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TRANSCRIPT OF DAY 6 – PUBLIC HEARINGS

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**PROFESSOR ELEANOR A BOURKE AM, Chair**  
**MS SUE-ANNE HUNTER, Commissioner**  
**DISTINGUISHED PROFESSOR MAGGIE WALTER, Commissioner**  
**PROFESSOR THE HON KEVIN BELL AM KC, Commissioner**  
**MR TRAVIS LOVETT, Commissioner**

**FRIDAY, 5 MAY 2023 AT 9.03 AM (AEST)**

**DAY 6**

**HEARING BLOCK 5**

**MR TONY McAVOY SC, Senior Counsel Assisting, with MS SARALA FITZGERALD and MR TOM RAWLINSON, Counsel Assisting**  
**MS GEORGINA COGHLAN KC for the State of Victoria**  
**MR PETER GRAY KC, with MS GEMMA CARAFELLA AND MS SARAH KEATING for the witness**

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**LAW IN ORDER**  
Where work flows.

CHAIR: Good morning. Today we will hear from the Honourable Jaclyn Symes MP. This is the sixth day of the hearings in Hearing Block 5 where we are primarily hearing from government witnesses on the priority areas of child protection and criminal justice. I have a longstanding commitment which requires me to leave at 1 pm and I'm grateful if the

5 Commissioners do continue after I've gone. But I would like to make some opening remarks today, given the importance of this historic Royal Commission and the historical significance of having the Attorney-General with us, engaging in truth-telling before the country's first Aboriginal-led Royal Commission.

10 The Attorney-General's role occupies the position of the first law officer. However, this authority is derived from the contested Colonial project in Victoria since 1851. Aboriginal people's lore and law have governed the land and our people for thousands of years. First Peoples have lived in land owning clan groups representing the longest continuous living cultural tradition in the world. The government's own submission acknowledges that

15 establishment of the State of Victoria in 1851 brought with it widespread land theft, decimation of culture, removal of children and enforced poverty.

For us, the past is the present. The word "protection" has been with us since 1838, the Port Philip protection. The Board of Protection began a series of boards which have been in our

20 lives since 1860, and we have conversations about child protection using that same word, "protection".

The board itself was replaced by a Welfare Board in 1957. This is a long chain of history that our families have experienced and in my own family, my great grandparents, both great

25 grandparents, were moved from different sides of the State under this legislation, and only one of them died in their own country when they passed.

Violence, racism and denial of self-determination continued under these laws. At this moment of historical significance, there is a choice to be made. The government can choose to listen to

30 the hard truths emerging from the Yoorrook Justice Commission - and they are hard truths. They are hard to hear and they take a toll on our people in terms of trauma and the continuous exposure to having to talk to this space.

The government can choose to make change. I believe it is now a time for reckoning with the

35 past and creating a new future together. Commissioner Hunter, may I ask you to give the Welcome to Country.

COMMISSIONER HUNTER: Thank you, Chair. I would like to acknowledge that we are on the lands of the Wurundjeri and pay my respects to Elders past and present, not only mine but

40 with all the nations in Victoria. I want to acknowledge the Stolen Generations. I want to acknowledge those that didn't make it home, those that did and those still searching, and to those who died at the hands of the State, I would like to acknowledge those. Can we please all stand for a minute's silence.

45 May we never forget them. Be seated. Thank you.

CHAIR: Thank you, Commissioner Hunter. Counsel, may we have appearances please.

MR MCAVOY: May it please the Commission, Chair. My name is McAvoy. I appear as co-Senior Counsel Assisting assisted by my learned juniors, Ms Sarala Fitzgerald and Mr Tom Rawlinson.

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MR GRAY: Thank you, Chair. My name is Gray. I appear again with Ms Sarah Keating for the State and, in particular, for the Attorney-General. We wish to acknowledge that we meet today on Wurundjeri land, and we pay our profound respects to Elders past and present, and we pay our respects to Aboriginal and Torres Strait Islander people who are here today, or who are listening in. Thank you.

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CHAIR: Thank you. Thank you, Counsel.

MR MCAVOY: Chair, there's one administrative matter to deal with before we move to today's witness. I should add that there is only the one witness, the Attorney-General, today, and we will have further witnesses on Monday. The Commission has received an updated version of the Attorney-General's witness statement. That document is identified as DJCS.0015.0001.0066\_R.

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CHAIR: Thank you, Counsel.

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MR MCAVOY: We seek to tender that document, which can then be made publicly available.

CHAIR: The document will be allocated the next exhibit number.

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MR MCAVOY: Thank you, Chair. Now, if the Commission pleases, I now call today's witness, the Honourable Attorney-General, the Honourable Jaclyn Symes MP.

**<THE HON. JACLYN SYMES, CALLED**

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CHAIR: Thank you, and welcome. Welcome.

THE HON. JACLYN SYMES: Thank you so much. It's an honour to be here. I would like to provide an opening statement, and I of course would like to begin with acknowledging the traditional land - Traditional Owners of the lands of which the historic meeting is taking place today, the Wurundjeri people. I pay my deep personal respects to Elders past, present and emerging, and I extend that respect to all Aboriginal people, people that are here today and people who may be tuning in.

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I would like to acknowledge the importance of Collingwood and Fitzroy where we are meeting today as a place of rich Aboriginal community-led activism and leadership. I would also like to acknowledge the Taungurung people as the Traditional Owners of the country on which I live and where I'm raising my children. I pay my respect to Taungurung Elders and particularly those I've been fortunate to meet and build relationships with. I also acknowledge that this is and always will be unceded Aboriginal land.

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I am truly humbled to appear before the Yoorrook Justice Commission today as the Attorney-General. I particularly want to thank the Commissioners and staff. Your dedication to this process is evident and you are exercising your duties with purpose, but I know that this week in particular, Block 5 has touched on many topics that have huge emotional impact for Aboriginal people and I want to acknowledge that I know your job is not an easy one.

As first law officer, I personally acknowledge nearly two centuries of dispossession and Colonisation of Aboriginal people and the role that the legal and criminal justice system has played in this. I hope my evidence offers value to the historic truth-telling process in making sense of these very difficult truths.

I'm planning on being open, frank and hopefully useful to this Commission. I also expect to learn from the process, as I regularly do when engaging with Aboriginal stakeholders, especially the AJF and its members. As Attorney-General, my role includes up holding the rule of law, a key principle and foundation of existing systems of law and government. I recognise, however, that although the rule of law means equal application of the law, in practice, this has not been the case for Aboriginal people, which is undeniably evident through data and poor justice outcomes.

The *Uluru Statement from the Heart* is profound and beautiful in its language but the one sentence, or two sentences that are entirely gut wrenching to me is:

*"Proportionately, we are the most incarcerated people on the planet. We are not innately criminal people."*

I come today recognising that there is a crisis when it comes to justice outcomes for Aboriginal people. In doing so, I acknowledge the death of Veronica Nelson, Michael Suckling, Heather Calgaret, Joshua Kerr and Clinton Austin who have passed in prison since January 2020, and I also regularly reflect on the tragic passing of Aunty Tanya Day. I acknowledge the profound impact these deaths have had on families, friends and the wider Aboriginal community.

In preparation for today's hearing, I have personally reflected on the criminal justice system, the structures of government and government decision-making and their significant flaws. Sometimes government doesn't get the balance right, and sometimes we don't make the right decisions. Clearly there have been too many instances where the law-making processes or the application of those laws have failed Aboriginal people.

I acknowledge that many in the community, including the Commission, rightly consider that the pace and scale of the just and necessary change has been too slow. But I do appear before the Commission today with a sense of urgency in this critical moment in history, which I hope will be a break-through, a turning point for us all.

I cannot change the past, but I can certainly acknowledge past wrongs. I can vow to do better, to listen, to learn and to engage and enact meaningful change. To this is acknowledging structural racism. It is both overt through the data and disguised in its operation. Structural racism that has been inherited from our Colonial past that is undisputed through many stories

heard in the Commission and told extensively through the Aboriginal Justice Forum. I acknowledge that both conscious and unconscious bias still exist in individuals and is still prevalent throughout the justice system. Its persistence is unacceptable. These are all failings that are not unique to the justice system but permeate through every level of society, and we should be ashamed that they still exist.

I am proud to be part of a government that is committed to work together with this Commission and the Aboriginal community to create a future that's based on respect, empowerment and self-determination. For too long, Aboriginal communities have been denied their right to self-determination through the dispossession of land, the denial of culture and very often the silencing of voices.

I do recognise that self-determination is not just the correct thing to do; it's a fundamental right of Aboriginal people. And inherent to self-determination is the right of Aboriginal people to define for themselves what self-determination means.

We are still far from achieving self-determination in the justice system, but we are starting from a really strong foundation of 23 years partnership working with, and being led by Aboriginal communities through the Justice Forum and the Caucus and more recently with the First Peoples Assembly. The government will be guided by the truth told at Yoorrook and the findings and recommendations that the Commission will make.

I do appear today with optimism. I hope that truth-telling can lead to healing. Most of all, I hope that non-Aboriginal people and Aboriginal people can continue to walk together as we build a new relationship through Treaty.

I'm here to assist the Commission and I welcome your questions.

MR MCAVOY: Thank you, Attorney. Chair, is there to be any further comment at this point?

CHAIR: No, not -

MR MCAVOY: Thank you. Attorney, I will now ask some questions. You've prepared a statement which has been tendered this morning in response to a notice to produce? Yes?

THE HON. JACLYN SYMES: Yes.

MR MCAVOY: And in that statement - you've got it in front of you, do you?

THE HON. JACLYN SYMES: I do.

MR MCAVOY: Paragraph 7 on the first page, you acknowledge that:

*"The justice system has both recently and historically been a site of exclusion and oppression, whether through laws that are specific..."*

I'm sorry. Before I go any further, I need to make sure that you are going to tell the truth.

THE HON. JACLYN SYMES: Yes. We are going to do that.

5 MR MCAVOY: I ask, do you undertake to provide truthful evidence to the Yoorrook Justice Commission today?

THE HON. JACLYN SYMES: I do.

10 MR MCAVOY: Notwithstanding two reminder notes, I moved straight past that very important piece. So I'll just take you back to paragraph 7. There's an acknowledgement at that paragraph that:

15 *"The justice system has both recently and historically been the site of exclusion and oppression, whether through laws that were specifically targeted at Aboriginal peoples, laws unequally applied to them or through the refusal to enact specific laws for the advancement of Aboriginal peoples or engage Aboriginal peoples in the design of laws that affect them. I acknowledge that this has resulted in entrenched systemic and structural racism within the justice system and the broader institutions of government."*

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You can see that? It goes on:

25 *"I acknowledge also that the impact and structures of Colonisation are far-reaching and intergenerational and are continuing to affect Aboriginal peoples' interactions with the criminal justice system."*

And it is in the context of that acknowledgement and others in the beginning of your statement that you are giving your evidence today on behalf of the Victorian government?

30 THE HON. JACLYN SYMES: I am.

MR MCAVOY: And in your role as Attorney, Attorney-General for the State of Victoria, you have certain responsibilities, Ministerial responsibilities, including with respect to the Charter of Human Rights and Responsibilities?

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THE HON. JACLYN SYMES: I do.

MR MCAVOY: The *Bail Act*?

40 THE HON. JACLYN SYMES: Yes.

MR MCAVOY: The *Sentencing Act*?

THE HON. JACLYN SYMES: Yes.

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MR MCAVOY: The *Crimes Act* and the *Summary Offences Act*?

THE HON. JACLYN SYMES: Yes.

MR MCAVOY: And you also have responsibility for the courts, the Independent Broad-based Anti-corruption Commission; yes?

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THE HON. JACLYN SYMES: Respecting their independence, I have administrative responsibilities, yes.

MR MCAVOY: Yes, and similarly for the Ombudsman?

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THE HON. JACLYN SYMES: Correct.

MR MCAVOY: And so these are all matters, you accept, that are extremely pertinent to the criminal justice inquiries that this Commission is undertaking?

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THE HON. JACLYN SYMES: Yes.

MR MCAVOY: And in terms of your own experience, is there anything that you can say, particularly looking at paragraphs 13 to 20 of your statement, about your background and what you bring to the role of Attorney-General?

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THE HON. JACLYN SYMES: In terms of my – my background, I was appointed as Attorney-General in December 2020. I've been a Member of Parliament since 2014. First was made a Minister following the 2018 election and was appointed to the roles of Agriculture Minister Regional Development and Resources Minister. And in addition to the Attorney-General portfolio that I hold now, I'm also the Minister for Emergency Services. I have a longstanding background in justice. I am a lawyer. And I previously started my, I guess, career in government as an advisor to the former Attorney-General starting in 2015.

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30 So I've had direct responsibility for justice policy as an advisory for a period of time, then I guess a bit of a break into different policy areas and have returned to justice.

MR MCAVOY: So it is the case that some of the longstanding reform issues you've had previous responsibility or engagement with?

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THE HON. JACLYN SYMES: Certainly knowledge of, various degrees of involvement with before becoming the Attorney-General.

MR MCAVOY: Now, the acknowledgements that you have made here today on behalf of the State of Victoria, I suggest, are significant and the words are perhaps words that many people would never have expected to hear from an Attorney-General even maybe a decade ago. However, they appear to be consistent with a government that has listened to the First Peoples of Victoria when they demanded fundamental change in their relationships with the State. You would agree with that?

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THE HON. JACLYN SYMES: I do.

MR MCAVOY: Would you agree with me, Attorney, that the broad change in government as it is occurring through these Treaty and truth-telling processes is rarely linear? By that I mean that some parts of government move more quickly than others. Some issues are more amenable to resolution than others and there may not always be a uniform shift in the direction across the whole of government. You would agree with that proposition?

THE HON. JACLYN SYMES: I can acknowledge that - I can acknowledge that, yes.

MR MCAVOY: But even though this is the case, that doesn't mean there shouldn't be strong action where there's urgent need?

THE HON. JACLYN SYMES: Agree.

MR MCAVOY: You say that in your opening.

THE HON. JACLYN SYMES: Yeah, absolutely.

MR MCAVOY: Nor should there be every effort made to oversee consistent change across government. Do you agree with that?

THE HON. JACLYN SYMES: I do agree with that.

MR MCAVOY: You're aware that the Victorian government has entered a negotiation framework with the First Peoples Assembly of Victoria?

THE HON. JACLYN SYMES: Yes.

MR MCAVOY: And under that agreement, negotiations towards a state-wide Treaty may - may commence this year?

THE HON. JACLYN SYMES: Yes.

MR MCAVOY: You're aware of that? And consistent with the commencement of those negotiations, you're aware that the Aboriginal Justice Caucus has called for a self-determining justice system for some time?

THE HON. JACLYN SYMES: Six years, yes - well, some time - six years since government and AJA agreed to it.

MR MCAVOY: And looking at paragraphs 60 and 61 of your statement, are you able to perhaps give the Commissioners some insight as to what your understanding of a self-determining justice system is for Aboriginal people in Victoria?

THE HON. JACLYN SYMES: I can try, because it's a very difficult question to answer. As we know, self-determination is a principle that government certainly supports, and Aboriginal organisations and stakeholders have been talking about it for some time and how that it can bring about meaningful change. Self-determination is a feature and a desire and, indeed, a



commitment under the Aboriginal Justice Agreement. Self-determination was first agreed with government and Aboriginal Justice Caucus six years ago.

5 Defining what Aboriginal self-determination is something that I shouldn't do. What I acknowledge is that self-determination for Aboriginal people must be led, determined and defined by Aboriginal people. But what I do know is that it is not just handing over everything to Aboriginal people and saying, you know, you fix it. It requires meaningful partnership with government to ensure that self-determination principles can be respected, enacted and have meaningful effect for Victoria.

10 COMMISSIONER WALTER: Thank you for that. I have noticed through the various witnesses, many government witnesses have said it's difficult to actually say what self-determination is and it's up to First Peoples to determine that. But having said that, don't you - it's really necessary for both sides to actually have an agreed position on what  
15 self-determination is and perhaps, more importantly, what it isn't. So are there any moves to actually come to - because it's not much point if First Peoples have a definition of self-determination, if that's not agreed on the government's side and the sides have different ideas of what it looks like. It sort of seems to me a recipe for chaos.

20 THE HON. JACLYN SYMES: I think it's an evolution of exploring where you can embed self-determination principles in policy. For instance, when I asked the exact question of members of the Aboriginal Justice Caucus, you know, what does it mean for self-determination for you, how can I help enact that in my portfolio, a practical example is, well, rather than government determining which policies are best to receive funding, how  
25 about you allocate the bucket of funding to Aboriginal-led organisations and let us determine which are our highest priorities? Government shouldn't do the cherrypicking. We understand that there's limited resources, but leave us to determine which is best for our people, which could be different in different locations across the State which I think is a really good example of, yes, I would much prefer Aboriginal people to tell me what is a priority for them rather  
30 than hearing from government what we think is best.

COMMISSIONER LOVETT: You mentioned the words "meaningful partnership" before. Can you just explain what you mean by meaningful partnership?

35 THE HON. JACLYN SYMES: Yeah, I think what I mean by that is that consulting for the sake of talking isn't meaningful partnership. Going to a group of people with a predetermined outcome and consulting with them, getting their views but not acting on them is not true partnership. So, for me, true partnership, particularly in policy development, particularly in  
40 the way I approach my work, is getting in and having conversations early so that my policy development process is informed at an early process, having meaningful engagement that is reflected in outcomes, as opposed to try to convince someone of your position when it's been formed without them.

45 COMMISSIONER LOVETT: And under Treaty where there has been advocacy from Caucus and our people for a long period of time around self-determination, so under self-determination - and why I ask the question around partnership is, at the moment community doesn't have authority in the partnership. It ultimately sits with government.

Under Treaty reimagined system, something different, you are talking about true self-determination. What does equity in partnership look like in a self-determined context?

5 THE HON. JACLYN SYMES: That's a really good question. I really, really value the input from Aboriginal Justice Caucus and the members and the Forum, and I also - I leave quite excited each time I've left those meetings because there's purpose and there's things that we want to get on and do. And that's the structure that I'm working within, and I add a lot of value to that process. But I acknowledge that, ultimately, the decision is of government, it is of Cabinet. And I think that the next iteration of what that Forum looks like, how it fits in with  
10 Treaty, will be a great opportunity to explore some of the issues that you've raised in terms of greater capacity to influence the final decision-making, not just the creation of it, I think is something that I'm particularly interested in; the next steps of what AJF or Treaty and how they work together is going to look like.

15 MR MCAVOY: Thank you, Commissioner. Attorney, in your statement, you acknowledge that there's not much in the way of guidance from other jurisdictions in Australia as to how self-determination is given effect in the criminal justice systems. I might observe that, in part, that's because the work here is at the forefront of that particular level of reform. But I wonder whether, Attorney, you are aware of the material that's the work that is being done in New  
20 Zealand in this space?

In particular, I'm referring to a referral to the New Zealand law reform body, the Law Commission, which has received a referral to examine the relationship between, and to develop a framework for engagement between Tikanga Māori, which is Māori law, and the  
25 New Zealand laws, including the common law. That work, it seems to me, might be something that this government could do in the context of Victoria to help develop a better understanding of the relationship between Victorian Aboriginal lore and the western law that exists. Is that something that has been brought to your attention before?

30 THE HON. JACLYN SYMES: It has, but I'm not - I'm not across the detail. But I've certainly been interested in what they're doing in New Zealand. I know that they were a good influence in relation to even the setting up of this process. Looking to other jurisdictions, obviously, is a good way to learn. I am interested in exploring more what they're doing in New Zealand and whether it can be of any benefit to Victoria.

35 MR MCAVOY: So built into the question I've just asked is a presumption, I suppose, that self-determination in the criminal justice context is not just about doing things and programs, but about understanding and knowledge, and there's work that could be done in that realm. You would agree with that?

40 THE HON. JACLYN SYMES: Yeah, I would. I think there's opportunities to build on things that we have here in Victoria, and if you can learn from other jurisdictions, absolutely.

45 MR MCAVOY: I want to take you now to the issue which you've touched on in several places in your statement and you've touched on in your opening remarks, and you cover those matters at paragraphs 36 to 42 of your statement, and that is your comments with respect to systemic racism. Now, in those paragraphs, if I may try and paraphrase it, you address some

of the issues relating to systemic racism in the justice system and you accept that systemic racism exists in the present day as well, but I don't see in the statement a connection between racism that occurred - has its origins in the British invasion of First Peoples countries.

5 Now, you did make some mention of that in your opening statement, but it's not in your statement in such an overt form. Can you confirm for the Commission that the State of Victoria understands that - at least from Aboriginal peoples' perspective, and it's been well recorded that those systemic - that systemic racism has its origins in the arrival of the colony on their shores?

10 THE HON. JACLYN SYMES: Undisputably.

MR MCAVOY: Do you accept that, in the Colonial period, the prevailing way of describing Aboriginal people was to describe them as subhuman? To deny human dignity and status to Aboriginal people? Do you accept that that's what happened in the past?

15 THE HON. JACLYN SYMES: Yes, that's the factual reality of the history, yes.

MR MCAVOY: Sorry?

20 THE HON. JACLYN SYMES: That's factually correct, yes.

MR MCAVOY: And this served the purpose, we know, of assisting in justifying the theft of land without compensation and the dispossession of Aboriginal people in Victoria?

25 THE HON. JACLYN SYMES: Amongst a lot of other terrible behaviours, yes.

MR MCAVOY: Do you accept that this willingness to disregard and discount Aboriginal peoples' rights and interests flows through in the organisational culture to the present day in government agencies?

30 THE HON. JACLYN SYMES: Look, I think structural racism, as you've put it, absolutely has its foundations in colonisation and, for me - and I touched on it in my opening and my statement - there are certainly structural racism that persists today. For me, that is most evident in the outcomes in the numbers, in the disproportionate impacts of the justice system on Aboriginal people, and there is - there is a lot of factors for that, but certainly structural racism is certainly a leading cause.

35 MR MCAVOY: And some of that is what was complained of by Aboriginal people in the Cultural Review of the Adult Custodial Correction System; do you agree?

40 THE HON. JACLYN SYMES: Yeah, I agree with that and also through a lot of the hearings that you've had here at the Commission.

45 MR MCAVOY: You also accept, though, that those same sentiments which underpin the structural racism may consciously and unconsciously affect decisions by persons exercising governmental power in relation to Aboriginal people?

THE HON. JACLYN SYMES: Sometimes.

5 MR MCAVOY: So to be more direct, there are many discretions, discretionary powers, that government officers of all varieties exercise in relation to Aboriginal people, whether it's making some decision in relation to the safety or welfare of a child, whether a person is drunk or whether a person ought to be - is a bail risk.

10 THE HON. JACLYN SYMES: Yep.

MR MCAVOY: And that there may be conscious and unconscious racism that comes into those decision-making processes.

15 THE HON. JACLYN SYMES: I think that's true.

MR MCAVOY: The question I have now is perhaps a more difficult one. How does a colonial government such as the Victorian government confront and eliminate one of the elements upon which it was built?

20 THE HON. JACLYN SYMES: Well, I think through processes such as this, through truth-telling, through acknowledgement, through acceptance and apology for years and years of poor behaviour that has been underpinned by racism and understanding that you need to proactively consider reversing that. You need to think about how you can change your policies and processes in conjunction with meaningful engagement with Aboriginal people  
25 about how you can do things better and, in fact, differently.

MR MCAVOY: With respect, Attorney, it hasn't happened to date that those changes have been made. It's not - this isn't the first time that the issue of structural and systemic racism has been raised. It was one of the underlying features in the report from the Royal Commission  
30 Into Aboriginal Deaths in Custody, some 32 years ago.

THE HON. JACLYN SYMES: Yeah, I think I'd reflect on my comments about the slowness of change and of pace. But acknowledgement, acceptance and working towards change doesn't mean that there hasn't been some positives. I think the Aboriginal Justice Caucus, 23  
35 years of engagement and sometimes, yeah, I reflect on the fact that the agenda items haven't changed a lot over the years, but there has been successes that have been achieved before my time as Attorney-General and I've had the honour of finishing off -- yeah, a bit too late - some of the things that they've been asking for, for some time. I see not myself as someone that should be congratulated for achieving something, but I've been the vessel of which Aboriginal  
40 Justice Caucus has achieved some outcomes.

Coming back to my earlier point, the pace has been too slow. Is it held up for a variety of reasons? Yes. Racism could be one. The practical restrictions on legislative reform, resource allocation, structural changes within governments and their agencies - these are difficult,  
45 complex issues. But I have optimism that we are acknowledging that racism is something we should address and we're constantly learning how we can continue to do better in that space.

MR MCAVOY: One of the ways in which the government is looking to work in that regard is picked up in paragraph 42 of your statement, I believe, where it's noted:

*"The government is committed to strengthening anti-vilification protections."*

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Can you just speak to that for a moment?

THE HON. JACLYN SYMES: Yeah, I can. So there was a Parliamentary inquiry that looked at anti-vilification laws, hate speech and basically the impacts of what's happening in Victoria in relation to how people are feeling, how they access the systems and help from the justice system if they suffer racism or, indeed, any form of - any form of inappropriate behaviour based on a characteristic.

So what we did was advance one of the recommendations from that report in relation to banning of the Nazi hate symbol. That was picked out as something that was relatively straightforward in terms of legislative change. Anti-vilification laws, as reported to me by many stakeholders, both Aboriginal and other stakeholders, particularly CALD groups and the LGBTI-plus groups, would suggest that the laws aren't robust enough. The thresholds are too high. Some attributes are excluded, and it's not being used as an appropriate mechanism to respond to poor behaviour both civilly and criminally.

In advancing anti-vilification reforms, we are embarking on a consultation process. I really hope that the consultation process brings about an educative function as well. These are the types of laws you don't really want anyone charged with. You prefer that people don't behave in a way that is racist, that is offensive, that is drawing on people's differences. We - most Victorians want an inclusive society and we - but we these laws that stamp out those very few that behave in inappropriate ways. So it's a commitment of mine as to strengthen anti-vilification laws so there's greater protection for people who receive harm based on a variety of attributes, including race.

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MR MCAVOY: And just in terms of the timeline or trajectory for those - those - that reform, is that something you can talk to the Commission about or is it a work in progress?

THE HON. JACLYN SYMES: We're just at the early stages of consultation in relation to anti-vilification. So that is underway. There is a lot of interest in this space. I got asked in Parliament this week how are you up to in terms of your timing? We've - in terms of law reform, I've got a little bit on the agenda. I've got bail reform that was announced. We have got raise the age that we are progressing. There is some other pieces of legislation and the like. As I said, in the development of anti-vilification legal response, or law response, what that might look like in terms of legislation is one thing, but the consultation will be useful and we are hoping to have legislation in the Parliament within 18 months.

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COMMISSIONER WALTER: Just on the same part of your statement, you talk about the government could do more to systematically - systematically monitor non-Aboriginal staff attitudes around racism and the criminal justice system and the exercise of discretion within the criminal justice system. While it's good to systemically monitor more, just systematically

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monitoring it is not going to change anything. Could you elaborate a little bit about what you will actually do with that monitoring and where how it will lead to change?

5 THE HON. JACLYN SYMES: Yeah, no, I think that's - I agree with you. Monitoring after the fact is probably not as useful as getting in there and demanding change on the spot. I think you can learn from you can learn from reviews and examination, but I think ongoing cultural awareness and conversations in relation to how to make sure that racism isn't a feature of your organisation is something that's incumbent on all organisations, particularly government departments. The evidence is clear why we should continue to have a real focus on ensuring that all people that work for the State and interact with Victorians are appropriately aware and treat people with respect and are culturally aware of difference.

15 COMMISSIONER WALTER: So if that's cultural awareness and more training, that presupposes that all you have to do is make people aware that they need to be not racist and things will change. I suggest especially when you have got systemic racism in sentencing outcomes, police decision-making and cautioning and the granting of bail, that cultural awareness program is not going to cut it.

20 THE HON. JACLYN SYMES: Yeah, I think that's a fair observation. In relation to my remit, I'm really interested in talking to the Judicial College and the providers of legal education and the like to understand how extensive their training modules are. I know that a lot isn't mandatory. I'm interested in learning more about some of the more successful programs. And, you're right, you can attend an hour's session and tick a box to say you've undertaken cultural awareness training. That doesn't actually mean your behaviour is going to change. I think there's a number of ways of changing culture. It's promoting good practices and having good mentors and having a diverse workforce. I would love to have more and more people of Aboriginal background working in the justice system, because I think that that lifts everybody's ability to be aware of those - of the factors that they should be in relation to interactions with Aboriginal people in the justice system.

30 COMMISSIONER WALTER: Can I suggest just finally, that perhaps accountability for the leaders in these areas to make sure we don't see these ongoing patterns of systemic patterns in sentencing outcomes, police decision-making, cautioning and the granting of bail, that if that does not change, that those leaders are held accountable for that lack of change.

35 THE HON. JACLYN SYMES: Yeah, I think held accountable for lack of action definitely, ensuring that we should be celebrating the positives and promoting good practices. But we should also shine a light on poor practices so that people know that that is certainly not appropriate or accepted in an organisation, and that's certainly the job of a leader.

40 COMMISSIONER LOVETT: You have admitted a number of times causal factors could be racism, but at the outset of your statement today you acknowledge that there's systematic racism. So I just wanted to make a comment that, you know, this is the foundation that we're talking upon a lot of this important area today is around systematic racism. It's not "could be". It is. I just wanted to make that statement.

THE HON. JACLYN SYMES: Yeah, I think - and I appreciate your statement. I think absolutely I agree with you. There are other factors on top of racism, I think was the point I was trying to make. But I accept that.

5 MR MCAVOY: Commissioners, I am about to move on to another area, if there are other questions on the issue of systemic racism -

COMMISSIONER HUNTER: I just wanted to go back, sorry, Mr McAvoy, because you were talking about six years you've been talking to - excuse me, I'll try and find it. I think it was 57 of your statement. It says:

*"Whilst this pursued self-determination was a principle for six years..."*

That's a long time to pursue self-determination:

15 *"...the government continues to develop and hone in - to practically apply self-determination, achieving meaningful results."*

20 Six years is a long time. What's happened? What have we achieved in the six years while we are waiting for self-determination?

THE HON. JACLYN SYMES: Well, the commitment to self-determination in - six years ago is something that I think is fantastic, that it should have been earlier that government agreed with Aboriginal stakeholders to principles of self-determination. Aboriginal stakeholders are continuing to update and give us examples and advice on what self-determination looks like. So I don't necessarily think that there is an end point where we say yep, tick, we've achieved self-determination. I think we will continue to evolve and be a feature of learning better processes and, more importantly, better outcomes. So to - I'm not sure when we get to say we've achieved self-determination.

30 COMMISSIONER HUNTER: And probably - sorry, I didn't phrase my question as - what have we achieved in six years towards self-determination? I agree with you it's not a tick box, and it will continue to develop and change. But what - I guess if we are talking about the Aboriginal Justice Agreement, within those six years, what has happened towards self-determination?

THE HON. JACLYN SYMES: Yeah, look, if I could perhaps draw your attention to the Aboriginal Justice Agreement Phase 4, just in terms of you'd appreciate that I've been the Attorney for two years, so only two of the six that people have been talking about self-determination and advancing. But on page 12 of that document, it talks about self-determination in action, and I think, for me, when we're talking about self-determination - and similar to Commissioner Lovett's questions - practical examples are a good indicator of some of the outcomes that can be achieved through self-determination.

45 So if you - we've got new positions that have been created within the Justice portfolio, within justice agencies, whether it be police, sheriffs or courts and Corrections. And then programs that people - that have come out of consultation with Aboriginal Justice Agreement that are

5 purely designed to divert, intervene and respond to Aboriginal people and some of the underlying causes that may bring them into contact with the justice system. So that is in terms of self-determination in what we think - what Aboriginal people think will work for their people in their community, and there's some examples of that. And so those programs have been given priority because they've been identified through self-determination principles.

COMMISSIONER HUNTER: But you agree there's a lot more work to be done?

10 THE HON. JACLYN SYMES: Absolutely. I think coming back to, as I said, the consultation, meaningful partnership and then decision-making, there's elements of self-determination that should be throughout all of that.

15 COMMISSIONER WALTER: Can I just make one final thing. It's worrying me from your last comment. That we have acknowledged that there's systemic racism, it's all through, it's come from colonisation, that's acknowledged. Yet what's to be done about it seems to be about individual change. I would argue that you can't change a systemic racism and you can't - unless you actually make systemic change. So individuals making change is not going to lead to a change in the system. So the racism will persist. You can have racism without racists.

20 THE HON. JACLYN SYMES: When we talk about racism against Aboriginal people, I think it's incumbent upon government leaders to think about how we can ensure that the aspirations of Aboriginal people are the same as broader community aspirations. We need to ensure that we are not just focusing on the deficits and the problems to fix through racism, through a lens of racism, "We need to help the Aboriginal people be better". That is racism, in a sense.

COMMISSIONER WALTER: I concur.

30 THE HON. JACLYN SYMES: So, for me, flipping it and identifying the positives and embedding them as a - you're not doing it to counter racism, you're doing it because it's the right thing to do, in a sense has a positive impact on reducing racism.

COMMISSIONER WALTER: But even so, I will go back to my point, you actually need systemic change to address systemic racism?

35 THE HON. JACLYN SYMES: Agree.

40 COMMISSIONER LOVETT: It would be good to understand - you talked about investment and a lot of the comments made were around investing in justice, the department, courts, etcetera, it would be good to understand the balance of investment to community, into how much government is investing internally in itself towards that objective of self-determination, better outcomes for our people in the justice system. Do you have any sort of comments? But I think it would be good to understand, yeah, how much investment is going out and inwards.

45 THE HON. JACLYN SYMES: Difficult for me to sort of talk about figures but I - if - let me know if I'm going down the right way with this answer. The justice system is picking up disadvantage and issues at the pointy end, at the tail end. And that's expensive. There are



many opportunities for government in particular to intervene in people's lives to address issues earlier.

5 We know that most people in the justice system, particularly in custody, have underlying reasons they're there, whether it's trauma, disability, poverty - there's so many factors that should be supported before coming into contact with the justice system. So identifying opportunities for investment, whether it is in kinder. I think that our government's policy in relation to free kinder for three year olds and four year olds is going to be a fantastic intervention and fantastic opportunity to identify families that need support so that those  
10 young kids don't then come into contact the youth justice system or you're helping to prevent intervention from child protection and the like. So in terms of where your investment as a government goes, of course we have to respond to crime, to community safety but you can actually avoid a lot of those costs if you are investing in support for families, for children, for young people and for first time offenders.

15 COMMISSIONER HUNTER: We - Sorry, our community has been here before us asking for investment in early intervention for many years. You just talked about kinder, early kinder. Some of our families don't access that because of the Stolen Generation. Sometimes that's where kids were first removed in their families. So they don't want to access these places  
20 because they are not safe.

We need that early investment in our Aboriginal orgs. They're already there. They are screaming out for money. They have wraparound services for our parents to be able to progress the children to school, through kinder. They meet all their milestones. They support  
25 the families. And I think the advocacy that, you know, they do through the Aboriginal Justice Caucus and through our agencies and through our community, it just doesn't seem to be heard.

30 It just - we've heard time and time again, "We have consulted, we have consulted" but the money just doesn't go there and it's really getting frustrating. As a mum myself, I've seen it all firsthand. And as an Aboriginal woman, supporting some of these families is really difficult because you know if you invested in these early years, we have so much better outcomes for our people. We wouldn't be spending so much at the other end, you know, in the child protection system, in the youth justice system, in the criminal - you know, I just don't understand.

35 MR MCAVOY: Attorney, on that point, the Commissioners have expressed some views about the expenditure of 1.1 billion on a new remand centre at Western Plains and the fact that was a response, seemingly, to the bail reforms in 2018, it's now not in use, and the difficulty for community organisations to even get small grants for the early intervention work, and the  
40 disparity between such a large spend and the very small amounts that community organisations need to deliver those very important front-end services, early services. Is there any comment you can make, Attorney, in relation to that type of concern that the Commissioners have expressed?

45 THE HON. JACLYN SYMES: Well, I agree with the Commissioners' comments in relation to investment in early intervention is something that I know we have been talking about for a long time, and I remain of that view. I've remained of that view since my first day of entering

into government, frankly. I'd love to spend less at my end. I'd love to be spending all of it at the front-end, and I think that that's something we have an obligation to work on.

5 In relation to the allocation of resources, coming back to some of the earlier comments I made about responding to what Aboriginal people say is best for their communities, identifying the programs and supporting the programs in an enduring way. There's some fantastic work going on out there with Aboriginal-led organisations and I take - I thank them for their work. I take motivation from talking to them and hearing about their stories on the ground.

10 And, in terms of the balance of where government spends the money, there are competing interests, but an interest of mine, an interest of many people in government, is addressing disadvantage, helping vulnerable people. And we're very committed to investments in those programs. You always want more money for those programs but, hopefully, we can do what we can to continue to support them and tilt that balance. I don't want to build any more  
15 prisons. Of course I don't. I would like to build more culturally safe kinders, family programs. Of course that's a much better use of taxpayer funds than a prison.

COMMISSIONER LOVETT: I think earlier my comments were - or my questions were about the investment in - you know, we've seen a growth in, I guess, the public service around  
20 when you are funding programs that staff internally have to, I guess, look over and monitor process around how these ACCOs and so forth are reporting. And it was probably more around, again, there's a lot of investment internally but not as much goes out to community as well.

25 COMMISSIONER BELL: Counsel, can I ask a question about systemic racism. As a former Supreme Court judge, I'm really appalled that systemic racism exists in the system, and I agree it does and I have seen it. But the element of it that concerns me in relation to Aboriginal people is the undermining of their confidence in the system that it brings about. If people don't see the law as a source of protection for them but, rather, a source of harm for them, then  
30 clearly the law is not operating equally. And I can't see how we can possibly expect a system based on respect, mutual respect for equal human dignity being the foundation of a Treaty, unless the law is seen to operate equally as regards all partners.

35 We have heard evidence of people expressing that want of confidence in the law. A really good example of how - of the inimical consequences is the lack of any serious legal challenge about the exercise or mis-exercise of child protection decisions. There should have been, in the Supreme Court, many cases that have looked carefully at the exercise of those discretions from the point of view of the Charter, from the point of view of the foundational public law principles. That hasn't happened.  
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45 It has happened in relation to areas like mental health and some others, but not there, and one of the reasons, I believe, is that people haven't seen the law for them. They just see it operating in the way that they expect it to operate, which is unequally, along racial lines. So before my next question, I wonder whether you would reflect upon the need to attack systemic racism from the point of view of restoring confidence by Aboriginal people in the law itself.

THE HON. JACLYN SYMES: Yes, thank you for your comments, Commissioner Bell. I think - I agree with a lot of that and there's a lot of different angles we could go down in the issues you have raised.

5 COMMISSIONER BELL: Yes.

THE HON. JACLYN SYMES: I think it's incumbent upon courts to be more culturally safe, and I think that we have made advances in that in relation to Koori Courts. They're a similar kind of feel to this Commission in terms of being less intimidating for Aboriginal people,  
10 involving Elders. If anybody has the opportunity to check out the Bendigo Law Courts, I'd certainly urge you to do that. That was certainly a project both through infrastructure and through programs, really wanted to be a place that could be positive for Aboriginal people, not just somewhere that you came to get told off and potentially given a criminal consequence.

15 Ensuring, building that confidence, breaking down that it's not just the law imposing outcomes on Aboriginal people but working with Aboriginal people about how the law, how courts, how justice can be a positive intervention in people's lives. I think we have got good examples of that, but there's certainly more to do. I know how, or I hear from stakeholders how  
20 intimidating it is to have a conversation with a police officer if you're Aboriginal because of generational trauma. And I understand that.

Courts is similar. I've heard awful cases of people on the stand feeling uncomfortable and just pleading guilty even if they haven't been asked to plead guilty or not. The system has not been accommodating for Aboriginal people, and we acknowledge that and we need to ensure that it  
25 is much more culturally safe place so that you can explore those positive interventions. As we were touching on before, often when an Aboriginal person has come into contact with the justice system, it's a feature of several failures of opportunities or missed opportunities to intervene at a more appropriate time. So ensuring that you have an appreciation of that, I think, is really important for the justice system to be more responsive to Aboriginal people.

30 COMMISSIONER BELL: Thank you. And my second question goes to the topic of the need for there to be systemic or structural change as part of the response to systemic racism. The Charter was intended to be such a change. There is an equality right in the Charter. It's defined by reference to discrimination in the *Equal Opportunity Act*. That includes racism.  
35 To exercise a discretion by reference to a racist criteria is a plain Charter breach. The Charter was introduced in 2006, as you well know, and yet there doesn't seem to be the kind of understanding of obligations under the Charter within Charter-bound agencies as I would expect there to be this long after the event.

40 Have you reflected upon whether the Charter is strong enough to make an effective contribution to preventing racism and to providing redress when it occurs?

THE HON. JACLYN SYMES: I've reflected in the sense that you're not the first person to raise concerns of that nature with me. I think ensuring that there's greater awareness of the  
45 Charter, I think it's sort of - it's been around for 20 years and it's embedded in a lot of processes. But is it understood and well-known? Probably not.

Certainly, conversations that I've had with the Commissioner at VEOHRC in terms of the role about ensuring that we can explain better the rights and responsibilities of people. I think it is well understood in government agencies, perhaps to the point where it has got a little bit taken - taken - it's not as front and centre as what it was, so it's become so regular process and perhaps maybe a refocusing our attention on its purpose isn't a bad thing to consider.

COMMISSIONER BELL: Thank you.

MR MCAVOY: Thank you, Commissioner Bell. I just want to take you now, Attorney, to an issue involving this particular Commission before moving on to issues of substantial reform - substantive reform. This Commission is the first of its kind in Australia and, in this respect, the First Peoples' Assembly of Victoria and the Victorian government are clearly showing great leadership. But the Terms of Reference for this Commission are far-reaching, and the level of inquiry needed to be undertaken has and will continue, it seems, to clash with the need for Cabinet confidentiality.

You're aware, I'm assuming, that there has been some difficulties with the production of documents and the use of documents in this Commission, are you?

THE HON. JACLYN SYMES: Yes.

MR MCAVOY: I suggest to you that if the historic and continuing causes of injustice to First Peoples in Victoria is to be properly understood by the Commission and by the public, there's a need for a degree of transparency about this process, the evidence before it. You'd agree with that?

THE HON. JACLYN SYMES: I would.

MR MCAVOY: I suggest to you that it appears that a specific model of document production and use will be needed to facilitate fulfilment of the Terms of Reference of this Commission going forward in future hearings, and I ask, is the - the - search for an adapted or different model which can better suit the needs of this Commission something that the government is wanting to participate in?

THE HON. JACLYN SYMES: Well, we have been participating in a process to be very transparent, to provide the documents necessary for the Commission to do its very important work. As Attorney-General and as Chair of a Cabinet committee that considers such matters such as public interest immunity and the like, I've had to bring some perspective to some decisions in relation to documents that bring me outside of a participant of Yoorrook to make sure that I can apply the principles of what are important to the fundamental foundations of government in protection of Cabinet-in-Confidence, Cabinet discussions. But we have tempered that with what is required of the Commission and we have made decisions that have gone further than what we have in the past in relation to ensuring that as much material as possible can be provided to the Commission.

And to my knowledge, it's only the documents that go to, effectively, the conversations within the Cabinet room that have been withheld, and with respect, I stand by that decision. Cabinet

decision-making processes within the existing framework of government is a series of people bring a series of views, can have arguments, can have robust discussions and then a position is formulated and everyone gets behind that decision and that's communicated to the community and we stand by that.

5

And I think if you start to infiltrate that process too much, you risk that robust debate, you risk frank and fearless advice from departments, because that's important to government decision-making. So whilst we have been, in my mind, as accommodating, almost, as possible to the point of wanting to - of course we want to give the Commission everything, but there are some materials that have been withheld for that very reason, that very small cohort of documents in relation to the Cabinet room.

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MR MCAVOY: It is, in many cases, I might suggest, Attorney, the very documents of which you were last speaking that go to the heart of the decision-making processes and the heart of the structural issues that the Aboriginal people in Victoria face. Now, the Commission is very alive to the need for Cabinet confidentiality. But if the Commission were to seek to find some further adapted mechanism to deal with those documents in a way that allowed them to be more transparent in their use, the question is: is that something that the government would continue to participate in that discussion?

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THE HON. JACLYN SYMES: I think the conversation has -

MR GRAY: I object. Would my learned friend please consider clarifying the reference to being more transparent in that question? There is, I fear, a risk here of confusion about a few different concepts. One is disclosure of documents to Yoorrook, and I on that point add that, with the exception of notes of discussions in Cabinet, there has been a great deal of transparency.

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However, many of the documents that go to Cabinet but fall short of disclosing actual discussions in Cabinet have been subjected to a form of claim under which the government asks Yoorrook not to disclose that material more generally to the public at large. So there's two tiers of transparency involved here, and I would ask my learned friend Mr McAvoy to be clear about what issue he is directing his question to.

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COMMISSIONER LOVETT: Can I jump in and make a comment.

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MR MCAVOY: Commissioner, may I just respond so that we are clear. The transparency of which I speak is the obligation of this Commission to be able to be transparent to the community and particularly the Aboriginal communities. It's not the question of whether the documents have been provided to Yoorrook but, rather, what can be done with them and how it can be done in a way that satisfies the community that the truth is being pursued, and that matters aren't been dealt with secretly. Commissioner.

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COMMISSIONER LOVETT: Just to complement that. You would be well aware, and I know you have been tuning in, that we did have to call a directions hearing in April - two, sorry - about this fact. Not to the level of detail you're talking about, but broadly, we did have

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to ask for government to come to the table in good faith and be more transparent with the documents as well. I just wanted to put that on there.

MR GRAY: Yes, thank you Commissioner.

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MR MCAVOY: To be clear, it's not suggested there hasn't been work to date. There has been work to date but, Commissioners, the proposal being put to the Attorney is that there can be more work done to figure out a way in which this Commission might be able to be able to be more open with the Aboriginal community who are demanding answers. And, Attorney, I'm not sure whether you answered that proposition when I put it to you earlier, but is it something that the government is prepared to do with Yoorrook?

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THE HON. JACLYN SYMES: I think that the conversations about documents have been ongoing, and it is always the intention for government to be as accommodating as possible. I think that - I don't know how many documents have been handed over. I know it's a lot. I haven't had the opportunity to review all of them personally. But we certainly want you to have what you need. So more than happy to continue those conversations.

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MR MCAVOY: Thank you.

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COMMISSIONER HUNTER: Mr McAvoy, can I just say, we know - we knew this was coming and we know there's a lot that we are going to ask for and there's a lot. It's from 1788, our Terms of Reference today. So I don't think anything is a surprise to anybody, and just that waiting or arguing about documents - our time's running out here to get this Commission done, and I just agree with Mr McAvoy and Commissioner Lovett that we need to be timely in these responses because we're having money going into directions hearings or arguments about documents that actually could go towards going out and hearing the truth about our community. So I just wanted to put that on the table.

25

MR MCAVOY: Thank you, Commissioner. Attorney, there are a number of matters within your portfolio which you've addressed in your witness statement. The first of which I propose to take you to is the issue of public intoxication or public drunkenness. You were sworn in as Attorney-General on 22 December 2020.

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THE HON. JACLYN SYMES: I was.

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MR MCAVOY: And so it's the case that the *Summary Offences (Decriminalisation of Public Drunkenness) Bill* had already been tabled in Parliament by the time were you sworn in as Attorney?

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THE HON. JACLYN SYMES: Yes.

MR MCAVOY: But, of course, you picked that up as one of the important matters that you had responsibility for.

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THE HON. JACLYN SYMES: Correct, and took passage of it through the Legislative Council.

MR MCAVOY: And that passed through the Legislative Council in February 2021.

THE HON. JACLYN SYMES: That sounds right.

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MR MCAVOY: And you have had carriage of that matter since that time.

THE HON. JACLYN SYMES: For the legislation, yes.

10 MR MCAVOY: And on the 9 April 2020, before you were sworn in, the Coroner's report into the death of Aunty Tania Day was released. Are you familiar with that date or do you accept it from me?

THE HON. JACLYN SYMES: I do.

15

MR MCAVOY: And that report, you agree, was highly critical of the failure of the Victorian government to repeal the public drunkenness laws.

THE HON. JACLYN SYMES: Indeed.

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MR MCAVOY: However, in 2022, you had the responsibility for bringing before the Parliament the *Crimes Amendment Bill*, deferring the commencement of the *Summary Offences Act* to 2021; that's correct?

25 THE HON. JACLYN SYMES: Yes.

MR MCAVOY: There was some - a great deal of discussion about the reasons for that deferral and the commencement of the repeal of the public drunkenness laws at the time, and the commencement of the repeal was deferred until November this year.

30

THE HON. JACLYN SYMES: Correct.

35 COMMUNITY MEMBER IN HEARING ROOM: (Indistinct) drunk and (indistinct) drunken (indistinct) pneumonia (indistinct) get off the road (indistinct) then they tried to handcuff me (indistinct) cops over here, pin me down around on my stomach. I couldn't breathe and I'm yelling out I can't breathe. (Indistinct) they come and (indistinct) and I'm charged (indistinct) charges (indistinct) yeah (indistinct) for vagrancy.

40

COMMISSIONER LOVETT: All right. Thanks.

SPEAKER: (Indistinct).

45

COMMISSIONER LOVETT: Thank you, Uncle. We are going to ask questions about this particular important subject, all right? Thanks, Uncle.

MR MCAVOY: Thanks, Uncle. Now, Attorney, the Minister for Mental Health and the Minister for Health also have responsibility in respect of the public drunkenness reforms.

THE HON. JACLYN SYMES: Implementation, yes.

5 MR MCAVOY: The implementation. I might just ask you to go to paragraphs of your witness statement, paragraph 150 and 151, and if you could just - sorry, 149 and 150, I'm sorry, and just read those paragraphs for the Commissioners.

THE HON. JACLYN SYMES:

10 *"To deliver the government commitment of reducing the overrepresentation of Aboriginal people in the justice system and supporting a true transformation away from a police response to public intoxication, the government will not legislate replacement powers for Victoria Police to respond to individuals who are intoxicated. Victoria will not have a protective custody regime, and a person will not be placed in a police cell solely on the basis of being*  
15 *intoxicated in public.*

*I am proud of the fact that Victoria is the first jurisdiction in the country to decriminalise public drunkenness without implementing replacement powers for police, delivering a genuine shift away from the archaic laws that have so disproportionately impacted Aboriginal*  
20 *communities. This decision was based on extensive consultation with Aboriginal community members, particularly the Day family, VALS and the AJC, and research into the experience of other jurisdictions which collectively demonstrated the risks of continued coercive police approaches to public intoxication in a decriminalised environment."*

25 MR MCAVOY: Thank you. Just to be clear, while the public intoxication laws have had a disproportionate effect on First Peoples in Victoria, the policy underpinning the reform is that – is broader, in that it's simply inappropriate to arrest and deny any person their liberty solely because they are intoxicated; is that correct?

30 THE HON. JACLYN SYMES: Could you repeat that?

MR MCAVOY: So while Aboriginal people are disproportionately affected, the underlying principle which supports the reform is that it's simply inappropriate to arrest and deny people their liberty simply because they are intoxicated.

35 THE HON. JACLYN SYMES: The underlying reason for this policy position was to avoid Aboriginal people dying in cells. That was what drove the reform. Being put in a cell for merely being intoxicated was something that we saw as a contributing - could contribute to deaths in custody. That was the motivating policy driver for this reform. It is a direct  
40 response to Aboriginal stakeholder advocacy, in my view. I acknowledge that other people will benefit from the reform but the policy driver was Aboriginal deaths in custody, for me.

MR MCAVOY: And do you acknowledge that the public intoxication laws are generally applied by police exercising their discretion as to whether somebody appears to be intoxicated  
45 or not?

THE HON. JACLYN SYMES: Yes.



MR MCAVOY: And it's public knowledge, of course, that in exercising that discretion, they obviously turn a blind eye to intoxication by the mainstream community at sporting events such as the Melbourne Cup.

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THE HON. JACLYN SYMES: Yeah, I think that's right. I don't think you will see many non-Aboriginal women who have been left by their friends on the side of a road drunk being picked up and put in a police cell. You don't see that. What we do know -

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COMMUNITY MEMBER IN THE HEARING ROOM: (Indistinct) if you have trouble getting home, they are to get you home somehow, get you home safely. I had one copper (indistinct). Instead of them coming up and treating me like they did, they should have come and talked to me. Any problem, it's their job to get me home safely, concern is (indistinct). Yeah, and -

15

COMMISSIONER LOVETT: Thanks Uncle. Not to takeaway from what you're saying here, I think we'll give the opportunity for the Attorney to answer the questions about this particular point. Maybe not your case directly, but just more broadly about the system issues around this particular topic.

20

SPEAKER: Yeah, alright.

COMMISSIONER LOVETT: It's really important.

25

SPEAKER: Important.

COMMISSIONER LOVETT: And we want to give the Attorney an opportunity to answer questions about this. Alright? Thanks, Uncle.

30

MR MCAVOY: Thank you. As you've referred to in your statement, Attorney, the issue of the particular impact on Aboriginal people of the public drunkenness laws has been known since the Law Reform Commission Report in 1989 and the Royal Commission into Aboriginal Deaths in Custody report in 1991?

35

THE HON. JACLYN SYMES: Yes, I reflected on these matters in the debate in the chamber, that it was long sought after and overdue.

MR MCAVOY: And as a result, over that period of 34 years, it's obvious that many Aboriginal people have been the subject of public drunkenness charges, notwithstanding the recommendations that those offences be reformed or repealed.

40

THE HON. JACLYN SYMES: Disproportionate impact on Aboriginal people is undeniable.

MR MCAVOY: Just at a broader level than just your immediate response, are you in a position to offer the Commissioners any view as to why it has taken 34 years for this reform to come about?

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THE HON. JACLYN SYMES: It's difficult for me to provide excuses on it or even reasons. Other states have tried, or they've effectively decriminalised but have different ways of doing that, and the experience and advice from particularly people with lived experience is that it's not true decriminalisation in other states. I know it's been long on the agenda of many  
5 Aboriginal advocacy groups on AJA in terms of wanting to decriminalise public drunkenness for that underlying reason, that specific harm can be caused to Aboriginal people in custody, and just being put in custody for being intoxicated is not appropriate.

10 I cannot reflect on why it took so long, only that I wished it didn't take so long, and I think that the tragic passing of Tania Day - and I've met with her family - was certainly the catalyst for change in Victoria. It should have happened before it, but it's now happening and it will be enacted in November this year.

15 It was not - delaying it wasn't something that I was particularly proud of, but it was something that was necessary, and I spoke to the Day family about the reasons that that was important. So it will be important that we stick to that date, and I have a firm commitment to you and to the Aboriginal community that have been long advocates of this reform that it will be enacted by November of this year.

20 MR MCAVOY: Thank you, Attorney. In this reform process that's currently underway, one of the organisations which has been vocal in its opposition has been the Police Association of Victoria. You are aware of that?

25 THE HON. JACLYN SYMES: Yes.

MR MCAVOY: Yes. The Secretary of the Police Association of Victoria, Mr Gatt, has previously expressed concerns that the proposed reforms were dangerous virtue signalling. Have you heard that expression used in relation to these reforms?

30 THE HON. JACLYN SYMES: Similar language, yes.

MR MCAVOY: He made complaints that the health response would cost millions of dollars, and I suggest to you that the comments attributed to Mr Gatt were, whilst - sorry, I will put it in this context, whilst he has a role in terms of representing the members of the Police  
35 Association, they can only be understood as an attempt to undermine the government reform. Would you agree with that?

40 THE HON. JACLYN SYMES: Look, I can't give you an answer as to the intention of Mr Gatt's language. That's a matter for him. Mr Gatt has been vocal in some of these issues and is entitled to his opinion.

MR MCAVOY: But on its face, it didn't assist the reform process?

45 THE HON. JACLYN SYMES: In my - in my dealings with this reform, it wasn't - it wasn't comments that led to the delay, if that's what you're asking. The reform was settled and agreed in the Parliament in February '21, and it is in various stages of implementation through four trial sites. The delay is attributed predominantly to impacts on the health sector,

understandably, who were focused on dealing with the pandemic. The four trial sites are in various stages of implementation with a view to implementing the full reform by the end of the year, November.

5 MR MCAVOY: The term "virtue signalling" is one with which you are familiar?

THE HON. JACLYN SYMES: Sure.

10 MR MCAVOY: And I suggest to you that it has an understanding of implying that somebody lacks sincerity and is merely doing what they're doing for some effect without any real commitment to the issue. Surely that can't have been helpful to the reform process that you're trying to deliver.

15 THE HON. JACLYN SYMES: It didn't distract me from my commitment to this reform. I think the most compelling audience, the most impactful people in relation to who this means something for was the Day family, to me.

MR MCAVOY: Did the attitude of the Police Association to this reform have any impact on the conduct of the tests at the test sites?

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THE HON. JACLYN SYMES: I can't answer that.

25 MR MCAVOY: In the - I'm going to stay with the Police Association for a moment, but in the criticisms that were publicly made in relation to the public drunkenness reforms, there was a call for replacement powers to arrest and to transport, detain and move people on who were drunk. And one of the points that you, in your statement and in the press, have made clear is that the Victorian government has not given the police what they are calling replacement powers. Can you just explain to the Commissioners the reasoning behind that, the rejection of that call?

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35 THE HON. JACLYN SYMES: We wanted to bring about cultural change, legislative reform that wasn't - that was a true decriminalisation. We have heard from other states that have coercive or residual police powers remaining a decriminalised environment for intoxication that it really didn't bring about the cultural change and impact that they would have - that the intention of the decriminalisation had. So we've gone down the route of ensuring that we want a true health response to public intoxication. That's not to take away police's ability to deal with inappropriate behaviour, disorderly conduct, crime, aggression and the like. This is to ensure that if someone is merely drunk in public, that is not a factor to be put in a police cell to sober up.

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45 We want to have investment in health responses or, indeed, where appropriate, somebody to just go home. Not arresting someone for just being drunk is something that we are committed to. We think that it will bring about a greater - a better health outcome for Aboriginal people in particular who we know have been disproportionately impacted in the past by being arrested, as Uncle has drawn our attention to today, having a few beers.

MR MCAVOY: Indeed, I suggest to you, Attorney, that the reference to the ability to transport or detain or move people on as replacement powers is indicative of an understanding of the public drunkenness laws as being much broader than what they are and perhaps being used for collateral purposes.

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THE HON. JACLYN SYMES: I accept that as a statement.

MR MCAVOY: It also appears that there has been used on occasions as an alternative to the public nuisance laws, an entirely different offence. Do you want to comment on that?

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THE HON. JACLYN SYMES: I don't have - what will be interesting is to - what's important to me when these laws are enacted in November is to pay really close attention to it. We are aware that there could be unintended consequences or we hope there's not the consequences of upcharging, for instance. I don't want to see people ordinarily charged with being intoxicated in public get a more serious charge to deal with that behaviour. We don't want to see that happen, and that's an ongoing conversation with the police and the agencies on the ground and, indeed, people with lived experience.

15

That's why, rather than have a review of this legislation in a year or two, which is often what happens, we've made the decision to have an implementation monitor, for example, so someone that can oversee the legislation, speak to the stakeholders, Aboriginal stakeholders. This will be through an Aboriginal lens, coming back to the intention or the main policy driver for this is to avoid Aboriginal people in custody for merely being drunk. So having somebody that is overseeing this reform to report to government, department, be transparent about how it's working, is going to be really important because it is a difficult, complex area of public behaviour and responding to issues.

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25

And the police want - you know, their job is to protect people, and that includes people that are drunk and there are going to be challenging issues where, what do you do when you come across someone that you're concerned about and we want to make sure that there are alternatives for police to be able to refer to and, indeed, opportunities for people to have avenues to get home, access health, have a friend. We think we can do better. It's not just a police response. It's not just a health response. I think there's a broader community response.

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COMMISSIONER WALTER: Can you tell me a bit more about - I'm interested there's going to be oversight of this right from the start. Can you tell who is going to oversight, where it will be placed and how they will report and monitor?

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THE HON. JACLYN SYMES: Yeah, we are just working that out now and we want - I think we - implementation monitor sounds like the wrong word, and I will get back to you if I've described it as the wrong word, but, effectively, a guardian of the legislation. We want somebody that in real time can report to government about how it's working, rather than me being presented with a series of stats a year or two after that demonstrate there's a problem. I don't want to be in that situation. We know that this is difficult. We know it's challenging for police, for health providers and for the community. So we want to see how it's working so we can tweak the system, if we need to, as it's rolled out.

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45

MR MCAVOY: You spoke about upcharging. Clearly there's a challenge - and I understand from your discussion on that point that it's something that those in charge with the design of the system are fully aware. But, clearly, there's a challenge to ensure that the path of least resistance for an officer is one that allows for a health response and it doesn't incentivise the criminalising conduct in another way. Do you agree with that?

THE HON. JACLYN SYMES: I agree with that. And in my discussion with police officers, they would much prefer drunk people would be dealt with by health providers and not them.

MR MCAVOY: That may be so with some of the police officers you have spoken to, Attorney. Much of the evidence here in this Commission relates to the circumstances that our Uncle in the audience has spoken about, where that's - it's being used for, perhaps, other purposes.

THE HON. JACLYN SYMES: If there's other options, hopefully that's much better.

COMMISSIONER HUNTER: Can I just ask, how do you - I think you said the word upcharging. How do you monitor that? That people aren't getting another charge?

THE HON. JACLYN SYMES: That's why it will be important to have a monitor, but we have the Crime Statistic Agency and the like who can help with the collection of data, and I can come back to the Commission when we are a bit more firmed up in exactly what that will look like. But I'm alive to the issue that that could be a problem and we want to make sure it's not. So the way to do that would be a close eye on it.

COMMISSIONER: Yes, that will be -

COMMISSIONER LOVETT: Will the oversight mechanism have an Aboriginal lens or a stakeholder or someone involved in that?

THE HON. JACLYN SYMES: That is the absolutely intention, yeah.

COMMISSIONER LOVETT: There has been a couple of references, and I asked the question earlier on about what partnership meant to you, and you referred sometimes to the word "Aboriginal stakeholders" -

THE HON. JACLYN SYMES: Yes.

COMMISSIONER LOVETT: - in your responses. And the Aboriginal stakeholders, in my view and my knowledge of our community here, are Justice Caucus members. So I just want to sort of understand the stakeholders - partners have more weight in - and authority, I would sort of feel, generally thinking, around that those words "partners". You know, you listen to, you respond and engage. But, yeah, I just want to clarify, yeah, what do you mean by "Aboriginal stakeholders" because, yeah.

THE HON. JACLYN SYMES: It's - I guess it's a good point. It's a collective term for the groups of people that I value in terms of who I work with: So VALS, Djirra, AJAC, RAJAC

chairs, Caucus co-conveners would be people that I regularly speak to. I guess one of the best parts of my jobs or one of the things I like enjoying is not just speaking to the leaders ever those organisations, but visiting those organisations and talking to the workers on the ground, because I think one of the most valuable things for me as the Attorney and as thinking about  
5 how laws and policies and how they are going to apply, listening to people that are either have lived experience or are working and supporting people with lived experience is actually really valuable.

And so I wish I had more time to do that because it is one of the best parts of the job, and you  
10 learn so much and you can think about the practical application or the consequences for your decisions. So when I say - I don't mean to diminish the value of their contribution, but I guess it's a collective term of I really value people's feed-in, and many of them are partners and some of them, I guess, are just people that have got good stories to tell me.

15 COMMISSIONER LOVETT: I think it's really important because a lot of the time, you know, our advocacy is kind of diminished by the word "stakeholder" in a sense, so I think it's important we understand where you are coming from. Also as well, I mean, as you acknowledged in the outset, though, that we do have inherent cultural rights to this country which elevates us way beyond the terminology and weight of a "stakeholder".  
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THE HON. JACLYN SYMES: I'll take that on board. I like that. I will think about that language.

25 COMMISSIONER LOVETT: Yes. And particularly in the context of our aspiration that we want to turn into an actualisation around Treaty as well. We have got inherent cultural rights to this land. And I'm probably sound like I'm banging on, but we are the First Lore People of this land, and I just wanted to really make that point. Thank you.

30 THE HON. JACLYN SYMES: Thank you for making that point. I appreciate it.

MR MCAVOY: Thank you, Commissioner. Just following on from that point on - not the point on partnerships, but the point in relation to monitoring, are you aware of any estimates or actual figures of any savings or additional costs that the police service might have from officers not being involved in attending to public drunkenness matters?  
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THE HON. JACLYN SYMES: No.

MR MCAVOY: Is it something that the government proposes to undertake?

40 THE HON. JACLYN SYMES: We've got statistics on how many arrests have been made for public intoxication charges. I can certainly provide you with that. But it will be resource-intensive and expensive for a health model as well. So I guess in relation to the motivation for this policy, this isn't an economic saving driver. This is doing the right thing by people policy, I would suggest.  
45

MR MCAVOY: It's not a suggestion that the savings that the police service may achieve is a driver, but it's simply to draw out any figures that may be available as to whether the police

service is making savings from not having to engage in the detention of people for drunkenness.

THE HON. JACLYN SYMES: I can take that on notice.

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MR MCAVOY: Thank you. Commissioners, it's 10 to 11. We have been going since 9 o'clock. It might be a suitable moment for a morning tea?

CHAIR: 15 minutes.

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MR MCAVOY: Thank you.

CHAIR: Yes, we will adjourn until 11, thank you.

15 MR MCAVOY: Shall we resume at 11.05, Chair?

CHAIR: 11.05, yes.

MR MCAVOY: Thank you.

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**<ADJOURNED 10:49 A.M.**

**<RESUMED 11:07 A.M.**

25 MR MCAVOY: Thank you, Chair. Attorney, I just wanted to take you back to a topic that Commissioner Bell engaged with you on, a little bit before the morning tea break, in relation to the *Victorian Charter of Human Rights and Responsibilities*. Are you aware that the definition of discrimination, racial discrimination as it appears in the Charter relies upon the *Equal Opportunity Act* for its definition?

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THE HON. JACLYN SYMES: Correct.

MR MCAVOY: Are you aware of the situation with the definition of "services" as it currently operates within the *Equal Opportunity Act*, where there are questions about its applicability to police officers and custodial officers. Are you aware of that?

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THE HON. JACLYN SYMES: Yes, I am.

MR MCAVOY: Is the reform of the *Equal Opportunity Act* to ensure that that gap in both that Act and the Charter are closed?

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THE HON. JACLYN SYMES: I'm aware of the problem, not necessarily landed the solution. I acknowledge that the *Equal Opportunity Act* has some limitations in how it's applied to provision of services and how that's defined. What I'm not yet satisfied of is that by changing the definition we would be fully across the consequences. So I'm more interested in identifying the problem and solving the problem and making sure that legislative change enacts that. I'm a little - just having - not having had detailed advice on this, I wouldn't be in a

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position to commit to a change of the definition without further consideration about the ramifications of that. But I acknowledge that there are limitations in the ability for people to make complaints under that system.

5 I think the broader conversation about police oversights and the ability to make complaints and how they're dealt with is relevant to the applicability of the *Equal Opportunity Act* and also we have our anti-vilification law reform that we discussed earlier today, which would also potentially be a vehicle to accommodate how those complaints are dealt with.

10 MR MCAVOY: Thank you. I will draw it to your attention to the Victorian Equal Opportunity and Human Rights Commission has made a submission to this Commission of inquiry and it's recommended that the Act should be amended to include a provision that some of the other Australian jurisdictions have, which is amendment to prohibit discrimination in the administration of government laws and programs. So that's a matter that you, as  
15 Attorney-General, can take into account the recommendations of the Victorian Equal Opportunity Commission in formulating an appropriate response?

THE HON. JACLYN SYMES: Yes, I commit to that.

20 MR MCAVOY: And is it something that's going to be dealt with, or could be dealt with in this current round of reform?

THE HON. JACLYN SYMES: Anti-vilification reforms, yes.

25 MR MCAVOY: Thank you. I now wish to take you, Attorney-General, to the issue of the raising the minimum age of criminal responsibility in Victoria. Do you have, at your fingertips, Attorney, the number of children that are involved in the 10 to 12 age bracket and the 12 to 14 age bracket in terms of interaction with the criminal justice system?

30 THE HON. JACLYN SYMES: In the 10 to 12 bracket, the most recent data for an annual set is around 150 children alleged to have committed a crime. That is almost half of what it was in 2017. The numbers are higher for the 12 and 13 year olds, and I will get you that figure because it's not coming to me right now. But it's higher.

35 MR MCAVOY: It is higher, but the figures in all respects are relatively low, in the scheme of things, for both categories; would you accept that?

THE HON. JACLYN SYMES: Absolutely, yep, and trending down.

40 MR MCAVOY: And do you agree that both of those categories, the under 12 and the under 14, there's a disproportionate ratio of Indigenous children coming into contact with the criminal justice system?

THE HON. JACLYN SYMES: Yes.

45 MR MCAVOY: And that's concerning?



THE HON. JACLYN SYMES: Absolutely.

5 MR MCAVOY: And you're also familiar with the research that says - suggests that once a child comes into contact with the criminal justice system, the likelihood of continued contact with the system is greatly increased?

THE HON. JACLYN SYMES: Yes, I'm aware of that. Contact amounts to more likely future contact, and incarceration almost guarantees it.

10 MR MCAVOY: And so it's not necessarily being charged and convicted, but simply being dealt with in the criminal justice system is enough to expose a child to that risk of greater contact later in life?

15 THE HON. JACLYN SYMES: It can be, although I would caveat that with programs or diversions or activities that are run by justice to respond to young people can be positive.

MR MCAVOY: Are you aware of data that supports a proposition that children, young children, or young people engaged in antisocial behaviour tend to grow out of that type of conduct as they mature?

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THE HON. JACLYN SYMES: Yeah, we call it ageing out.

MR MCAVOY: Yes. You're also - I ask whether you are aware that a high proportion of first-time interaction with the criminal justice system in the 10 to 14 age bracket of Indigenous kids are subject to child protection orders?

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THE HON. JACLYN SYMES: Correct.

MR MCAVOY: And we know that in almost all circumstances, those children will be suffering some form of disadvantage and likely to have some untreated trauma in their history?

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THE HON. JACLYN SYMES: Yes.

35 MR MCAVOY: The standing Council of Attorneys-General met on 28 April this year?

THE HON. JACLYN SYMES: We did. It was last week, I think.

MR MCAVOY: And you attended that meeting on behalf of the State of Victoria?

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THE HON. JACLYN SYMES: I did.

MR MCAVOY: Each of the other states and Commonwealth were represented by their respective Attorneys-General?

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THE HON. JACLYN SYMES: Yes.

MR MCAVOY: And as a result of that meeting, a communique was issued?

THE HON. JACLYN SYMES: Yes.

5 MR MCAVOY: Prior to your attendance at that meeting, did you have some expectation that all jurisdictions would agree to raise the minimum age of criminal responsibility to at least 12 years of age?

10 THE HON. JACLYN SYMES: At a prior meeting last year, all states and territories agreed to - and the exact wording would be in that communique, but agreed to advance - advance changes in each of their jurisdictions to seek to raise the age of criminal responsibility to 12.

15 MR MCAVOY: And in those discussions, including at the meeting on 28 April, was it discussed that a national increase to 12 years of age not be seen as a cap?

THE HON. JACLYN SYMES: Yeah - yes, in terms of - I don't think - I don't think that's ever been anyone's understanding. So I don't recall it being actually discussed and -

20 MR GRAY: I object. If my learned friend could be a little cautious about not attempting to elicit any confidential discussions of the Standing Council of Attorneys-General. And I'm not saying that he is intending to do that but it might be misinterpreted by the Attorney-General that the question is intended to elicit confidential discussions between the Attorneys-General.

25 MR MCAVOY: Thank you. It's your understanding, though, isn't it, that one of the factors of reaching a national position was that the Northern Territory had already committed to raise the age to 14 at some point in the future.

30 THE HON. JACLYN SYMES: Northern Territory and ACT have been advanced in their policy development, correct. Victoria's the first State to formally commit to legislation to raise the age to 12, with a view to 14 in a stage 2 process. And both ACT and NT have taken similar approaches, and other states remain open to what they might do in their jurisdictions. You reflected on the national approach: it's fair to say that different states are moving at different rates, but it's an important national conversation to have.

35 Me - for me in particular, who is a local member for Northern Victoria, half of my electorate is abutted by the New South Wales boundary, and for communities such Albury-Wodonga, it's always great if you can have uniformity in your laws, so this one in particular is a good one to keep on the national agenda. And it's - you know, we're talking about young people and not just the age that's important, but sharing what other jurisdictions are doing to ensure that  
40 young people don't come into contact with the justice system is also a valuable - SCAG is a valuable forum for those discussions.

45 MR MCAVOY: Thank you. So prior to the Standing Council of Attorneys-General - and I may be incorrect on the date but it appears to have been 25 April 2023, on Anzac Day, there was recorded in *The Age* newspaper that the Victorian government approved a raise in the minimum age of criminal responsibility to 12 at a Cabinet meeting on 24 April 2023. Correct. Correct? Are you aware of the newspaper article?

THE HON. JACLYN SYMES: That's - I'm aware of the newspaper article.

5 MR MCAVOY: Can you confirm that the newspaper article was correct in reporting that there was a Cabinet meeting on 24 April 2023 which approved the raising of the age in Victoria to 12?

THE HON. JACLYN SYMES: I came out on the 24th and confirmed that formally, yes.

10 MR MCAVOY: It wasn't just limited to an approval of the raising of the age to 12. There are other aspects to that decision. Are you at liberty to speak to the Commissioners about what the other aspects of that decision are?

15 THE HON. JACLYN SYMES: I am, sure. So what we have announced that we are doing is legislating for raising the age of criminal responsibility from 10 to 12. It's our intention to bring legislation to the Parliament this year I think it's scheduled for around October with a view to that becoming enacted in the middle of next year. In addition to that, we want to have a look at how we can improve the common law principle of doli incapax, which is effectively  
20 the recognition that a child under 14 cannot form the necessary criminal intent for purposes of understanding that what they did is wrong. The reports are is that that principle is not universally applied across courts, particularly across the whole of Victoria.

It is something that we're seeking to codify. I'm particularly interested in whether we can bring it forward more earlier to the process rather than in the court process so that it's more of  
25 a factor in terms of charging or, more importantly, not to charge, earlier on in the process. So that's part of the reform.

We have also given a commitment to develop an alternative services model which we will be able to, in effect, test with the 10 and 11 year olds with a view to expanding it to accommodate  
30 a raise to age 14 by 2027, and ensuring that we've got all of the systems in place to a bit like we were talking earlier, in terms of appropriate ways to intervene. So whether it's through an education lens or family support lens or child welfare lens, making sure that there are other options for children who may engage in concerning behaviour.

35 MR MCAVOY: Thank you. Are there any questions on that?

COMMISSIONER HUNTER: Yeah, I just - so given the government's commitment to raise the age of responsibility to 12, but delaying the raising the age to 14 - so this is really contrary to the advice of Aboriginal organisations, legal and medical professionals in child  
40 development. And given we are overrepresented in the out of home care system, it's Aboriginal children that are more likely to be affected, I guess, by this. What is - you have said the services but we've also been told that it's a small number. So I'm trying to understand why the delay, in knowing these children - you know, we know these children - and why they have to come into the justice system but we have to wait until 2027 for that small amount? I  
45 mean -

THE HON. JACLYN SYMES: If I could offer some comfort in, I think, our thinking to this. There are a very small number of children that are incarcerated in custody that are under 14. Last week, the number was two. And neither child was Aboriginal. Where I'm interested in is the cohort of children that are not incarcerated but coming into contact with the justice system and ensuring that we've got more appropriate programs to deal with them. Undeniably, children have underlying reasons that they are being picked up by police and entering a justice system. A lot of them are in out of home care. A lot of them have underlying disabilities that haven't been picked up earlier. Generational disadvantage, trauma, newly arrived migrants. There are so many factors that we should be dealing with more appropriately.

Raising the age to 14 doesn't - we don't have to wait until raise the to 14 to have those services available to children. It's hopefully - it's my hope that when we do make the legislative change to 14, it actually doesn't have any practical effect because all of the children that have been picked up by the justice system are already being diverted and supported in a more appropriate way. But we want to make sure when we do raise the age, that that safety net is there.

I acknowledge having a justice safety net is not ideal but it is better than nothing, because the last thing I want to do is change the legislation to 14 and have children not having the option of a justice response and not having anything else, because I think you're just going to delay the consequences to later. And we know that if you don't deal with issues, it's not going to prevent a cycle of crime.

COMMISSIONER HUNTER: Do you agree it's more like a health response, given the intergenerational trauma you're talking about, what children have gone through? Their mental health and physical wellbeing is more of a health response?

THE HON. JACLYN SYMES: I probably use the word wellbeing response, absolutely. I've heard from not just Aboriginal partners and advocates but also members of other communities like South Sudanese communities about some of the supports they want to help their young people, and they're similar but different. But at the underlying theme of all of it is a child's wellbeing and what they need to prosper, whether it's family support, assistance to remain in school, mental health treatment, substance abuse treatment, unfortunately. There are a range of issues, that, yes, health and wellbeing would be a much better approach than a justice intervention. But at the moment, having a positive intervention through any lens is better than none.

COMMISSIONER HUNTER: Can I ask then. Why have we built another facility with 300 beds at Cherry Creek, I think it is? Yeah, that's sort of contradictory to what you're saying?

THE HON. JACLYN SYMES: Look, in terms of the configuration of the custodial environment, I hope that we create the best environment possible for the last resort when children may have to go into custody to deal with those behaviours, and this is something you might like to explore with Minister Erdogan. As I repeat, I don't want to build - I don't want to be a government that's building prisons. I want to be investing in ensuring that young people in particular are diverted away from crime so they are not in youth detention and certainly not ending up in adult detention later on. We need to really focus our attention on that. And I

think raising the age is a way of doing that because we are committing ourselves to a health and wellbeing response, not a justice response for that cohort, and that's going to make a big difference to the need or, hopefully, the reduction of the need of prison beds in future.

5 COMMISSIONER LOVETT: Can you explain to us, you engage with Aboriginal stakeholders and partners - and thanks for picking up on the partners comment. Can you share some of the advice around their advocacy, particularly around raise the age? As in what are the expectations?

10 THE HON. JACLYN SYMES: Look, I know that we have fallen short of expectations to introduce a staged response. I don't want to put words into advocates' mouths, but there's a recognition that taking a step is better than not. And they want to work with us in what the programs look like, coming back to self-determination. I don't want to dictate to the Aboriginal community what we do with a 13 year old Aboriginal kid. You guys tell me.

15 Same with the South Sudanese community. Same with the health and education experts. They are the people that we'll draw on about what's the best approach to support those young people.

So they will be partners in this process. I know many advocates wanted 14 straightaway. I would have loved to have done 14 straightaway. Don't get me wrong. Absolutely. But I am scared that if we did that, we would have young people falling through the gaps and that's unsatisfactory. NT, ACT have faced the same reality. Let's get it right in the small group first before advancing to 14. Unfortunately, there is more complex needs in the higher age group, particularly 13.

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COMMISSIONER LOVETT: They were advocating for 14, though, right?

THE HON. JACLYN SYMES: Always.

30 COMMISSIONER LOVETT: Yeah. And they have had to accept the position of 12 at the moment.

THE HON. JACLYN SYMES: That is a fair assessment.

35 COMMISSIONER LOVETT: What's - Talking about self-determination, what self-determination principles were involved in the decision around that?

THE HON. JACLYN SYMES: That Aboriginal people know better how to help their young people than the justice system.

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COMMISSIONER LOVETT: As in the decision to make it 12 instead of 14, given the advocacy of Aboriginal communities.

45 THE HON. JACLYN SYMES: Of course I was aware of the advocacy being 14. We had to weigh up - we had to balance competing interests, competing views, what was ready to go in the system. You've heard from child protection. They're stretched. You know, they've got important work to do. Just raising the age would make a lot of that work more difficult and

would have a downstream impact potentially on vulnerable children so the whole system had to be considered in relation to the impact of those decisions.

5 COMMISSIONER LOVETT: I understand that, but I guess self-determining principles weren't applied in that decision is probably what I'm saying.

THE HON. JACLYN SYMES: Considerations, definitely. Decisions, correct.

10 COMMISSIONER LOVETT: Thanks.

COMMISSIONER BELL: Could I ask what is it that you have the capacity to do with respect to the sub-12 cohort that you don't have the capacity to do with respect to the sub-14 cohort? That has enabled you now to proceed with respect to the former but not the latter?

15 THE HON. JACLYN SYMES: Well, I think coming back to - it doesn't mean that you can't have services for the under 14 cohort as well. It will just be that no child under 12 can be criminally responsible. So they won't necessarily - and we have to work through this.

20 COMMISSIONER BELL: But you've moved, and so I'm interested to know what is it that has enabled you to move with respect to the sub-12 and what is it that is, in your judgment, has not enabled you to move with respect to the sub-14?

25 THE HON. JACLYN SYMES: We need to build the response. We need to ensure that the systems, the programs and, importantly, the workforce is available. So by going to 12, as we indicated, around 150 little kids have been alleged to have committed a crime. That's a number that I know that are in contact with the justice system. It's less that are charged. None have been incarcerated. But it gives us an opportunity to start to get some good outcomes for those people, build and test our response.

30 It doesn't mean 13 and 14 year olds can't sort of access - and there's already diversion programs in existence. We are building it - we are not building from the ground up. We are building it from a couple of steps up. But we want to get it right, so we want to be able to do it incrementally. And if we can do it before '27, we'd love to, but we want to make sure that the services are available so that we get good outcomes and we don't just delay poor outcomes.

35 COMMISSIONER BELL: Is it the case, then, given that answer, that the services that will be available to the sub-14 group will essentially be the same as the services available to the sub-12s?

40 THE HON. JACLYN SYMES: Not necessarily. The older cohort have more - the evidence is more serious offending - still a small number - often more complex needs, often more difficult to have success in diversion. So we just want to stage it out and get it right and hopefully, as I said, when we raise to 14, it's just catching up with reality.

45 MR MCAVOY: Commissioner Lovett drew your attention to the advocacy from the Aboriginal groups involved in the sector, all strongly in favour of a raise immediately to 14.

You are also aware that the medical evidence as to the state of the young people's neuro-cognitive development in children under 14 is clear.

THE HON. JACLYN SYMES: Mm-hm.

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MR MCAVOY: And I draw your attention to statements by the president of the Royal Australian College of Physicians that were recorded in *The Age* on 25 April that:

10 *"Raising the age of criminal responsibility to 14 years is critical to protecting the health and wellbeing of children and young people at risk of incarceration, especially Aboriginal and Torres Strait Islander children and children with developmental disabilities."*

15 So it's not just the Aboriginal community and human rights groups who are all advocating for the raise to 14 but the Royal Australian College of Physicians. So you accept that the medical evidence is strong on this point?

THE HON. JACLYN SYMES: Yeah, I'll draw you back to the statement you made in relation to critical to their wellbeing that they not come into contact with the justice system, but I would also argue that it's critical to their wellbeing that there is an appropriate response. So I certainly accept that international evidence is that you should have a high - the criminal age of responsibility should be at least 14. That's - that's universally accepted. But that's not the end of the argument for me. Sure, you can raise the age and not - and - but if you don't deal with the issues, the underlying problems, why a young person is engaging in problematic behaviour, that's not fixing the problem, as far as I see it.

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MR MCAVOY: And do you say - do you say - that young people who are coming into the system are having their underlying issues dealt with presently?

THE HON. JACLYN SYMES: Sometimes, yes.

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MR MCAVOY: It's not the case that it's - that the services are readily available to all young people, is it, coming into the system?

THE HON. JACLYN SYMES: It's not universal and as robust as it should be, which is why our commitment to raise the age to 14 is also a commitment to build an alternative services model so that young people that are currently accessing the justice system for support services won't need to, because there'll be alternatives. I hope that there's a menu of options based on self-determination principles, based on best evidence about the different supports that different young people need.

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MR MCAVOY: You understand - your evidence today indicates that you are really very well versed in the issues surrounding this matter.

THE HON. JACLYN SYMES: It's been a pretty popular topic since I've been Attorney, yeah.

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MR MCAVOY: And you would be aware that there is research data to the effect that the coming into contact with the justice system through attendance at court is something that can affect a child's trajectory. You accept that?

5 THE HON. JACLYN SYMES: Yes.

MR MCAVOY: Where you've got children who are not necessarily guaranteed the service provision that they need and they're nevertheless going to be dragged into the criminal justice system, would it not be better just to keep them out of the justice system?

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THE HON. JACLYN SYMES: That's the intention of the development of this policy, but I want a safety net for kids. I think that's important.

MR MCAVOY: I think - to be more direct, I think the point I'm making is that, for some kids, the safety net doesn't exist in the justice system. Do you accept that?

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THE HON. JACLYN SYMES: Yes.

MR MCAVOY: So there is a gap there that the failure to raise immediately to 14 doesn't quite capture; do you accept that?

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THE HON. JACLYN SYMES: I think it's more complex than that. I don't think any one child is the same. I've always maintained that there is an obligation on the criminal justice system to, when everything else has failed, for it to be a positive intervention in the life of someone who comes into contact with the justice system, because there is very few people that aren't there - you can't point to a cause, a reason that they have found themselves committing crime. We have a range of support programs, a range of diversion programs. Are there some people falling through the gaps? I'm sure there is. If you were to raise the age, I think you would have - without filling the gaps with the proper support systems you would have more people falling through the gaps.

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COMMISSIONER BELL: Can I ask if those gaps did not presently exist and you had the support systems you've described in place, including diversion and other programs, would you move to 14?

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THE HON. JACLYN SYMES: Yes.

COMMISSIONER BELL: Can I ask, in relation to the way the criminal justice system is organised, the principles on which it's based, individual responsibility for crime is the fundamental principle?

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THE HON. JACLYN SYMES: Sorry, can -

COMMISSIONER BELL: Sure, I will be more specific. We have a criminal justice system that involves individuals being responsible for crimes that they commit through the legal process, and that responsibility is founded upon notions of intention and individual consciousness of wrongdoing.

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THE HON. JACLYN SYMES: Yes.

5 COMMISSIONER BELL: The international evidence suggests that people, young people under the age of 14, are not sufficiently well developed to have that sense of wrongdoing and to form that intention?

10 THE HON. JACLYN SYMES: Yes, similar to the conversation we had about doli incapax, yes.

COMMISSIONER BELL: We had earlier.

THE HON. JACLYN SYMES: Yes.

15 COMMISSIONER BELL: Your approach involves - and, incidentally, I want to concede the serious significance of your commitment to rolling out programs, the diversionary, protective and to attack the problem at a much earlier end, I absolutely accept that. But would you accept that your approach involves we, as a community, tolerating subjecting 12 to 14 year olds to legal processes on the basis of notions of consciousness and intention and  
20 responsibility that they are not developmentally able to have?

THE HON. JACLYN SYMES: Well, I think there's an acceptance in that of our commitment to raise the age.

25 COMMISSIONER BELL: Yes, but in the meantime, real people, real young people aged 12 to 14, will be subjected to charging, will be subjected to trials in respect of crimes of which intention is an element, and yet the evidence shows that they are not developmentally mature enough to form that intention.

30 THE HON. JACLYN SYMES: Yeah, no, I agree with that, and very few children under 14 progress to the full extent of the justice system. There are many opportunities to positively intervene, which is coming back again to if you can't demonstrate mental capacity for the purposes of criminal intent early, then of course those kids should be diverted out.

35 COMMISSIONER BELL: Hence your interest in doli incapax.

40 THE HON. JACLYN SYMES: Correct. I'm also interested in restorative justice practices, because, at the end of the day, there are victims that are, regardless of the age of the offender, that - whose views are relevant here. And I think there's quite a lot of evidence out there and examples of restorative justice practices, particularly Aboriginal-led restorative justice practices where having a conversation that involves an offender, the family, Elders, is therapeutic, and if it's culturally safe, that's a great intervention and it's through a justice lens.

45 COMMISSIONER BELL: Attorney, I do accept that. Indeed, I applaud it. There was once an age when none of this was available. But I think you are asking us as a community to accept that young people who shouldn't be, and couldn't be tried on the basis of individual intention will continue to be tried because 14 has not yet - has not been - you have not moved

to 14. I am very uncomfortable about that because I have tried a person aged under 14 and it's left me - I won't say any more.

THE HON. JACLYN SYMES: No, no, I appreciate your - thank you.

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COMMISSIONER HUNTER: Just on Commissioner Bell's point, these are children, and in the context of talking policy or very few children, it is still a child that is still going to be impacted by this. And I personally know, of working in the child protection system for so long on the opposite side, I have seen - and I've even seen some end up in adult prison and be a death in custody because of that trajectory. We just - the kids in out of home care, when we're talking about the crossover kids, they're not getting those early intervention services there around their wellbeing that is really required, and they end up in these systems. And one child is one child too many.

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MR MCAVOY: Thank you, Commissioner. Attorney, you're aware that there are many countries around the world in which the minimum age of criminal responsibility has been raised to 14?

THE HON. JACLYN SYMES: Yes, I've been provided a list several times.

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MR MCAVOY: And you're aware that in different places, different models are used in terms of alternative service models? Yes?

THE HON. JACLYN SYMES: Yes.

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MR MCAVOY: And are you aware that in some circumstances they use an educational model?

THE HON. JACLYN SYMES: Yes.

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MR MCAVOY: And in others a health model. It sounds, from the evidence that was given by the departmental officers earlier this week, that decisions have been made about the model that will be used in Victoria. Is that the case?

THE HON. JACLYN SYMES: It's well developed but not finalised, yes.

MR MCAVOY: And that's a - I tried to characterise in in their evidence as a child welfare based model. I think they agreed but I'm not sure that they agreed wholeheartedly with my characterisation of it in that manner, but that's basically the model. It will be dealt with through the Department of Family, Fairness and Housing.

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THE HON. JACLYN SYMES: I don't - that isn't fully settled. I guess - this will probably explain it best. The alternative service model is being developed through Department of Justice in collaboration with DFFH. So relevant ministers include myself, the Minister for Police, the Minister for Youth, Justice, the Minister for Child Protection and the Minister for Aboriginal Affairs. We were the sort of group that came together about what do we do to have a non-justice response. But in my mind, coming back to the way I describe it a bit more

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like a menu, there's some really good justice programs out there, and I'm not convinced that just because you're not criminally responsible, that you mightn't benefit from accessing those. We have to think carefully about that. But who provides the support and programs, to me, is less important than the outcomes that they achieve.

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MR MCAVOY: Certainly, but I'd suggest to you that in other jurisdictions around the world, the objective with respect to children who come into the - who are referred from the criminal justice system for antisocial behaviour of some type, the objective is to make them a better person, to help them become a better person than when they were before they got involved with the system. Is that really possible applying a justice lens?

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THE HON. JACLYN SYMES: Well -

MR MCAVOY: Because you're starting from the deficit position of being in the justice model.

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THE HON. JACLYN SYMES: Not necessarily because we are talking about government agencies within the Department of Justice who can have a wellbeing focus as well, to prevent crime, to prevent - so yes, I acknowledge that it's - the child welfare and child protection have got good programs and I think we should be - I don't think we should silo it, is probably my best answer. I think coming back to there should be a range of programs available for children to divert them away. And I'm not really too fussed if it's delivered by Justice or not, as long as the underlying principle and what you're trying to achieve is picked up. I don't think it's necessarily a criminal justice lens, I think there's a difference between justice and criminal justice.

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MR MCAVOY: Thank you. Accepting that you individually have a strong desire to see the removal of children under the age of 14 from the criminal justice system, accepting that for a moment, would you agree that having the medical science information that we now have and has been available to all of us over the last 10 or dozen years about child brain development, neuro cognitive development, that none of us in the system can say that we don't know that children under the age of 14 in particular are not sufficiently developed to understand the consequences of their actions and the risks of their actions. Do you accept that?

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THE HON. JACLYN SYMES: Yes.

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MR MCAVOY: You can't say that we don't know. We know that.

THE HON. JACLYN SYMES: Correct.

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MR MCAVOY: Is there some risk of liability to the government from not acting?

THE HON. JACLYN SYMES: We are acting.

MR MCAVOY: With respect to the 12 to 14 cohort, given that the government has that knowledge.

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THE HON. JACLYN SYMES: I think it comes back to my earlier response in you need to ensure that you have appropriate support for these young people and not nothing.

5 MR MCAVOY: Attorney, is the legislative proposal that you will be taking forward this year going to include a provision enacting the raising of the minimum age of criminal responsibility to 14 subject to some later commencement date?

10 THE HON. JACLYN SYMES: I can't confirm the specifics of the legislation yet. We're not at that stage. Where we're at is what we have announced and our commitment to raise the age to 14 by 2027, subject to a consideration of relevant offences, and the alternative services model. I think that public commitment is firm.

15 MR MCAVOY: I'll ask you this: do you accept that including that commencement date of 2027, as the government has done with the delayed commencement of the public intoxication reforms, would be something that would give the Aboriginal community and the Aboriginal Justice Caucus and this Commission some great comfort as to the actual implementation of that stated policy?

20 THE HON. JACLYN SYMES: I think the government's public commitment is strong. I have made it on several occasions. The Premier has made that on occasions. When you put dates in legislation, look what happened with public drunkenness. I don't want to have to go back to Parliament and have a debate about this policy. I just want to get on with it. If we can do it earlier than '27, I'd like to do that. That's going to be difficult because we want to make sure that we've got everything in place. Whether you have a legislative trigger or a public  
25 commitment, I think that my personal commitment to particularly the Aboriginal advocates is we're getting on with this to get it done by '27.

30 MR MCAVOY: And, as I put to you earlier, your personal commitment is not in doubt, Attorney.

THE HON. JACLYN SYMES: Mm.

35 MR MCAVOY: But ministerial positions change, and there is an election in 2026 in Victoria. And this position that has been arrived at where the government has only been able to move forward on the raising the minimum age of criminal responsibility to 12 notwithstanding the medical evidence and notwithstanding the strong advocacy from the community, I suggest to you would benefit from the greater security of being confirmed in legislation. And you're nodding. You accept that that would provide greater security?

40 THE HON. JACLYN SYMES: Depending on your perspective, I guess. But I accept your statement.

MR MCAVOY: Well - and in the context where ministers do change.

45 THE HON. JACLYN SYMES: Well, what I would say is that legislation does as well.

MR MCAVOY: But you will agree that it's harder to change legislation than it is to change a policy position?

5 THE HON. JACLYN SYMES: Depends on who's sitting in the chambers, but yes.

MR MCAVOY: Attorney, I now wish to take you to the topic of bail reform. On Monday this week, 1 May, the Victorian government published its response to the report of Coroner McGregor into the death of Veronica Nelson.

10 THE HON. JACLYN SYMES: Yes.

MR MCAVOY: Yes. I had intended to attempt to summarise the response, but I propose to ask you to go to page 36 of your written statement and at the bottom of page 36, you will see paragraph 198 appears under the heading Future Reform. Do you see that?

15 THE HON. JACLYN SYMES: Page?

MR MCAVOY: 36. It might be 35. Paragraph 198.

20 THE HON. JACLYN SYMES: Sure. Yep. Yep. Got it.

MR MCAVOY: See the heading Future Reform?

25 THE HON. JACLYN SYMES: Yes.

MR MCAVOY: If you can commence at that paragraph and continue over to the following page. And it's your statement and you know that this section of your statement sets out your view and the government's view about the possibilities for future reform and some of what's intended; is that correct?

30 THE HON. JACLYN SYMES: Yes, particularly around bail which, following the passage of time since I submitted by statement, we've been out in consultation which is enabling me to speak a little more freely and less confined by my Cabinet processes.

35 MR MCAVOY: Yes, and I'm giving you the opportunity through your statement to speak a bit more freely about the options for reform and the directions that the government might take. So if you could start at paragraph 198, please, and just read.

40 THE HON. JACLYN SYMES: Sure. Sorry. Till when?

MR MCAVOY: To the bottom of - well, if we can just start by going to the end of paragraph 200 and we will just stop there for a moment.

45 THE HON. JACLYN SYMES:

*"I will soon introduce legislation into Parliament to amend the Bail Act to address the adverse impacts that have been well documented through this statement, earlier evidence and,*

of course, in the border community conversation. The reforms will maintain proper consideration of community safety and decision-making by maintaining an appropriately tough approach to those accused of the serious offending who pose an unacceptable risk to community safety.

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Importantly, reverse onus bail tests will be limited to only those charges with serious offences and those who pose a terrorism risk. There will also be refinements to the unacceptable risk test to strike the right balance between violent and non-violent crime. These are not reforms I am prepared to defer further, but they are most certainly not the only reforms that respond to the overrepresentation of Aboriginal peoples in the justice system that I am prepared to prioritize for consideration during the time I have the privilege of being the Attorney-General.

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I am not in a position to provide specific detail about the proposal that is currently the subject of consultation before finalisation of this statement. I hope to have more to share with the Commission on these matters at a later time that will assist in your deliberations and report."

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MR MCAVOY: There's two questions I have in relation to those paragraphs. Firstly, when you say you will soon introduce legislation into Parliament, can you be any more specific as to how soon?

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THE HON. JACLYN SYMES: This year.

MR MCAVOY: Thank you.

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THE HON. JACLYN SYMES: August at the latest is the plan.

MR MCAVOY: Thank you. And when you say you hope to have more to share with the Commission on these matters at a later time, that will assist in the deliberations of the Commission and the Commission's report, is that an intention to provide further material that might go to the coming report on the criminal justice priority topic, or is it something that may come later?

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THE HON. JACLYN SYMES: I was specifically referring to the fact that the bill, the legislation, would be more developed and I could probably share that with you as it's being progressed. So -

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MR MCAVOY: So the next report of this Commission is due on 30 June, we're not talking about that report. We're talking about some later report from this Commission.

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THE HON. JACLYN SYMES: I guess I acknowledge the interest in this area of justice for the Commission, and so it's an invitation or an offer to continue to keep you updated as this is progressing in real time.

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MR MCAVOY: Thank you. The reform that you speak of in paragraph 199, in general terms regarding:

*"The reverse onus bail test will be limited to only those charges charged with serious offences and those who pose a terrorism risk and there will also be refinements to the unacceptable risk test to strike the right balance between violent and non-violent crime."*

5 In reaching that position, the government has taken into account the Coroner's report in respect of the death of Veronica Nelson?

10 THE HON. JACLYN SYMES: Yes, at the outset, I might take the opportunity to express my extreme sorrow for the passing of Veronica Nelson, send my condolences continuing to her family, friends and community. Bail, the issue of the need to reform the *Bail Act* was certainly brought to my attention upon commencement of Attorney-General, very stridently by Aboriginal Justice Caucus in particular but other Aboriginal representatives. And the broader justice community, I've got to say, VLA CLCs. So work has been underway prior to the inquest, but the findings of the inquest have certainly informed and been taken up as we are  
15 working through that legislation and those reforms.

And I would say that it's - it will be - there will be a continuation after the bill as well.

20 MR MCAVOY: Thank you. The proposals that the government has in terms of reform are not on all fours, if I can put it that way, with the Coroner's recommendations?

25 THE HON. JACLYN SYMES: We are certainly responding to the most urgent issues that the Coroner has identified. There are, I think, 11 recommendations in relation to bail and we're progressing, as I understand it, about six of those in some way, not necessarily the same way as was advised by the Coroner, but certainly will acquit the intention of some of his suggestions.

30 MR MCAVOY: And so you've answered the question I was about to ask, in part. The reasoning behind the departure from the Coroner's recommendations is - if you could explain that for the Commissioners please?

35 THE HON. JACLYN SYMES: Just by virtue of saying we can achieve the same thing differently; appreciate the work that the Coroner did. Really important story to be told. The practical outcomes of such a harrowing report, for me, are very specifically in relation to his bail recommendations. He drew on those recommendations from the evidence that was presented to him. I have the benefit of having a department of experts who have the ability to consult more broadly with the courts, for example, on the operation of such reform.

40 So similar - we are doing the same thing in a different way because we have had the benefit of being able to test it more than perhaps the Coroner has. But we are - his recommendations - the most urgent parts of his recommendations, I believe, are acquitted by where we're headed in our legislation.

45 MR MCAVOY: So the proposed amendments, as they are, are consistent with the principles that the Coroner was striking at?

THE HON. JACLYN SYMES: That's probably a better way of saying it, yes.

COMMISSIONER LOVETT: Can I ask what consultation was undertaken in relation to the government proposed reforms prior to the response to the governor - sorry, to the Coroner.

5 THE HON. JACLYN SYMES: They've been operating concurrently. So the - we went out on - timeline - we went out before the response to the Coroner on targeted consultation with stakeholders.

COMMISSIONER LOVETT: Can you - Caucus, Justice Caucus?

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THE HON. JACLYN SYMES: Justice Caucus, VALS.

COMMISSIONER LOVETT: Stakeholders?

15 THE HON. JACLYN SYMES: Yeah, I can get you a list.

COMMISSIONER LOVETT: Was Aunty Donna included in those consultations? I know you spoke earlier about Aunty Tanya Day's family but was Aunty Donna in the context of these reforms consulted with?

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THE HON. JACLYN SYMES: The Secretary of the department has met personally with Aunty Donna in relation to the Coroner's recommendations and what the government's plans of action are in relation to bail, yes.

25 COMMISSIONER LOVETT: But not yourself as the Attorney?

THE HON. JACLYN SYMES: I haven't met Aunty Donna, no.

COMMISSIONER LOVETT: Okay. Thanks.

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MR MCAVOY: I might direct your attention to paragraph 201 of your statement where you talk about the 1 March 2023 consultation paper. Is that the same consultation as you have been discussing with the Commissioner?

35 THE HON. JACLYN SYMES: There's my answer to Commissioner Lovett. Yes, 1 March the consultation paper went to stakeholders, yes.

MR MCAVOY: In paragraph 202, it reads - your statement reads:

40 *"The proposed amended legislation was intended to appropriately address the issues identified in the current bail laws which are echoed in the Veronica Nelson inquest and to give effect to these policy objectives (a) refining the bail test to focus on serious alleged offending and serious risk; (b) reducing overrepresentation of vulnerable groups on the justice system, including women, Aboriginal people and children; (c) promoting alternatives to remand that*  
45 *deal with the root cause of offending behaviour; and (d) balancing the reforms with the rights and protection of victims/survivors in the community."*



You then at paragraph 203 go on to set out the first proposed amendment. Might I ask you just to read that out?

THE HON. JACLYN SYMES: 203?

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MR MCAVOY: Yes, please.

THE HON. JACLYN SYMES:

10 *"The first proposed amendment is a differentiated child bail test where the reverse onuses no longer apply to children, with limited exceptions. The Bail Act would be amended to exclude children from the application of the show compelling reason test and exceptional*  
15 *circumstances test, with two exceptions. The intended effect of this amendment would be to reduce the incidence of remand of children, including Aboriginal children. Bail decisions relating to children would be solely based the unacceptable risk test in the vast majority of cases."*

MR MCAVOY: Thank you. Are you at liberty to expand on what the limited exceptions are?

20 THE HON. JACLYN SYMES: Homicide and terrorism.

MR MCAVOY: And then at 204, your statement makes the more catch-all observation that:

25 *"The overarching intention of applying a differentiated approach to bail for children is to reiterate that custody must be used as a last resort for children."*

But that's a current principle, isn't it, that custody be a last resort for children?

THE HON. JACLYN SYMES: That's why we are reiterating it.

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MR MCAVOY: Is there going to be further opportunity for the community to participate in the development of these amendments?

35 THE HON. JACLYN SYMES: Yes, but I want to say limited opportunity. And the reason I say that is because this is the number one pressing issue in my portfolio. It has been for some time. It is the number one request of the Aboriginal Justice Caucus and other legal stakeholders, particularly those that deal with vulnerable cohorts. So we know what the issues are. We have that confirmed by a Coroner's report. I want to get on with it. This is legislation that I've just indicated to you that I want to get into Parliament in the next few  
40 months. So I want to get that done and then a conversation about any further reforms would more than welcome. But my priority is to reduce the remand numbers and, indeed, have less people who shouldn't be in custody.

MR MCAVOY: And is that approach one that the Aboriginal Justice Caucus is satisfied with?

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THE HON. JACLYN SYMES: I've communicated that to the last Aboriginal Justice Caucus, and I think it's - there is a - again, my - my understanding is there's acceptance of this, of me

getting on with the first stage, because they are the most urgent requirements in terms of protecting vulnerable people or having a better response to vulnerable people. It's fair to say that there's interest in ensuring that I don't put a full stop on this reform. And that's fine. But that doesn't mean we should hold up the process to accommodate everyone's wishes. Let's get what we are agreed on now done and have another conversation after, after that's passed.

COMMISSIONER BELL: Attorney, could I ask you to explain the justification for the two exceptions? Homicide and terrorism.

THE HON. JACLYN SYMES: It's just that the - it's still fundamental principle that custody should be as a last resort, but having an exception for the presumption against bail for those two offences, we believe, is in line with community expectations.

COMMISSIONER BELL: Yes.

THE HON. JACLYN SYMES: It doesn't mean that bail can't be granted.

COMMISSIONER BELL: Can't be granted.

THE HON. JACLYN SYMES: It's just - it's not the - it's just a -

COMMISSIONER BELL: Higher test.

THE HON. JACLYN SYMES: Correct.

COMMISSIONER BELL: Yes. Thank you, I understand.

MR MCAVOY: Thank you. Now, at paragraph 205 of your statement, Attorney, it's noted that the proposed amendments also include the introduction of child - Aboriginal child specific considerations. Can you just explain what those considerations are?

THE HON. JACLYN SYMES: As my statement goes on to say, this is under development and in consultation with the Aboriginal Justice Caucus on the wording of those considerations. I'm very interested in their views on getting this right.

MR MCAVOY: At 207, there's reference to proposed amendments also involving refining the acceptable risk test to focus on community safety. In the second sentence, it says:

*"By the proposed amendment which takes into account recommendation 4.11 of the Veronica Nelson inquest, the unacceptable risk test in section 4E(1)(a) would be amended to provide that the risk that the accused will commit an offence while on bail can only be an unacceptable risk if that offence would endanger the safety or welfare of another person."*

Is that the extent of it? Or does it go beyond that?

THE HON. JACLYN SYMES: I don't think that's limiting, but that's to capture the main intention of why we would make an amendment to that provision. So the mere risk that

someone will reoffend in itself is not enough to provide or grant bail. It must be that that risk is - goes on to be a community safety concern.

MR MCAVOY: At paragraph

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MR GRAY: (indistinct)

MR MCAVOY: I thank my learned friend. In your answer, Attorney, I think that you might have said "not enough to grant bail" when you meant not enough to withhold bail.

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THE HON. JACLYN SYMES: Yes. Thank you for that. Thank you, yes.

MR MCAVOY: I was prepared to let it slide but

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THE HON. JACLYN SYMES: That's an important clarification. Thank you for picking that up.

MR MCAVOY: Paragraph 208 of your statement, you refer to the consultation paper also setting out - sets out proposed amendment to section 3A of the *Bail Act*. The operation of section 3A and its application has been something about which this Commission has heard evidence from a number of witnesses. The paragraph 208 says that:

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*"The proposal takes into account recommendation 4.10 of the Veronica Nelson inquest, that is, to update the existing set of principles that bail decision-makers must take into account when making a determination under the Act with respect to Aboriginal (indistinct) - as part of meeting the identified policy objectives, including overrepresentation of Aboriginal people and children in custody."*

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The commentary that this Commission has heard about section 3A of the *Bail Act* goes not only to its application but the - or misapplication but a misunderstanding by bail decision-makers and some judicial officers as to how to properly apply that provision. Is that something that has been brought to your attention?

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THE HON. JACLYN SYMES: Yes, it has.

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MR MCAVOY: Is there proposed to be some further education of bail decision-makers and judicial officers in that respect?

THE HON. JACLYN SYMES: There is.

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MR MCAVOY: And what type of assistance will they get in respect of section 3A of the *Bail Act*?

THE HON. JACLYN SYMES: I've got some information in relation to bail justice - bail justices. So there's - I guess for context, there's recruitment of new bail justices at the moment. The department is actively seeking to improve the diversity of applicants, including

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working with Aboriginal Justice and Aboriginal Justice recruitment team within the department to promote this as a volunteer opportunity.

5 Aboriginal Community Controlled Organisations have been proactively contacted to promote this opportunity amongst their local communities. And Aboriginal cultural awareness training will be provided to all new bail justices prior to their commencement of the role, and there will be consequences for not attending training. Four bail justice volunteers who have not yet completed their Aboriginal cultural awareness training were suspended last week for not having undertaken that training. So we're taking it pretty seriously.

10 MR MCAVOY: Thank you. And there is some commentary in your statement from paragraph 214 about the cultural awareness training for bail decision-makers through to paragraph 221; that's correct?

15 THE HON. JACLYN SYMES: Yep.

MR MCAVOY: And the decision to suspend bail decision-makers as a result of not undertaking their training, is that something that is - has been made public before this?

20 THE HON. JACLYN SYMES: I don't think so.

COMMISSIONER WALTER: Can I just ask, is that the first time that has ever happened?

25 THE HON. JACLYN SYMES: To my knowledge, yes.

MR MCAVOY: Attorney, the reform process that's being undertaken with respect to the *Bail Act*, of course, is generally welcome. Clearly, it's too late for many people, and, clearly, the State knew that the consequence of the amendments would be an increased prison population when it undertook those amendments.

30 THE HON. JACLYN SYMES: In 2018?

MR MCAVOY: 2018.

35 THE HON. JACLYN SYMES: You'd appreciate that I wasn't in this position in 2018, but the material that I've reviewed would indicate that that's accurate, yes.

40 MR MCAVOY: And we've heard evidence from departmental officers during the week that there's a division within Justice which has the responsibility for trying to predict numbers and growth and decreasing prison population to ensure that the resources are there and available at the appropriate time. You're aware of that facility?

45 THE HON. JACLYN SYMES: That's information that's provided to most development of policy, yes.

MR MCAVOY: And it was on the basis - it was my understanding of the evidence, on the basis of that information that the Western Plains Remand Centre was built.

THE HON. JACLYN SYMES: Prison population numbers would be a driving reason to - for that facility, correct.

5 MR MCAVOY: And before the amendments were brought in in 2018, there was strong advocacy from the Aboriginal community through its representative organisations making clear that they understood that it would disproportionately affect Aboriginal people.

THE HON. JACLYN SYMES: Yes.

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MR MCAVOY: And we now are in the situation in Victoria where the Aboriginal remand population in adult prisons is at an extraordinary rate, you accept that?

THE HON. JACLYN SYMES: Unacceptable rate, yes.

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MR MCAVOY: Unacceptable?

THE HON. JACLYN SYMES: Unacceptable.

20 MR MCAVOY: Clearly, nobody would wish an event such as happened on Bourke Street and prompted these reforms to happen again, Attorney.

THE HON. JACLYN SYMES: Mm-hm.

25 MR MCAVOY: But there seems to be an argument that the Aboriginal community in particular paid the price for that event; that the price was a strengthening of the bail laws in a way which particularly captured Aboriginal adults and children. There were other options open. The government could have, as it's done with the mental health system levy, raised funds from the various forms of industry around the State to do front-end work. And a  
30 decision was made to punish the poorest people in the community. Would you agree that that assessment of what occurred is open on the known facts?

THE HON. JACLYN SYMES: As you've indicated, it was a challenging time, responding to such a horrific incident, and community expected government to act with force, with - in a  
35 way that promoted community safety. I share your view that no one wants to see something like that happen - happen again. The laws - the government at the time sought advice on how we could best respond to that. Options were presented. I wasn't a part of the decision-making there, but as a member of the government, it's incredibly challenging, balancing up a range of interests.

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In relation to this particular reform, what we know now is that the balance was probably wrong. I know it was wrong. And I'm seeking to recalibrate that balance or tip it back so that we are appropriately dealing with serious offenders, appropriately those people should be remanded. But the evidence is clear: we've cast the net quite wide, too wide, in the bail  
45 changes, and we have picked up vulnerable cohorts, including Aboriginal people. That's why we're - it's why it's my number one priority, since being re-elected, to get on with it and fix this.

MR MCAVOY: Accepting absolutely that it's your priority and that you weren't involved in that decision, the decision, though, in 2018 with the knowledge that the government had from the Aboriginal Justice Caucus and other advocacy bodies, to borrow the vernacular from the racial discrimination field, was an act of punching down on the Aboriginal community and the disadvantaged communities in Victoria, I suggest to you.

THE HON. JACLYN SYMES: It's difficult to put myself in the position of the decision-makers at that time. It was an incredibly emotional time and there was a lot of factors that would have been in the minds of people making those decisions. Responding appropriately to such an event, to responding to community fear was something that governments are responsible to do. What you've picked up on is consequences of those decisions, known or unknown, should be better factored in when we're making those decisions, and I think that the experience of our bail laws has been a sober reminder that you need to be really careful about making changes to laws and the impact that it has on vulnerable people.

COMMISSIONER WALTER: Although it wasn't intended that Aboriginal people would have paid the biggest price from the bail reform that perhaps the systemic racism that was already in the system and the impact on that of how these laws would have been interpreted wasn't considered?

THE HON. JACLYN SYMES: I can't confirm whether it was to what level of consideration these factors are given. I can confirm that these are factors that we give consideration to in my experience.

MR MCAVOY: It leads inevitably, this discussion, Attorney, it leads inevitably to the question that concerns the Commission and the Aboriginal community in Victoria. How can the Aboriginal community be protected against that sort of decision-making in the future? How do they tell their family and their children that they're going to be safe from a system that is designed to ensure that it's much harder for them to get bail and to stay out of custody?

THE HON. JACLYN SYMES: Look, I think we can go further than just giving confidence by someone like me saying yes, I consider it, it's part of my philosophy and how I approach law reform. I know that the community expect more than just that. I know I'm not going to be in the position forever. We need to embed it. We need to do better than just consult. We need to have meaningful partnerships, embed self-determination so that when we are factoring up all of the complex issues that have to be considered when you are changing the laws which impact people's lives, when you are making decisions about who should be incarcerated and who shouldn't be - the Aboriginal Justice Forum often bring the problems to me, and I think in having that open conversation about how we address the changes to bail is a good example of how you can feed in better.

How do we embed that through future decisions, particularly in the criminal justice system, I think, is something that we - is incumbent upon all of us to work out how we do that. I would love Aboriginal Justice Caucus to have the confidence that their views have been given sufficient weight. I hope I can demonstrate that there is - that it is important to government for

their concerns to be heard. But how do we demand that? How do we make sure that happens? I think that's an opportunity for Justice Treaty. What Aboriginal Justice Agreement looks like next, what the next Aboriginal Justice Forum, how it evolves, how it can be more - have the principles of self-determination more brought out in more examples and more - not an option, I think, is - trying to work out how it's not just an option and how it's embedded is something I'm interested in exploring with Aboriginal partners.

MR MCAVOY: Commissioner - Attorney, I'll say - I'll put this to you before moving on to the next topic: Aboriginal people in Victoria have been the subject of consultation for a long time, and decisions are made against the interests of Aboriginal people over the top of that consultation on a regular basis. That's the evidence that we've heard in this Commission. There has to be some real structural change to ensure that that doesn't happen, unless there's really good reasons for it. And it's encouraging to hear your reference to a Justice Treaty and the Treaty processes but I suggest to you that until such time as there is some real structural change, the process of consultation is bound to leave Aboriginal people disappointed. What do you say to that?

THE HON. JACLYN SYMES: Well, I think in the interim, particularly in - before there is a structural change, it is my responsibility to ensure that it's more than just consultation. I learn a lot through the Aboriginal Justice Caucus and those -and the stakeholders and the members, and so much so that I ring casually and test my thoughts now and again. Coming back to the point that it's not mandatory for agreement with the Aboriginal Justice Caucus, but certainly value their input, as does the members of my Cabinet. I can confirm that.

MR MCAVOY: Thank you. Chair, I note the time. Is this a convenient time for you, or am I -

CHAIR: Yes, it is. Do you want to have a break? Yes.

COMMISSIONER HUNTER: Can I just note also, then we come back, I've just got a few comments on the bail, but I'm happy to break now.

MR MCAVOY: Well, it's 12.30 now. I understand that the Chair has some other commitments to attend to. Perhaps we could take five minutes, Chair, if that's okay with the Commissioners?

COMMISSIONER BELL: How long have we got to go?

MR MCAVOY: If we only take five minutes, we should finish by 1.

COMMISSIONER BELL: I see and not have to come back this afternoon.

MR MCAVOY: And not need to come back this afternoon, yes.

COMMISSIONER BELL: Well, let's take the five and come back.

CHAIR: I can stay.

COMMISSIONER BELL: The Chair can stay until 1.

MR MCAVOY: I'm sorry. So you are able to stay, Chair?

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CHAIR: Until 1, yes.

MR MCAVOY: I apologise. I thought it was a 12.30 departure.

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CHAIR: Thank you.

MR MCAVOY: So, Commissioner Hunter, you have got some questions on this issue?

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COMMISSIONER HUNTER: I'm not sure if they are more probably comments than questions. We talk about the bail reform and we talk about Veronica Nelson, but we need to remember that you only appeared to commit to bail reform when public sentiment following the Veronica Nelson inquest was overwhelmingly in favour of the addressing failure in the current bail system. But we need to remember despite this being a recommendation, this was a recommendation over 30 years ago in the Royal Commission into Aboriginal Deaths in

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Custody.  
And will the recommendations, I guess, of this body that sit under you, will this be another recommendations that sit on the shelf? I worry that it's going to take another death somewhere for other reforms that impact us quite adversely. Sorry, did I make sense in that? So we've had reforms sitting there, recommendations sitting there for 30 years. But it actually takes the death of an Aboriginal person and people to actually see it visually to see the impact and the impact it has on the community.

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But we - something has to happen for reforms. Does something have to happen if we're - if you see those statistics of Aboriginal people rising in certain areas? Do we have to wait for another death for something to happen? Or will this bail reform be monitored? Will also, I guess, the outcomes that the Day family have pushed for, will they all be monitored so these things don't adversely affect our people and that we are going to get change? I might have gone around the long way there.

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THE HON. JACLYN SYMES: Let me start with bail and the changes and how we want to monitor them, for example. I'm - bail decision-makers are individuals, and so we're going to have a variety of outcomes, and I want to make sure that we're monitoring those to make sure that we are getting the intended change from our bail reforms. So we're making the tests. We're changing the tests so that it's effectively easier, in appropriate circumstances, for bail justice - bail decision-makers to not have people on remand, like, they've got a little more flexibility.

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But it's still discretion. So I'm really interested in making sure that we are - making sure that that is having the intended outcome. And, frankly, the intended outcome is less people on remand. Those figures are unacceptably high and disproportionately impacting various groups, including Aboriginal people. And so that is the intention of addressing the bail laws,



is to reduce remand. So that will be the indicator of success. But, again, it's something that we are very interested in monitoring in real time.

5 It will take some time to flush through, I guess, in terms of points in time to see how we're going, but it's something that I'm going to leave for a two-year review to see if it's had the intended benefit or outcome.

10 COMMISSIONER HUNTER: Thank you. And just one on community safety. So we've heard in our evidence and in the Coronial inquest of the passing of Veronica Nelson that community - for us, we feel like community safety is not considered important by law-makers. So we assume that when governments say they are concerned about community safety, they are more concerned about the safety of white middle class communities, and that's what it feels like to our community.

15 THE HON. JACLYN SYMES: That's the feedback I get from the conversations I have with Aboriginal people and I'm learning more and more about that.

20 COMMISSIONER WALTER: Can I just make a comment too. I think that we need to remember that the bail reform laws that are being proposed are not sort of a great leap forward. They are actually undoing a terrible injustice that was imposed on Aboriginal people in 2018. So I'm asking, I guess, what assurances you can give Commissioners that what gets in its place is not just a reversion to bog-standard Aboriginal systemic injustice within the criminal justice system, that it is actually better than it was when these laws were introduced?

25 THE HON. JACLYN SYMES: It's certainly in response to the consequences of the reforms and so I agree with you: we are returning to a better setting that more appropriately responds to low-level offending, offending that the community actually accept is not a danger to their safety. It's not acceptable behaviour, but - shoplifting and the like, of course, should have a consequence, but that shouldn't be remand. And so the intention here is to ensure that people  
30 who are not a risk to community safety are treated appropriately, and that means bailed.

35 COMMISSIONER LOVETT: What review mechanisms or processes will the State put in place to ensure the reforms work as intended and are effective in reducing the rates of First Peoples on remand?

THE HON. JACLYN SYMES: There will certainly be review mechanisms, because there's a range of data that's available, there's a range of lived experience that we will hear through legal service providers, for example. So I'll firm up exactly what the review mechanisms look like and come back to you on that. At the moment, I want to get the legislation done, but, as I  
40 said, I'm doing - I'm supportive and passionate about the legislation, because I want it to work. So I'm certainly keen to identify opportunities for review.

45 It's probably more a remit for the department. It's not my expertise, but I certainly ask the questions. So, therefore, making sure that we have mechanisms that provide the answers and that I can be transparent with those answers. It's something that I will probably put as a regular agenda item on my report backs to Aboriginal Justice Caucus, for instance, so that we are continuing to have the conversation to ensure that the reforms are working.

And they're pretty good at holding me to account, and there was a lot of interest in, "Okay, that's great. Go and do your bail reform but we want to talk about what more you can do after that." So I think it will be an ongoing priority of Aboriginal Justice Caucus, which means it will be an ongoing priority for me.

MR MCAVOY: Attorney, before we move off this topic, you're aware of a request from the mother of Veronica Nelson as to an appropriate name for this reform provision, are you?

THE HON. JACLYN SYMES: Yes.

MR MCAVOY: And is that something the government is taking into consideration?

THE HON. JACLYN SYMES: As I said, the Secretary for Justice has sat down with Veronica's family and talked about some of our reforms. It's as we've identified that the Coroner's recommendations are not all fully implemented in the first tranche of our reforms, and the family's request was that their consideration of their proposal of a name for legislation involved the full suite of recommendations. So it's my understanding that the first tranche may not be captured by that request.

COMMISSIONER LOVETT: Poccam's law, I think, was the advocacy from the family, Poccam's law.

MR MCAVOY: So has a further discussion been had with the family about whether that would be something that they would be happy with?

THE HON. JACLYN SYMES: I'll have to take that on notice about where that conversation landed with the Secretary.

MR MCAVOY: You would agree that it seems like a small request in the circumstances?

THE HON. JACLYN SYMES: I want to respond to the grief of that family through action, and the action is the law reform.

MR MCAVOY: Are there any other questions on that topic before we move on? The next topic, Attorney, is independent oversight of the police. You are aware that the Aboriginal community, through its various advocacy bodies, including the Aboriginal Justice Forum, have been consistently calling for independent oversight of police conduct for numerous years?

THE HON. JACLYN SYMES: Yes.

MR MCAVOY: I pose a hypothetical question: if an independent body were to be created, it's possible that it would be created within the Justice portfolio just as the - well, administratively, in the same sense as, administratively, IBAC and the Ombudsman's Office within that portfolio, so to speak.

THE HON. JACLYN SYMES: I hadn't thought it would fit anywhere else, but now you mention it, I will have a think about it. But I think Justice is probably its likely home, yes.

5 MR MCAVOY: Yes. Well, that's a suggestion. That's where it naturally fits, if I can put it to you that way.

THE HON. JACLYN SYMES: Sure.

10 MR MCAVOY: And I was going to - my next question was going to be whether you've given consideration to that issue, and in your comment in your last answer, I think you have demonstrated that you have given consideration to where it might sit.

15 THE HON. JACLYN SYMES: I just accepted it would sit with me, but you are giving me room for thought that perhaps it's not. But I think it probably does, yes.

MR MCAVOY: You're aware, are you, that there was evidence before this Commission from Mr Maguire and Professor McCulloch in relation to civilian control models of police oversight.

20 THE HON. JACLYN SYMES: Mm-hm.

MR MCAVOY: Particularly the Police Ombudsman in Northern Ireland. The PONI model.

25 THE HON. JACLYN SYMES: The PONI model, yep.

MR MCAVOY: You accept that that model is one which has the highest degree of transparency?

30 THE HON. JACLYN SYMES: There are a range of different models. I'm not the expert in which is the most transparent and which isn't. So I don't know the answer to your question.

MR MCAVOY: We did hear evidence from Tamar Hopkins of the Police Accountability Project.

35 THE HON. JACLYN SYMES: Yes.

MR MCAVOY: About her research and views about the need for external independent police oversight, distinct from a model - the present model where matters are referred back from IBAC to police to investigate internally.

40 THE HON. JACLYN SYMES: Yes, I'm aware of Tamar's or Ms Hopkins' evidence.

MR MCAVOY: And you're also aware that in 2022, The Independent Broad-based Anti-corruption Commission published a Review of Police Handling of Complaints by Aboriginal People? You're aware of that review?

45 THE HON. JACLYN SYMES: It requested a review, recommendation 61.

MR MCAVOY: Sorry.

5 THE HON. JACLYN SYMES: The Royal Commission into Police Informants recommendation 61 requested a review.

MR MCAVOY: Yes, they conducted a review.

10 THE HON. JACLYN SYMES: No, they asked government to review.

MR MCAVOY: The - I'll find the document. In that report, there was a finding that - I've got it here as 85 per cent but that doesn't sound tight to me. It's in the 80s:

15 *"In 85 per cent of cases, there was a conflict of interest reported by the investigating officer in relation to matters which referred from IBAC back to the police."*

THE HON. JACLYN SYMES: Correct. Yeah, I'm aware of that statistic.

20 MR MCAVOY: The conflicts of interest in this setting, I think, must be largely - I'd ask you to accept are largely a circumstance where the investigating officers knows, or knows of, the officer the subject of the complaint in a way that gives rise to some conflict.

25 MR GRAY: Objection. Can my learned friend just make it clear that he is asking the Attorney-General to make an assumption to that effect, rather than seeking to elicit it as a fact? I'm not certain whether the Attorney-General has been armed with enough facts to be able to answer it as a matter of fact.

30 MR MCAVOY: I thank my learned friend. It wasn't intended to be put as a matter of fact, but that - in that - in the setting of a police investigating police, where there's a conflict of interest, it's likely that it's going to be in relation to the officers knowing each other, the investigating officer knowing the subject of the complaint.

35 THE HON. JACLYN SYMES: I think that's accurate. I haven't - apart from knowing the complainant, it's difficult to come up with a lot of other examples of where you would have a conflict.

MR MCAVOY: Purely - Attorney, purely on the basis of good governance and transparency, that level of conflict of interest is really unacceptable; would you accept that?

40 THE HON. JACLYN SYMES: Look, it's a complex area of policy. So at the outset, yes. But that's - that's my answer in general, but having an appreciation of what the complaints are is - may temper that response a little bit. So if the complaint is a customer service-like complaint, like, "The police officer was rude to me", if that's then goes to IBAC and goes back to the sergeant, even though there's a conflict, that might be appropriate to deal with. Even  
45 though they know each other, that might be an appropriate way to deal with that particular complaint.

But I think you can't apply that logic to a complaint that involves a serious complaint involving physical contact or something. So it's a little difficult to draw - for me to draw an assumption on what's appropriate and what's not because I think it's a case-by-case basis or categories of complaints which make it difficult to just say yes.

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MR MCAVOY: Certainly. Would you, however, accept that for an Aboriginal person thinking about making a complaint about a police officer, if they knew that there were conflicts of interest in 85 per cent of complaints, do you think that would have an effect on their willingness to make a complaint?

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THE HON. JACLYN SYMES: I do. And I - do you want me to keep -

MR MCAVOY: Yes, please.

15 THE HON. JACLYN SYMES: I think my approach to police oversight - and I've been looking at this for some time so you would be aware that we have an IBAC model which you can make complaints to IBAC and it works in conjunction with - yeah, you know all the basics, good. The Royal Commission into Police Informants gave a recommendation to government to conduct a review to ensure that you have a better system of police oversight.

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We have been out for consultation for some time in relation to that.

We want to have a - we know that we need to change it. We know we need to do better. We want to have a more complaints - a complainants-focused response. But what I have been particularly interested in is how we do better for Aboriginal complainants and, in fact, how we do better for Aboriginal, because we know a lot of them aren't complainants when they should be because they are reluctant to make complaints.

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So as part of that review which has not come to me as Attorney yet - it's still with the department - we had a specific stream of consultation with

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Aboriginal - Aboriginal - Aboriginal legal partners and the like, to give us their views of what would be a better system. How can it be more culturally safe. And so when that comes to me and when we are forming what the first approach to a new oversight system might look like, very conscious of Aboriginal people's experiences, and I want to make sure that that is factored into any new model. And that will be something that, again, I can brief the

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Commission as it advances.

COMMISSIONER LOVETT: Are you still consolidating that advice? Is that what you are saying?

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THE HON. JACLYN SYMES: Yeah, the reviews have been undertaken for some time and that's with the department. So the consultation work is with the department. You might be aware that at the moment we have an acting IBAC Commissioner. So we are recruiting for a new Commissioner. So as part of that, we want to have conversations with a new Commissioner about a new model, legislative change, and how the police oversight fits within the existing IBAC model or otherwise.

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But what we know is that public expectation is not being met. The vast majority of police complaints that go to IBAC go back to police and where the appropriate line is, is a little bit of the conversation we were having about some of that might be appropriate. Some of it might not be. And then I think that you have to have a completely different appreciation of vulnerable cohorts and how their complaints are treated, because I want people to feel confident in making complaints, I think.

I know you've got the Chief Commissioner on Monday, I think police want - most of police want complaints being made as well, because it brings about cultural change in their organisation. So we don't - we want a system that is more accommodating of vulnerable cohorts to make complaints, and I don't want them to fear that making a complaint is going to have repercussions because of the local - the local police officer knowing about it and that kind of thing.

So these are all issues I'm conscious of. We haven't landed a model. I think it's fair to say there's an aspirational model of independence. There is what we have now, and somewhere in between of what it looks like. I'll be upfront with you: I know that a lot of people want a PONI model, and it's not that that's not attractive but it's not realistic right now.

You couldn't flip to and create an entire new Police Ombudsman model because of not just resources but, frankly, the people, like who would service that. You would be creating just another body. And I don't think that we necessarily shut down that as an idea, but how do we start moving towards that? How do we build public confidence. How do we ensure that complaints are dealt with appropriately and people have confidence in the system, within the confines of what - the system that we have. I need to - we need to do better, and I think it will be an evolving model.

COMMISSIONER LOVETT: I understand you are not Aboriginal, but what does self-determination in your view look like in the context in which you just discussed?

THE HON. JACLYN SYMES: I would have to have Aboriginal people employed in IBAC, be a Commissioner, have a stream for Aboriginal people to make complaints that can be dealt with by Aboriginal people. That would be awesome.

MR MCAVOY: Attorney, it's not just the case that people don't have confidence in the complaints system, but if there is a flawed complaint system, it has a whole range of other effects. The research tells us that is - there becomes a - there develops a sense of - within the police cohort that they can act without any repercussions because there's a knowledge that they won't be the subject of any findings. It spreads out from those who are inclined to act in ways which might be regarded as misconduct to other officers who might not be of that particular type, and, you know, I think that's referred to in the research as the contagion effect.

And so the evidence that this Commission has heard from many witnesses is about discriminatory conduct from the police and a total unwillingness to go through the complaints process. The evidence from the VALS and - the Victorian Aboriginal Legal Service and Kurnai Legal is people don't want to make complaints because they expect that they will never be proved. They can't get anybody to make complaints. That's how much lack of faith there is

in the system. And with that lack of faith on the Aboriginal side of the equation, there's this sense of being untouchable on the police service side of the equation, it would appear. Would you accept those two factors feed each other?

5 THE HON. JACLYN SYMES: Yeah, I do. I know that Aboriginal people - and other groups of people are reluctant to make complaints because they're not sure they will be believed and they are not sure that they will be substantiated. I want to create a system. I want to work with the existing bodies. I want to work with Victoria Police on making sure that when complaints are made, they can bring about cultural change. I think what you referred to can be  
10 dealt with, if you are shining a light on the poor behaviour and calling it out. That would be an important process, I think, of an effective oversight system.

MR MCAVOY: It goes even further, Attorney, in that Aboriginal people in Victoria are entitled to the same level of community safety and protection from the police force as  
15 everybody else.

THE HON. JACLYN SYMES: Of course.

MR MCAVOY: And people are reluctant to make - to go to the police to report crime  
20 because they're fearful of the police. And so we have situations which we've had evidence of in this Commission where people have not reported matters to the police because they're fearful. That can't be a satisfactory situation. The police service must be there for everybody, and the underpinning feature, one of the underpinning features of a proper police service that serves the whole community, I suggest to you, is a proper, properly resourced accountability  
25 system.

THE HON. JACLYN SYMES: I agree.

MR MCAVOY: Finally on this issue, Attorney, we have touched on it before, but it's  
30 necessary to say it for the purposes of the record. The relationship between the police and First Peoples in Victoria has been - fraught is not a strong enough word. It has been a terrible experience for Aboriginal people from the very outset.

Police, as we know, were used as a domestic army against Aboriginal people, and the  
35 evidence that this Commission has heard indicates that the culture in relation - of police in relation to Aboriginal people that is likely to have existed in the early 1800s still persists. So there's a lot of work to be done, I'd suggest to you, in terms of making the police culture one which serves the whole of the community, including the Aboriginal people.

40 THE HON. JACLYN SYMES: I agree with that and I'm sure that your conversations with the Police Minister and Chief Commissioner will explore some of these issues on Monday. But, yes, I'm certainly aware of that position and I fully understand it.

MR MCAVOY: Now, I want to take you to the discussions regarding reform of the  
45 *Sentencing Act*, particularly at paragraph 298. Paragraph 298 of your statement.

THE HON. JACLYN SYMES: Do you want me to -

MR MCAVOY: Paragraph - it's written that:

"A comprehensive review of the Sentencing Act 1991 is proposed."

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Isn't the *Sentencing Act* already the subject of some consideration for reform?

THE HON. JACLYN SYMES: Frankly, it always is. That's kind of the problem. It's - well, what's my maths. It's old. Not too old, I suppose, but it hasn't really been comprehensively reformed with a thorough examination of how it's serving Victoria. So it's kind of been added on, tacked on, different things added in response to issues, gaps, and the like.

This is an ambitious plan of mine. I would certainly like to leave the *Sentencing Act* in a slightly better position than it is right now. I think it's, yeah, 30 years old and I think it's a bit outdated. It's convoluted. It's difficult to - no ordinary person can read the *Sentencing Act*, and I think we can have a community conversation about what's more appropriate so it's a bit more predictable about what's going to happen, but also picking up some of the issues that we have been talking about today, having appropriate responses factoring in a range of considerations. This isn't going to be easy and it's not going to be quick. But I'd like to get it done in my term.

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MR MCAVOY: And your term being until the next election in 2026.

THE HON. JACLYN SYMES: Hopefully, yeah.

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MR MCAVOY: So that - given what we have heard this morning and your response just then, is the reform of the *Sentencing Act* something in which the Commission and the Aboriginal Justice Caucus might expect that principles of self-determination within the justice sector can be a part?

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THE HON. JACLYN SYMES: Yes, that's - as I said, it's early days. We're just thinking about how we go out for consultation on these issues. But that would be - that would be giving respect and life to the agreement of what we've agreed to do in the Aboriginal Justice Agreement. It's finding ways to give practical realisation to the principles of self-determination.

35

So it's complex because the *Sentencing Act* has to apply universally to everyone. So how do you do that and embed self-determination principles is something that I'm grappling with at the moment, but I'll be certainly interested in a lot of conversations about - about that. I think the options would be the suite of measures that can be imposed as a sentence, whether it's community correction orders and what they look like, and then further conversations with what happens once you are sentenced, I guess.

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MR MCAVOY: And that would include ensuring that there are restorative justice options?

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THE HON. JACLYN SYMES: Absolutely.



MR MCAVOY: I'm about to leave this subject, Attorney, but if it's the case that the - that it's something that you've been able to move on before the end of your term, does that not require action now in order to make that happen?

5 THE HON. JACLYN SYMES: Yeah, it does. We've started. I think - I like to fix problems, and one of the problems that keeps me awake at night is the overrepresentation of Aboriginal people in custody, and others. There are so many people in prison that shouldn't be there, whether it's remand or sentence. So fixing bail laws is one way of addressing it. And I see the other avenue of fixing that problem is the *Sentencing Act*.

10 So I've started. I want to finish it. It's not easy, and I'll need a lot of help to do it. But, yeah, I'm committed to having a crack.

MR MCAVOY: Attorney, your statement that you provided to the Commission is some 356  
15 paragraphs. It will be publicly available to the Commission website. We haven't touched on all of the matters that you've raised, but the fullness of the statement and the response is something that will surely be of interest to the Commission. I don't propose to ask any further questions at this stage. I know that the Chair has some need to leave. My learned friend Mr Gray, I understand has some questions which might take only a short period if he is able to  
20 do that now? If the Commissioners have no other questions themselves?

COMMISSIONER BELL: I don't have any questions.

CHAIR: Alright. We will proceed. Thank you.

25 COMMISSIONER LOVETT: I've got a question. We know community is watching today. Many who have faced harm and injustice as a result of the actions of policies of government. What would you like to say to them today?

30 THE HON. JACLYN SYMES: I apologise for the harm and injustice that should have been avoided, could have been avoided. I take - I'm in admiration of the strength and resilience of the Aboriginal community and their continued fight for justice. I want to tell them that I'm a partner in that fight, and I want to walk besides them and do better through my position as Attorney-General and the limited scope I've got to influence the criminal justice system in  
35 particular, and to say to them that my door is always open and I value their input.

CHAIR: Thank you.

MR GRAY: Thank you. One point about the Attorney-General's statement and its being  
40 available to the public, paragraph 195 is available to Yoorrook, but it's not available to the public, and the exhibit number that my learned friend Mr McAvoy read out at the beginning with the underscore R after it, as I understand it, results in the document without paragraph 195 being visible, being accepted into evidence. But you do, Commissioners, have paragraph 195 available to you to read, just provided it isn't made public, please, and if a non-publication  
45 direction could be made at some point, we'd be grateful.

CHAIR: Thank you. Thank you for that clarity.

MR GRAY: Thank you. I've got two very quick questions. About an hour ago, Attorney, you were asked about mandatory training for certain bail decision-makers, and you mentioned the suspension of four particular bail decision-makers. All that evidence was limited to bail justices, wasn't it? It didn't refer to magistrates or judges.

THE HON. JACLYN SYMES: No, just bail justices.

MR GRAY: Thank you. And a long way back, back around 9 am or a little after 9 am, you were asked about the connection between colonisation and systemic or structural racism, right at the beginning of the examination, and you were taken to page 7 of your statement, and my learned friend, Mr McAvoy, suggested that the linkage between colonisation and systemic or structural racism wasn't made there, but it's the case, isn't it, that on page 1 of your statement, paragraphs 5 and 7, you do make that connection, don't you?

THE HON. JACLYN SYMES: I made that connection in my statement and I personally make that connection.

MR GRAY: You did indeed. Thank you very much. No further questions.

MR MCAVOY: Commissioner, just one point of clarification, with respect to the exhibit that was tendered, I note the State's concern. The tendered version is a redacted version and, therefore, there's no need for a section 26 order restricting publication of that paragraph 195. So the tender as it stands doesn't need any further order, and I think that concludes the evidence for this witness.

CHAIR: Thank you. We will now adjourn until Monday next week. So thank you.

**<THE WITNESS WITHDREW.**

**<ADJOURNED 1:07 P.M.**