
16 the Towards Healing protocol and, indeed, the arrangements
17 in relation to the Melbourne Response have provisions that
18 say that victims accessing both those schemes are
19 encouraged to report matters to the police.
20

21 Under Towards Healing there was, and still is,
22 a provision that says that if the complainant doesn't want
23 to take the matter to the police, the details of the
24 complaint should be provided to the Director of
25 Professional Services, who then should report to the police
26 other than giving details that could lead to the
27 identification of the complainant. So that was the sort of
28 genesis of the blind reporting arrangements that applied
29 under Towards Healing.
30

31 That, as you know, was the practice that was followed
32 in New South Wales up until the recent Police Integrity
33 Commission report, where there were doubts raised about the
34 legality of that practice in terms of the provision we're
35 now looking at, section 316 of the Crimes Act. So upon the
36 handing down of that report, the New South Wales
37 Professional Standards Office stopped the practice of blind
38 reporting and now provides all the information to the
39 police on a reporting form that has been, I think,
40 developed in conjunction with the police.
41

42 The information that I've got is that since that has
43 happened there are about 17 Towards Healing police reports
44 and 28 intelligence reports that have been lodged with the
45 police since blind reporting stopped last year, and these
46 reports all include the name of the complainant.
47

1 Because, of course, there had been a significant
2 amount of blind reports that had occurred before then, the
3 New South Wales Professional Standards Office has
4 undertaken the large task of going back over all previous
5 blind reports and providing further information, including
6 the victim's names, to the police. The information I've
7 got suggests that about 250 report updates have been
8 provided to the police so far pursuant to that re-looking
9 at all those files. So that's the position in New South
10 Wales.

11
12 I should say that individual dioceses in New South
13 Wales have for many years, when they have become aware of
14 information of an alleged sexual offence, reported fully
15 the information to the police in accordance with what was
16 seen as the requirements of section 316 of the Crimes Act,
17 including the name of the victim.

18
19 In Victoria now, of course, there is the provision in
20 Victoria which has a bearing on what should be reported to
21 the police - not a bearing, but sets down requirements as
22 to what should be reported. I'm told that under Towards
23 Healing in Victoria, in fact, they have, over all the years
24 that Towards Healing has operated, never had a case of
25 victim who is under 18, so they're looking at cases where
26 certainly the abuse was alleged to have occurred when the
27 complainant was a child, but they are cases where the now
28 adult is coming to Towards Healing.

29
30 In Victoria, the position is governed by the new
31 criminal provision down there, although, of course, as we
32 will see, I guess, this afternoon, that provision does have
33 some qualifications around it where the person is over 18,
34 or over 16, I think, at the time of the information coming
35 to the knowledge of a third party. So that's, as
36 I understand, the position at the present.

37
38 THE CHAIR: Denis, is there any concern, in retracing old
39 files where there has been a blind report, about a church
40 person having said to a survivor, "We will tell the police,
41 but we won't give the police your name" - is there any
42 concern that the relationship with the survivor had that
43 condition in it, and that you are breaching it?

44
45 MR O'BRIEN: I'm not aware of the details, your Honour.
46 I think those sorts of issues have had to be addressed.
47 How, in a practical way, that has been worked through

1 I don't know. I think one would have to talk to
2 Michael Salmon to just work out how he's worked through
3 those sorts of problems.
4
5 THE CHAIR: I take it it's the same with a contemporary
6 report, too: if someone comes to you now and says they
7 don't want their name to go to the police, as I understand
8 it, the church will give their name to the police --
9
10 MR O'BRIEN: Yes.
11
12 THE CHAIR: -- even if the person says they don't want it
13 to happen?
14
15 MR O'BRIEN: That's my understanding.
16
17 THE CHAIR: Do you know whether that causes problems in
18 your relationship with that survivor?
19
20 MR O'BRIEN: I don't know, your Honour. I don't know, in
21 the practical sense, how that works, yes. That's my
22 understanding as to what happens.
23
24 THE CHAIR: Yes. I'm going to break precedent now and ask
25 Linda Howlett if you can just outline what the police
26 position is in New South Wales. I think behind tab 4,
27 again, I think we have your memorandum as appendix B.
28
29 D SUPT HOWLETT: That's correct. Just for the record, in
30 case anyone is listening in, I'm Detective Superintendent
31 Linda Howlett, I'm the Commander of the NSW Police Sex
32 Crimes Squad.
33
34 We basically have a process that most of the other
35 agencies have identified. We actually have a SARO option
36 available to members of the public, and basically what that
37 is, it is the Sexual Assault Reporting Options, and it
38 enables members of the public to confidentially report
39 reports of sexual assault to the NSW Police via our
40 website.
41
42 That particular website is actually maintained by the
43 Sex Crimes Squad. It has an option on that system for the
44 victim to be anonymous, or would they actually like to be
45 contacted by the police. If they indicate that they wish
46 to be contacted by the police, we actually make contact
47 with them and we have a discussion about whether they are

1 providing the information just on an intelligence basis, or
2 we actually encourage the victim to seek either counselling
3 or support services and also report to the police.
4

5 We have had instances where victims have made a report
6 and contacted us some time later saying that they are now
7 in a better position and they do wish to report to the
8 police and actually make a statement, provide a statement.
9 So that is one option.

10
11 I just want to say, the stance of the NSW Police is
12 that we would encourage all victims of any crime, in
13 particular, sexual assault, to report it to the police. We
14 would want them to actually come to us and we would like to
15 investigate it. Because, at the end of the day, that's our
16 job.
17

18 However, I do understand that it is problematic in
19 regard to the NSW Police, victims and also NGOs in regard
20 to the processes that are actually being implemented.
21

22 Prior to my taking over the command of the squad,
23 there was what I would describe as an ad hoc format of
24 receiving information from NGOs, which I considered to be
25 problematic. As a result of that, I sat down with the
26 management team and we basically redesigned the format of
27 the information that we actually required from NGOs to be
28 provided to the police.
29

30 In particular, some of the concerns that I had were to
31 ensure that NGOs gave consideration to current risk to
32 children, adult victims, whether they had the retention of
33 any exhibits, offenders' details, whether appropriate
34 notifications had been made to either FACS or the
35 Ombudsman's office. I know for a fact, I had a look at
36 just a couple of the reports, and some of them basically
37 said, "In 1965, the gardener at a particular institution
38 touched up two girls", and that was the extent of the
39 information. So, really, it makes it very difficult for us
40 to proceed with that. So what we wanted to do was
41 establish a format to encourage NGOs to provide as much
42 information to police as possible so that we could also
43 conduct a risk assessment to see whether, even though the
44 victim doesn't wish to proceed, there could be a common
45 thread where the same offender is constantly being raised
46 in these reports. Also, we wanted them to give
47 consideration to whether, even though these blind reports

1 relate to historical allegations, the person of interest or
2 the offender was still actually having contact with
3 children.
4

5 I know that you earlier raised a point about whether
6 a school teacher might have been too old now, but the other
7 consideration is whether that school teacher might have
8 grandchildren that they are possibly offending against. So
9 we wanted NGOs to turn their mind to those elements,
10 because even though they might not actually still be
11 working, they could have contact with victims and could
12 still offend against children.
13

14 THE CHAIR: Thank you. Nicola Ellis, your firm has a lot
15 to do with survivors in various ways.
16

17 MRS ELLIS: We do.
18

19 THE CHAIR: No doubt you are called upon to give advice
20 about reporting to police. Can you just tell us what the
21 advice is that you give people?
22

23 MRS ELLIS: Certainly. Well, many of the people who come
24 to us have in fact already been in touch with the police.
25 Often, people will be referred to us through knowmore, and
26 so may well have already been in contact, or through the
27 Royal Commission - they have had a private session and so
28 may well have had a discussion within that private session
29 about a referral through the Police Liaison Unit.
30

31 If the client hasn't been in touch with the police at
32 all, we always encourage reporting to the police. If they
33 know that the perpetrator is alive, if they have been told
34 that, somewhere, then certainly we would be encouraging
35 that. If they don't know if the perpetrator is still
36 alive, then we encourage the report to the police because
37 that's the best way to find out the current circumstances
38 of the perpetrator.
39

40 As you know, our practice is primarily with religious
41 institutions. Many of the perpetrators may have left the
42 order, so we can't get that information from the order
43 directly.
44

45 We have never had to blind report, because - the
46 wording that came before was "facilitate" the reports to
47 the police - we also explain potential difficulties with

1 a matter going all the way through to prosecution, but
2 these days, we are able to say to people that the police
3 will respect the choice, that if they will go and talk to
4 the police initially and give a statement and then for some
5 reason, for their wellbeing, they can't continue to give
6 evidence, that the police will respect that. We've had
7 numerous people who have taken those first steps and then,
8 often because of the length of time that the matter takes
9 to come to court and other things happening in their lives,
10 with an opinion from their psychologist or therapist that
11 really in terms of their wellbeing it would be better to
12 pull out, then they have done that, but that has always
13 been with the support of the police. I haven't had anybody
14 who has said, "I'm being pressured to stay in and I really
15 don't want to".

16
17 We also then stay in contact with the police if we
18 have facilitated that referral. There have been times when
19 we have been able to support - so, for instance, for
20 a couple of clients where there was no written statement,
21 we were able to listen to the private session, the audio
22 recording, to produce a transcript, whereas if the police
23 were doing that, our understanding was that the survivor
24 would have to come as well, so we were able to
25 short-circuit that.

26
27 So, basically, we generate this sense of everybody
28 working together to support the survivor, and, as I say,
29 we've not had to consider blind reporting, because we've
30 managed --

31
32 THE CHAIR: It doesn't arise?

33
34 MRS ELLIS: It doesn't arise.

35
36 THE CHAIR: Thank you. Wayne Chamley, you also must have
37 had a lot to do with people in these circumstances, what's
38 the position with Broken Rites?

39
40 DR CHAMLEY: I want to respond, but I also want to ask
41 a couple of questions at the end. Our experience is that
42 these matters aren't sorted out on the basis of one phone
43 call. Particularly if it is a first-time contact, it will
44 just be a listening exercise. It will be suggested that
45 the person should speak to us more, or we would be willing
46 to speak to the person more, and there may be a series of
47 telephone conversations take place. Often, following that,

1 there will be one or more actual meetings with the person.

2
3 In the first ten or so years, many of the people we
4 were being contacted by were barely literate, and a key
5 thing always has been to explain that there are different
6 law systems - there is the civil process and there is the
7 criminal law - because they often didn't see that they had
8 been the subject of crime.

9
10 The men then differentiate from the women, because
11 many of the men, as young men, had been in trouble with the
12 police themselves. Many had been convicted and done time
13 in gaol. So they are very untrusting of police. So we
14 would have spent quite a lot of time with these people, to
15 the point of, if we can get a person to agree that making
16 a police statement is an important thing to do, we will
17 accompany them to the police station, and that raises
18 a difficulty sometimes because they will ask, "Well, what
19 do you want me to tell the police?", and we can't do that -
20 the barrister will have us for breakfast.

21
22 THE CHAIR: Well, yes, lunch maybe.

23
24 DR CHAMLEY: So it gets a bit tricky.

25
26 THE CHAIR: Tell me, if the person, when they first come
27 in, reports, do you tell the police at that stage, even
28 without telling the police the name of the survivor?

29
30 DR CHAMLEY: It has always been our practice that we have
31 to abide by what the person wants to do, and if they don't
32 want to go to the police at that point, then nothing
33 happens. But we don't give up on it, because we wait to
34 see if we get more phone calls about the same perpetrator
35 from other people, and we keep going back to each of them
36 and saying, "There looks to be more than your experience.
37 Would you reconsider?", and "This is the way you would have
38 to go about it."

39
40 JUSTICE COATE: And are we right to assume you are talking
41 about adults making contact with you?

42
43 DR CHAMLEY: Yes, invariably adults. Very young adults,
44 sometimes, but in the past it was a lot of fellows who had
45 been the subject of these crimes earlier in their life and
46 they were in mid-life, as it were.

47

1 THE CHAIR: We've been told multiple times that people are
2 more prepared to subject themselves to the criminal
3 process, including a trial, if they are aware that there
4 are other people who are going to give evidence against
5 that person.

6
7 DR CHAMLEY: Yes, that's right. And then they become
8 motivated - I've heard them time and time again - that they
9 don't want this to happen to any other person, what
10 happened to them.

11
12 THE CHAIR: What about someone who comes to you as an
13 adult, when it's reasonable to assume that the perpetrator,
14 or alleged perpetrator, is still in a position to offend?

15
16 DR CHAMLEY: Well, it is really difficult, but we have to
17 abide by the fact that we will honour what they say. And
18 then we just have to work hard to change their current
19 thinking.

20
21 THE CHAIR: Yes.

22
23 DR CHAMLEY: Because we just feel if we destroy that
24 confidence, then we may never get a conviction. At least
25 if we keep them in the ring, in time, we might get
26 a conviction.

27
28 THE CHAIR: It is a hard question. Does the Victorian
29 legislation affect the way you operate?

30
31 DR CHAMLEY: No.

32
33 THE CHAIR: No.

34
35 DR CHAMLEY: The other group that are in even more
36 difficulty are the ones with intellectual impairment and
37 the role of legal guardians and people who have power of
38 attorney, because often those fellows can't even verbalise
39 really and yet, the family knows and so the family are
40 phoning us to see if there's suspicious behaviour and
41 strange emotional outbursts when the person comes home for
42 the weekend, and that's really difficult because often the
43 parent is quite elderly and the legal guardian is a
44 sibling, or whatever, and so we have to meet with the
45 families and try and work it through with them.

46
47 THE CHAIR: David Shoebridge is known to everyone in

1 New South Wales and I suspect in Australia. He is a Greens
2 member of the Legislative Counsel which is our Upper House.
3 David, I think you have expressed publicly some views about
4 this issue. Can you give this audience the benefit of
5 these views?

6
7 MR SHOEBRIDGE: Yes, and it has been a fascinating
8 conversation. I think there are very distinct issues where
9 a victim has come to the institution that abused them,
10 whether it is a church or a non-government organisation, as
11 against the victim coming to someone like Broken Rites or
12 Blue Knot Foundation, because where the victim has come in
13 to, say, the church, the Catholic Church, and they allege
14 that they were abused by the church, well then the question
15 of blind reporting really puts in focus a very strong
16 conflict of interest, because we know from the police
17 protocols that where there's a blind report there won't be
18 a criminal investigation commenced and therefore there is a
19 strong self-interest, and it may be unspoken, it may not
20 even be fully intellectually recognised by the institution,
21 but there's a very strong self-interest in the institution
22 having a blind report made because then they and their
23 members will not be the subject of a police investigation.

24
25 There is also a very strong power imbalance between
26 the institution that has abused the victim and the victim
27 and the victim in those circumstances might be very loath
28 to challenge that institution in a court of law or go to
29 the police to challenge that institution.

30
31 From our perspective, it seems almost impossible that
32 an institution that is alleged to have abused a victim can
33 in any way assess whether or not they consent or don't
34 genuinely consent to go to the police and indeed, in those
35 circumstances, the accepting of blind reporting by the
36 NSW Police is, in my view, very deeply problematic. There
37 needs to be a circuit-breaker in those circumstances,
38 somebody who can genuinely assess whether or not the victim
39 consents and can actually be someone who doesn't have that
40 power imbalance to talk with the victim and genuinely work
41 through with the victim the benefits and the demerits in
42 going forward.

43
44 THE CHAIR: Who do you think that might be?

45
46 MR SHOEBRIDGE: I think one of the obvious examples in New
47 South Wales would be the Ombudsman's Office.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE CHAIR: I am coming to Steve in the moment.

MR SHOEBRIDGE: I don't mean to give the Ombudsman's Office more work, but they have a long history here of dealing with reportable conduct. They seem to have an appropriate set of skills and procedures in place to be that fair broker and the number of blind reports in New South Wales, we know since 2010 there have been about 1400 that have gone to the Sex Crimes Unit, but that's an underreporting of the numbers because since the middle of 2014 most blind reports haven't been going to the Sex Crimes Unit but in fact have been going to the individual local area commands and despite our best endeavours, we haven't been able to find how many of those reports there are in local area command. It is not a small issue, it is a very substantial issue.

THE CHAIR: Steve?

MR KINMOND: Just a couple of observations.

THE CHAIR: I should say to everyone listening, Steve is the New South Wales Ombudsman.

MR KINMOND: In terms of children blind reporting, clearly, the answer to that is no, no blind reporting. In terms of historical allegations, survivors of child abuse who report, our approach in relation to bodies under our jurisdiction once again is to turn our mind to the question as to whether the material might indicate that there are current significant risks to children. We are in the business of oversighting matters in the child related employment area, so from an ethical perspective, rightly or wrongly, we have taken the view that if we've got or an agency has information to indicate that somebody who potentially presents a current significant risk to children has been reported and there is some reliability to the report, that in those circumstances our approach in relation to bodies under our jurisdiction is to say there should not be a blind report in that context.

THE CHAIR: Irrespective of the wishes of the victim.

MR KINMOND: Irrespective of the wishes of the victim. That is the approach that we have taken. I understand the other points but the difficulty that one has is how does

1 one explain subsequently to those who might be the subject
2 of abuse, or indeed to their parents, that this critical
3 information was withheld from the police and that's the
4 challenge we have. I also have the other challenge that
5 I have Royal Commission powers, so the difficulty that I
6 have is to make an ethical call if I think there are very
7 substantial risks to children in this context and I had the
8 ability to obtain the information and I haven't given an
9 undertaking to the person who has come forward, then I am
10 in a very difficult ethical position, having the power to
11 obtain that information if I believe it is critical and yet
12 not exercising that power.

13
14 That sounds rather dire, does it not, but one of the
15 things that I can say is that we've worked with a range of
16 agencies under our jurisdiction now on this issue. What
17 was interesting when the police issued its guidelines,
18 for example, to non-government agencies, the concern was
19 expressed to me by a number of entities that the guidelines
20 seem to allow for blind reporting and so it wasn't agencies
21 worried about protecting their right to blind report, the
22 concern was that it seemed to allow for blind reporting and
23 there were subsequent discussions with the police. Denis
24 has referred to the practice, as I understand it, either
25 across all or most of the New South Wales dioceses of the
26 Catholic Church, where reports are made, where there is an
27 indication that they will always provide the name of the
28 victim now, that there will be an indication given to
29 police if that victim does not wish to be interviewed by
30 the police.

31
32 My only advice to the Catholic Church on that issue
33 would be that it would be useful to build into that
34 process, picking up David Shoebridge's point, an
35 independent advice avenue so that prior to the
36 Catholic Church indicating to the police that the
37 individual doesn't wish to be interviewed by the police,
38 perhaps Bravehearts or another organisation --

39
40 THE CHAIR: David suggested maybe your organisation.

41
42 MR KINMOND: I am happy to move the ball around,
43 your Honour.

44
45 THE CHAIR: Are you happy to accept the ball, though?

46
47 MR KINMOND: That is a decision for others, your Honour.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE CHAIR: Let me ask you this: would it be a function that could fit into your office or would it be a stranger to your office?

MR KINMOND: Potentially, it could fit within our office because I hope that we're seen as an independent, honest, reasonably competent broker in this area. Can I also make the point too that my understanding from discussions with a number of the senior representatives who exercise child protection practice across the diocese is that contrary to popular mythology, when victims are spoken to in a respectful, caring fashion about why there's a feeling that there is a need to pass on their details, then the vast, vast majority of circumstances results in that person appreciating that advice and understanding why that information needs to be provided.

One of the critical things I think we need to do looking forward is to say well, the legislation might say one thing in terms of what is and isn't criminal behaviour, but that's separate from whether we can sit on our laurels in terms of our practice in providing supports to victims.

THE CHAIR: That positive response, is that in the context where the person understands that their name will go to the police but that doesn't mean that they have to participate in a criminal prosecution?

MR KINMOND: Absolutely, your Honour. In fact, I had discussions - I hope this was acceptable, - with Linda Howlett last night on this issue to say where is our facts sheet that we've prepared which emphasises very strongly the rights of victims in those circumstances, post the referral to police? Where is it included in this non-existent facts sheet? The police are there to provide support to individuals and together with other very helpful advice that they have a right to receive, so, yes, there are some good things I think happening in New South Wales, but I think we all agree in terms of a victim focused approach there is more that could be done.

Can I just make one final point? Denis's observation that in Victoria now the Catholic Church adheres to the legislation that defines reasonable excuse, my only concern about that is I think they are two issues. The question as to whether it constitutes a crime is one thing, the failure

1 to provide information. The question as to whether it is
2 good practice is another issue and so I don't want to
3 overstep the mark, Denis, but my observation would be for
4 the Catholic Church in Victoria the fundamental question to
5 deal with is what's good practice, not whether people might
6 be charged with offences for failing to report.

7
8 DR CHAMLEY: Could I just make a comment? In relation to
9 what you're saying, it has been my observation that people
10 who don't want the police involved are often disclosing it
11 for the first time to any person and what they're concerned
12 about is the police are going to make a phone call and
13 their wife or somebody takes the call, or they're going to
14 receive a letter where the police in Sydney are on it.
15 I don't think it's that they don't want to engage with the
16 police, they're worried about the process.

17
18 THE CHAIR: We see that many, many times when we're
19 talking to people. The method of communication is very
20 often defined and confined, absolutely right, but that can
21 be overcome by defining the means by which you do
22 communicate. Many people don't want a policeman knocking
23 on the door saying, "Is Mr So and so home?" Yes.
24 Karyn Walsh, what's your position on all of this?

25
26 MS WALSH: We have had different processes at different
27 times because of the nature of Queensland's inquiries and
28 what people were doing and not doing. We have supported
29 people access Bravehearts. I suppose our position as
30 workers is that we will support the person to understand
31 the role of the police, both with gaining intelligence and
32 investigating, so we would encourage people to have a
33 conversation with the police.

34
35 There isn't a formal way of the police communicating
36 to all victims very well that they will talk through with
37 them what are the implications of talking to them, versus
38 making a decision to proceed with making a complaint to go
39 through an investigation.

40
41 We have spent lots of time talking with individual
42 police or units of police, like Argos, when it was doing
43 it, or the Child Protection Unit. If it was a current
44 situation of a child under 18 and we have had a few because
45 of the nature of our work, we'd go straight to the Child
46 Protection Unit in the police and would tell the person
47 exactly that that's what we needed to do and we would go

1 with them to talk to the police if their child was at risk,
2 even if it was implicating them and let them know their
3 rights and link them up with everybody that needs to
4 happen.

5
6 The historical issues are really unclear in Queensland
7 about where is the first point of contact. As Wayne said,
8 people don't want to turn up at the local police station
9 and have to talk about something like sexual abuse
10 historically. I think separating the issues, most people
11 do want to know and would ask is there any way that they
12 can give the name of the offender, so that if there were
13 other people who had experienced abuse by that offender,
14 then that would change their mind about what they might
15 personally want to do, or if it didn't, they would be happy
16 that it supported other people make that choice in going
17 through with a prosecution.

18
19 I think the role of supporting people through all of
20 the police options is really complicated and there needs to
21 be better training for NGOs about what that is, how the
22 decision is made, for example, about whether, even in
23 making a complaint, it goes forward or it doesn't go
24 forward, that's a very confusing time, whether the evidence
25 is considered relevant, you know, enough evidence to
26 proceed or as people sometimes interpret it, is it good
27 enough to go forward or do they believe me or not believe
28 me, particularly with all the historic cases.

29
30 Certainly, people we work with are fully aware of
31 Bravehearts' scheme and Broken Rites, looking up to see if
32 the offender is on the list and that information is really
33 important. People really expect though that the
34 institutions in which the abuse occurred, that there would
35 have been reporting to the police, but not in their
36 complaint process now. It is really confusing for them as
37 to what is actually happening.

38
39 People may have said that they didn't want to give
40 their name and if they now find that it has been given, it
41 is just that trust issue about being transparent about the
42 process from the very beginning, whether it's police,
43 church or anyone, and what happens with the information,
44 what people have choices about.

45
46 Those are the really important issues that we find and
47 they're so complicated with every situation. This week it

1 could be different to a month ago. You've constantly got
2 to be ringing up and saying, "Well, where is it at now?
3 Where should a person go in the police to actually talk
4 to". And the court process is what scares people as well.
5 I know that's not part of this, but I think that fear of,
6 "What it's going to take? How public it is going to be?"
7

8 THE CHAIR: It is part of this because that's what is the
9 driver for many people saying they don't want their name to
10 go to the police. It is a fear of the criminal justice
11 process.
12

13 MS WALSH: Wherever there has been a positive and
14 constructive conversation with a police person who is able
15 to explain the process in a very objective way, cannot make
16 promises, you know, can explain people are really positive
17 about that, and I think they believe it is the role of the
18 police to both collect the intelligence in terms of the
19 patterns of offending behaviour and the accountability of
20 what has happened or not happened around that, because
21 sometimes there is evidence there to suggest that hasn't
22 been done well, but also it is the role of the police not
23 to investigate and not prejudice any process of getting a
24 prosecution. I think it is important that our roles are
25 very clearly defined and that there are fact sheets would
26 be a great help.
27

28 THE CHAIR: Thank you. Our schedule provides for us to
29 have a cup of tea now. I think, having regard to
30 everything that's happening in our premises today, that's a
31 good idea. When we come back I will ask the
32 Victorian Police, first of all, to tell us their position,
33 but we'll have a cup of tea or coffee. Thanks.
34

35 SHORT ADJOURNMENT
36

37 THE CHAIR: Thank you, ladies and gentlemen. We are now
38 back live streaming. We have lost David Shoebridge for a
39 little while and Karyn I think is not far away, but I think
40 we should start. Michael, what is the position of the
41 Victorian Police?
42

43 DSS DWYER: Thank you, your Honour. Just the observation
44 of sitting here and listening to other people around this
45 table talking, everyone is obviously doing a very similar
46 procedure or procedures, including the Victoria Police, and
47 it was indicated that the role of the police is basically

1 to investigate and prosecute and I suppose that's very true
2 but in these circumstances we try and do that where we can,
3 but it's not always the wish or desire of the complainant
4 that that's the way they want to go with things. We have
5 gone a way - we have virtually become policemen, social
6 workers, referral agency, we do all those.

7
8 THE CHAIR: I assume it's true in New South Wales too.

9
10 D SUPT HOWLETT: Very similar. We all have the same
11 difficulties.

12
13 DSS DWYER: There were a couple of things that we did very
14 early, it came out of the Victorian Parliamentary Inquiry,
15 was I recognised that we needed a pamphlet to give people
16 options. We just didn't want to talk to people. I wanted
17 something that someone could screw up, put in their pocket,
18 take it home and actually --

19
20 THE CHAIR: Do you have multiple copies of that with you?

21
22 DSS DWYER: No, I haven't. I think I have provided those
23 to the Commission in the past.

24
25 THE CHAIR: Do we have them somewhere, do we? We will
26 find them.

27
28 DSS DWYER: It just gave options and so the option was it
29 is your choice to make a formal police report and initiate
30 an investigation, or tell your story and defer any decision
31 to proceed, so you can think about it forever. Make a
32 statement with a clear decision not to proceed formally.
33 What I do is I ensure - and I speak to most of the
34 complainants via a system where we have a 1800 number where
35 a lot of people call through, leave their details. We
36 don't actually answer it. I will ring those people back
37 and personally speak to them. I will have them then send
38 me an email with the circumstances of the abuse and they
39 tell me right at the start whether they want to proceed or
40 not to proceed. This is where these conversations come
41 about regarding they're the only victim or they think
42 they're the only victim.

43
44 They will proceed if they become aware or I'm aware
45 that there are other victims. It becomes a situation where
46 you do get to know a lot of names, offenders' names, and
47 you can then tell the person, confirm with them, "Yes, we

1 have that person on the books. If you wish, I'll have an
2 investigator contact you, otherwise I can have the
3 information you've provided to me in your email converted
4 to an intelligence report and we'll put it on the system."
5

6 In some cases they are the only person that we are
7 aware of, but we keep that aside and then we go back and we
8 just pump the person's name into the database again and see
9 how many intelligence reports we have. It is a bit of a
10 combination of, "Yes, we would like you to proceed but we
11 won't, but if something further comes in we'll let you know
12 and hopefully, you'll come on board." And that has
13 happened quite a few times, especially where we already
14 have a prosecution happening and there's media coverage and
15 the prosecution has just finished, then people come forward
16 and they want to be part of that process again, so we have
17 to reinitiate.
18

19 That gives the surety to the complainant that, "Hey,
20 there were other people. How can I now assist?" We have
21 that happening all the time. It is a situation of there's
22 no hard and fast rule.
23

24 JUSTICE COATE: Michael, when people ask you whether or
25 not there are other victims in those initial calls, what do
26 you say, if you know that there are?
27

28 DSS DWYER: I am just very honest and transparent about
29 the situation and I will say to them, "I am personally
30 aware that there are other people that we're dealing with,
31 other complainants", and in some cases I might even tell
32 them the figure, if I'm aware of that figure. In some
33 cases, if there are 16 or 17 other complaints against that
34 perpetrator then I'll be very clear to the fact that we
35 have multiple persons involved in the case and with a
36 couple, especially where there were people who were
37 females, when they were as children sexually assaulted and
38 maybe that person has been before the court system before
39 and refuses to admit to sexually assaulting females, that's
40 the difficult thing, trying to assist those people, but we
41 do everything we possibly can and we have been very
42 successful in the cases where we have introduced the female
43 complainant or victim to the process.
44

45 JUSTICE COATE: Has giving that knowledge to the victim
46 that you're talking to ever caused a problem for you in a
47 criminal trial, that you're aware of?

1
2 DSS DWYER: No, because it is a growing number. I might
3 say that there are multiple other victims, but generally,
4 when we are doing a process, before - when we start an
5 investigation, from start to finish, it may go from two and
6 finish up at 22, unfortunately, but it's also important for
7 me to try and capture as many complaints as I possibly can
8 to make sure that they go as a bulk or try and get everyone
9 who has been offended against by that person to the court
10 at that one time.

11
12 It is not always the case, but no, it has never been
13 challenged and I say that that figure has never been
14 precise because it will grow. Very rarely do we have
15 people who withdraw their complaint.

16
17 THE CHAIR: Do you have then, at the end of the day now,
18 many people who will give you their story in a statement
19 but say, "No, there must not be a prosecution"? Do you
20 have many of those now?

21
22 DSS DWYER: Not many; it does happen from time to time but
23 not many.

24
25 THE CHAIR: Tell me this - one of the issues we've come
26 across is that, regrettably, as all of you would know, for
27 many people who are abused their life story can be tragic
28 and traumatic and also includes for many people some
29 criminal contacts with the police. Is that an inhibition
30 that you find in people being prepared to engage with you?

31
32 DSS DWYER: Yes, it is an issue that people see from their
33 perspective. We don't see that.

34
35 THE CHAIR: No.

36
37 DSS DWYER: We have dealt with quite a number. Over the
38 journey we have seen the situation where we know that
39 that's a direct result. The path they've taken in life is
40 a direct result of the abuse.

41
42 THE CHAIR: Yes.

43
44 DSS DWYER: We accept that and that comes in many forms,
45 whether it is criminal history, drug, alcohol abuse,
46 et cetera, and also whether they've been sex offenders
47 themselves.

1
2 THE CHAIR: Yes, that's true.
3
4 DSS DWYER: We just have to look at that and say, "Well,
5 that may be challenged before the courts, but in respect to
6 your matter, we will prosecute it, we will assist you", and
7 in many cases that hasn't hindered --
8
9 THE CHAIR: So you're not inhibited by the fact that they
10 may have a criminal record in bringing a prosecution.
11
12 DSS DWYER: No.
13
14 THE CHAIR: The same in New South Wales?
15
16 D SUPT HOWLETT: New South Wales is very similar to
17 Victoria. We also have an information sheet on our website
18 about options for victims how to report as well. With the
19 institutions you will find that a lot of victims actually
20 know each other. For instance, in the referrals you've
21 made to New South Wales, some of the victims actually have
22 come back to us and actually provided names for other
23 witnesses, et cetera. The difficulty that we have, which
24 is slightly challenging, is the fact that there was a
25 60 Minutes proposed interview with a number of women who
26 were abused at a certain institution and we wanted to,
27 obviously, put a halt to that because we didn't want the TV
28 interviews to compromise any trial down the track.
29
30 THE CHAIR: Yes. Did you succeed in stopping it?
31
32 D SUPT HOWLETT: Yes, we did, we got some assurance.
33
34 THE CHAIR: Tell me, have you prosecuted under the new
35 offence in Victoria?
36
37 DSS DWYER: No. When I say no, not Sano, Sano haven't
38 done that because we're looking at the historical matters.
39 The issue there centres around do institutions need to
40 report the abuse from the past? The SOCITs, yes. The
41 relevant SOCITs, I think in total there have been 71 under
42 three categories of the legislation, there have been 71
43 matters reported and on our system. The break-up for
44 those, they're incidents that are reported under grooming,
45 failure by a person in authority to protect and failure to
46 disclose a sexual offence against a child. The majority
47 come under the grooming part of the thing, so that's all

1 inclusive and that's from 1 January 2015 until 11 April of
2 this year.

3

4 As far as the break-down further, there were no
5 recorded incidents in relation to a person in authority
6 failing to protect a child from sexual offence.

7

8 THE CHAIR: No. Any failure to report?

9

10 DSS DWYER: Three.

11

12 THE CHAIR: Three. Have they been prosecuted
13 successfully.

14

15 DSS DWYER: I think they're in the process of being
16 prosecuted.

17

18 THE CHAIR: Nothing has come to a conclusion.

19

20 DSS DWYER: There have been some, but I think the grooming
21 part of it is the bigger issue.

22

23 THE CHAIR: Chris Atmore, you must have a perspective on
24 all of this. Can you help us? What is your view?

25

26 DR ATMORE: We take more of a systems policy approach
27 because, obviously, our lawyers are bound by lawyer-client
28 privilege so the only exception there is knowmore is our
29 sister community legal service and they're obviously very
30 familiar to the Commission and my understanding is that
31 they always prioritise the victim's choices around
32 disclosure.

33

34 I guess it is probably more of an observation in terms
35 of linking this morning's sessions with this afternoon's
36 and that's that I echo David Shoebridge's point about the
37 need to distinguish between institutions and reporting
38 issues and everybody else's and everybody else's in
39 particular, of course, includes victims and other
40 vulnerable persons and this afternoon I will obviously
41 canvass a bit more around vulnerable persons.

42

43 I think the linking thing that all of us in various
44 ways have sort of touched on this morning is how much
45 carrot and how much stick do we apply both to victims,
46 because I actually think compelling reporting where victims
47 have actually said they don't want their details to go

1 forward is a form of stick, and of course the stick under
2 fail to disclose and concealment of crime laws and how much
3 do we instead go for the carrot which is about, as people
4 have talked about, the facilitating of support for
5 disclosure by victims and by other persons.
6

7 I think institutions are clearly in a different category,
8 and we strongly believe in the stick as far as that goes.
9

10 Our observation of the Victorian context, which we
11 will talk about more this afternoon, is that it is often
12 too easy, politically, to pass a kind of sledgehammer
13 criminal law and then say that that has actually addressed
14 the problem. What we believe is that if more resourcing
15 was actually given to the support services in the
16 facilitation of disclosure by victims and by vulnerable
17 persons - that is a harder task and costs more money, but
18 I think that's the dilemma that we have in varying ways,
19 both with the blind reporting discussion and then with this
20 afternoon's discussion.
21

22 THE CHAIR: All right. Can I then raise some issues
23 generally - and, Victorians, don't think you are off the
24 hook; we're going to come back to you this afternoon in a
25 big way - but there are just a few questions that we
26 thought we would like to explore to see what views there
27 may be around the table.
28

29 First of all, if you remove blind reporting, so you
30 require everything to be reported, including the victim's
31 name, does anyone think that that would discourage people
32 from coming forward to whatever organisation - the
33 institution in which they were abused, one of your support
34 organisations or the police themselves? Does anyone have
35 concerns that if you mandate reporting across the board,
36 that would discourage people from coming forward?
37

38 D SUPT HOWLETT: I do have a concern in regard to that.
39 I work very closely with a lot of sexual assault
40 counsellors and the Rape Crisis Centre. They have
41 indicated to me that they have concerns that if all
42 victims' details are reported to the police, against their
43 will, that victims actually won't receive counselling
44 services and even perhaps medical services. So that's
45 certainly a concern out in the community and amongst
46 counsellors.
47

1 DR KEZELMAN: I think that is a very big concern.
2 I wanted to pick up on a point you made about disclosure.
3 I think there is a very big difference between disclosing
4 to someone for the first time, receiving the support and
5 whatever ongoing care you need to start processing through
6 it, and then getting to a point of reporting. I think we
7 really need to differentiate between that.

8
9 I do agree with you, I think mandating reporting could
10 be a very big deterrent, unless it can be debunked.
11 I think there are many fears around the system and I think
12 a lot of people have said that going through the criminal
13 justice system is as traumatising as the original abuse.

14
15 THE CHAIR: I can understand that.

16
17 DR KEZELMAN: I'm sure you have heard that. I don't know
18 if there is a way that we can educate, inform --

19
20 THE CHAIR: The police position seems to be, at least from
21 the two that we have here, that if someone doesn't want to
22 give evidence you can't make them give evidence, so you
23 can't have a criminal trial - which is pretty obvious. But
24 I assume that's not well understood in the community.
25 Would that be right?

26
27 DR KEZELMAN: Yes.

28
29 D SUPT HOWLETT: Very much so, yes. Police would actively
30 encourage all victims to report to the police, and, look,
31 I would love it if we arrested every sex offender in the
32 country. But, at the end of the day, the victims' wishes
33 have to be the priority, because I've actually had
34 a conversation with a victim two weeks ago who has just
35 currently gone through the court process, and he indicated
36 to me that he felt just as brutalised by the court process
37 as the actual sexual assaults in the first place, which is
38 a horrific situation. It's totally unacceptable.

39
40 THE CHAIR: I understand that, and you are aware of my
41 part in the court process.

42
43 MR POCOCK: From Berry Street's perspective, the carrot
44 and stick that were talked about here - the thought that
45 that brought to mind for me is, when Berry Street is
46 holding out the carrot, I suppose, of what we hope is
47 a fair and just redress scheme for people who have

1 experienced abuse and maltreatment whilst in our care, from
2 their perspective, that can just look like a stick if we
3 attach to it that, regardless of their wishes, we are going
4 to provide their details to the police.

5
6 In our experience, it's often the first engagement
7 these survivors have had in stepping forward and stepping
8 out to discuss and disclose what has happened to them. So
9 to attach, at that point, that there will be mandatory
10 disclosure, against their will, to the police - we know,
11 from the people who have come back to us and who we have
12 worked with, that some of them wouldn't have taken that
13 first step.

14
15 Secondly, our observation would be that it's the
16 people who have probably experienced the severest form of
17 abuse and the severest forms of maltreatment and have had
18 the severest impacts who are the ones who are most likely
19 not to step forward. So, from our perspective, that would
20 seem to be placing an enormous, unfair and unjust burden on
21 them to put themselves into a process in order to receive
22 some restorative response for the abuse they have
23 experienced. If they have to step in to that process on
24 the basis that their information is going to be provided to
25 the police it is, in our view, a condition that should not
26 be there. It mitigates against us developing the
27 relationship with them, being able to refer them to
28 counselling, being able to refer them to other support
29 services outside the institution that, with our support as
30 well, may be able to encourage that person, when they are
31 ready, to disclose what it is they want to disclose to the
32 police and others.

33
34 THE CHAIR: I take it you and Denis have had a robust
35 discussion, then?

36
37 MR POCOCK: Not yet.

38
39 MR O'BRIEN: We haven't had the discussion, your Honour,
40 but I was going to say that it was that sort of thinking,
41 originally, behind Towards Healing. If you have
42 a pastoral-type response program, which is how Towards
43 Healing was conceived, then certainly encouraging people to
44 approach that program for the assistance that they want -
45 it may run counter to that if there isn't some facility for
46 blind reporting. So that was the original conception as to
47 why it was appropriate for blind reporting to be part of

1 the scheme, where a victim did not want to go to the
2 police.
3
4 THE CHAIR: You have moved away from that, though?
5
6 MR O'BRIEN: Well, that's true, but that's, in a sense
7 driven, I think, by the provision in New South Wales,
8 your Honour.
9
10 THE CHAIR: But, equally, do you accept David Shoebridge's
11 point that there is inherent in both of your processes -
12 not yours, now - that there is a conflict if the decision
13 as to whether or not to advise someone, or in the way that
14 you might encourage or discourage - there is a conflict
15 between the institution's reputation and the criminal
16 justice system?
17
18 MR O'BRIEN: I understand David Shoebridge's point on that
19 and it has been one of the major issues, as you know, with
20 Towards Healing, the extent to which it is standing
21 independently from the church. But I do understand the
22 point.
23
24 THE CHAIR: Julian, do you respond to David's point? He
25 has just come back into the room, so he will hear it.
26
27 MR POCOCK: I think the important thing for Berry Street
28 to think, about and for other institutions who are
29 supportive of blind reporting, is to not see it as the end
30 of the process and not see it as having fulfilled our
31 obligation to pursue the matter and support people to
32 hopefully, and eventually, make a report to the police.
33 I think that's the thing that institutions that are doing
34 blind reporting, like Berry Street, have to consider, and
35 we probably need to consider that more closely.
36
37 The other aspect that I wanted to comment on was the
38 comment from Steve from the New South Wales Ombudsman
39 around the option of providing the name of the survivor to
40 the police but on the condition that the police don't
41 contact that person, if I understood it correctly. I must
42 say, I am curious about that, because I wonder what the
43 point is. I'm not quite sure what the point is of
44 providing information to the police, as in the name of the
45 survivor, if the police can't actually use it. So it seems
46 to me to be a blind report under another guise.
47

1 MR KINMOND: I am happy to respond to that, and the police
2 will, I'm sure, back me up on this. Having the name of the
3 victim provides important context and it provides
4 a platform, potentially, for other lines of inquiry, which
5 could bear fruit.

6
7 Quite frankly, providing to the police the name of
8 a perpetrator, if you don't have the name of a victim, is
9 inherently problematic, generally speaking. I'm not saying
10 it is of no intel value, but it is of much less intel value
11 than if you have the name of the victim, because that gives
12 some context.

13
14 That doesn't mean that the victim's rights, in terms
15 of not wishing to proceed with the matter, will be ignored.
16 Far from it. Their rights, the victim's wishes, I would
17 argue, at that point in time must be given priority. It
18 must be given priority. I would still maintain the
19 position, though, that if you have before you a victim who
20 has made a disclosure, and you have information to believe
21 that the alleged perpetrator is someone who is presenting
22 a current and serious risk to children, that's a very
23 difficult ethical dilemma, in those circumstances, to say,
24 "Well, we won't provide that victim's name",
25 notwithstanding that that victim will be almost invariably
26 assured by the police that their details will be kept
27 confidential, that they won't be required to give evidence
28 in relation to proceedings.

29
30 I come back to, you know, taking the process one step
31 forward - and I'm picking up Cathy's point: let's debunk
32 the myth that the referral of the matter to police per se
33 involves riding roughshod over people's rights. That is
34 not the case in terms of modern police practice.

35
36 D SUPT HOWLETT: I would also support those comments of
37 Steve, because if we have the victim's details - ideally,
38 we would like all the victims' details, because it doesn't
39 necessarily mean you approach them as a victim, you could
40 always approach them as a witness and have a conversation
41 with them and engage with them to see whether they
42 ultimately reveal to you that they have been abused.

43
44 THE CHAIR: What about when the victim says to whoever
45 gets the report, "I don't want my name to go to the police
46 and I don't want to be contacted by the police". What do
47 you do then?

1
2 D SUPT HOWLETT: I think it is on a case-by-case basis.
3 Ideally, we wouldn't contact the victim against their
4 wishes. However, depending upon some investigations, we
5 actually have approached victims under the context of
6 possibly having witnessed or having other evidence that
7 might assist a prosecution, and we explain that process to
8 them. We certainly don't knock on their door and say, "We
9 believe you are a victim of sexual abuse". We approach
10 them under the context that, "We believe you might have
11 some information that might assist a current
12 investigation."

13
14 THE CHAIR: How do you make that contact? You can
15 understand - we have heard this many times - that for a man
16 who has been married for 30 years and never told his wife,
17 a policeman knocking on the door is a horrific prospect.
18 How do you do it?

19
20 D SUPT HOWLETT: It is a case-by-case basis. It depends
21 upon the information and how we actually receive it.
22 Sometimes we get it through counselling services, so what
23 we will do is make contact with the counselling service and
24 actually ask them if we could have an introduction to the
25 victim. We certainly don't do cold-calling, knocking on
26 someone's door, because I've actually had victims collapse
27 in front of me, which is quite - you know, a lot of them
28 have never disclosed to family and friends and their
29 children.

30
31 THE CHAIR: That's right.

32
33 DSS DWYER: We have had the same thing, and we basically
34 do the same - through the counselling services or through
35 a mobile telephone number. Obviously, we don't speak to
36 a third party. We make sure that the person on the other
37 end of the phone is the person who has been identified.
38 Some people want to talk to us and some don't.

39
40 But the thing about blind reporting for me is: does
41 that mean that in the redress system or compensation or
42 payment from an organisation - and also the courts,
43 through, say, VOCAT, Victims of Crime - generally they ask
44 if the matter has been reported to the police to confirm
45 the matter. Does that take them out of that process or
46 does it acknowledge that they have actually been a victim
47 of crime and that they could be and will be entitled to

1 some redress?

2

3 MS WALSH: They have to be charged, don't they?

4

5 DSS DWYER: We take reports where the offender is
6 deceased. We still put them on the system. It doesn't
7 mean they weren't the victim. It's not our job to prove
8 that they were or weren't at that time. It's then
9 a follow-up for lawyers who act on their behalf, on the
10 behalf of the complainant, to follow up with that process.

11

12 So there is, I suppose, a legitimate side to the
13 process that needs to be in place. There needs to be
14 a process where people can report, it goes on the police
15 records, but police don't follow through with the process,
16 don't contact them, but, when it comes to some form of
17 redress, that they can say they've been to the police.

18

19 THE CHAIR: The answer to this may be apparent from the
20 discussions so far, but if you take blind reporting at its
21 highest level - that is, no name of victim at all and
22 nothing to identify the victim, but, nevertheless, a report
23 to police that someone has come and said they were abused
24 by school teacher X in 1986 at so-and-so high school - is
25 a blind report which is confined in that way of value to
26 police?

27

28 D SUPT HOWLETT: It depends upon the information contained
29 with it, but it doesn't actually stop the police from going
30 back to the reporter and seeing if they have further
31 details about the particular victim, or it also doesn't
32 stop the police from actually looking at the offender and
33 perhaps doing an overt investigation or a covert
34 investigation, targeting that particular person.

35

36 THE CHAIR: So what would you have in mind? So you have
37 the one report, but no name of a victim. What
38 investigation could you do?

39

40 DSS DWYER: We'd go back to the Victorian Institute of
41 Teaching, where there may have been a complaint lodged back
42 in 1986 or in other years. We'd also go back to the
43 Education Department to see if any of those complainants
44 have been in contact. We work through that whole process,
45 because one of the things that actually has come to the
46 fore is that teachers move around the State; different
47 complainants - and we have actually done prosecutions as

1 a result, because, as I said before, eventually, someone
2 has contacted us to complain about that person. We will
3 know about them through our contact with the other
4 authorities. And, especially, the other side of that is,
5 that we want to know if that person is still teaching and
6 whether children are currently at risk.

7
8 D SUPT HOWLETT: Yes.

9
10 THE CHAIR: And if that person is still teaching, what do
11 police do?

12
13 DSS DWYER: Then we start a process through the Education
14 Department again and we look at what their role is: do
15 they have contact with children, is it viable to suspend
16 that teacher, given that there could be a criminal
17 investigation - which we have done in the past, and it has
18 eventuated that we have charged the teacher and taken the
19 matter to court.

20
21 THE CHAIR: Charged them with the allegation that was
22 originally blind reported?

23
24 DSS DWYER: It could be, or it might be that we have
25 become aware of other complaints, and the complainant at
26 that time may have made a complaint to the police but it
27 didn't go anywhere. So we have matters that have been
28 reported and the victim wanted a prosecution, but there
29 might not have been sufficient evidence at that time,
30 because it's been siloed, because they've been in
31 a different part of the State. So we follow through with
32 those as well and do, I think, a comprehensive
33 investigation of the initial complaint and other matters.

34
35 THE CHAIR: Do you cold-call, Michael, any known victim?

36
37 DSS DWYER: It's not a practice that I like at all. We
38 don't generally cold-call. There has to be a lot of work
39 put in to how we would go about it, considerations of what
40 the bigger picture is, I suppose, of the situation. But
41 generally, no, we don't cold-call. We respect the fact
42 that people have moved on with their lives.

43
44 THE CHAIR: Yes. Leigh Sanderson and I spent some time
45 last week - and this will be publicly available - talking
46 to the DPP in England about the way they go about their
47 task and also about the way they review decisions made and

1 oversight of the DPP - issues that we need to look at. We
2 talked about the approach that they have been taking in
3 England to the determination of whether or not there is
4 a case to go to the jury in the eyes of the police or the
5 prosecuting service.
6

7 I am just interested in the way that you would
8 approach an investigation in circumstances where you start
9 off with very little. You have a report, which is blind,
10 and you then set about the steps, Michael, that you say you
11 might take - and I assume you might do the same thing.
12

13 D SUPT HOWLETT: We follow a very similar process.
14

15 THE CHAIR: What level of evidence do you seek out before
16 you then start to say, "Yes, we have a real case here?"
17

18 DSS DWYER: Well, the unfortunate thing about historical
19 matters is that there is no evidence except corroboration,
20 so you need to make sure that the corroboration is there in
21 the process.
22

23 THE CHAIR: What are you thinking of as corroboration?
24

25 DSS DWYER: Well, offending against multiple victims and
26 different locations are generally the matters that probably
27 push that prosecution up to a viable situation.
28

29 THE CHAIR: So you wouldn't bring just a single-victim
30 allegation?
31

32 DSS DWYER: Not generally, no.
33

34 D SUPT HOWLETT: We are in the same boat. We work closely
35 with our other agencies. I know our organisations work
36 very closely with the Ombudsman in regards to reports about
37 teachers moving schools and also moving interstate as well.
38 Because even though we don't have enough for a criminal
39 prosecution, it could be the case that the Department of
40 Education could follow another civil process to bar the
41 teacher from working with children.
42

43 THE CHAIR: If we are requiring multiples before we
44 convict, then, of course, we are missing out, a lot.
45

46 D SUPT HOWLETT: It depends. I would say it depends upon
47 the circumstances of the particular case and what the

1 evidence is in regard to that particular case.
2
3 DSS DWYER: Remembering, sir, that we are dealing with
4 historic legislation.
5
6 THE CHAIR: I understand the difficulties, yes.
7
8 DSS DWYER: So the offending that took place in those days
9 wasn't looked on in the same light as it is nowadays, so
10 today it's totally different; where the offending was
11 actually pushed down a rung or two, which is very
12 unfortunate for a lot of the victims. Some of the offences
13 were quite horrific, but it depends on the degree of the
14 offending as well. So if you have a single complaint,
15 which you can't corroborate, and because of the legislation
16 at the time it's not to a level that the court would - and
17 there are difficulties with the courts. You really do need
18 to have some significant information or evidence to take to
19 the court before you will get a conviction, especially in
20 the summary stream.
21
22 THE CHAIR: But if you just have one complainant, you
23 won't take it?
24
25 DSS DWYER: There have to be circumstances that would
26 strengthen that case.
27
28 D SUPT HOWLETT: And you would assume, if it was in the
29 context of an institution like a school, that they haven't
30 just offended against one victim.
31
32 THE CHAIR: That's what you would expect.
33
34 D SUPT HOWLETT: Yes, you would expect.
35
36 THE CHAIR: But if you only have the evidence of one --
37
38 D SUPT HOWLETT: Yes, but, as I said, you could conduct
39 a number of inquiries, like other schools they have worked
40 at, other intelligence reports, check with other States,
41 check with other agencies, identify who was in the school,
42 other students in that class that might have some
43 information. So there is a number of inquiries that you
44 actually could conduct.
45
46 D SUPT NEWBERY: I think with an investigation, certainly
47 if you had one complaint and the complainant was willing to

1 go to court, you would gather all the evidence you could -
2 Greig Newbery, sorry, NSW Police. You would gather all the
3 evidence that you could and take that investigation as far
4 as you could, if that meant you received enough evidence
5 there to mount a prosecution. Certainly you would progress
6 it, but you wouldn't rely on just having multiple victims
7 to require you to investigate it, no, not at all.

8
9 MR SHOEBRIDGE: But the NSW Police Protocols on Blind
10 Reporting make it pretty clear: where they have a blind
11 report they don't commence an investigation. The protocols
12 say for point 2, where the report is where the identity of
13 a victim of a suspected crime is known - so it is not
14 a blind report - (iv) says that NSW Police, under those
15 circumstances, will commence an investigation. But if you
16 go to circumstances where the victim of a suspected crime
17 is known but the victim doesn't wish to speak with police,
18 there is no criminal investigation even being commenced,
19 and that I find remarkable. It is at odds with what you
20 are putting.

21
22 THE CHAIR: That's the position as you put it. Linda,
23 what do you say?

24
25 D SUPT HOWLETT: As I said earlier, it doesn't necessarily
26 mean that we actually conduct an investigation. We could
27 go back to that victim, that person who made the report, as
28 a witness. I think I said that earlier. It doesn't
29 necessarily mean they are not contacted in any way, shape
30 or form.

31
32 THE CHAIR: David, I think, is suggesting that your
33 protocol says that you won't conduct an investigation. Do
34 you mean by that that you won't investigate that particular
35 allegation? That just seems a little bit --

36
37 D SUPT HOWLETT: It depends upon the circumstances of the
38 particular investigation. If we receive an investigation
39 where a victim does wish to proceed and we are aware of
40 multiple victims, what we would do is possibly contact
41 those victims under the guise of being a witness to the
42 offence and asking whether they wished to provide any
43 evidence and see if they do disclose, themselves.

44
45 THE CHAIR: Right. But you would not investigate --

46
47 D SUPT HOWLETT: We would never force a victim to proceed

1 against their wishes.
2
3 THE CHAIR: No, I think it is a slightly different
4 question. You get a blind report. The impression I gained
5 was that, like in Victoria, that wouldn't necessarily be
6 the end of the matter; that you would do what you could to
7 work around, with the knowledge that a certain person had
8 allegedly perpetrated, and that person, say, was a school
9 teacher in 1986 - you would then go looking to see what
10 their movements were after that, you would go and see
11 whether there were complaints to the Department of
12 Education and other sources of information that might lead
13 you to build a case?
14
15 D SUPT HOWLETT: That's correct.
16
17 THE CHAIR: That's what I understood you to be saying,
18 Michael.
19
20 DSS DWYER: Yes.
21
22 THE CHAIR: What David is saying is that doesn't seem to
23 be consistent with the protocol. Is that right?
24
25 D SUPT HOWLETT: The protocol is only a guideline. It
26 doesn't necessarily mean it is in cement. As I said, it
27 depends upon the circumstances of the actual investigation
28 and what is happening at the time. It doesn't prevent us
29 from actually approaching the organisation, asking for the
30 victim's details or, if they have been provided, going back
31 to a victim.
32
33 THE CHAIR: I think what might be suggested is that, in
34 that event - I don't know how many people read your
35 protocol or access your protocol - it might be a good idea
36 to make that plain.
37
38 D SUPT HOWLETT: We have actually updated our protocols
39 and we have done a review recently and specifically asked
40 those questions: does the victim wish to be contacted by
41 police, "Yes" or "No". So we have updated those
42 protocols.
43
44 THE CHAIR: Do you have a brochure like Michael has?
45
46 D SUPT HOWLETT: No, we actually have that information on
47 how to report to the NSW Police on our website: "If you

1 are a victim of a sexual assault, these are the options
2 available to you", what to do - it's all listed on our
3 website.

4
5 JUSTICE COATE: But do you have something in hard copy -
6 perhaps if you hold that up, Michael, what you had?

7
8 DSS DWYER: Yes.

9
10 JUSTICE COATE: I assume it could be distributed to
11 agencies like Bravehearts and Centres Against Sexual
12 Assault and various other places.

13
14 D SUPT HOWLETT: Not that I am aware of. I don't know if
15 the Child Abuse Squad has any brochures like that.

16
17 MR SHOEBRIDGE: But all of the Local Area Commands have
18 been advised, through the memorandum from your office, of
19 what the protocols are, and they explicitly don't include
20 "commence an investigation when there is a blind report".
21 A lot of the investigation now in New South Wales isn't
22 being done by your unit. The reports are going to Local
23 Area Commands and it would seem that if I was reading this
24 protocol and I was trying to be compliant with it as
25 a Local Area Commander, you would not be commencing
26 investigations when you get a blind report. Of the
27 1400-odd blind reports that have come to the Sex Crimes
28 Squad, I wonder how many you have commenced investigations
29 on.

30
31 D SUPT HOWLETT: I don't have those exact numbers.
32 However, some of the victims who actually do fill out the
33 blind reports do indicate that they do wish to report to
34 the police. So they are the ones we actually instigate and
35 commence an investigation upon.

36
37 THE CHAIR: It's plainly an issue that we will have to
38 grapple with in terms of what recommendations we make, but
39 one can see a significant difference between a blind report
40 that remains static, never goes anywhere, and one which you
41 might incorporate into an investigative process, although,
42 of course, the prospects probably aren't anywhere near as
43 great as if you have got the victim prepared to make
44 a statement and go to court.

45
46 The other thing, of course, that we need to do is try
47 to work out whether there are protocols in the other States

1 in relation to this. But that's another issue again. One
2 of our great difficulties is that we are, of course, a
3 Royal Commission for every State as well as for the
4 Commonwealth, and there are different practices in each
5 State.

6
7 JUSTICE COATE: Karyn has a comment, I think.

8
9 MS WALSH: I just don't wish to lose sight of the value of
10 gathering intelligence about the pattern of offenders that
11 can be fed back to witnesses, to people, you know, to
12 encourage them to take action or proceed with charging.
13 Because that is the dominant reason why people want to talk
14 to the police, but they don't know whether there is any
15 systematic way that that information goes into a system,
16 how it is managed, and that would be good information, not
17 just how you report sexual abuse to proceed with a
18 prosecution.

19
20 One of the other things is really clearly articulating
21 what is the difference from historic abuse to current
22 abuse, today. People need to be able to find that
23 information if they are adults wanting to talk about what
24 happened when they were children. Often when it is put up
25 as what you do if you are a child today it doesn't match
26 their experience, and when they try to follow some of those
27 processes it gets very confused, particularly if it is at
28 a local level, it's not in the Child Protection Unit, for
29 example. So that would really help.

30
31 I just think that issue - because sometimes, if you
32 have reports that don't have the victim, are there other
33 ways of getting the context, you know, asking for
34 information to give the context, without the name? Also,
35 are there other ways of asking the institutions to ask
36 people to come forward if anything happened, if there is
37 evidence of trends of an offender in a school?

38
39 THE CHAIR: Karyn, I think you've put your finger on
40 a significant issue, can I say to both police, and that is
41 that it is a bit like courts and the law: if you are
42 inside it, you understand; but if you are outside it, you
43 need as much information as possible about how it will
44 work. You really can't assume that people will even
45 understand what you might think is obvious. And all of the
46 people around this table who assist survivors are an
47 immensely important source of information about how you

1 work, as police, going back to survivors. There is no
2 question about that.

3
4 DSS DWYER: Could I just answer that, Karyn. I would
5 expect that when Sano Task Force reaches the end point in a
6 few years, that we would go back and look at how many
7 intelligence reports that we have actually gathered,
8 compiled and put on to the system, what the break-down of
9 those actually are, the total number of referrals that we
10 have received, how many people we have prosecuted, all the
11 finer details of that, so that we can provide the
12 Royal Commission with the bigger picture out of Victoria.
13 I think that it's very much a part of our role to be able
14 to do that. I see that one of the main things for the
15 Royal Commission is to tell us how many victims of sexual
16 abuse were there from the past.

17
18 THE CHAIR: Carol?

19
20 MS RONKEN: Could I support exactly what Karyn said. I
21 think also making sure that victims have support throughout
22 the system and knowing where to go to for support is
23 absolutely crucial. I think the information given to them
24 is just so important because they don't know what's going
25 to happen every step of the way and not knowing that can be
26 a huge barrier in itself to wanting to go forward. Years
27 ago we put out a brochure with Queensland Police and the
28 Queensland Law Society called "Loud and Clear" which gave
29 adult survivors step to step around what is going to
30 happen, how they can report and what will happen after they
31 support. I just think that that sort of information for
32 victims is absolutely crucial to help support them come
33 forward.

34
35 THE CHAIR: There would be no doubt for many people that
36 there would be apprehension engaging with police, full
37 stop.

38
39 MS RONKEN: Absolutely.

40
41 THE CHAIR: I know that that probably isn't what should
42 be, but that's the reality.

43
44 MS RONKEN: Yes.

45
46 THE CHAIR: We will come this afternoon to the legislative
47 processes, but we do have now obviously a significant

1 division in the way this issue is approached, between us,
2 and plainly, David, if there was to be, as we recommended,
3 a National Redress Scheme with an ongoing - which is
4 something else that we've talked about now with the
5 Government - truth-telling component, then that would be
6 the ideal place for people to go and be given, as it were,
7 independent advice; that's plainly so.

8
9 The issue though is given that the Catholic Church, at
10 least some dioceses anyway, have now accepted that they
11 should send every victim's name, if that was to become the
12 culture of institutions in which abuse occurred, would that
13 be a sufficient response? In other words, one doesn't
14 legislate a total mandatory obligation but legislates only
15 in - perhaps we'll look at it - the confined ways of New
16 South Wales and Victoria and leave it to institutional
17 culture to address the issue in an effective way.

18
19 MR SHOEBRIDGE: With all due respect to where the church
20 has got, I think it is an improvement but it is still very
21 far from perfect, because if the police are getting a note
22 from the church that says, "We've spoken to the victim and
23 the victim doesn't want to be approached by the police",
24 there are those inherent conflicts of interest in that and
25 the power imbalance. It is almost impossible to see how
26 the police could actively accept that assurance.

27
28 That being said, it is a significant advance. One of
29 the only reasons we've got to that point in New South
30 Wales, in my opinion, is because we've had the legal
31 obligation underpinning it. The church hasn't jumped to
32 this point and many organisations haven't jumped to that
33 point. They have been driven there because of the
34 underpinning legal obligation. They have been responding
35 to the concerns about litigation and potential criminal
36 liability and so the law has played a really important role
37 in developing good practice.

38
39 Obviously, the best solution would be a nationally
40 consistent redress scheme with essential points for
41 reference. That would clearly be the Rolls Royce model and
42 I would 100 per cent endorse that. In the absence of that,
43 there is a role I think to be played by state jurisdictions
44 putting in a mandatory obligation and driving good practice
45 in that way.

46
47 THE CHAIR: I appreciate what you said earlier - and

1 Steve, I appreciate what you've had to say about this -
2 when you sit down, in your head at least, you haven't put
3 it on paper, to try to define the offence and, as it were,
4 the safety valve that you're contemplating, it actually
5 gets quite hard because if the report is to an organisation
6 that is set up to assist survivors, your suggestion would
7 be that would be a different circumstance to where the
8 report is to the organisation or institution where the
9 person was abused. Are we contemplating, if we went down
10 this path, defining a criminal offence which differentiated
11 between the recipients of the information? Is that what
12 we'd have to do?

13
14 MR SHOEBRIDGE: Potentially, you could.

15
16 THE CHAIR: It would be difficult to do it, wouldn't it?

17
18 MR SHOEBRIDGE: One of the other issues could be in terms
19 of reasonable excuse. You could actually give some content
20 to the concept of reasonable excuse and one of the
21 reasonable excuses may be that you have complied with
22 guidelines that have been established for reporting as
23 adopted by the Ombudsman, or guidelines that have been
24 approved by the Attorney-General on reporting.

25
26 In some ways reasonable excuse is such an amorphous
27 concept. If you tied it to some actually well thought out
28 guidelines and if organisations had complied with those
29 guidelines and they could satisfy the reasonable excuse
30 obligation, that would get rid of a lot of the
31 uncertainties.

32
33 THE CHAIR: If Bravehearts - I will pick on Bravehearts -
34 gets an allegation and they don't do other than blind
35 report because their survivor doesn't want them to do other
36 than that, you would define your legislation to make that a
37 reasonable excuse for Bravehearts?

38
39 MR SHOEBRIDGE: The guidelines would potentially
40 differentiate between an organisation such as Bravehearts,
41 which is victims oriented, and an organisation such as the
42 Salvation Army or a school or a church, which is allegedly
43 culpable in the conduct.

44
45 THE CHAIR: From where the abuser was located, yes.

46
47 MR SHOEBRIDGE: Yes.

1
2 THE CHAIR: That raises of course the next issue which is
3 one that we won't resolve today, but in this context you
4 could start creating a criminal offence for the institution
5 itself, as opposed to the individual. We have talked about
6 that in other contexts but that raises that issue as well.
7 Julian, did you want to say something?
8
9 MR POCOCK: No, not at this point. I think Denis does,
10 though.
11
12 MR O'BRIEN: This is just thought off the top of my head,
13 your Honour, but it may be there could be some thinking
14 around the situation, if you've got some sort of a
15 guideline around this, that you differentiate cases where
16 the alleged offender is alive, or may still be alive, from
17 cases where the offender is dead. That might be a way
18 through some of this.
19
20 THE CHAIR: Yes. Does anyone else want to comment on
21 that?
22
23 DR CHAMLEY: Your Honour, can I make a few comments?
24
25 THE CHAIR: Yes.
26
27 DR CHAMLEY: Unfortunately, I don't share your view about
28 the change of culture. To me it's moving with glacial
29 speed.
30
31 THE CHAIR: I am not suggesting it happened but I'm
32 suggesting you could leave it in that basket, that's all.
33
34 DR CHAMLEY: Yes. At the end of the day, institutions
35 have to, I believe, experience some pain over all this and
36 survivors would be of that view. They have changed from
37 charities and whatever, now they're major service providers
38 to government and there's still a coterie of them that are
39 in the room for everything being offered. It's not the
40 sporting ones either; it's faith based institutions,
41 whatever. Ultimately, somebody has to carry the can and
42 that's not what happens at the moment.
43
44 I notice what's going on in Victoria at the moment.
45 There's all this window-dressing going on with protocols
46 and whatever, but it's all about the fact that the national
47 disability scheme is about to be rolled out in Victoria.

1 They're all lining up to have a go at another trough, you
2 know, and yes, we've got to move beyond that. I think the
3 community is pretty fed up with the whole box and dice of
4 this coterie of service providers that have this shocking
5 history now and they're still in the ring.

6
7 THE CHAIR: That raises some big issues.

8
9 DR CHAMLEY: Absolutely.

10
11 THE CHAIR: Peter Fox is sitting in the back of the room.
12 Peter, you have had a bit of experience in this domain.
13 You'll have to find a microphone, so maybe if someone could
14 just make way for you. Would you like to comment?

15
16 MR FOX: Thank you, Marisa. Thank you, sir. I do welcome
17 this opportunity, it is something that I have been quite
18 passionate about for some time. Can I start off by saying
19 that although I have been very critical of blind reporting
20 in some respects, I don't think we should do away with it
21 altogether. I can acknowledge that there are some very
22 good aspects that should be maintained.

23
24 I do very much agree with Mr Shoebridge's comments.
25 I think it is very dangerous to leave the handling and the
26 decision making of whether or not to blind report within
27 the abusing organisation. I have had personal experience
28 and I note that it has been reported in the media today,
29 for example, one abuse victim who reported to church
30 authorities back in the '90s and intimated that she would
31 be --

32
33 THE CHAIR: I think we need to be careful, Peter. I think
34 you carry certain obligations.

35
36 MR FOX: I will steer away from that. My point is made.
37 It is a very dangerous process and even though there have
38 been great inroads, maybe at a glacial pace, but the
39 organisations are changing. I think that there does need
40 to be - and I was going to suggest something like FACS, but
41 I would certainly go along with somebody like the
42 Ombudsman's Office being that mediator, that safety
43 mechanism to ensure that what is being blind reported can
44 be confirmed by an independent party to make sure that that
45 is, in fact, the victim's wishes.

46
47 I think that there can also be other benefits there in

1 that the Ombudsman's Office, possibly through the
2 employment of counsellors, and I don't mind spending some
3 of the State Government's money in allowing them to
4 facilitate that, but they can also explain more fully
5 because there is a great deal of ignorance out there. As
6 much as the police try to get that message out, the victims
7 will not be forced by police and I don't know of any police
8 that have ever done that. Most are very caring, as has
9 been mentioned by Michael. A lot of them do cross over
10 into that welfare area and will not push a victim beyond
11 the point that they want to go to.
12

13 Sitting with victims myself, I used to liken it, as an
14 analogy, to driving a car. They are in the driver's seat.
15 They can turn the car off and get out at any time they
16 like. They can hit the brake at any point or they can push
17 the accelerator to go a bit further. I had one victim,
18 for instance, that was prepared, outside of an
19 institutional scenario, to make a statement about her abuse
20 as a child but not prepared to go to court. We filed that
21 statement for over three years. She came back and changed
22 her mind after counselling, after dealing with it herself
23 and we then proceeded. Not enough victims are aware of
24 that and we need to do more in getting that message out
25 there. It is great for websites but I think we haven't
26 done a real good job in being able to sell it over the
27 time.
28

29 THE CHAIR: Yes.
30

31 MR FOX: Again, listening to the church's view and I do
32 applaud, there have been some terrific initiatives within
33 the faith based organisations and can I single out, just
34 for a moment, the work of Maureen O'Hearn, who works for
35 Zimmerman House in the Maitland-Newcastle diocese. I did
36 note at the end of the Cunneen Inquiry that they have
37 changed their policy and now they tell the person ringing
38 up straight off, "Before we start, just letting you know
39 that we have to report it to the police." And they go
40 through the explanation. I don't know whether it has
41 changed since but Maureen made the comment that not one
42 survivor backed away from it from that point. They fully
43 comprehended what was going to happen. They were told from
44 the start and they knew, "Hang on, if this does get passed
45 on, I'm in control here, I can't be forced", but they were
46 made very much aware of that.
47

1 THE CHAIR: That is a very interesting observation.
2
3 JUSTICE COATE: It is consistent, Carol, isn't it, with
4 what you have said of the Bravehearts' experience?
5
6 MS RONKEN: Yes, definitely.
7
8 MR KINMOND: It is consistent with the information I had
9 been provided in relation to that diocese and it does go to
10 the question as to the claim is often made, people walk
11 away. My observation is, or the evidence seems to suggest
12 to me, that if they're well supported they won't walk away.
13
14 MR FOX: Very much so. I could not agree more.
15
16 THE CHAIR: Critical, though, must be the support.
17
18 MR FOX: I know I'm rambling through a number of issues
19 here and I do apologise.
20
21 THE CHAIR: You have one more minute, Peter, because
22 everyone wants to have lunch.
23
24 MR FOX: I will try to hurry it up. You mentioned it just
25 a moment ago - and I had it down on my note here - there
26 has been no mechanism to penalise or sanction an
27 organisation. Not that that necessarily is going to be the
28 be all and end all, but I have spoken to some clergy, some
29 of them I have become quite good friends with. Some of
30 them talk quite openly about the culture and I think that
31 an organisational sanction would help that culture to
32 change because there is still an undertone that, "We keep
33 this in-house."
34
35 Even though there are lectures - and I've seen it done
36 before - where something is written down as policy, what
37 really is sold underneath in the culture is a little bit
38 different, but I think if there are sanctions there and the
39 organisation is being heard and those at the higher levels
40 genuinely get behind changing that, I think that that would
41 be a great big tick in making moves in the right direction.
42
43 THE CHAIR: Thank you, Peter. We will break for lunch
44 now. Before we start into the Victorian legislation after
45 lunch, I wouldn't mind just exploring with others this
46 question of whether or not one can contemplate a corporate
47 offence, but secondly, we do need, if anyone has a

1 perspective to, of course, understand that what we're
2 talking about as an offence, a reporting, we're talking
3 about in the context of sexual assault. Are we saying that
4 you carve out special rules in relation to sexual assault
5 as against, for example, murder or coming down the range of
6 offences?
7

8 It is not the direct issue but it is, of course,
9 necessary to remind ourselves that all of this fits into a
10 context for the criminal law. I suspect that many will say
11 there should be special rules in relation to sexual
12 assault, but others may not. After lunch could we just
13 spend a little bit of time on that before we turn our
14 attention to the Victorian legislation which, of course,
15 then operates generally across the criminal law and we need
16 to be conscious of that. All right.
17

18 LUNCHEON ADJOURNMENT

19

20 THE CHAIR: Michael Dwyer, a couple of things have been
21 brought to my attention, and I thought we might just get
22 you to respond before we move into the afternoon's
23 discussion. You mentioned that the brochure, that I have
24 now got, tells me to call the toll-free 1800 number. You
25 say that's an answering service. It has been suggested to
26 me that many survivors would have real difficulty leaving
27 a message on an answering service rather than being able to
28 immediately engage with a person. Is that an issue for you
29 and is it an issue for anyone who helps survivors?
30

31 DSS DWYER: It is not the case, in fact. Everyone who
32 rings through leaves a number. We may have the occasional
33 hang-up, but it has been enormously successful and I think
34 it's based on the response time of getting back to the
35 caller. A lot of these people call late into the night,
36 early hours, weekends, so we couldn't have been expected to
37 answer all those calls.
38

39 So we put it there for people - because it is
40 a nation-wide toll-free number and we respect the fact that
41 a lot of people have moved interstate, and that's one of
42 the bases around the Sano Task Force, with travel -
43 international or interstate travel. So this is where the
44 1800 number comes in. The fact that it is a free call and
45 the fact that they are able to leave a message. I respond
46 to them the very next day and the investigator is in touch
47 within 72 hours.

1
2 THE CHAIR: Does anyone else have a comment?
3
4 MS RONKEN: I think it would very much depend on what the
5 message is that they are greeted with. I think for many
6 victims, if they have got to that point where they are
7 ringing the number, they may be willing to leave a message,
8 but there may certainly be a percentage, I would also
9 imagine, that would get it and go, "Oh, I have to leave
10 a message", and won't. But I think it does depend on the
11 message that is left there and, yes, as I say, most get to
12 that point and are willing to do it.
13
14 DSS DWYER: I record the message myself and it basically
15 says, "Thank you for contacting the Sano Task Force. We
16 are interested in hearing from you. Please leave a message
17 and we will be in contact with you immediately that we
18 answer the call."
19
20 But, as I say, very rarely do people ring up and just
21 hang up. And it records all of those, if you ring through
22 and it is on for a second. So I would say out of the
23 hundreds of calls that we have had, probably three people -
24 three to five people.
25
26 MS RONKEN: That's amazing.
27
28 THE CHAIR: There may be no real answer to this, but it
29 has also been suggested that many of the people we are
30 talking about won't have access to email facilities, but
31 I guess there's not much you can do about that - if they
32 don't have them, they don't have them.
33
34 DSS DWYER: No, that's just a variation in the reporting
35 process. They all appear to have telephones, mobile or
36 landline. So that's an issue. I give them a call back.
37 The first thing I ask them is if they have an email address
38 and the facility to be able to send me an email. If they
39 don't, what I do is I arrange for an investigator to go and
40 see them.
41
42 THE CHAIR: That just means, I guess - and I haven't
43 looked at it carefully enough - that you would need to be
44 very careful to make sure your brochure, which I notice has
45 a blank back page, has enough information for those who
46 don't have access to email, because you invite them to go
47 to your email site to find out more. I guess critical -

1 and it would apply to all police - would be to have enough
2 information on this sheet so that those who don't have
3 access to email can get what they need.
4
5 DSS DWYER: It is also on the Victoria Police website. We
6 try to cover as many bases as we possibly can.
7
8 THE CHAIR: Yes, I'm sure that's right.
9
10 All right. I said we might talk about corporate
11 offences, but I think we might try to capture this into one
12 broader discussion, but out of the Victorian history. Is
13 it you, Marisa, or is it Greg who is going to carry the
14 can --
15
16 MS DE CICCICO: We might tag-team, judge.
17
18 THE CHAIR: I think what we would like to know is, just
19 run us through your legislation - it is at annexure C,
20 I think. Then, just tell us a little bit about the history
21 and the purpose of it.
22
23 I don't want to let New South Wales entirely off the
24 hook in this. I don't know whether it is you, Paul, or
25 Daniel, but I do want to have a brief discussion about the
26 qualification on prosecutions that is there in New South
27 Wales and where that came from. Do you understand?
28
29 MR NOLL: Yes.
30
31 THE CHAIR: I have some ideas myself as to where it came
32 from, but I would like to open up that discussion.
33
34 But, Victoria - how we have we ended up in this
35 position and what is it all about?
36
37 MS DE CICCICO: I might start with the historical and
38 perhaps let Greg speak to the offence itself.
39
40 It may be worth just tracking back across the history
41 of the development of this offence and, indeed, the failure
42 to protect offence as well.
43
44 Originally it arose as a consequence of the Protecting
45 Victoria's Vulnerable Children Inquiry, which was led by
46 his Honour Justice Phil Cummins, and that inquiry made
47 a few recommendations around mandatory reporting,

1 protection of children and disclosure offences.
2

3 When that report was handed down to the government of
4 the day, there was a lot of discussion and it did raise
5 a lot of contention with stakeholders around some of the
6 recommendations around mandatory reporting or
7 non-disclosure.
8

9 The parliamentary committee of inquiry was then tasked
10 with looking at similar and like issues, and, indeed, the
11 parliamentary committee report did reflect upon
12 Justice Cummins' inquiry and, indeed, made the range of
13 commentary of which I'm sure the Commission is aware, but,
14 for those who are not, in chapter 23 of their particular
15 report and reflected upon some of the issues around the
16 failure to disclose, some of the challenges that that would
17 pose, some of the issues around what would be the
18 implications of such report. Indeed, their recommendation
19 specifically was to actually amend section 326 of the
20 Crimes Act, which is very similar to the concealment
21 offence of New South Wales.
22

23 At the time we took that report recommendation and we
24 did do a bit of digging around, as to what might be
25 a better approach, because that offence is quite broad in
26 its nature.
27

28 So we determined to take a more specific approach and,
29 indeed, there were examples of other offences in other
30 jurisdictions, such as Ireland, et cetera, that were
31 similar in terms of the failure to disclose.
32

33 So from the perspective of the offence itself, we drew
34 upon some of the commentary that the parliamentary
35 committee made in its report, wherein it made a range of
36 comments around the moral obligation of persons in the
37 community to report such offending; it made commentary
38 around the need to ensure that the community is aware and
39 to obtain that sort of cultural change, I guess, and
40 community-wide change to the approaches to this sort of
41 offending. So we did move to introduce the offence in the
42 manner that you see it on the statute book now.
43

44 Of course, more recently, just in late April, our
45 Royal Commission into Family Violence, having received
46 a range of submissions around the concerns that some
47 stakeholders had expressed, particularly in circumstances

1 where the offending against children had occurred in the
2 context of family violence - the Royal Commission received
3 a range of stakeholder submissions, legal and advocacy
4 stakeholders, who expressed the view that, in such
5 circumstances, it could have two effects: one would be to,
6 I suppose, discourage the victim, the parent victim, from
7 actually seeking some assistance from services and actually
8 advising of the family violence that was occurring; and
9 then the second issue would be - generally speaking, it is
10 the mother - in the context of the mother, then potentially
11 putting that victim at potential harm of being, I guess,
12 further victimised by potentially being exposed to
13 a failure to disclose charge under the legislation.
14

15 Now, we had developed a range of defences to it - and
16 I will let Greg speak to the detail of it - but our Family
17 Violence Royal Commission did recommend to government that
18 there be legislative changes to this particular construct.
19 Their particular recommendations were around the Director
20 of Public Prosecutions approving a prosecution for an
21 offence against this section in cases where the accused is
22 a victim of family violence, just to mitigate the sort of
23 risks that stakeholders had raised with the
24 Royal Commission.
25

26 That perhaps gives you a bit of a brief outline of how
27 we got to this specific construct.
28

29 THE CHAIR: Marisa, I'm just not quite sure - what's that
30 qualification they have suggested?
31

32 MS DE CICC0: I'm not sure which recommendation it is
33 specifically, but they have suggested that the Director of
34 Public Prosecutions actually approve a prosecution for an
35 offence against section 327(2), which is our disclosure
36 offence, in cases where the accused is a victim of family
37 violence. I suppose it provides an element of final review
38 in cases where the victim may be a victim of family
39 violence and the circumstances have arisen wherein police
40 might be proceeding to charge.
41

42 THE CHAIR: So this would be a summary offence, normally
43 brought by police, but the suggested recommendation is that
44 instead of the police having the final say, it be the DPP's
45 office that has the final say?
46

47 MS DE CICC0: Yes.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE CHAIR: I see. Okay.

MR BYRNE: Sorry, just to clarify, it is still an indictable offence but it is triable summarily, so in those circumstances, it would require the Director's consent for it to proceed summarily, still.

THE CHAIR: Yes, right. Okay. Otherwise it wouldn't have. Yes, interesting. Well, what can you tell us about the legislation and how it works?

MR BYRNE: I will perhaps just start with one aspect of the Betrayal of Trust Inquiry's recommendation. They essentially started from the point of section 326 of the Crimes Act. Subsection (1) is virtually identical to section 316 of the New South Wales Crimes Act, which is in the materials that people have, except that the offence in Victoria also requires proof that the person who has the information accepted a benefit for failing to disclose the information. And the committee said one of the things that would need to be considered is the removal of that particular limb, and then, in very broad terms, part of their recommendation was that there would need to be consideration of any unintended implications for other groups or individuals, given the potential breadth of the offence once you removed the requirement for proof of a benefit for failing to disclose.

So in turning to the Victorian offence, it really differs from the New South Wales offence in a number of ways.

Firstly, it only applies to adults. So the obligation to disclose only applies to an adult; it doesn't apply to a child.

There were some changes to the elements. So the New South Wales offence refers to "information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender". In the Victorian approach a number of people were concerned about what information does a person actually have about an offence? How do they know what information might be of assistance because, in some senses, they don't know what the police already know and they don't know enough about what the law is to know what kind of

1 evidence is admissible, what information might help the
2 police. So in a sense, what we tried to do was to simplify
3 that obligation to say that if a person has information
4 that leads them to form a reasonable belief that a sexual
5 offence has been committed, then the obligation to disclose
6 attaches to that information, to that belief.

7
8 Another aspect of it is that it applies to a sexual
9 offence. So the Betrayal of Trust Inquiry committee raised
10 the issue of whether or not this should apply to offences
11 more broadly than a sexual offence, including physical
12 abuse and child abuse more generally. The previous
13 government took the view, I think perhaps in the context
14 that this is a very broad obligation and imposed upon the
15 whole community, that the focus should be on sexual
16 offences and the particular harm caused by sexual offences
17 and, in that sense, limiting the breadth of the obligation
18 created by this offence.

19
20 The offence also applies to a sexual offence committed
21 against a child under 16, and that is primarily to align
22 with sexual offences in Victoria where, for many years, the
23 general age of consent has been 16, and 16 was chosen as
24 the sort of appropriate age. There are different ways, of
25 course, of defining a child.

26
27 THE CHAIR: I haven't checked back on the definition, but
28 does the section which has the definition in it capture all
29 levels of sexual offending? So it's not serious
30 indictable; it could be all levels?

31
32 MR BYRNE: The definition of "sexual offence" includes
33 a number of subdivisions --

34
35 THE CHAIR: Yes, I see that, but I haven't checked those
36 subdivisions.

37
38 MR BYRNE: -- which would include rape, indecent assault,
39 sexual assault, sexual penetration of a child --

40
41 THE CHAIR: So they would all be indictables?

42
43 MR BYRNE: I'm pretty sure they are all indictable
44 offences.

45
46 THE CHAIR: So your summaries wouldn't be caught by this
47 Act?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

JUSTICE COATE: Some are triable summarily.

MR BYRNE: Certainly summary offences are not caught, like exposure-type offences are not caught by this.

THE CHAIR: Okay. So a teacher who fondles the genitals of a child, of a boy - would it be caught by this?

MR BYRNE: Yes, indecent assault.

THE CHAIR: Because that is indictable - yes, right. Okay.

MR BYRNE: Yes. Including, more broadly, indecent act in the presence of a child would also be captured, yes.

THE CHAIR: So it goes a fair way down the scale?

MR BYRNE: It goes a long way, yes.

MS DE CICCICO: We were just advised, too, that it does include a couple of summary offences - loitering near a school and suchlike. We're happy to provide you with the full definition, the listing of it.

THE CHAIR: Yes.

MR BYRNE: It might be helpful if I take you to subsection (3), which Marisa referred to, which refers to where a person fears, on reasonable grounds, for the safety of any person. So subsection (3) sets out circumstances in which a person would have a reasonable excuse, without limiting that section, and where a person fears, on reasonable grounds, for the safety of the person if they were to disclose the information, then that failure to disclose, if it is a reasonable response in the circumstances, constitutes a reasonable excuse.

Part of it also indicates that the safety of a person who is believed to have been the perpetrator or somebody involved in the commission of the offence is not a relevant consideration. In a sense, that is broadly based on principles of self-defence, with those two limbs that are involved in that defence.

Paragraph (b) also refers to where the person believes

1 information has already been disclosed to police. So this
2 was to deal with the interaction between what we could
3 broadly describe as the welfare reporting/mandatory
4 reporting system and the interaction with this new
5 disclosure regime, so that if somebody has already provided
6 information to the Department of Health and Human Services
7 in accordance with a mandatory reporting obligation, that
8 reporting would constitute a reasonable excuse under this
9 provision. Then there are arrangements between police and
10 the Department of Health and Human Services for the
11 transmission of that information.
12

13 Subsection (5) also sets out circumstances in which
14 a person's interests or wishes, in terms of information, as
15 to whether that would be disclosed - in what circumstances
16 does the offence apply or not apply. So if the victim was
17 of the age of 16 or older at the time that they provided
18 the information, and they requested that the information
19 not be disclosed, then the offence does not apply. That
20 may be a matter for discussion, but it raises a number of
21 issues about at what point is a person old enough to make
22 a determination as to what is in their best interests and
23 at what stage do you say, well, the law says that
24 irrespective of the person's interest, you must disclose
25 that information.
26

27 Part of the committee's findings were that children
28 often feel embarrassed and ashamed and often unable to
29 reveal what is happening to them, and also that they are
30 too young to understand, sometimes, that what is happening
31 is a crime and that they are the victim. So that's part of
32 the backdrop for creating the obligation, so that if a
33 child is under 16, the State says that the information
34 about that offending must still be disclosed to police.
35

36 Then subsection (7) sets out some other circumstances
37 in which a person does not commit an offence. So where the
38 person comes into possession of information as a child -
39 and that, in many circumstances, might be children speaking
40 to other children - there is no obligation, in those
41 circumstances, for that to be disclosed, even once the
42 child becomes an adult.
43

44 Privileges under part 3.10 of the Evidence Act - so
45 legal advice, journalist's privilege, religious
46 confessions, privilege against self-incrimination - if the
47 information is conveyed in that context then the offence is

1 not committed. And also under the confidential
2 communications provisions under the Evidence (Miscellaneous
3 Provisions) Act, for a person who is speaking to
4 a counsellor, that counsellor is not required to provide
5 that information. So, again, that is designed to try to
6 provide a general obligation of disclosure but not on
7 people who are there to provide services to the child, and
8 not to deter a child from seeking that kind of support.
9

10 Then the last main one is (d) where information came
11 into the public domain. So perhaps if there was a story on
12 60 Minutes or some other TV show, one might say that
13 everybody has some knowledge or information about a sexual
14 offence. Well, if it has come in that forum, then there is
15 no obligation to disclose at that point.
16

17 THE CHAIR: Greg, just a couple of questions. The concept
18 of reasonable belief - I haven't looked at the Second
19 Reading Speech, and we have talked a lot about this amongst
20 the Commissioners - you can receive information by way of
21 allegation: is it contemplated that you need more than
22 that before you have a belief? You can have a survivor
23 come to you and say, "This is what happened to me" - and
24 the police must confront this all the time - and they
25 then - police - investigate in order to see whether all the
26 circumstances bring forward a case that justifies them
27 going to a jury and getting a conviction, but the initial
28 allegation doesn't raise, or not necessarily, a belief.
29 What do we think will work itself out as to how you define
30 a reasonable belief?
31

32 MR BYRNE: I think it's one of those difficult concepts,
33 because there is no clear point at which you can say, "This
34 has turned from" - well, it's very difficult to say what is
35 the bit of evidence or the context or information, perhaps
36 in conjunction with other information that is received,
37 that turns a suspicion into a belief. We know those
38 concepts are slightly different but still quite close, and
39 I think it would really depend a lot on the nature of the
40 information or the allegation that was made and the
41 surrounding circumstances, and perceptions of credibility
42 might also come into it.
43

44 THE CHAIR: That's right. You could have provided
45 a clearly identified objective test, but obviously you
46 didn't, and I assume that was deliberate.
47

1 MS DE CICCÒ: It was the subject of quite some discussion
2 at a policy level, and it did cause quite some concern. We
3 had discussions even within our own State-based service
4 agencies and non-government organisations that we did
5 consult with. There was a concern - and it's always
6 a difficult balance: cast it too low, in terms of
7 a suspicion, then potentially in the mind's eye of general
8 community members, what does that mean and how broadly
9 would the reporting then be?

10
11 In the fact sheet that we published to accompany the
12 offence when it was first introduced, we gave some
13 examples, you know, "A reasonable belief might be formed
14 when a child states they have been sexually abused; a child
15 states that they know someone who has been sexually
16 abused" - and we go on and give a few examples of that to
17 try to guide and steer. But because it is pitched at the
18 general community, it is a difficult one.

19
20 We have subsequently had information from police and
21 others that people will ring and say they are concerned
22 about something - what that means in someone's mind when
23 they are concerned about circumstances or particular
24 situations that they observe or they become aware of.

25
26 So it wasn't without quite some debate and discussion
27 internally that we reached the view that belief might be
28 best at first instance, and we would see whether or not
29 that caused dilemmas either from an enforcement perspective
30 or from a perception.

31
32 THE CHAIR: You can understand what a judge has to tell
33 a jury about beyond reasonable doubt in this context, and
34 I suspect it is a pretty high threshold that you have
35 imposed.

36
37 MS DE CICCÒ: Mmm.

38
39 THE CHAIR: Secondly, the reasonable excuse provision, the
40 exception provision in subsection (3) - what's the
41 assumption as to who carries the onus?

42
43 MR BYRNE: Sorry, in subsection (3)?

44
45 THE CHAIR: Yes. Does the Crown have to negative that?

46
47 MR BYRNE: Yes, it's for the Crown to --

1
2 THE CHAIR: That's a pretty high hurdle, too.
3
4 MR BYRNE: It is, and perhaps tying in with your previous
5 question, your Honour, reasonable belief is the test that
6 is used under the mandatory reporting legislation in
7 Victoria, so there was some alignment with existing
8 practice, albeit that is in relation to people with the
9 obligation to report --
10
11 THE CHAIR: A regulatory regime, yes.
12
13 MR BYRNE: -- rather than a community-wide obligation.
14 And also the penalties are very different. So it is
15 10 penalty units or \$1,500, or something, as opposed to
16 three years.
17
18 THE CHAIR: Yes. What about subsection (3)? The Crown
19 has to negative?
20
21 MR BYRNE: The Crown has to negative that beyond
22 reasonable doubt.
23
24 THE CHAIR: Was it accepted that that puts a pretty high
25 threshold on the Crown?
26
27 MR BYRNE: Yes, in the same way as it would apply for
28 self-defence - if self-defence is being raised as an issue,
29 the Crown has to negative that.
30
31 THE CHAIR: Yes, that's what I have in mind, and that
32 causes all sorts of grief from time to time. But this will
33 cause a lot of prosecutions never to get run - you know
34 that?
35
36 MR BYRNE: Yes. I think it causes less grief in Victoria
37 than in New South Wales, for self-defence for murder.
38
39 THE CHAIR: That's probably true, actually, yes.
40
41 First of all, New South Wales, Paul or Daniel, do you
42 want to comment on the Victorian legislation? Is it good,
43 bad or indifferent? Feel free.
44
45 MR NOLL: Strangely enough, even though, on paper, they
46 look quite different, when you line up what the
47 requirements are, there is a lot of correlation, except

1 there's been a choice in Victoria to add more detail to
2 things like the reasonable excuse defence, which has always
3 been one of the major criticisms of the New South Wales
4 offence, in that that defence is very broad and undefined.
5 That has been one of two major criticisms of the New South
6 Wales offence.

7
8 But in other respects, it's quite similar. The
9 defence itself is raised on an evidentiary basis and has to
10 be negated by the Crown beyond reasonable doubt, and all
11 of the matters which are delineated as a reasonable excuse
12 defence in the Victorian Act, I would think, probably could
13 be raised as a reasonable excuse in New South Wales.

14
15 THE CHAIR: Mmm. When you look at the New South Wales
16 offence, I have wondered how you in fact prosecute that.

17
18 MR NOLL: Well, strangely enough - I don't want to pull
19 focus from the issue of child sexual assault - there are
20 about 100 prosecutions of this offence in New South Wales
21 every year.

22
23 THE CHAIR: And how do you prove the failure to have
24 reasonable excuse?

25
26 MR NOLL: Well, as we were saying, the majority of
27 prosecutions - I'm not aware of any prosecutions, except
28 for the one that your Honour mentioned at the beginning of
29 today - most prosecutions are in the line of other serious
30 offences like drugs, violence, murder. So people who may
31 be close to the alleged offenders but who don't fall into
32 the category of accessory, who may have found out, either
33 before or afterwards, of information, but didn't actually
34 have any criminal involvement. So it's a summary offence
35 prosecuted by the police in the Local Court, apart from
36 where there has to be the sanction of the Attorney General,
37 which has been delegated to the DPP, and on those occasions
38 it has to be bumped up to the DPP to get his sanction.

39
40 We pulled the figures from the Bureau of Crime
41 Statistics and there are about 100 prosecutions every year
42 and with a fair rate of pleas of guilty and also findings
43 of guilty in relation to --

44
45 THE CHAIR: Mostly in drug and serious --

46
47 MR NOLL: My experience has been within serious crime. It

1 is part of the police investigation process where --
2
3 THE CHAIR: It turns up, yes.
4
5 MR NOLL: -- people are brought in that are connected to
6 it but aren't to the extent of criminal involvement, from
7 the point of view of accessorial liability, and this is the
8 default offence which is charged.
9
10 THE CHAIR: Where did subsection 4 of your section come
11 from? I think I know but you'd better tell me.
12
13 MR NOLL: In 1995 the Criminal Law Review Division of the
14 Attorney-General's Department convened a working group to
15 monitor the operation of 316, which had been introduced in
16 1990, and that had some representation from mental health,
17 legal, health professionals on it and they expressed the
18 concern that their activities may be caught up by the
19 operation of 316. I think CLRD at the time did some
20 qualitative investigation and reported back that there had
21 been no prosecutions of those professions for this offence
22 in the operation of the offence that had been going for
23 five years, but despite that the concerns were answered by
24 inserting fault to give those professions some sort of
25 comfort that they wouldn't be caught up in the operation of
26 316.
27
28 THE CHAIR: Denis may know this, but was the church
29 involved in that issue?
30
31 MR O'BRIEN: I think the church was because I think
32 religious are one of the categories, but I don't know how
33 that happened in terms of the consultation, but I think
34 that certainly in terms of that category the church was
35 consulted.
36
37 THE CHAIR: Are there questions around the table of the
38 Victorians, first of all, about the structure of the
39 legislation and its operation?
40
41 MR POCOCK: My question is about how it intersects with
42 mandatory reporting and in particular my memory, but I
43 don't have a copy of the Children, Youth and Families Act
44 with me, that mandatory reporting applies to children,
45 "children" being defined to include 16 and 17 year olds.
46
47 MS DE CICC0: I think it is up to 17.

1
2 MR POCOCK: The reason for my question is that it seems we
3 have mandatory reporting requirements where your duty to
4 disclose is retained, if I can put it that way, even if the
5 victim is 16 years or older and even if the information
6 comes from the victim, but then over here we have some
7 legislation which sets those things up as a reasonable
8 excuse for not disclosing. I think there is a disconnect
9 between the mandatory reporting requirements and the
10 requirements here.

11
12 My second question is given the Children, Youth and
13 Families Act and given the Children's Court can make child
14 protection orders for 16 and 17 year olds, why in this
15 legislation the age would be set at 16? It seems to be
16 taking a different view about what constitutes a child.

17
18 MS DE CICCIO: I might try the first question first and
19 perhaps move to the second. The mandatory reporting is a
20 specific defined set of reporting requirements on
21 particular professions with respect to their particular
22 engagement and it is broader, too, in the context of the
23 welfare of the child, not necessarily in the context of
24 sexual offences. They serve different purposes and I think
25 in the second reading speech our Attorney at the time tried
26 to draw out where each offence served a particular purpose
27 within the system of protecting children.

28
29 The age issue is one that we still debate internally
30 ourselves, should it be 16, should it be 17, and indeed,
31 even more recently, there have been issues raised with us
32 as to whether or not it shouldn't be up to 18. We
33 ourselves continue to have the debates as to where that
34 particular age level should be set. Being a broader
35 offence and applying to all persons, not a particular class
36 of persons in terms of the obligations around disclosure,
37 in the first instance, again, we went with 16, but it is a
38 matter that, as I say, we still debate internally.

39
40 MR POCOCK: From Berry Street's perspective, we have to
41 give clear guidance to our staff, many of whom are mandated
42 reporters and we, in fact, direct all of our staff, whether
43 they're mandated reporters or not, to report matters
44 directly to the police and child protection, but in essence
45 we've got a piece of legislation that says the staff who
46 are mandated reporters at Berry Street have to report the
47 sexual offences against children who are 16 and 17, and we

1 have another piece of legislation that says the fact that
2 the person is 16 is a reasonable excuse for not reporting
3 it.
4

5 I think there is some policy inconsistency in Victoria
6 and our view would be that the age should be 18 and that
7 the fact that the information comes from the child should
8 not be a reason to not have to, on a compulsory basis,
9 provide the information to police and child protection.
10

11 THE CHAIR: That of course is information including the
12 name of the victim.
13

14 MR POCOCK: Yes.
15

16 THE CHAIR: Which is different to the view you take once
17 the child becomes an adult.
18

19 MR POCOCK: That's right.
20

21 THE CHAIR: Any response to that?
22

23 MS DE CICC0: As I say, it is something that we continue
24 to debate internally as to whether it should be increased.
25 At the time there was a lot of discussion as to how we
26 would cast and how we would try and include or reflect the
27 mandatory reporting obligations under the Children, Youth
28 and Families Act so that we didn't have a duality of
29 reporting variously to the Secretary of the Department of
30 Health and Human Services and under the disclosure offence
31 to police. We did try and exclude that particular class of
32 reporting, but as I say it remains an open question even
33 within our department as to whether that should be moved to
34 17 or 18.
35

36 THE CHAIR: It does sound on the surface like it would
37 create problems for people in the field.
38

39 MS DE CICC0: We have been and DHHS has been doing a bit
40 of work around trying to advise people as to how they
41 should treat with their mandatory reporting obligations
42 vis-à-vis these disclosure offences and then there is of
43 course the failure to protect offence as a separate
44 exercise as well in Victoria.
45

46 We will, as part of the implementation of the Family
47 Violence Royal Commission, have another look at this

1 offence and indeed the Royal Commission has asked us to
2 have a look at another offence in the Children, Youth and
3 Families Act which is very similar to the failure to
4 disclose offence and we'll review all of that as part of
5 that implementation.

6
7 THE CHAIR: Greg?

8
9 MR BYRNE: One of the difficulties that arises with
10 changing the age and the failure to disclose offence, at
11 the moment it is relatively straightforward in that it
12 involves a sexual offence against a child under 16 by a
13 person who is 18 or older, so it is an adult, so it is
14 quite straightforward. An 18 year old and a 17 year old
15 can engage lawfully in sexual activity. If the disclosure
16 obligations apply to 17 year olds and 18 year olds, there
17 would then be more focus on what was the nature of that
18 activity between them, which was, prima facie, it's lawful.

19
20 The only circumstance in which it would not be would
21 be either because it is rape or some general offence, or
22 there is a relationship of care, supervision or authority,
23 which may be more like the circumstances you're familiar
24 with. It just adds an extra complication about the
25 lawfulness of some sexual activity engaged in by some 17
26 years olds.

27
28 THE CHAIR: Chris Atmore, I think your organisation had
29 quite a bit of input into the policy development of this
30 legislation. Would you like to help us with your
31 perspective on it all?

32
33 DR ATMORE: Yes, your Honour. The basis for what I'm
34 saying is actually appended as 3(a) and 3(b) in the
35 Federation's submission to the Royal Commission into Family
36 Violence, if the Commission needs to follow that up.

37
38 What then became section 327 was actually very
39 contentious in Victoria through the process of law reform
40 and also in Parliament. It was actually passed in the
41 Lower House by one vote and that was because at the time
42 the Government and the Opposition were about fifty-fifty
43 and there was an independent MP who ended up voting with
44 the Government. That gives you an indication I think of
45 some of the contentiousness.

46
47 The Federation actually led a coalition of 11 other

1 specialist family violence and sexual assault providers,
2 including a number of peak bodies, to oppose the draft
3 version of section 327, not because we didn't support the
4 offence applying to institutions or organisations and in
5 fact that was what we suggested, that the focus on fail to
6 disclose should be on institutions and organisations, but
7 we opposed its broader remit for a number of reasons, one
8 of which goes back to the Cummins inquiry.

9
10 Interestingly, the Cummins inquiry's scope, of course,
11 was much broader than child sexual abuse, it was child
12 abuse more broadly, and at 14.7.2 the final report said:

13
14 A general failure to protect offence
15 without an element of intention but with a
16 significant gaol sentence attached would,
17 in the Inquiry's view, be disproportionate
18 to the stated aims of the legislation.

19
20 The Cummins inquiry also then went on to say that at the
21 very least there should be basically a complete defence of
22 family violence, so exempt a family violence context from
23 possibly being charged and prosecuted under that provision.

24
25 The Betrayal of Trust report, as Greg and Marisa have
26 said, was the next significant development in Victoria.
27 One of the difficulties for us with that report is that we
28 believe that its broad recommendation, which was
29 essentially a version of the New South Wales concealment of
30 a crime but to remove the benefit aspect of that provision,
31 actually went beyond the terms of reference of the
32 parliamentary inquiry.

33
34 If you look at the parliamentary inquiry terms of
35 reference, it specifically applies to religious
36 organisations and non-government organisations and we would
37 have been happy if the recommendation about concealment of
38 a crime applied purely to those organisations, but again it
39 took a very broad approach and basically said persons with
40 the subsequent development --

41
42 THE CHAIR: Why did you think it would be better to
43 confine it?

44
45 DR ATMORE: As far as we are aware, there's only one
46 jurisdiction that applies fail to disclose so broadly in a
47 similar form to what we have now with section 327 and

1 that's Ireland. I am not sure that we know enough yet
2 about how that's actually shaking down, but interestingly,
3 Ireland doesn't exempt the confessional, so I think that's
4 a significant difference from our approach.
5

6 There are other jurisdictions in the United States and
7 also New Zealand where there have been a number of cases
8 where women have been successfully prosecuted in a family
9 violence context for more the offence of fail to protect,
10 but I think you can argue that fail to disclose in those
11 jurisdictions came under the umbrella of fail to protect.
12 That backed our argument that we were concerned, even
13 despite the framing of the current defence in section 327,
14 that women and family violence situations would be
15 inappropriately charged and prosecuted and potentially
16 convicted under that legislation, so we partly used the
17 evidence from those other jurisdictions and there are a
18 number of really quite appalling examples, but we were also
19 I think backed up by, for example, ANROWS, the Australian
20 National Research Organisation for Women's Safety.
21

22 They regard as best practice that in a situation where
23 a child was sexually abused by, say, his or her father and
24 the mother is the non-sexually abusing parent, that the
25 mother should be supported to actually stay with that child
26 and actually help that child to heal and be the protective
27 parent and we believed that the risk under section 327
28 remains that that mother could be, effectively, taken away
29 from the child. The child has already lost the father
30 because he's an abuser and has presumably been charged and
31 convicted and all the welfare evidence suggests that that
32 is really the wrong way to go.
33

34 Interestingly, in the course of our campaign, we got
35 support from a number of other organisations, including the
36 Victorian Branch of the Australian Association of Social
37 Workers who I think really took our point.
38

39 The other issue in terms of the potential targeting of
40 mothers is twofold. One is that we know that mothers tend
41 to be unfairly targeted with an expectation that they'll be
42 more protective than fathers, so we think that would also
43 go to lowering the threshold for mothers compared to
44 fathers in terms of who is going to be charged with a
45 potential fail to disclose offence.
46

47 The other significant issue, which we don't really

1 think was resolved in the public material that was
2 available, was why we proceeded to section 327 when
3 section 493 of the Children, Youth and Families Act was on
4 the books, and Greg and Marisa might want to say more about
5 that, but as far as we are aware that has never been used
6 to obtain a successful conviction. We wanted to know more
7 about why that was and hence, the Royal Commission into
8 Family Violence's recommendation that that section needs to
9 be reconciled with an amended section 327.

10
11 I think it raises all kinds of issues about the fact
12 that section 327 - until we came here today we weren't
13 aware, and neither was the Royal Commission into Family
14 Violence, that there had been any charges taken under that
15 legislation and it has been on the books now for slightly
16 under 18 months. I think I heard you say, Michael, that
17 there are now three in process, so it would be interesting
18 to know how they relate to our issues of concern.

19
20 The other issue for us - and this is my final point
21 about the context - is the defence fail to disclose,
22 because we advocated very strongly for at least a specific
23 family violence defence and I know on its fact that it
24 could be argued under the various subsections that that is
25 kind of implicitly there. Our concern, nevertheless, is
26 that there are three judgments required of "reasonable" in
27 those subsections.

28
29 There are three ways in which "reasonable" has to be
30 interpreted, including, you know, let's think of a woman in
31 a family violence situation, that her failure to disclose
32 based on a reasonable fear for her safety was also
33 reasonable in the circumstances. The "reasonable in the
34 circumstances" is the objective judgment and the reason why
35 we weren't convinced by that is - and this is another
36 roundtable for another time - our experience in Victoria of
37 all the debates around defence of homicide and how they
38 work or don't work for women, and of course we don't have
39 that any more now in Victoria, but the significance of that
40 for us was that a lot of the difficulty for women who try
41 to run a successful defence is around the notion of what is
42 reasonable for her in the circumstances and we have
43 advocated for some years for social framework evidence to
44 be lawfully present in the relevant legislation around
45 defence of homicide and we say that the same problem exists
46 here, that there's just not enough in the legislation or in
47 lawyers training and, with respect to your Honours,

1 sometimes in judicial training, to actually recognise what
2 "reasonable" might mean for a woman who is experiencing
3 family violence and then is charged with a fail to disclose
4 offence.

5

6 THE CHAIR: You don't see the need for the Crown to prove
7 it, rather than the accused, as being a reasonable
8 protection?

9

10 DR ATMORE: I think that certainly helps. Yes, I am still
11 not convinced that the interpretive framework and the
12 understanding of the social context of family violence
13 would necessarily be brought to bear sufficiently in the
14 way that it is framed.

15

16 THE CHAIR: It does have a significant consequence when
17 you get into the homicide area of the law, the way you've
18 framed the offence, but do either of you want to reply to
19 that? If you don't want to I'm going to ask you to anyway.

20

21 MS DE CICCICO: Perhaps I might defer from replying on the
22 defence of homicide because, as Chris knows, that has had
23 quite a bit of law reform in Victoria and indeed some of it
24 resulting in quite unintended consequences in the context
25 of how it was actually used.

26

27 Having said that, I don't necessarily disagree with
28 any of the issues that Chris raises and they were certainly
29 genuinely held concerns on the part of the stakeholders and
30 we understood that.

31

32 As I say, there was quite some debate within
33 government in the development of the legislation at the
34 time in the manner it has come out and some of the language
35 that the Betrayal of Trust report used and putting aside
36 whether it went beyond its particular terms of reference,
37 nonetheless, it held quite a strongly expressed view, even
38 reflecting on the Protecting Victoria's Vulnerable Children
39 report and some of the reflections that Justice Cummins and
40 the inquiry panel made in that report which Chris has
41 accurately contextualised in the family violence area,
42 nonetheless, it was believed that it should be a statement
43 of the gravamen with which these matters should be taken by
44 the community and I guess the view that in part this would
45 bring forward some greater focus and I suppose be a
46 mechanism by which we could also change community attitudes
47 to this sort of offending and reporting.

1
2 As I say, it was an area that the Family Violence
3 Royal Commission did look at. It wasn't just the
4 Federation's submission that actually addressed this point.
5 There were a number of submissions to our Family Violence
6 Royal Commission that actually highlighted this issue and
7 suggested that the Royal Commission make recommendations to
8 include some form of explicit family violence defence, or
9 indeed to actually exempt, to have some sort of exception
10 from the reporting obligation.

11
12 The Family Violence Royal Commission I think made the
13 point that it was so newly commenced and had only been on
14 the statute book for a short period of time, that they
15 recommended rather than reform and amend the legislation,
16 we would try and mitigate the risk by involving the DPP
17 now.

18
19 As Michael suggested, we have three matters currently
20 under investigation, so it really is an issue of how the
21 matter will be dealt with by the courts.

22
23 THE CHAIR: Greg, did you want to add to that?

24
25 MR BYRNE: Just to clarify in case people draw inferences
26 as to the current Attorney's position when he was the
27 Shadow Attorney-General, when Chris mentioned the voting,
28 he moved that there be an adjournment for a month, was his
29 focus, so that there could be further consultation with
30 family violence sector groups, FCLC and others, and that
31 was the purpose of the amendment that the then Shadow
32 Attorney-General made to try and have that further
33 consultation. Now that they're in government, it forms
34 part of the Family Violence Royal Commission with its
35 recommendations that Marisa has spoken to.

36
37 THE CHAIR: Is it the case that the section will be
38 reconsidered at a policy level in light of the family
39 violence report?

40
41 MS DE CICC0: Certainly, Government has indicated that it
42 will implement the recommendations. The explicit
43 recommendations of the Royal Commission, as I noted and has
44 been noted, also look at a like section in the Children,
45 Youth and Families Act as part of that reform and indeed
46 there are many other law reform recommendations that the
47 Commission has made. I am sure we'll have a broad

1 consultation with stakeholders.

2

3 THE CHAIR: Does anyone else have a perspective on either
4 the Victorian or New South Wales Act?

5

6 MR SHOEBRIDGE: I have one question of the Victorian. The
7 New South Wales Act requires reporting to the police or
8 another appropriate authority. You didn't pick that up in
9 the Victorian model, it is just the Victorian police. Was
10 that because you don't have the reportable conduct
11 arrangements?

12

13 MS DE CICCIO: I think the then Attorney noted in his
14 second reading speech that we have the mandatory reporting
15 offences which would be to the Secretary of the DHHS. We
16 don't at this stage have a report for conduct per se. We
17 are in the throes of developing one. The then Attorney
18 again noted in his second reading speech that those
19 reports, the mandatory reports under the Children, Youth
20 and Families Act would be made to the Secretary of the
21 Department of Health and Human Services and these reports
22 by general community members would be made to
23 Victoria Police.

24

25 THE CHAIR: I think we, the Royal Commission, need to sign
26 off on another issue that is relevant. If you look at
27 table 6, which is annexure D, if you haven't already, you
28 will see there we have set out the mandatory reporting
29 state of mind required in the different states. You will
30 see that they vary: "belief on reasonable grounds",
31 "suspect on reasonable grounds", "becomes aware or
32 reasonably suspects", "suspects on reason grounds",
33 "believes or suspects on reasonable grounds", and so on.

34

35 Would anyone suggest that with respect to the criminal
36 offence, as opposed to the regulatory regime for mandatory
37 reporting, the test should be lowered to be
38 "reasonable suspicion"? No-one would suggest that? All
39 right. I assume it was a conscious decision in Victoria to
40 use the expression "reasonable belief" as opposed to
41 believing on reasonable grounds. Can you explain why that
42 choice was made?

43

44 MR BYRNE: Essentially, it was part of a process of trying
45 to modernise the language. We don't really think there's
46 any significant difference between the two.

47

1 THE CHAIR: You wait.
2
3 MR BYRNE: But in other areas of sexual offence laws
4 "reasonable belief" is used and we just thought it was
5 probably a little bit easier for people to understand.
6
7 THE CHAIR: Yes. Does anyone have any comment on that?
8 New South Wales?
9
10 MR NOLL: I hear what you say about if you have used two
11 different terms people will say, "Why did you use the two
12 different terms, they must mean something different?"
13
14 THE CHAIR: Yes. It depends on the context in which you
15 are using them, I suppose. It just struck me - maybe it is
16 New South Wales context - that "belief on reasonable
17 grounds" is a very easy concept for me to work with;
18 "reasonable belief" is by no means so easy, and I don't
19 think they are the same. But it won't be me who has to
20 assess that in due course. Does anyone else have any
21 comment on that? Chris, did you have any view about that?
22
23 DR ATMORE: No, your Honour.
24
25 THE CHAIR: Julian?
26
27 MR POCOCK: I am actually going back to an earlier point,
28 but just in relation to the mandatory reporting
29 requirements in Victoria, just to note that the mandatory
30 reporting requirement is that people report to child
31 protection or the police - they have either option.
32
33 "A reasonable belief" - and this is what Berry Street,
34 in its procedure, provides to all staff, and we've taken
35 this from the Act - "is formed when the person has more
36 than a suspicion and/or is more likely to believe than
37 disbelieve that a child or young person is at risk". So
38 that's how we --
39
40 THE CHAIR: "More likely to believe" or --
41
42 MR POCOCK: "More likely to believe than disbelieve that
43 a child or young person is at risk".
44
45 THE CHAIR: You can see endless litigation about that.
46 Yes.
47

1 MR POCOCK: That's the explanation that agencies are
2 provided with in Victoria.
3
4 MS WALSH: That's across all abuse, though, isn't it?
5
6 MR POCOCK: That's a child or young person being at risk
7 of significant harm.
8
9 MS WALSH: Yes, that covers not just sexual abuse.
10
11 JUSTICE COATE: Mandatory reporting relates to physical or
12 sexual abuse.
13
14 Julian - and I don't know if Greg wants to comment on
15 this - it probably is worth noting that the Victorian test,
16 of course, has a second element to it - the mandatory
17 reporting test - and that is because, as Marisa said, the
18 mandatory reporting legislation is directed at the child's
19 welfare inside the family, so the second part of the test
20 goes to whether or not the parents are acting protectively.
21 I think it is worth noting that, because when one compares
22 it with the offence that is being created by 327, it's
23 obviously a much broader net that is being cast, for a very
24 different purpose.
25
26 THE CHAIR: My final question on this issue is: when you
27 came to define this obligation, "reasonable belief", did
28 you discuss the objective/subjective approach to the
29 problem, and why did you come down where you did? Or, put
30 another way, to spell it out simply, if you'd described it
31 as a belief which a person would have formed on reasonable
32 grounds - I don't put that elegantly - in other words, for
33 those who don't throw these concepts around a lot, you
34 stand outside the person and say, "What would the
35 reasonable person, knowing what we can prove this person
36 knew, have decided - would they have had a belief or not?"
37 So you make it an objective arrangement as opposed to the
38 Crown having to prove that the accused actually held that
39 reasonable belief, whatever "reasonable belief" means.
40
41 MR BYRNE: There are probably a few different components
42 to that answer.
43
44 THE CHAIR: There are, yes.
45
46 MR BYRNE: One is, as I mentioned before, having something
47 that is similar to the mandatory reporting obligation, so

1 there's something that is more familiar in the context.

2
3 A belief itself may not be a sufficient basis for an
4 offence punishable by three years' imprisonment. So the
5 fact that somebody believes something but may mistakenly
6 believe it, or perhaps because of their own particular
7 views about something or their own pre-dispositions, may
8 not necessarily be enough that you would want to say that's
9 the kind of belief on which people need to act to render
10 them potentially liable to a serious criminal offence.

11
12 THE CHAIR: If the foundation is such that the ordinary
13 person would hold the belief, why wouldn't that be enough?

14
15 MR BYRNE: That could be done. As I say, the first part
16 was really trying to draw some alignment with the mandatory
17 reporting protection regime, and probably that the existing
18 offence that we were drawing from focused on knowledge or
19 belief, and that the general presumption with criminal
20 offences is if you can start and come up with something
21 that is based on a state of mind, a subjective state of
22 mind, that would be where we would go to first, if we think
23 we can develop an offence that works appropriately there,
24 rather than going to an objective test. It may also be an
25 uncertainty --

26
27 THE CHAIR: What's the police is view about this?

28
29 DSS DWYER: I am listening to what everyone is saying.
30 I understand they are trying to align it with another Act,
31 so that sort of creates, I suppose, a position where you
32 take away the two interpretations and you have one. But
33 I know, throughout the years, what other legislation has
34 said about grounds for acting, and it's a little bit
35 different to that.

36
37 THE CHAIR: Here you have to prove - you, the police,
38 through the DPP - that the person had the belief, as
39 opposed to proving all the circumstances which they knew,
40 and what that should have led to. Again, it's a pretty
41 high threshold.

42
43 MR NOLL: That's the case with the New South Wales offence
44 as well, though, and there are successful prosecutions for
45 that every year.

46
47 THE CHAIR: Chris, I don't know whether you have any

1 response to this. Does it help you to think in this frame?
2
3 DR ATMORE: If the discussion further down the track
4 agrees that this is a particularly high threshold, I guess
5 our position has always been, if it only applied to
6 institutions, let's do something about the threshold, you
7 know what I mean? Part of the reason why we're a bit more
8 sanguine about it is because it is so broad, but the
9 problem is you are protecting vulnerable persons that
10 shouldn't be prosecuted at the expense of successfully
11 prosecuting organisations who should be.
12
13 THE CHAIR: Daniel, the ones that are succeeding,
14 I suspect - I don't know, but you might be able to tell
15 me - if it is someone who is on the fringe of the activity,
16 what the police are presumably proving is that there was
17 a communication which gave that person actual knowledge?
18
19 MR NOLL: I think TI material is probably the best example
20 of proof of knowledge. So people's phones are off and you
21 have a telephone recording of the accused telling them --
22
23 THE CHAIR: "Hey, Bro, I did it."
24
25 MR NOLL: Which you wouldn't get in these sorts of
26 matters.
27
28 THE CHAIR: No, it is quite a different context.
29
30 MS WALSH: Why did Victoria not stick to institutions and
31 organisations but, rather, the whole community?
32
33 THE CHAIR: Sorry, Karyn, we couldn't quite hear that?
34
35 MS WALSH: Why did it go to the whole community rather
36 than sticking to institutions and organisations? Because
37 wasn't the problem that you were trying to fix what
38 organisations were doing?
39
40 MS DE CICCIO: The Betrayal of Trust Report that we had did
41 actually recommend a failure to protect offence that
42 targeted organisations or, indeed, those with some sort of
43 duty of care or care and supervision over children, as well
44 as recommending that we put in place a concealment or
45 failure to disclose offence. So they recommended that we
46 act in the context of both, and in the context of that
47 latter offence, they recommended a broad remit rather than

1 a narrower one, as Chris has observed.
2
3 DR ATMORE: I think the problem is that most Victorians
4 would have no idea that they actually could get into
5 trouble for not disclosing if they think that a child has
6 been sexually abused, because all the discussion around
7 Betrayal of Trust and the media coverage, and so on, was
8 focused on organisations, and then you sort of ended up
9 with this recommendation that applied to almost everyone.
10
11 MS WALSH: And the intent to cover up. So it seems like
12 the response is different to the problem.
13
14 THE CHAIR: One of the problems is going to be defining an
15 organisation in this context. As you know, we have
16 a suggestion that has its origin with Arie Freiberg, that
17 there be a criminal offence for negligently failing to
18 secure the safety of a child within an institution. We
19 have to work out how you define your institution.
20 Particularly, Denis, we're looking at you, in the context
21 of the Catholic Church; and Nicola will help us with
22 understanding the Ellis defence, which has recently
23 surfaced again in the context of financial obligations of
24 an Anglican diocese - you may know that, too - where this
25 question of what is the institution comes to the fore.
26
27 Now, you could deem things, of course, under
28 legislation, and cope with it in that way, but that would
29 be an issue you have to face.
30
31 MS WALSH: But where does the confessional fit in with
32 this?
33
34 MS DE CICCIO: Into the failure to disclose? It's subject
35 to the same sorts of exceptions as legal professional
36 privilege and a range of others. So it's sustained, and
37 that was a recommendation of the --
38
39 THE CHAIR: NSW Police, do you have any comments on this
40 aspect of the discussion? Greig?
41
42 D SUPT NEWBERY: Interestingly, I suppose, for New South
43 Wales - I can only talk about New South Wales - I think we
44 do about 4,000 matters that are reported to us each year,
45 which involve child sexual assault offences. We do about
46 four and a half. So about 90 per cent of our matters are
47 child sexual assault matters. Of those, the vast majority

1 are interfamilial. So we are talking about institutions
2 but, in reality, the vast majority of child sexual assault
3 occurs in the home, whether that be by parent or someone
4 known to the parent or an uncle, grandfather, whatever.

5
6 And we do see matters where, unfortunately, the child
7 is subjected to ongoing abuse because of unprotective
8 parents, whether that be through family violence or not.
9 Sometimes, it's not. So there's a sort of broader range of
10 issues for that.

11
12 In New South Wales, for mandatory reporting, we don't
13 have an offence for mandatory reporting, but we have
14 a pretty strong mandatory reporting scheme - apart from
15 316. But, yes, looking at it in the context of talking
16 about kids and the need to protect kids, I think we still
17 need to ensure there is a focus on how we do that within
18 the family and how that occurs, because that's where the
19 largest amount of sexual assault occurs.

20
21 DR ATMORE: Could I comment on that, your Honour? We had
22 a meeting at one stage with some members of the SOCITs in
23 Victoria to talk about the draft legislation, but we could
24 only get anecdotes about how difficult it was to prosecute,
25 say, the Death of Hayley, which is an inquest that also had
26 an Ombudsman's investigation associated with it. That was
27 an example where the police still say - one of the
28 perpetrators, or alleged perpetrators, is deceased now -
29 that they couldn't pin enough on either of the two persons
30 of interest, and so they often bring that up as an example
31 of why they need something like section 327.

32
33 But we can't get any hard evidence on how often that
34 is the case, when they couldn't proceed with some kind of
35 alternative charge or if there was some other way in which
36 they ought investigate it, and there was some suggestion
37 around the Death of Hayley that perhaps other evidence
38 could have come to light if the investigation had proceeded
39 differently, in which case they wouldn't have been caught
40 in that dilemma.

41
42 So it is all a bit unclear in terms of what is the
43 real need for a section like section 327 and, again, going
44 back to section 493 of the Children, Youth and Families
45 Act, which has never been used successfully - why is it on
46 the books? We have just not been able to get an answer on
47 that.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

MR SHOEBRIDGE: In terms of an institution, there are two aspects to it, if you are talking about criminal culpability. One would be identifying individuals who are in a position of knowledge and authority and who are culpable and having, potentially, a specific criminal penalty against the individuals, and that wouldn't necessarily bump up into the problem with an unincorporated association, if you defined that the right way.

But the more difficult thing with unincorporated associations, if you wanted to impose a monetary penalty - how do you attach a monetary penalty to something as amorphous as the Catholic Church? Maybe you would need to confront those issues that the Commission has in other cases about statutory trusts. But I think there are two distinct things there: one is finding individuals in positions of authority who are culpable within an organisation - and that, I think, can apply across the board; the monetary penalty thing is a more complicated task.

THE CHAIR: Before I turn to try to bring us into some sort of order for the day, is there anyone else who wants to contribute to a discussion about these legislative provisions?

MR KINMOND: Your Honour, I would observe that 316 is very broad and that there would be benefit, I believe, in amending 316, but there would also be benefit in an additional provision, and that additional provision really was about prescribed bodies. I mean, from what I've heard - and I was apprised of a very broad provision of this type covering all individuals - if one still had 316 on the books, in a very, very rare case, if one needed to pursue an individual, you could pursue an individual under 316, but, really, the driver could be a specific provision of a type similar to Victoria, but you would limit it to prescribed bodies.

I would probably argue that the age of the victims who you should be concerned about are those who are under 18.

And so as not to be a nuisance I won't repeat the views I have expressed earlier in terms of blind reporting, but one would expect that blind reporting would not be entertained, except if it aligned with certain exemptions.

1 I think Victoria has made a very good start in terms of the
2 types of exemptions that would need to be considered.

3
4 But one of the difficulties, I think, in terms of
5 containing exemptions in legislation is that that can be
6 a very challenging proposal. There could be the
7 possibility that a new provision of this type could simply
8 recognise guidelines that were issued by a particular body,
9 whether it is the DPP or the Attorney General, and if one's
10 conduct or the circumstances fell within those guidelines,
11 that could constitute a basis for a defence.

12
13 THE CHAIR: I'm not sure about that. But, tell me, what
14 would be your class of institution that you would attach
15 the offence to, if you confine it?

16
17 MR KINMOND: I think the thing about having prescribed
18 bodies - it would be reasonably easy to identify religious
19 institutions, schools, most of those that are in the
20 child-related employment area, and the benefit of having
21 those prescribed bodies I think we will learn as we go. So
22 one can then, of course, simply prescribe other bodies over
23 time when we have a body of knowledge to examine how the
24 legislation operates.

25
26 THE CHAIR: So you would take out 316 as it applies to
27 sexual offences against children?

28
29 MR KINMOND: What one would do is, to the extent to which
30 this new provision applied, 316 wouldn't apply, as
31 a possibility.

32
33 THE CHAIR: Mmm.

34
35 JUSTICE COATE: But you wouldn't give the exemption for
36 the victim requesting that the information not be
37 disclosed? Have I understood that correctly, Steve?

38
39 MR KINMOND: Unless there was certain other surrounding
40 conduct or circumstances that fell within the exemptions
41 that were outlined in the guidelines.

42
43 An illustration, for example: if a prescribed body
44 attempted to obtain information in connection with
45 a matter, they were upfront, they disclosed the fact that
46 they would need to disclose everything and, as a result,
47 the victim withheld certain information, the guidelines

1 could cover this. If it was clear that no information,
2 essentially, was going to be provided to the police unless
3 one gave an assurance that the name of the victim would be
4 withheld, I think that would be a reasonable excuse.

5
6 I could think of a range of other scenarios where,
7 when one weighs it up, to provide police with some
8 information with which they could work, as opposed to no
9 information, because victims must be consulted in these
10 circumstances, is obviously preferable.

11
12 Now, if we were able to have guidelines that were
13 associated with this legislation, it would enable us to do
14 work on clearly outlining what is acceptable in the context
15 of withholding information.

16
17 THE CHAIR: Steve, I'm not sure that the High Court would
18 like your idea.

19
20 MR KINMOND: I'm sorry, your Honour.

21
22 THE CHAIR: In fact, I think they would be almost certain
23 to knock it over, and probably the Court of Appeal would,
24 too.

25
26 MR KINMOND: If it had that one didn't fetter the court in
27 terms of reaching its own conclusion --

28
29 THE CHAIR: You would have to define your offence. No-one
30 is going to allow you to have legislation that operates by
31 reference to some external --

32
33 MR KINMOND: Guidelines?

34
35 THE CHAIR: No. Regulations are as far as you can go.

36
37 MR KINMOND: We might do it there, your Honour.

38
39 MR McKNIGHT: Can I just comment on the proposal? Some
40 aspects of it are quite interesting, but we would need to
41 think very carefully about the general offence as opposed
42 to the specific offence, and we wouldn't want to be in a
43 situation where it was harder to prove the specific offence
44 in relation to child sexual assault than it would be to
45 prove the general offence that applied in all other
46 matters. So that demarcation would have to be thought
47 about very carefully indeed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE CHAIR: I think I said at the beginning of the day that we need to make sure that we do recognise that we are talking in our context in relation to the reporting of crime.

Steve has thrown, as it were, a curve ball at us all, but can I bring it back to try to establish where we are on some general principles. What is our position around the room as to an obligation to report that should not depend upon the victim's or survivor's wishes? In other words, an obligation to report irrespective of what the survivor wants? Do we want an offence defined that requires or imposes the obligation on everyone to report in those circumstances?

MR SHOEBRIDGE: I have suggested before that there are, if you like, two distinct groups we are talking about: one is the institutions who are alleged to be culpable, and there should be no discretion in those circumstances; the other one is those victim-based, victim-focused support bodies, where I think most ordinary people in the community would feel there isn't that conflict of interest, and perhaps that there shouldn't be the immediate criminal culpability. I don't think one law that applies to both the organisations that are potentially culpable and the organisations that are out there trying to help is particularly good.

THE CHAIR: And you would see that as a corporate offence or an institutional offence, irrespective of the age at which the survivor is reporting to the institution?

MR SHOEBRIDGE: I would in those circumstances.

THE CHAIR: Yes. If you went down that path, does anyone have a different view about the question of the age? In other words, do you leave it or do you make it dependent upon the report coming from a child, which you might define as 18 or 16, whichever you did, but if it was an adult, then there was no obligation to report?

MR POCOCK: That's Berry Street's position as we have outlined through today.

THE CHAIR: So we sit pretty much where no-one has changed their view in the course of the discussion during the day?

1 We do have a record of what you have said, so we can go
2 back to it.

3
4 MS WALSH: So we're talking about children --

5
6 THE CHAIR: David is saying for child abuse, but reported
7 to an institution at any time - the person might be 60 -
8 the obligation falls upon the institution to report. But
9 Berry Street says, no, only if they are reporting as
10 a child, which you would define as --

11
12 MR POCOCK: Or if we have the person's consent.

13
14 THE CHAIR: Yes, sure. And for that purpose, the child is
15 16 or 18?

16
17 MR POCOCK: Eighteen.

18
19 MS RONKEN: Eighteen. That's the same position as
20 Bravehearts', we are the same. If it is a child, we will
21 report. For an adult, we will support them in reporting
22 and encourage them, do everything we can to help them do
23 that, but we would respect the adult's wishes as well.

24
25 MS WALSH: But we are not institutions, and I think that
26 is very difficult.

27
28 THE CHAIR: David, can I tax you, then, in relation to
29 your proposition: why, once the person becomes an adult,
30 don't you leave it in their hands as to whether or not they
31 choose to go to the police?

32
33 MR SHOEBRIDGE: Say it is a young adult, a 19-year-old.
34 They may have just come out of the care of the institution.
35 It's almost impossible to suggest that the institution can
36 properly mediate the consent or otherwise. They may have
37 only literally just come out of the care of the
38 institution.

39
40 For other people, if you are talking about abuse in a
41 faith-based context, their faith might continue to be such
42 a core part of their identity that it makes it extremely
43 difficult for them to see the organisation held to account,
44 but society, I think, would expect the organisation to be
45 held to account, and, in fact, holding the organisation to
46 account has enormous benefits across society in preventing
47 other people from being abused. So institutions really are

1 in a different situation.

2

3 THE CHAIR: Does anyone have any comment on that?

4

5 MR O'BRIEN: I think it would need some very serious
6 thinking through, I have to say. I mean, in terms of what
7 is an institution. Okay, there are faith-based
8 institutions, but there are other institutions, there are
9 government institutions, and I'm not sure - I mean,
10 I suppose if all institutions were treated the same way,
11 that might be one thing, but I do wonder about offences
12 that differ as between different segments of the community
13 or different people in the community. I just sort of
14 wonder about that, whether that needs sort of thinking
15 through.

16

17 MR SHOEBRIDGE: The focus would be on the role of the
18 institution in looking after/supervising children, as
19 opposed to whether it is a faith-based or
20 a government-based or an unincorporated association. It
21 would be the role they have in the care and supervision and
22 oversight of children.

23

24 THE CHAIR: You are looking at the relationship between
25 the child and the institution. That's where you are going.

26

27 DR ATMORE: I'm not sure how one would distinguish this
28 legally, but all of this stems from the number of survivors
29 that have been sexually abused in an institution, while
30 they have been a part of that institution. So if there is
31 some way to distinguish - because the scenario that comes
32 to mind when you look at some version of Victoria's
33 section 327 is the child - or maybe they are an adult by
34 then - who goes to, say, the church, to say that they have
35 been sexually abused by someone who belongs to that
36 organisation: that would seem to be a scenario that needs
37 particular attention compared to, say, that same child or
38 adult going to the organisation and saying they have been
39 sexually abused but not by someone within the organisation.
40 There would seem to be an extra onus on the organisation in
41 the first scenario, and I'm just not quite sure how we
42 would sort of distinguish that.

43

44 JUSTICE COATE: Sort that out legally.

45

46 DR ATMORE: Because they have an obligation to deal with
47 conduct in their own organisation that has impacted on that

1 child.

2

3 DR CHAMLEY: Your Honour, there is another dimension to
4 this also, I think. We are aware of cases where
5 a consenting relationship went on beyond 18 years, both
6 heterosexual and homosexual, and those people are highly
7 conflicted about now making accusations, even though the
8 relationship has finished. But there is that dimension to
9 it also.

10

11 THE CHAIR: David, I know what you said earlier about an
12 independent mediator in this circumstance, but even the act
13 of reporting to an institution, if the institution wasn't
14 principled in its response, could, of course, lead to
15 a diverting behaviour by the institution as against the
16 survivor. So the creation of an offence doesn't
17 necessarily mean you end up with the mediator, if you had
18 a mediator in the loop, does it?

19

20 MR SHOEBRIDGE: No, it requires some level of decent
21 response from an organisation. They may not have behaved
22 well in the past, but an acknowledgment now that they need
23 to change their behaviour.

24

25 THE CHAIR: I have in mind, though, that the immediate
26 response may be, "Well, the law requires us to tell the
27 authorities about this, whether you want us to or not", and
28 the person may be diverted by merely that statement.

29

30 MR SHOEBRIDGE: I don't think any law can be perfect if
31 you have a mendacious organisation out there wanting to
32 actually prevent, with that kind of aggressive approach.
33 But we've heard multiple cases around the table here that
34 the victim has been told early on, in a supportive
35 fashion --

36

37 THE CHAIR: Sure, that depends on the organisation
38 responding in that way.

39

40 MR SHOEBRIDGE: Which is why I think interrogating the
41 figures about blind reporting that we have seen in
42 New South Wales really is important, because every
43 organisation we have heard from which is really victim
44 oriented, they say that when they explain it carefully to
45 the victim, the victim almost universally wants to come and
46 report. So how have we got to a situation where we have
47 1400, 1500 instances in New South Wales where victims have

1 allegedly said they don't want their name reported. There
2 must be some poor practice there that I think we need to
3 uncover and unpack. Something is going wrong in that
4 process, which probably bases the concern you put.
5
6 THE CHAIR: Maybe. Although our experience would suggest
7 that there will be people who won't want the police to
8 know, and we are certainly not an organisation that in any
9 way threatens or does other than support.
10
11 MR SHOEBRIDGE: No, but I would suspect it would be a very
12 small minority of people, if they get a supportive
13 situation --
14
15 THE CHAIR: That's probably right, but there are people
16 who genuinely fall into that category.
17
18 MR SHOEBRIDGE: But since 2010, in New South Wales, some
19 1500 that we know of - that's not a small cohort, that's
20 a substantial problem.
21
22 THE CHAIR: Now, if we didn't take up David's suggestion,
23 that we were looking at the obligation to report as
24 a criminal obligation or an obligation under the criminal
25 law in relation to someone who is a child at the time of
26 reporting, what do people think should be the age - 16 or
27 18?
28
29 MS RONKEN: We would go with 18. We have always said that
30 the UN Convention on the Rights of the Child defines
31 "child" as being under 18, so we have always said under the
32 age of 18.
33
34 THE CHAIR: What is the age of consent in different States?
35
36 MS RONKEN: Sixteen.
37
38 D SUPT NEWBERY: Sixteen in New South Wales
39
40 THE CHAIR: Is it all 16 now?
41
42 MR NOLL: Queensland has that funny 16/18 thing, depending
43 on the nature of the sexual act.
44
45 THE CHAIR: Nevertheless, people would say 18 would be
46 mandatory. The legislation as currently framed, that we
47 discussed, has a subjective test in it. Is everyone happy

1 with that or would it be better to have an objective test,
2 or don't we know?
3
4 MR SHOEBRIDGE: I think the reasonable belief test is
5 deeply problematic. A belief on reasonable grounds at
6 least allows --
7
8 THE CHAIR: You've still got to prove the subjective
9 belief.
10
11 MR SHOEBRIDGE: Yes, but at least you focus on what the
12 reasonable grounds are.
13
14 THE CHAIR: True.
15
16 MR SHOEBRIDGE: It gives you some grounding for your
17 inquiry as opposed to just the inquiry entirely being about
18 what's in the individual's head.
19
20 THE CHAIR: You don't think it would be better if it was
21 framed so that the prosecution could establish the
22 information available to the accused and persuade the jury
23 that that justified an ordinary person going to the police?
24
25 MR SHOEBRIDGE: I think as an element of defence and then
26 perhaps have a defence, a subjective element being able to
27 be proven by the defence, notwithstanding that might be a
28 fairer way of dividing the onuses, yes.
29
30 THE CHAIR: That's the second step I was going to take and
31 that is, is everyone happy that the Crown should have to
32 negative all the exceptions, if you like, as opposed to an
33 obligation falling upon the accused?
34
35 MR NOLL: The traditional approach of the criminal law.
36
37 THE CHAIR: I know, yes, but not in every circumstance,
38 but it means that, let me assure you, for those who don't
39 deal in this territory, it makes it very hard for the Crown
40 to prove. No-one is frightened by that?
41
42 MR SHOEBRIDGE: Can I come up with a test that's
43 unworkable, unless we have a telephone intercept, and if we
44 go entirely down that path, that's what we get to.
45
46 MR McKNIGHT: The situations that we're dealing with here
47 that we have been talking about today are all situations

1 where someone has disclosed abuse, so that puts it in the
2 mind of the person to begin with. The question here is do
3 they believe that or disbelieve that on some grounds, so in
4 the sense of the TI situation, it is fairly similar.

5
6 MR NOLL: That's what I was going to say. The cases that
7 I've dealt with are you have a witness saying, "I went to
8 the principal and told him", whatever. In some cases, I've
9 seen that notes have been made about that conversation. In
10 some of the cases I have seen you can subpoena the
11 documents.

12
13 THE CHAIR: This is an admission you're talking about?

14
15 MR NOLL: No, a complaint by a student, for instance, that
16 something has happened. I have seen files subpoenaed from
17 schools where the parents have come in because the child
18 has complained about the activity and there are notes of
19 the conference between the principal and the parents,
20 for instance. It is not only TI, there's witness
21 complaint, there's sometimes documentary evidence.

22
23 THE CHAIR: Documentary evidence of an allegation
24 communicated by a parent.

25
26 MR NOLL: To the principal.

27
28 THE CHAIR: You got a conviction? I'm surprised.

29
30 MR NOLL: This is in a different context. This was a
31 prosecution on an historical matter which was of that, not
32 of the non-reporting. All I'm saying is that there will be
33 different forms of evidence depending on each case.

34
35 THE CHAIR: That's true.

36
37 MS WALSH: Some people have evidence of letters they've
38 written and received.

39
40 THE CHAIR: There will be some cases, but whether the
41 person to whom they're reporting receives that material
42 will, of course, vary, but there will be the odd one like
43 that, but there won't be too many like that, from what
44 we've seen anyway. I can assure you that we Commissioners
45 have seen thousands of people now who we have no difficulty
46 accepting what they have to say, but to pass the threshold
47 in this legislative arrangement for a criminal offence is a

1 different matter altogether.
2
3 MR KINMOND: It is interesting, if you think of the
4 reportable conduct scheme, we would caution people against
5 forming any belief until there has been a proper
6 examination of the evidence. I can see some problems. It
7 is one thing saying good evidence was provided; it is
8 another thing being able to prove that the person who
9 received the information had formed a belief as to the
10 truth of that.
11
12 THE CHAIR: That's exactly right.
13
14 MR KINMOND: It is very difficult.
15
16 THE CHAIR: Prove it and also negative the potential
17 defences that are available.
18
19 MR POCOCK: In terms of your question to the room,
20 I suppose, as I understand it, what I could say is that
21 Berry Street will leave the room not feeling particularly
22 confident that the section 327 amendment to the Crimes Act
23 in Victoria will have any practical, positive impact.
24
25 THE CHAIR: That has been the comment expressed about 316
26 in New South Wales at least in this context.
27
28 MR POCOCK: We would have to say we would certainly want
29 to see the way it is framed reviewed, both in terms of the
30 age and the other questions that have been put on the table
31 today.
32
33 JUSTICE COATE: Specifically, Julian, that's because you
34 think the age should be 18?
35
36 MR POCOCK: That's right.
37
38 JUSTICE COATE: And is it implicit in what you say that
39 there shouldn't be an exemption after 18?
40
41 MR POCOCK: No, because of the matters that
42 Justice McClellan has pointed to in terms of what's
43 required of the prosecution.
44
45 JUSTICE COATE: Because of the complexities of a
46 successful prosecution rather than anything else.
47

1 MR POCOCK: Yes, and not being able to operate with an
2 objective test rather than a subjective test.

3
4 THE CHAIR: Can I throw this into the ring then. If you
5 focused just on children reporting as children, say under
6 18, would it ever be reasonable to create a criminal
7 offence that mirrors some of the mandatory reporting
8 arrangements so you would define it as reasonable
9 suspicion? The police have to be told if you, in relation
10 to a child who comes to you as a child, tells you things,
11 or someone else tells you things reported by that child
12 which caused you to have a reasonable suspicion. Would
13 anyone support that approach?

14
15 DR ATMORE: Is that just assuming that organisations are
16 the only possible entities --

17
18 THE CHAIR: No, the starting point is everyone, but you
19 could then go into categories, yes.

20
21 DR ATMORE: I think our instinct, if it was narrowed to
22 organisations, would be to support that lower test. The
23 only hesitation is we've had similar debates about
24 mandatory reporting of family violence and there's a lot of
25 opposition in the sector to mandatory reporting in
26 Victoria. I know they have it in I think it is the
27 Northern Territory, or there's somewhere where there is
28 mandatory reporting of family violence, and the problem is
29 services just get overloaded and then they're trying to
30 filter out because of the lower threshold. Maybe police
31 might want to comment on what that might mean if they're
32 actually getting concerns with the lower threshold that
33 they would be getting a lot more reports that deal with
34 that.

35
36 THE CHAIR: Linda or Greig, do you want to put your toe in
37 the water?

38
39 D SUPT NEWBERY: Talking from a child sexual assault, as a
40 child, there are already mandatory reporting requirements
41 in New South Wales, there is no offence, but I don't know
42 whether it would increase reporting if we put a sanction
43 out there. I suppose the information to the Wood Special
44 Commission of Inquiry in 2007-2008 indicated that for
45 mandatory reporters in any case there were sufficient
46 internal controls. I don't know whether I totally agree
47 with that because there are a lot of other issues

1 surrounding that, but the fact that there hadn't been a
2 prosecution mounted in relation to a mandatory reporter was
3 certainly sufficient for them to say that they didn't think
4 there was a need for that offence and that it be repealed
5 and it was repealed.

6
7 Would it increase reporting? That's the idea of this.
8 We want increased reporting. We want people who know
9 something to say something so we can do something. That's
10 what this is all about, but there are a lot of complexities
11 around that, particularly when you're looking at offences
12 for non-reporting, you look at the interfamilial issues
13 with parents not saying things because they have certain
14 views about subjecting their children to the criminal
15 justice system. Again, there's a lot of issues around it
16 but I suppose, back to the question, increasing reporting
17 for us creates more work but again, for us, it gives us
18 more information to investigate matters which we think are
19 probably underreported.

20
21 THE CHAIR: Michael, I'll ask you before I ask the people
22 beside you.

23
24 DSS DWYER: We are here to talk about institutions and
25 where things went wrong, so I think that there needs to be
26 some sort of legislation in place to make sure that that
27 doesn't happen again. My opinion is you should make it as
28 tough as you possibly can on the institutions to make sure
29 that they do report anything that comes to their notice in
30 the future because that's the only way we are going to
31 protect children.

32
33 THE CHAIR: Your mandatory reporting regime I think is
34 reasonable belief. Would you accept from a police point of
35 view that reasonable suspicion or suspicion on reasonable
36 grounds should be the threshold? It would increase your
37 workload.

38
39 DSS DWYER: It would. Going into this argument today and
40 listening, the jury is open for me at the moment. I would
41 like to think about that and see how it would fall.
42 Obviously, the legislators have formed an opinion around a
43 few different matters in the State, so that's a thing for
44 me. I don't work with family violence. It obviously could
45 have an impact on that. Across the board will it in time
46 be more acceptable and understanding because of the
47 different variations? I don't know.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE CHAIR: Suspicion, although it is a low threshold, in the context of a child reporting as a child, which means it is likely that you've got an offender who may still be active, suspicion at that level has a lot to commend it in terms of protecting other children, but Marisa and Greg, you haven't gone down that path with your mandatory reporting or your criminal legislation.

MS DE CICCIO: No. When the Betrayal of Trust report came out, and I think I've been at previous roundtables where we made this point, no one measure is going to be effective, it needs a whole systemic approach, and we have put in place a failure to protect offence, we've put in place a failure to disclose, we've put in place grooming as well and grooming of parents. We are looking at the Child Safe Standards, we're looking at reportable conduct and we're looking at the Royal Commission's recommendations around Working With Children. We are looking at a whole series, if you like, of measures that should hold to account, because the key issue here is ensuring that the children are protected from predation in the first instance.

The issue for us will be that we have observed in our family violence work that the work that Victoria Police has done in terms of its protocols and ensuring that Victoria Police training and otherwise is appropriate and does enhance the reporting, we found that has led to quite a significant increase and our Family Violence Royal Commission has noted that in the child protection reports, because of course any family violence incident where children are involved will be passed on to our child protection authorities.

There is an issue there too about volume, the pressures that puts on service agencies to respond and respond expeditiously too and then to try and triage and try and assess whose risk is significant, the service agencies that then have to support those exercises, so it does have to be carefully considered and that threshold issue is a key one.

Ultimately, as I said, the Family Violence Royal Commission made recommendations that are failure to disclose and I don't doubt that once we engage with our stakeholders, we'll probably open it up further than the Royal Commission may have suggested.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE CHAIR: Does anyone else want to comment on that subject or any other subject before I bring everything to a close? Julian?

MR POCOCK: Just on the issue of reasonable belief versus suspicion, Berry Street wouldn't have any opposition to working on the basis of suspicion, but I think when we've analysed mandatory reporting data comparing New South Wales to Victoria, the more significant consideration is how harm is described and New South Wales managed to bring down very significantly the number of notifications they were receiving by changing their risk threshold from "harm" to "significant harm", and when we've looked at who reports to our system in Victoria compared to New South Wales, New South Wales has a broader set of categories of mandatory reporters than Victoria. Some of the additional categories that New South Wales has, in Victoria we have very similar numbers of people from those professions reporting, even though they're not mandated.

The most significant issue around getting reports of child abuse and neglect, including child sexual abuse, into the system is about how the level of risk is described to reporters, not so much whether they suspect it, whether they hold a reasonable belief, because I think people on the ground are just operating with a bit of a commonsense notion of that and the thing they're focused on is not whether they hold a reasonable belief or a suspicion, the thing they're focused on is, is this child at risk and what are they at risk of and how significant is that? I think we need to put as much attention into that.

MS RONKEN: I think in relation to that as well that training people who are working with children in those organisations is just so important; you know, what to look out for, what are the indicators, the red flags. So I think anything around this needs to be supported with training in the organisations themselves so that people know what to be looking out for and so when they are reporting, they're reporting on grounds that are reasonable, so I think that's a really important thing that needs to be supplemented in the legislation or policy around this area.

THE CHAIR: Anyone else?

1 MS WALSH: In relation to historic abuse, I just think
2 that there is a need for greater clarity between systems
3 and how the systems engage with each other in regard to how
4 people can get criminal convictions through the system and
5 I suppose it has to be at a state level. We haven't got a
6 national code. Queensland hasn't done much in any of these
7 areas in terms of law reform, but what's really confusing
8 for people is not understanding the roles and
9 responsibilities of the different institutions that we have
10 and that they're changing all the time and all historic
11 cases are about adults and they get quite confused with the
12 conversation around children today as well.

13
14 People are passionate about not wanting children to
15 experience abuse today and want the system today to work,
16 but there's just a need at a state level for clarity around
17 police internal complaints and processes of reporting. In
18 Queensland if people withdraw because psychologically they
19 can't keep up with it, the case is closed. If they want to
20 come back they've got to have new evidence. There is just
21 so much variation across Australia that it would be good to
22 maybe have some set best practice principles and that there
23 be really clear communication around how people who have
24 experienced abuse as children and have disclosed as adults
25 can proceed and what their options are and how they can be
26 supported in doing that, because it is a space that's very
27 variable.

28
29 DR CHAMLEY: Immediately before lunch you posed a
30 question. I felt that part of the question was asking, in
31 terms of institutions, how many should get caught up in all
32 of this. What we didn't talk about was, we were talking
33 about the sexual abuse of children but I think any
34 institution that's caring in any way for any child must get
35 caught up in it.

36
37 The second thing is I keep asking myself how is this
38 going to work and is it going to work for these groups that
39 have disabilities, particularly of the intellectually
40 impaired, because they're a hugely vulnerable group and
41 they don't even have the communication skills.

42
43 THE CHAIR: As you know, we have devoted a bit of public
44 hearing time, and there's more to come, in relation to
45 people with disabilities; it is a huge problem.

46
47 DR CHAMLEY: Yes.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE CHAIR: A huge problem, as indeed it is, not that it is within our remit, for aged persons too. Not all of us but some of us are getting to the point where people describe us as "aged", but that's the reality, that the risk increases very significantly. Are there any other contributions?

JUSTICE COATE: Can I just check with you, David, that your position is that it is the context for the mandatory obligation should lie in those circumstances where the person who is making the disclosure is making the disclosure to an institution that may have responsibility for in fact the abuse; is that right?

MR SHOEBRIDGE: Yes, that's exactly right.

JUSTICE COATE: The obligation on the institution, the mandatory obligation on the institution should be to report that, but that I understood that you're saying that there might be some way of making that compulsion a report to a body such as the Ombudsman rather than to the police and using the terminology - my terminology - the honest broker, the independent responsible agency?

MR SHOEBRIDGE: Yes, absolutely. Where a victim has said that they don't want it to go to the police, give them that option, so we give multiple avenues to have the report happen and multiple opportunities for the victim to have an individual to speak to.

THE CHAIR: But as I understand what you have told us, David, the obligation you would see as falling upon the individual in the organisation, at least at first blush, so the person in the organisation who gets the report would carry the obligation, am I right?

MR SHOEBRIDGE: Yes, as well as the organisation.

THE CHAIR: Secondly, their obligation is to report, you would define, as I understand it, but you would raise the issue as to whether or not in the circumstances where the person says they don't want it reported, whether there should be some mediation process, the Ombudsman or otherwise, but the report you're contemplating goes to the police.

1 MR SHOEBRIDGE: Yes, through the Ombudsman or hopefully
2 directly to the police, but where there's no consent,
3 mediated through a third party.
4

5 THE CHAIR: Yes. If a school principal gets an
6 allegation, the obligation would fall upon the school
7 principal to send it to the police. If, however, the
8 person, the survivor said, "No, I don't want it to go to
9 the police then you would contemplate some process, which
10 could be the Ombudsman, whereby that person would be
11 referred to reconsider whether or not it should go to the
12 police.
13

14 MR SHOEBRIDGE: Yes, and primarily because there's no way
15 of allowing the institution to determine consent that I can
16 see, no practical way of allowing that.
17

18 THE CHAIR: The counterpoint to that, as reflected in the
19 comments around the table, is that the reference to the
20 Ombudsman may not be necessary, provided the institution to
21 whom the allegation is made is appropriately explaining and
22 assisting the person to go to the police, to which you say
23 that's not borne out as an obligation which institutions
24 presently accept in New South Wales because of the number
25 of blind reports. Is that what it comes down to?
26

27 MR SHOEBRIDGE: Exactly.
28

29 JUSTICE COATE: Chris, you're agreeing; is that right?
30 You're agreeing with that position?
31

32 DR ATMORE: Yes, I think I am. I am still struggling with
33 that scenario where the complaint is actually about sexual
34 abuse within the organisation because I think that has to
35 have a clear distinction from when the person complains to
36 the organisation about sexual assault but it didn't take
37 place in that organisational context, because I think we're
38 obviously going to be far more distrustful in that first
39 scenario that the organisation should really work with the
40 victim at all, but they have to have an obligation, they
41 have to be able to send it somewhere.
42

43 THE CHAIR: You could define it by reference to the
44 recipient of the allegation being someone who is in an
45 institution that falls into the bracket, irrespective of
46 whether that was the institution in which they were
47 allegedly abused, you could do that, so the relationship

1 between the recipient of the information and the child or
2 adult becomes the determinant of the obligation.
3
4 MR SHOEBRIDGE: I think Chris and I are furiously
5 agreeing.
6
7 JUSTICE COATE: And you too, Wayne?
8
9 DR CHAMLEY: Yes.
10
11 JUSTICE COATE: You are agreeing with that too?
12
13 DR CHAMLEY: Yes.
14
15 JUSTICE COATE: Can I just throw one curly one in, which
16 is the confessional.
17
18 THE CHAIR: Oh, I avoided that.
19
20 JUSTICE COATE: Why not? We're nearly at the end of the
21 day.
22
23 THE CHAIR: It's a big discussion but maybe for another
24 day, but anyway.
25
26 MR SHOEBRIDGE: I don't believe it should be exempt.
27
28 THE CHAIR: It is a big discussion, though.
29
30 DR ATMORE: We have actually said that in this modern age
31 where counselling communications are subject to - well, it
32 depends on the jurisdiction, obviously, but in Victoria
33 it's subject to a qualified privilege. Why should there be
34 an absolute privilege for the confessional?
35
36 THE CHAIR: It is not an issue that is only a
37 Catholic Church issue, it does extend to the
38 Anglican Church, I'm not sure about any others, and it is
39 an issue which will be addressed in the summary public
40 hearings which we will have which include the Catholic and
41 faith based organisations. It is a big issue, obviously,
42 and we'll have to see how it works out. All right? Thank
43 you very much. I have said this before and I mean it again
44 today, the roundtables we've had have been joined in by
45 people who have given us generously of their important time
46 and always with the most positive and considerate response
47 to the issues that have been raised, for which we, the

1 Royal Commissioners, are immensely grateful and the same
2 thing has happened today. As I said before, I feel like we
3 are all old friends. Thank you for coming.
4

5 AT 3.57PM THE PUBLIC ROUNDTABLE ADJOURNED ACCORDINGLY
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47