WITNESS STATEMENT OF BRUNO FIANNACA:

I, BRUNO FIANNACA, acting Director of Public Prosecutions for the State of Western Australia, do say as follows:

1. This statement has been prepared with the assistance of the State Solicitor's Office for the purposes of the Royal Commission into Institutional Responses to Child Sex Abuse and is based on a request by the Royal Commission that the Director of Public Prosecutions for Western Australia provide a statement addressing:

   (a) The then principles, practices and policies underpinning and referred to in the decision of former Director of Public Prosecutions, John McKechnie QC, referred to in Media Release 93/8483; and

   (b) The current practices and policies of the Director of Public Prosecutions in relation to prosecuting historic (sic) cases of child sexual abuse.

2. The media release referred to was released in November 1993, and concerned the decision of the then Director not to proceed with prosecutions in respect of allegations of child sexual abuse made against certain former Christian Brothers.

3. The Royal Commission also served Notices to Produce on the Director of Public Prosecutions for Western Australia in respect of various files concerning the allegations that have been made against a number of Christian Brothers. Those files were produced to the Royal Commission by my Office in electronic format.
Employment history & Qualifications

4. I am currently the acting Director of Public Prosecutions while the Director is on leave overseas.

5. I commenced in this position on 14 April 2014.

6. I am responsible for performing the functions of the Director, as well as continuing to perform my duties as Deputy Director.

7. Prior to joining the Office of the Director of Public Prosecutions for Western Australia, at its commencement in 1992, I was employed as an Assistant Crown Counsel in the WA Crown Solicitor’s Office (as it then was), having commenced in that office as an Articled Clerk in 1984. I was admitted as a Barrister, Solicitor and Proctor of the Supreme Court of Western Australia in February 1985.

8. I was appointed Senior Counsel in Western Australia in December 2005.

Response to request (a)

9. The principles, practices and policies underpinning the decision of the then Director referred to in the 1993 media release are substantially set out in the media release. They can also be discerned from the contents of the files produced to the Royal Commission in respect of the specific allegations that were made against the relevant Christian Brothers. Further, I have knowledge of the approach taken to such cases in 1993, as I was employed as a State Prosecutor in the Office at that time.

10. There was no specific policy or practice determining the approach that would be taken in such cases. Each case was considered separately on its merits. That is, the
decision whether or not to prosecute was made separately in each case, having regard to the strength of the available evidence, the law which a trial judge would apply, and the Statement of Prosecution Policy and Guidelines made under the Director of Public Prosecutions Act 1991 (WA). That was the approach taken in respect of the 1993 allegations, as is evident from the media release and the contents of the relevant DPP file (93/8483-01).

11. A prosecutor of suitable experience would review the evidential material provided to the DPP by the police. Such material would consist of the statements of witnesses and any documentary exhibits obtained by the police during their investigation.

12. In the case of the inquiry that was the subject of the 1993 media release, the materials were analysed by the office’s most experienced Senior Crown Prosecutor and the Director himself.

13. The approach that was taken was to analyse the complainants’ statements with a view to assessing a possible prosecution case at its strongest, so as to construct a case if it was at all possible: Letter of Mr G Overman, Senior Crown Prosecutor to Commissioner of Police, 23 November 1993 (on file 93/8483-01).

14. The media release refers to the special rules that apply to criminal trials, which precluded reliance on the expectation of ordinary experience, namely that a number of allegations against the same person may suggest that probably that person has committed offences. The media release goes on to refer to the criminal standard of proof and the absence of corroboration of individual allegations in the matters that had been referred.
15. While corroboration was not a necessary condition at law before a charge of a sexual offence, whether historical or otherwise, could proceed, the absence of corroboration was, and continues to be, a relevant consideration in assessing whether the evidence of a complainant is capable of proving an offence beyond reasonable doubt, particularly in circumstances where there has been a long period of delay since the offence is alleged to have been committed, and the court would be required to give a direction that it would be dangerous to convict the accused without scrutinizing the evidence with great care: Longman v R (1989) 168 CLR 79; 89 ALR 161; 43 A Crim R 463. Consistently with the principles in Longman, the jury would also be directed about the disadvantages to an accused person resulting from long delay in the making of a complaint. The principles in Longman underpin the first two paragraphs on page two of the media release.

16. Although it was determined in respect of the 1993 matters that there was no reasonable prospect of conviction, the potential impairment of an accused’s right to a fair trial, because of disadvantages arising from long delay, was a relevant consideration in determining whether it was in the public interest to proceed with a prosecution, notwithstanding the existence of a prima facie case. The courts have recognised that such disadvantages include the potential adverse impact on memory and the loss of opportunity to investigate the circumstances surrounding any particular allegation or to marshal evidence that might cast doubt on the allegation.

17. The media release states:

"On present rulings of the High Court, the experience of one complainant cannot become admissible evidence to
be used on the trial of another except in very limited circumstances."


19. As the law applied at that time, charges of several distinct indictable offences could be joined in the same indictment against the same accused if they were part of a series of offences of the same or a similar character or were constituted by a series of acts done in the prosecution of a single purpose: Criminal Code (WA) section 585. However, if a court considered that the accused person was likely to be prejudiced by such joinder, it could order separate trials in respect of each or any of the charges: Criminal Code (WA) section 585.

20. One circumstance in which prejudice was considered to arise was where the jury might engage in improper propensity reasoning in cases of sexual offences where the allegations of more than one complainant against an accused were joined in the one indictment. However, if the evidence of each of the complainants was admissible in respect of the charges concerning the other complainants, then the charges could proceed on the same indictment. A basis on which the evidence might be cross-admissible was if it constituted similar fact evidence (as it was then referred to).

21. The effect of Hoch was that similar fact evidence was admissible (and joinder, therefore, proper) –

(a) if it revealed "striking similarities", "unusual features", "underlying unity", "system" or "pattern" such that it raised, as a matter of common sense and
experience, the objective improbability of some event having occurred other than as alleged by the prosecution: (1988) 165 CLR 292 at 294-5; and

(b) if it was not reasonably explicable on the basis of concoction, which required an examination of whether there was a possibility of a relationship between the complainants and the existence of opportunity and motive for concoction: (1988) 165 CLR 292 at 297.

22. If the evidence of the various complainants was not cross-admissible in their respective cases, separate trials would be ordered in respect of the charges arising from the allegations of each complainant, as the joinder could give rise to impermissible propensity reasoning on the part of the jury. The experience in Western Australia was that the courts would order separate trials unless there were striking similarities in the offending alleged by the various complainants and there was no reasonable possibility of concoction. This informed the approach taken by prosecutors in any particular case to the question of joinder.

23. Subsequently, the enactment of s 31A of the Evidence Act 1906 (WA) broadened the bases on which evidence of various complainants might be cross-admissible and overcame the effect of Hoch, in respect of the significance of possible concoction, by stating that “it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion”: section 31A(3).

24. The third and fourth paragraphs, and the first sentence of the fifth paragraph on page two of the media release reflect the policy and practice of the Office of the Director
of Public Prosecutions in respect of all cases, as outlined in clauses 17 and 21-27 of the *Statement of Prosecution Policy and Guidelines* applicable at that time.

25. The reference to the public interest consideration of “the staleness of the alleged offence [being] likely to render the prosecution process oppressive” reflects clause 30(d) of the *Statement of Prosecution Policy and Guidelines*. Similarly, the reference to the advanced years of a number of the accused persons reflected the consideration in clause 30(b). The Guidelines recognised, consistently with longstanding practice in relation to the exercise of prosecutorial discretion, that despite the existence of a prima facie case and reasonable prospects of conviction, it may not be in the public interest to proceed because of the existence of other factors, which either singly or in combination, render a prosecution inappropriate.

26. In cases where an assessment was made that there was no reasonable prospect of conviction, the public interest factors referred to in the previous paragraph could be regarded as reinforcing the decision that it was not in the public interest to proceed. However, the absence of reasonable prospects was a sufficient basis for concluding that a prosecution was inappropriate.

**Response to request (b)**

27. The following assumes that the request concerns the decision whether or not to prosecute historical cases of child sexual abuse and what offences to charge when the decision is made to prosecute.

28. There is no specific policy or practice determining the approach that is taken currently to historical cases of child
sexual abuse. Each case is considered separately on its merits.

29. The conduct of such cases will ordinarily be allocated to an experienced State Prosecutor who will examine the brief prepared by the police and assess whether the evidentiary material establishes a prima facie case and there are reasonable prospects of conviction. If they determine that there are reasonable prospects of conviction, they are to consider whether there are any public interest factors that nevertheless render a prosecution inappropriate. This approach applies whether the prosecutor is dealing with a matter that has been committed for trial on indictment or a matter on which the police have sought advice whether there is sufficient evidence to charge.

30. The assessment at each stage is made having regard to the *Statement of Prosecution Policy and Guidelines 2005* (being a revision of the original *Statement of Prosecution Policy and Guidelines*) made under the *Director of Public Prosecutions Act 1991* (WA), in particular clauses 16 to 33, and the current law.

31. If the prosecutor does not have delegated authority to sign an indictment, a draft indictment or notice of discontinuance and a supporting memorandum, outlining the file manager’s analysis and recommendation, will be provided to a Senior State Prosecutor for review and signing of the indictment or notice of discontinuance. Delegation of the authority to sign indictments is limited to the level below Senior State Prosecutor and above. At the level below Senior State Prosecutor, the delegation is made by the Director specifically in respect of any prosecutor, having regard to their demonstrated ability.
32. If the prosecutor to whom the case is allocated has authority to sign indictments, they will sign the indictment if they determine there is a prima facie case and reasonable prospects of conviction, and that there are no other public interest considerations that would render a prosecution inappropriate.

33. If such a prosecutor is of the view that a notice of discontinuance should be filed, the procedure will be determined by the level of the file manager’s position. Only prosecutors at the level of Senior State Prosecutor and above are authorised to sign notices of discontinuance. Consequently, a State Prosecutor with authority to sign indictments who is below that level will refer the matter to a Senior State Prosecutor or a Consultant State Prosecutor, depending on the basis of the recommendation. The position of Consultant State Prosecutor is the most senior level of prosecutor within my Office below the office of Deputy Director.

34. A Senior State Prosecutor is authorised to sign a notice of discontinuance if the basis for doing so is that there are no reasonable prospects of conviction. Only the Director, Deputy Director, the Director of Legal Services and Consultant State Prosecutors are authorised to sign notices of discontinuance on the basis of public interest factors notwithstanding the existence of reasonable prospects of conviction.

35. Where a matter is to proceed to trial, it will be reviewed by a Consultant State Prosecutor to ensure it is ready for trial. If any deficiencies are identified in the evidence on which the case is to proceed, instructions will be given to the file manager in respect of the further conduct of the case to rectify the deficiencies.
36. The current practice of this Office in respect of all cases where there has been a committal for trial also includes a requirement that the file manager confer with the investigating officer at an early stage to identify any deficiencies in the evidence and explore avenues of further investigation that might overcome such deficiencies.

37. Current practice also includes early communication with a complainant to keep them informed of developments in the Office's conduct of a matter. Where necessary, conferences will be held with complainants to seek clarification of evidence or to discuss the difficulties with a case if there is a prospect that the prosecution will be discontinued.

38. The factors that are taken into account in determining whether there are reasonable prospects of conviction and that it is in the public interest to proceed are similar to those taken into account in 1993, but allowing for changes in the law. They include:

(a) the seriousness of the offending;

(b) whether there is evidence corroborating the allegations or the circumstances surrounding the alleged acts;

(c) whether there is evidence of a complaint having been made by the complainant at a time before the matter was referred to the police, whether it is an “early complaint” or otherwise;

(d) the quality of the particulars in the complainant's statement in respect of each of the allegations;

(e) whether a charge is time barred if the offences were
under section 187 or 189 of the *Criminal Code* (WA) as it applied until 1 August 1992: see subsections 187(3) and 189(6);

(f) whether there is any obstacle to pleading a charge because of changes in the offence creating provision, where it is uncertain if the alleged offending occurred before or after the legislative amendment: *Kailis v The Queen* [1999] 21 WAR 100;

(g) the nature of the *Longman* direction that the court would be required to give to the jury; and

(h) where there are multiple complainants, whether there is a reasonable argument for joinder of the charges, given in particular the provisions of section 31A of the *Evidence Act 1906* (WA).

39 In respect of the *Longman* direction, the assessment is informed by authorities since 1993, in particular the analysis in *FGC v The State of Western Australia* [2008] WASCA 47. The nature of the direction will depend on careful scrutiny of the facts of the case, so that lengthy delay may, but will not necessarily require a strong form of the direction.

40 As was noted above, the enactment of s 31A of the *Evidence Act 1906* (WA) broadened the bases on which evidence of various complainants might be cross-admissible and overcame the effect of *Hoch*, in respect of the significance of possible concoction, by stating that “it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion”. Joinder has become more
feasible in cases of sexual offending, including historical cases.

41 Also as was stated above, while corroboration is not a necessary condition at law before a charge of a sexual offence, whether historical or otherwise, can proceed, the absence of corroboration continues to be a relevant consideration in assessing whether the evidence of a complainant is capable of proving an offence beyond reasonable doubt. In practical terms, better investigative resources, including use of the internet, has meant that briefs for prosecution may include corroborative evidence, particularly in respect of circumstances surrounding alleged offences, that was not available in the past.

42 The decision whether to prosecute will be made in light of the overarching principle set out in clause 19 of the Statement of Prosecution Policy and Guidelines 2005:

“Ordinarily, prosecutorial discretion will be exercised so as to recognize the courts’ central role in the criminal justice system in determining guilt and imposing appropriate sanctions for criminal conduct.”

43. The contents of this statement are true and correct to the best of my knowledge and information and belief.

SIGNED: [Signature]

DATE: 23 April 2014