Royal Commission
into Institutional Responses
to Child Sexual Abuse

Statement

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Occupation	Barrister; Academic; Consultant
Date	14 July 2014

1. This statement made by me accurately sets out the evidence that I am prepared to give to the Royal Commission into Institutional Responses to Child Sexual Abuse. The statement is true and correct to the best of my knowledge and belief.

2. My full name is Nicholas Richard Cowdery. My date of birth is REDACT 1946.

3. I am an Adjunct Professor at two universities in New South Wales (**"NSW"**) and a Visiting Professorial Fellow at two others. I continue to hold an unconditional practising certificate as a NSW Barrister. I am a consultant to international criminal justice agencies. I am an author, speaker and commentator on criminal justice and human rights matters.

4. This statement is supplementary to my previous statement dated 8 July 2014.

5. The "prosecution test" adopted by Directors of Public Prosecutions and their officers Australia-wide must be applied when a decision is being made whether or not to prosecute and in relation to what charges. It requires consideration of three questions:

1. [This one is sometimes subsumed in the second question – as in Queensland; sometimes stated as a separate test – as in New South Wales.]
   Is there a prima facie case; ie is there admissible evidence available that, taken at its highest, is capable of proving each element of the offence?

2. [This one is sometimes posed in the positive – as in Queensland; sometimes in the negative – as in New South Wales.]
   Is there a reasonable prospect of conviction by a tribunal of fact properly instructed as to the law? [In NSW it is: can it be said that there is no reasonable prospect of conviction...etc?]

3. Even if there is assessed to be a reasonable prospect of conviction, are there circumstances that would make it contrary to the general public interest to prosecute – the so-called "discretionary factors" test?

6. The first test is self-explanatory – no prosecution may proceed if the elements of the offence cannot be proved.

7. The second ("reasonable prospects") test requires the prosecutor to make a judgment about future events. S/he must forecast the future course of proceedings, legally and factually, on the basis of what is known at the time (bringing to bear the prosecutor's experience and perhaps in consultation with others). A judgment must be made about the prospects of conviction – the likelihood of the tribunal of fact being satisfied of guilt beyond reasonable doubt.

8. S/he must consider: any legal issues that might arise (including the admissibility of evidence and directions to a jury) and the way in which they might be resolved in all the circumstances of the case; the available admissible evidence and the weight that a tribunal of fact might give to it in finding facts and making its decision; any inconsistencies in the evidence of a witness or between sources of evidence; any internal or external conflicts, implausibilities, improbabilities and any other faults; any relevant history or personal characteristics of witnesses that may have some bearing on the acceptance of their evidence by the tribunal of fact.

9. In doing all that, a prosecutor must have in mind the approach that might be taken by a defence representative (including any attacks that might be made on the evidence or witnesses) and the conclusions that might be drawn by a jury of lay people at the end of the process and evaluate any challenges that might arise in those quarters.

10. A prosecutor must consider how the case is likely to run and how all the players (defence representative, jury, judge, witnesses) are likely to respond to it.

11. So it is necessary to make a positive assessment of the case – to see and evaluate its strengths; but it is also necessary to notionally attack that case and assess the possible consequences for the verdict of any foreseeable attack.

12. The third (discretionary or public interest) test is applied (at least in NSW) only if there is found to be a reasonable prospect of conviction. Those factors may nevertheless require that there be no prosecution.

13. It would be an abrogation of the prosecutor's professional duty to simply put up a prosecution on the basis of a prima facie case and invite a tribunal of fact to decide (although that is sometimes suggested by commentators). In a famous and generally endorsed statement in the House of Commons in 1951 Attorney General (and former Nuremberg trial prosecutor) Sir Hartley Shawcross QC said: "It has never been the rule in this country... that suspected criminal offences must automatically be the subject of prosecution" and that is the case in Australia, which also applies the opportunity principle (as opposed to the civil law system legality principle).

14. When a case depends significantly upon the reliability (credit) of individual witnesses, it may be appropriate to confer with those witnesses before making or reaffirming the decision to prosecute. It will depend to some extent upon the role of the prosecutor at the time. S/he may be giving advice to police in the course of or at the end of an investigation after some kind of brief of evidence has been provided but before charges have been laid. In that case it would generally not be appropriate to confer with a witness, but to take statements provided at face value and advise on any issues that are apparent.

15. If the prosecutor is providing advice to another prosecutor with carriage of the matter (as in the Volkers case), again it would generally not be appropriate to confer with witnesses. If there are apparent credit issues with witnesses, they can be flagged in any advice given and it then becomes for the decision maker (in Volkers, the Queensland DPP) to address those issues.

16. If the decision making prosecutor is to conduct the prosecution, however, then it will always be necessary for the prosecutor to confer with the witness to address credit issues that have become apparent.

17. The Commissioner was quoted in the Sydney Morning Herald on 11 July 2014 as having asked Ms Cunneen "where is the balance?", without much context being given.

18. Balancing competing interests and considerations is an ever-present part of prosecutorial decision making and can make it a difficult exercise. But the underlying contest that is occurring is between (on the one hand) the public interest in prosecuting criminal offenders and (on the other hand) the rights of the accused. It is not a contest between a victim and the accused in our system of criminal justice – a victim is a special category of person in the community, part of the public interest consideration in striking the appropriate balance. For that reason a prosecutor must consult with any victim about the course of proceedings that the prosecutor is conducting, but does not take instructions from a victim and does not act in any sense for the victim, as the victim's representative.

Signed: .....

Date: 14 JULY 2014

Witness: .....
J. PHEILS.

Date: 14. JULY 2014