TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES: Mr D G Coates SC
OUR REF: 29442
YOUR REF:

11 October 2016

Royal Commission into Institutional Responses
to Child Sexual Abuse

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Dear Commissioners

RESPONSE TO CONSULTATION PAPER INTO CRIMINAL JUSTICE

I refer to Mr Justice McClellan AM's letter dated 5 September 2016, enclosing a copy of the above paper and inviting submissions.

I do not propose to make submissions concerning all matters called for in the paper but rather I will limit my response to matters that directly affect my Office or to the areas in which I have some expertise.

At the outset, I would like to say that this Office treats sexual assault cases, particularly those involving children, very seriously. All sexual assault matters are co-ordinated by a Principal Crown Counsel in the Office. The Principal Crown Counsel is a very senior person and is one level below the Deputy Director.

The Office offers Tasmania Police an advice service prior to charging and it regularly utilises the service. Once an accused person is charged with a sexual assault offence, Tasmania Police are required to notify the Office of the fact within 48 hours, and within a further 48 hours of that notification the complainant is written to by a Witness Assistance Service officer from this Office explaining what has happened, followed by telephone contact. Counsel are appointed at an early stage. Recently the Office has taken over from Tasmania Police the prosecution of those sexual assault cases which are heard in the Magistrates Court. This will have the benefit of the cases being conducted by trained and experienced Crown prosecutors, and also complainants and witnesses will have access to our Witness Assistance Service. Discontinuance decisions are reviewed by a committee of senior counsel in the Office after consultation with the complainant. If the committee disagree then the matter is referred to the Director. Under the new guidelines the complainant has a right to request a review from the Director. The complainant is told of this right in writing. I am committed to having internal audits to ensure compliance with the guidelines.

An audit conducted during the past financial year of 160 child sexual abuse matters between 2010 and 2014 showed a conviction rate of 71% compared with a conviction rate of completed child sexual abuse matters of 65.9% in 2013 and 75.75% in 2014. The discharge rate was less than that for other crimes. In particular, there was a low discharge of matters due to complainants being unwilling to proceed. Thus, it can been seen that the measures this Office has put in place have had a positive outcome in relation to offences of this type.

Chapter 4 - Issues in relation to police responses

The following is accepted:

- It is important to ensure the charges are correct at an early stage. In difficult or complex matters advice from this Office to Tasmania Police at an early stage is preferable. This enables the prosecution to be commenced on a proper footing. It enables early advice in respect to obtaining further evidence. It also prevents false expectations being raised with complainants. That is why this Office offers early advice to Tasmania Police prior to charging.

- The mere fact that there is no corroboration is insufficient reason not to charge an offender. The credibility of the whole complaint must be considered and if the complaint, even though not corroborated, is considered credible it is proper to charge.

- It is important that officers who conduct interviews with complainants are well trained because such interviews are an integral part of the success of any prosecution. A steering committee has been formed with Tasmania Police, sexual assault services and our Office. The committee has been in discussions with Professor Martin Powell and Dr Nina Westeria of Deakin University to develop a number of training programmes based on best practice.

- In respect of costs, Tasmania has the *Costs in Criminal Cases Act 1976* which limits the ability of defendants to obtain costs to certain criteria. Section 4(2) of that Act provides:

> The court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular to the following:
>
> (a) Whether the proceedings were brought and continued in good faith;
>
> (b) Whether proper steps were taken to investigate any matter coming to, or within, the knowledge of any person responsible for bringing or continuing the proceedings;
>
> (c) Whether the investigation into the offence was conducted in a reasonable and proper manner;
>
> (d) Whether the evidence as a whole would support a finding of guilt but the defendant is discharged from the proceedings on a technical point;

> (e) Whether the defendant is discharged from the proceedings because he established (either by the evidence of witnesses called by him or by cross examination of witnesses for the prosecution or otherwise) that he was not guilty.

In my experience costs are rarely given and only where it was unreasonable to proceed and/or the matter was not investigated properly. I have no difficulties with the costs provisions in Tasmania s they presently stand.

I am of the view that it is sufficient and preferable for the Commission to have general recommendations. Each State, police force and justice system is different, varying considerably in size. Therefore the approach and specialisations that can occur will vary from one State to another. However, with a general set of guidelines each State can work towards those principles.

Chapter 5 - Child sexual abuse offences

Persistent child sexual abuse offences

The charge of maintaining a sexual relationship with a young person under the age of 17 years contrary to s 125A of the *Criminal Code* is extensively used by this Office. To be guilty of the offence, an accused person has to have committed three unlawful sexual acts upon a young person, with at least one of those acts having occurred in Tasmania. It is not necessary to prove dates or the exact circumstances of the offence. In my view, this section has worked very effectively since its enactment. It is only on rare occasions where we are not able to particularise three separate occasions, bearing in mind we do not have to prove the exact circumstances in which the unlawful sexual act occurred. Indeed, particulars of a relatively general nature have been accepted. Section 125A(4)(a) of the *Criminal Code* provides:

> (4) For the purposes of subsection (3) –
>
> (a) it is not necessary to prove the dates on which any of the unlawful sexual acts were committed or the exact circumstances in which any of the unlawful sexual acts were committed;

Generally where a child has been repeatedly sexually assaulted by an offender we are able to particularise more than three occasions. Of course, once we can particularise three occasions, the entire sexual relationship is admissible and heard by the court.

I am concerned about any provisions where no individual assaults have to be identified because this could possibly result in police or prosecutors when interviewing complainants not actually getting details of specific occasions which could in turn lead to credibility problems with the complainant, in that their evidence may appear vague and non-specific. Where specific incidents are led it provides the jury with the capacity to judge the witness's credit and reliability and for the accused to test the charges. If evidence were only to be required of general sexual abuse, given the onus of proof, I think this would lead to a rise in acquittals. As I said above, under the current legislation particulars of a relatively general nature can be given as it does not normally pose a significant problem.

However, I am of the view that an amendment to the *Criminal Code* should be made to overcome the direction in *KBT v The Queen* (1997) 191 CLR 417 which requires a direction that all members of the jury be satisfied beyond reasonable doubt of the same three unlawful sexual acts in order to convict of the offence. In my view, this is a confusing direction. The charge is maintaining a sexual relationship with a young person. In other offences, for example, assault (where there may have been three punches), stealing, or even murder, the jury only have to be satisfied that the crime occurred, not of the number of blows, amounts stolen or the mechanism of causing the offence nor does a jury have to be satisfied on the same basis of criminal liability. (see, for example, *Georgiadis v R* (2002-3) 11 Tas R 137, *R v Serratore* (1999) 48 NSWLR 101, *Cramp v R* (1998) 110 A Crim R 198, *R v Ryder* [1995] 2 NZLR 70).

Such a direction is inconsistent with the direction each individual juror must determine themselves, whether they are satisfied of the accused's guilt. In other words, each individual juror could be satisfied that the accused has committed the offence but because of the *KBT* direction the accused will be acquitted.

As the paper recognises the offence of maintaining a sexual relationship with a young person is retrospective in Tasmania. I know of no occasion where it has been suggested that the provision has caused any injustice. Bearing in mind, that in order to prove the offence one has to prove that the unlawful sexual acts would have been unlawful at the time.

Grooming offences

At p 202 of the paper, it is stated that the Tasmanian offence of making a communication with intent to procure a young person under the age of 17 years to engage in an unlawful sexual act contrary to s 125D of the *Criminal Code* is limited to communication and does not include potentially broader conduct covered by the Victorian and Queensland offences. However, it should be noted "communication" is widely defined to include "by any means" which would include conduct. Further, s 125C of the *Criminal Code* makes it an offence for a person to procure unlawful sexual intercourse with a person under the age of 17 years or to procure a person to commit an indecent act with, or directed at, a young person either in the State or elsewhere. If you include the provisions of aiding, abetting and instigation under s 3 of the *Criminal Code* and attempts to commit the offence under s 299 of the *Criminal Code*, a wide range of criminal conduct to procure or groom a young person for sexual acts is covered. I do not know of any occasion where procuring-type behaviour has not been covered by one of these provisions.

In my view, the words "facilitate the procurement of a person to engage in a sexual act" as contained in the Queensland provision or "communicate by words or conduct" as contained in the Victorian provision is covered in the sections of the Tasmanian *Criminal Code* mentioned above.

Persons in positions of authority offences

When considering in the Tasmanian context whether there should be aggravating offences for offenders who are in a position of authority, it should be recognised that, apart from murder, all offences under the *Criminal Code* have a maximum penalty of 21 years' imprisonment (s 389(3) of the *Criminal Code*). In Tasmania there are no differentiating sentences for aggravating offences. Matters of aggravation are

generally taken into account in the overall sentence. Thus, if a person was in a position of authority that is regarded as an aggravating circumstance for offences involving children where consent is not an element of the offence. This has recently been codified in Parliament by the passing of the *Sentencing Amendment (Sexual Offences) Bill 2016*.

Further, as the paper states, s 2A(2)(e) of the *Criminal Code* vitiates consent where a complainant is overborne by the nature or position of another person. This provision has been used to charge and convict accused persons of the more serious crime of rape, rather than simply unlawful sexual intercourse with a person under the age of 17 years where, for example, the accused is a parent, employer or carer, and there is evidence that their position overbore the consent of the complainant. Given these provisions and the fact that, in any event, the position of the person is treated as an aggravating factor in the sentencing process, I am of the view that we do not need a separate aggravating offence for a person when they are in a position of authority. Making such a provision an element of the offence would only add to the complexity of a case to the jury without providing any tangible benefit.

Limitation periods

With regard to limitation periods, I advise that no time limits apply to sexual assault offences in Tasmania including the crime of indecent assault which can be dealt with summarily or upon indictment at the election of the accused. The only exception to this is the summary offence of assault with indecent intent. In practical terms, that offence is only charged for conduct where the touching of the complainant is above the clothes and is not prolonged. If, for example, the conduct was prolonged and involved other sexual assaults, the policy of this Office would be to charge the person with indecent assaults, or for it to become part of a maintaining a sexual relationship charge. Therefore, I do not regard limitation periods in Tasmania as a problem.

Chapter 7 - Issues in prosecution responses

Victim consultation

It is accepted that a complainant to an offence should be consulted prior to a final decision being made to discharge an accused or reduce the charges.

At p 288 the paper states:

> "The Tasmanian guidelines do not contain a clear requirement for formal victim consultation on charging decisions. However, the guidelines state that discussion with the victim should also take place to ascertain their views and forewarn them of the possibility there might be a discharge or reduction in number or severity of charges and the reasons that might be so. They also state that, where practical, victims should be informed of any proposed discharge or reduction in charges before the accused and police are informed and this enables the complainant to have an opportunity to provide their views."

It is submitted that under the revised guidelines (which I will quote below), there is little doubt that there is a requirement for formal victim consultation on charging decisions. At p 17, the guidelines state:

> "Where practicable, when there is a complaint, a complainant or claimed victim of a crime originally charged, he or she should be informed of any proposed discharge or reduction in charges before the accused or police are informed. This is the task of the prosecutor with conduct of the case, to whom the memorandum should be returned. This enables the complainant to have an opportunity to provide his or her views as to why the prosecution should proceed. It is an important step in the process that a complainant understands the reasons why a decision to discontinue has been made.
>
> It is preferable that the complainant be informed of the reasons in person. However, if this is not possible, it should be done by telephone. A letter should be sent confirming that the charges will not proceed and the complainant has a right to request the Director to review the decision."

Therefore, there is no doubt that it is a requirement of the guidelines, firstly, that a victim should be consulted and, secondly, that a letter should be sent informing them of their right to request the Director to review the decision. I enclose the guidelines and an example of the letter that is to be sent to complainants.

General recommendation

It would be preferable in respect to "Chapter 7- Issues in prosecution responses" for the Commission to address these matters by setting out general principles. It must be remembered that the size of the jurisdictions and therefore the size of the Offices varies enormously throughout Australia. In Tasmania it is a relatively small Office. Decisions regarding prosecutions are made at a very senior level. As can be seen from the Tasmanian guidelines, there is a right to review with complainant consultation prior to any final decision being made. Unlike the English Crown Prosecution Service, in this Office the prosecutor with conduct of the case does not make the decision to indict or to discharge a person. As can be seen from the guidelines, where the prosecutor with conduct recommends a discharge, two members of the Committee comprising the Deputy Director and the Principal Crown Counsel have to agree to the discharge but in cases where the prosecutor with conduct recommends that a prosecution should proceed, for it to be subsequently discharged three members of the Committee have to agree. Where there is disagreement, the matter has to be referred to the Director. A right of review by the Director is given to a complainant. All this is done before a final decision is made. In that way, a number of senior lawyers look at a matter and there is also complainant input before a discharge is made. In my view, this is far superior to a review system after an accused person has been discharged, like in the system operating in the English Crown Prosecution Service.

Correct charges

At 7.5.4 the paper states that it is imperative that Crown prosecutors recognise the importance to complainants of correct charges being laid as early as possible or that charges are not significantly downgraded or withdrawn close to trial and that prosecutors should provide early advice to police on appropriate charges to lay when such advice is sought. As you can see from the Tasmanian guidelines, the Office offers a advice service in respect to sexual assault matters as to appropriate charges. There is also early intervention by the Office once charges have been laid and, as I said earlier, as a result there is a relatively high conviction rate for sexual assault matters and a low discharge rate.

Review system

In respect to a review system, as stated above, this Office already has a system of internal reviews prior to any decision being made and a right to have the Director review any decision to discharge. In respect to judicial review, it is my submission and indeed it appears from the High Court decisions, in particular *Magaminy v R* [2013] HCA 40, that such a review by the courts would be unconstitutional. Further, it would be difficult for a court to review all the factors that are taken into account when determining whether to prosecute a matter. Also, particularly in a small jurisdiction like Tasmania where there are only six Supreme Court judges, if there were to be an appeal from a judicial review of a decision not to prosecute, it would significantly threaten the independence of the court for any criminal proceedings. Further, this Office makes numerous decisions during the prosecution process. Such decisions include the number and type of charges, what evidence to call and what facts to state in a plea. All these decisions have a significant impact on the final outcome. Which of these decisions are to be reviewed? There is a difficulty in who would actually conduct the prosecution if the Director of Public Prosecutions was of the view that no prosecution should take place, i.e. who would sign the indictment and who would prosecute it?

Finally, it was suggested at p 317 of the paper that where the decision not to prosecute had been made by the Director personally, it could be reviewed by a member of the bar. Such a suggestion has a number of problems. Firstly, the DPP is there to make the decision. The decisions I make are made in consultation with other senior counsel in the Office. Decisions being reviewed by an outside barrister will prolong the controversy and attack the credibility of the Office. It would simply replace one person's opinion with that of another and in small jurisdictions in particular, it is unlikely that any such person would have the prosecutorial experience of the DPP. Further, what would happen if evidence changed during a trial and a speedy decision was required whether or not to prosecute? In any event, as I indicate below, there is scope for a complainant to complain to the Attorney-General.

External oversight body

It is submitted that a person externally oversighting the Office of the DPP is unnecessary and inappropriate. The reasons for this are as follows:

- With decisions being made at a much more senior level than, for example, the Crown Prosecution Service in England, along with the guidelines and a right for a complainant to ask the Director to review any decision to discharge, combined with internal audits of discharges to determine the Office is meeting the guidelines, such an inspectorate would be unnecessary. This is particularly so in a small office such as Tasmania where there is strong supervision of junior lawyers and prosecutorial discretion is only exercised at a very senior level.

- Particularly in a small State such an officer would become a de facto DPP, with people who are unhappy with decisions stating they will go to the inspectorate. Then what occurs when the inspectorate and the DPP do not agree? It adds to the controversy and undermines the independence of the DPP.

- Section 12(2) of the *Director of Public Prosecutions Act 1973* provides "*The Director may not take over, continue or discontinue proceedings that have been instituted or undertaken by the Attorney-General or the Solicitor-General except with the approval of the Attorney-General or the Solicitor-General, as the case requires*". Therefore, in the Act, if the Director of Public Prosecutions makes a decision that the complainant disagrees with and the Attorney-General or the Solicitor-General form the view that the DPP is plainly wrong, then they can prosecute the matter. I note this has occurred (without any actual success) in some mainland States.

- In a State like Tasmania, the Office of the DPP has very limited resources. Such an oversight body would take resources that would be better used for the actual prosecution of offences.

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

- There is also the problem of what decisions are to be reviewed.

- If you had such a body would it be fair to limit it to complaints by complainants? Why not accused persons? This would lead to delay.

- It should be noted at p 302 of the paper it quotes from the CPS annual report that 1 in 8 of the 1674 decisions in respect of which victims sought review by the Appeals and Review Unit were found to be overturned, or approximately 12.54%. Given that the decisions of the CPS appear to be made by relatively junior persons in the organisation, this is a reasonably low figure. It amounted to 0.17% of all decisions made by the CPS. Given that in this Office, the decision is made after a review process has already been made by senior lawyers with a right of appeal to the Director, incorrect decisions would have to be minute in comparison. In fact, a previous audit of discharges conducted by the previous Director and Deputy Commissioner of Police of all discharges for the previous year found "*the viability of cases had been assessed appropriately, dispassionately ad assiduously*". They found only rare failure of communication or process. Since then the communication aspect of the guidelines have been tightened.

Liaison between police and prosecutors

You ask for submissions concerning liaison between prosecutors and police in relation to charges. As stated earlier, this Office has an advice service for Tasmania Police in respect of allegations of sexual assault. In 2014-15 there were 200 complaints to police from which they sought advice from this Office in respect to 140 matters. In my view, the system in place encourages regular early advice by this Office which is demonstrated by the high conviction and low discharge rates. This allows for the correct charges to be laid and for advice to be given concerning further evidence. Further it has the effect of not falsely raising complainants expectations.

Chapter 8 - Delays in prosecution

It would be preferable that the Commission should set out general principles without making specific recommendations. This is because the system of courts throughout the country is so different. For example, Tasmania has six Supreme Court judges and no intermediary court. Generally, there are two criminal courts sitting in Hobart, one in Launceston and one in Burnie. Therefore the notion of having a specialised court is not practical. I would accept the following general principles:

- It is important to have a Crown prosecutor allocated at an early stage to endeavour to get an early resolution to a matter.

- In a small Office, such as the Tasmanian Director of Public Prosecutions, it is not possible to have specialised prosecuting units. We have a Principal Crown Counsel who co-ordinates all sexual assault cases. However, we do not have the resources to allow these matters to only be conducted by a specialised unit. Sexual assault cases, by and large, are complex and need to be conducted by senior counsel. In an Office such as ours we need the flexibility to be able to have senior counsel conducting a wide range of serious prosecutions. If sexual assault cases were conducted entirely by a specialised unit we would only be able to afford to have a small number of senior prosecutors conducting the prosecutions, leading to a lack of flexibility and considerable delay. Further, exposure to a wide variety of matters greatly improves the skills of counsel, making them more effective in conducting sexual assault cases.

- Early guilty pleas would assist with delay. However, they can only be brought about if significant discounts were to be given to encourage accused persons to plead. Perhaps statutory discounts of varying amounts depending on when the plea occurs could be considered.

- Delays can be avoided by earlier identification of issues at trial and this can be assisted by the early appointment of a Crown prosecutor. However, there is also a need for defence counsel to be so engaged. Further, pre-trial hearings where evidentiary matters are decided can also prevent delays as once rulings are made an early determination as to whether a matter is to proceed to trial or will resolve in a plea of guilty can be expected.

Chapter 9 – Evidence of victims and survivors

I make the following comments:

- The law in Tasmania allows for children giving evidence about a sexual crime to give evidence by audio visual link except where a prosecutor had made application for them to give their evidence in court (ss 6B and 7 of the *Evidence (Children and Special Witnesses) Act 2001*). The difficulty with this provision is that it only applies to people who were children when they gave evidence. Consequently it does not apply to any historical sexual abuse cases. This should be amended so that every complainant in a sexual crime can give evidence by audio visual link as a right, but will give evidence in court if the prosecution makes application for them to do so. The experience has also been that having the child witness give evidence by audio visual link

does not create any real prejudice to the accused. While many defence counsel still claim that to properly cross-examine it is necessary to see the witness in person, in reality evidence can be properly and thoroughly tested without the complainant being intimidated by being in the presence of the accused.

The law in Tasmania now allows the prosecutor to make application for a child complainant in a sexual assault case to have the entirety of their evidence audio and visually recorded prior to trial. The recording then becomes the child's evidence on the trial (s 6 of the *Evidence Act 2001*). Similarly, if a child complainant gives evidence at trial and the facilities are available their evidence is to be audio and visually recorded and "may" be admitted at a subsequent trial (s 7B of the *Evidence Act 2001*). Again, this only applies to the evidence of a child. Thus, again it does not apply to historical sexual abuse cases. The scope of the provision should be increased to ensure that all complainants in sexual assault matters have their evidence recorded so the recording can be used at a subsequent trial in order to avoid them having to give evidence multiple times.

Section 8 of the *Evidence (Children and Special Witnesses) Act 2001* allows the court to declare any witness to be a special witness. Once a witness is declared to be a special witness the court can order that their evidence is to be given in the same way as a child complainant's evidence in a sexual matter. This might include the use of an audio visual link and the pre-recording of their evidence, depending on the circumstances of the case. The difficulty with the current provisions is that a witness may only be declared a special witness if the person is likely to *"suffer severe emotional trauma"* or *"be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily"* (s8(b) of the *Evidence (Children and Special Witnesses) Act 2001*). It is very difficult to prove that a witness will suffer *"severe emotional trauma"* or be *"unable to give evidence satisfactorily"* without calling the witness and watching as they are traumatised and unable to give satisfactory evidence. As the law currently stands the prosecution often makes these applications in relation to complainants in sexual assault trials who are no longer children. If such complainants were automatically covered by the provisions discussed above the current requirements in s 8 could be maintained and such applications would become quite rare. The alternative is to amend the provision such that a broader range of witnesses could be declared "special witnesses".

- In Tasmania pre-recording of the entire evidence of children and other special witnesses has been utilised for some 18 months. It has been the experience of this Office that this has resulted in a positive outcome in that it lessens the stress on the witness in that the witness can come at an appointed time and have his or her evidence heard. Also, on a number of occasions, it has resulted in an earlier plea of guilty, firstly, because defence counsel have had to look at the evidence at an earlier stage than they would have previously and, alternatively, we have had a number of pleas of guilty shortly after the pre-recording has been conducted. Also, once the recording has been completed it lessens the pressure to have the trial heard where there are conflicting priorities with other serious matters. Further, as Ms Henning,

Director of the Tasmanian Law Reform Institute, has been quoted in the paper, I am also of the view that pre-recording of evidence allows judges to intervene to control questioning more readily than they might otherwise.

- With regard to competency testing, it is my view that no testing should be required. Competency can be assessed by the jury after seeing the witness give evidence, by the video interview and cross-examination. If necessary, expert evidence can be given as to the witness's development and ability to distinguish between truth and falsehoods. In my view, this would be far better than the judge asking a few questions to assess the child's ability to tell the truth.

- Finally, in respect to intermediaries, I accept that they would be beneficial, not just during the trial process but throughout interview processes to advise police, lawyers and judges in relation to what questions are suitable to put to the witness. The precise nature and type of intermediaries is presently being studied by the Tasmanian Law Reform Institute and I will await their findings as to what would be best in Tasmania.

Chapter 10 - Tendency and coincidence evidence and joint trials

The experience in this State is that juries are able to rationally consider evidence which could give rise to a risk of unfair prejudice. There is no evidence in my experience to suggest that if juries are properly directed as to how such evidence is to be used that they will be enflamed and irrationally convict accused people without properly considering the allegations in relation to a particular charge.

This has been demonstrated by verdicts where the jury finds an accused guilty of some counts but not guilty of others. Similarly, it has been demonstrated where the jury finds an accused not guilty of maintaining a sexual relationship with a young person, a crime which is proved if the jury are satisfied that on three separate occasions an unlawful sexual act has been committed against the complainant, but guilty of one or two unlawful sexual acts. These verdicts can only be explained by the jury having logically determined their verdicts.

The uniform evidence law provisions have been applied in Tasmania such that in the vast majority of trials involving sexual allegations the evidence of each complainant has been ruled to be cross-admissible. It is settled law in Tasmania that if evidence is cross-admissible then the indictment is properly joined. While a trial judge retains discretion to sever a properly joined indictment, this discretion is seldom exercised. Where the evidence is cross-admissible it would be pointless to sever the indictment as the same evidence would be presented at two trials.

Presumption of joint trials

I do not have a difficulty with a presumption of joint trials. In reality, however, such a provision would only have an impact on the rare case where the crimes are properly joined, because they are a series (s 311(2) of the *Criminal Code*) but the evidence is not cross-admissible and the court exercises the discretion to sever. *De Jesus v R* (1986) 68 ALR 1 was such a case.

Probative value of similarities

Fortunately in this State, the courts have tended to follow the New South Wales authorities, such as *PWD* (2010) 205 A Crim R 75*,* in relation to the assessment of the probative value of tendency and coincidence evidence. The type of reasoning seen in decisions such as *PNJ* (2010) 27 VR 146*,* where similarities "outside the accused's control" were not considered relevant to the assessment of probative value, have not been followed. Similarly the Tasmanian courts have followed the New South Wales authorities as to the assessment of the probative value of evidence at its highest. *IMM v* R (2016) 330 ALR 382 has confirmed that this approach is correct.

Concoction and contamination

Although it is contrary to an assessment of the evidence at its highest, trial judges in Tasmania have continued to consider the possibility of concoction and contamination when assessing probative value (see *L v Tasmania* (2006) 15 Tas R 381; *Tasmania v W* (2012) TASSC 47; *Tasmania v L* [2013] TASSC 47). Fortunately this has rarely resulted in the exclusion of evidence and the consequent severance of an indictment. However, by entertaining the possibility that evidence may be excluded as a result of the risk of concoction or contamination the courts have routinely allowed the accused the opportunity to cross-examine complainants prior to trial on a *voir dire*. The law in Tasmania is that an accused can make application to a judge to examine witnesses prior to trial in preliminary proceedings, but in relation to sexual assault complainants an order will only be made in "exceptional circumstances" (s331(3)(b) of the *Criminal Code*). The possibility of concoction or contamination impacting on admissibility is therefore allowing cross-examination of complainants prior to trial, contrary to what was intended when the "exceptional circumstances" requirement was introduced.

In my view, the law should be amended to remove the possibility of concoction or contamination having any impact on the assessment of probative value. Given the High Court's decision in *IMM v* R supra, it seems inevitable that ultimately the High Court will rule that such an assessment is contrary to an assessment of the evidence at the highest. Such an amendment would therefore sit comfortably with current authority, but would make certain that complainants do not need to give evidence on more occasions than is necessary.

Notice

The notice requirements should be maintained for both tendency and coincidence evidence. The requirement that the State prepare a notice crystallises for the prosecutor the ways in which the evidence is relevant and will be used at trial. There have also been instances where shortly after a detailed notice is delivered an accused person changes his or her plea. This must be because the notice makes clear the probative value that the evidence will have on the trial. We have not had cases which have failed for lack of notice.

Possible amendments

In my view, there is scope to relax the current provisions to allow juries to consider a broader range of evidence. This would reflect the modern experience, being that

juries are able to dispassionately assess the weight to be given to fundamentally abhorrent evidence. This should, however, be done within the established uniform evidence framework. The uniform evidence legislation came into force in New South Wales more than twenty years ago but it is only this year that the law relating to the assessment of probative value has been settled by the High Court. It is not in the best interests of complainants to again completely re-draft the law in this area and subject them to the inevitable period of uncertainty as new provisions are applied and interpreted. With that in mind, I would not support the adoption of provisions mirroring the current scheme from Western Australia or those from England and Wales.

One step which would increase the potential for the admission of this evidence but maintain the current regime would be the revocation of s 101 of the uniform evidence legislation. Tendency and coincidence evidence would still need to have significant probative value (ss 97(1)(b) and 98(1)(b)) which outweighed the danger of unfair prejudice (s 137) but there would not be a requirement that the probative value substantially outweigh the danger of unfair prejudice (s 101(2)).

Amendments should not be made which create special provisions for sexual crimes. Such provisions would inevitably increase the complexity in an already legally complex area. If necessary, changes can be made within the current framework of the uniform evidence legislation without the need for provisions which apply to some crimes but not others. Directions would be particularly onerous when an indictment contained charges of both physical violence and sexual crimes. While it would be rare to file such an indictment in the context of sexual abuse in an institutional context, allegations of physical and sexual abuse may arise within familial relationships. It is not in the interests of justice to burden juries in such cases with competing directions relating to different crimes. The necessity for such direction would also be taken into account when the court was considering the discretion to sever.

Chapter 11 - Judicial directions and informing juries

There are no particular jury directions which are uniformly given in Tasmania in sexual assault trials which stand out as requiring amendment. The directions from *Longman v R* (1989) 168 CLR 79 are no longer given (see s 165B(4) of the *Evidence Act 2001*).

When the charge involves sexual assault allegations and there is evidence suggesting an absence of complaint s 371A of the *Criminal Code* requires the trial judge to warn the jury that the absence of complaint, or delay in complaint, does not necessarily indicate that the allegation is false. Similarly, he or she must inform the jury that there may be good reasons why a complainant may hesitate or refrain from complaining.

Section 165B(4) of the *Evidence Act 2001* prevents the trial judge from suggesting in any way that it would be dangerous or unsafe to convict solely because of delay or any forensic disadvantage suffered by an accused because of delay. If however an accused person persuades a trial judge that they have suffered a forensic disadvantage because of delay, s 165B(2) of the *Evidence Act 2001* requires a jury to be informed of the nature of the forensic disadvantages suffered and the need to take it into account.

These directions strike an appropriate balance. In particular, it is appropriate that there is scope for the jury to be informed about forensic disadvantage caused by delay in an objective way that does not undermine the credibility of the complainant.

I do not believe there is a particular need to codify jury directions. To do so would risk uncertainty in the short term when there are no particular directions which are routinely given that require correction.

Section 78(2) of the *Evidence Act 2001* ensures that opinion evidence as to the behaviour of children who have been victims of sexual abuse will be admitted. This allows the State to decide when such evidence is warranted and the scope of the evidence required. It also allows for that evidence to be tested. To play a video to the jury which may or may not be applicable to the evidence in the case which they are considering would be inappropriate and unnecessary. In my view, as far as is possible, trials involving sexual allegations against children should not be the subject of special rules and procedures. If such a video were to be played to the jury when the allegations involve sexual crimes against children, why would one not be played when the allegations involve family violence - to explain why the victim of family violence might stay in an abusive relationship, for example? Similarly, why would a video explaining how someone with an intellectual disability might behave having been sexually abused not be appropriate? Where required, such explanations are best left dealt with by leading expert evidence.

Chapter 13 - Appeals

Interlocutory appeals

There are currently very limited rights to appeal in Tasmania prior to an acquittal or conviction. The Attorney-General can only appeal a ruling prior to an acquittal where there has been an order arresting judgment, or with leave of the court an order staying or quashing an indictment or upholding a demurrer.

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

The lack of a right to appeal pre-trial rulings has the potential to create real injustice. For example, in a case involving multiple sexual assault complainants a pre-trial ruling that evidence is not cross-admissible and severing an indictment would result in the need for multiple trials. The evidence that could be adduced on the severed counts might not give rise to a reasonable prospect of conviction. If the case was to proceed a complainant would need to give evidence at a trial when it was unlikely that the accused would be convicted just to allow the State the opportunity to appeal the pre-trial ruling. This is an absurd situation.

The lack of a right to appeal may also lead to an inefficient use of resources. For example, I prosecuted a trial involving two counts of murder. The trial took more than five months. There were a number of pre-trial rulings but one ruling in particular

excluded significant evidence of admissions. If that ruling was incorrect it could only be corrected after the State had suffered the expense of a five month trial leading to an acquittal. In that sort of case the benefit to all parties flowing from the Attorney-General having a right to appeal an interlocutory decision is obvious.

The *Criminal Code* grants a person convicted of a crime the right, with leave, to appeal on any ground involving questions of fact alone, or which appears to the court to be a sufficient ground of appeal. In contrast, the Attorney-General can only appeal against an acquittal, with leave, on a question of law. Consequently there is little, if any, need for accused people to have interlocutory appeal rights as there is already an unfettered right to appeal upon conviction. Granting interlocutory appeal rights to accused people would lead to delay. Counsel for accused would arguably be obliged to seek leave to appeal a pre-trial ruling if they considered there was a chance that such an appeal would be successful. The DPP, as has been the experience in New South Wales, would exercise restraint and only appeal in exceptional cases as it is not in the interest of the DPP to delay trials.

Unfortunately the experience in Tasmania is that where a legislative provision requires that an accused person seek leave, the granting of leave is often treated as a formality. For example, an accused person can only cross-examine witnesses prior to trial if a preliminary proceedings order is made. Application for such an order is to occur on the accused person's first appearance in the Supreme Court. Application can be made on their second or subsequent appearance with leave, but leave is given so readily that it is the norm for such application to be made much later than the first appearance. Given this experience I would not support interlocutory appeal rights for accused people governed by leave.

Guidelines

The new guidelines require a detailed consideration of whether a retrial should occur after an appeal. The principal matters which must be considered are whether there remains a reasonable prospect of conviction, the views of the complainant or complainants and public interest factors.

Yours sincerely

D G Coates SC
DIRECTOR OF PUBLIC PROSECUTIONS

Encl.