

1 in the transcript is not quite to that effect. I'll hunt  
2 it out and --

3  
4 THE CHAIR: I'll rely on his Honour's judgment, I think.

5  
6 MR MENZIES: His Honour's judgment is recording what he  
7 understood Mr Maxwell said. If I'm wrong about it, I will  
8 keep quiet. I will find the passage, your Honour.

9  
10 THE CHAIR: In any event, we can agree, can't we,  
11 Mr Menzies, a lot of people --

12  
13 MR MENZIES: Absolutely. Absolutely. There's no issue  
14 there were a lot of people.

15  
16 THE CHAIR: And we know that Mr Maxwell's original  
17 affidavits did not give the correct impression, don't we?

18  
19 MR MENZIES: We don't - we know - I don't - we know that  
20 Mr Maxwell's affidavit does not reveal the existence of the  
21 150 - the whole 150.

22  
23 THE CHAIR: Or any of them.

24  
25 MR MENZIES: Well, that was my point, your Honour, that -  
26 your Honour, it doesn't matter. I'll hunt out --

27  
28 THE CHAIR: It does matter.

29  
30 MR MENZIES: Well, it doesn't matter in the sense that  
31 there's no issue at all that there were a significant  
32 number of people who weren't identified by Mr Maxwell.  
33 I was simply taking issue with the 150 number because, on  
34 his evidence as I recalled it, it included people who were  
35 identified. That's all.

36  
37 THE CHAIR: Did Mr Maxwell identify having contacted  
38 anyone who was alive or competent to speak of the matter?

39  
40 MR MENZIES: In that affidavit, no.

41  
42 THE CHAIR: No. Well, in neither affidavit, did he?

43  
44 MR MENZIES: He did in the third, your Honour.

45  
46 THE CHAIR: In the third?

47

1 MR MENZIES: Yes.

2

3 THE CHAIR: When did that come?

4

5 MR MENZIES: That comes later.

6

7 THE CHAIR: After the contest has been joined.

8

9 MR MENZIES: Oh, yes. Your Honour, the passage that I was  
10 going to in the transcript is at page 88 line 20. Question  
11 from his Honour, "That is, you prepared your affidavit on  
12 the basis of the disadvantages which the Crown has faced in  
13 meeting this allegation." Question, "But you also are  
14 aware of 150 other people who may be able to fill in the  
15 gaps." Answer, "It's a combined total of 150 people,  
16 inclusive of these people." That's all I was saying,  
17 your Honour.

18

19 THE CHAIR: Very well.

20

21 MR LLOYD: Q. Do you know, sitting here, Ms Allison, how  
22 these numbers that have been the subject of that exchange  
23 work with Mr Manollaras' earlier estimate of the witness  
24 list being over 70? Do you remember I asked you about  
25 that?

26

A. I do remember you asking me about that.

27

28 Q. Presumably the 70 Mr Manollaras referred to when he  
29 was at court on the day I asked you about were people who  
30 were alive and competent. They wouldn't make their way on  
31 to a witness list if they were dead, would they?

32

A. Very unlikely.

33

34 Q. So it appears, if Mr Manollaras' estimate given on  
35 that occasion was correct, there were at least 70 people  
36 that he knew about that Mr Maxwell hadn't said anything  
37 about in his two affidavits; right?

38

A. Correct.

39

40 Q. Do you remember that some time around May 2012 there  
41 was an estimate given by the Crown Solicitor's Office of  
42 costs, including damages and legal costs, of \$4.4 million?

43

A. No, I don't recall that. I don't dispute it, but  
44 I don't recall it.

45

46 Q. Returning to the question of trying to sit down and  
47 settle all the cases, if it's right that the Crown

1 Solicitor's Office were estimating costs and damages of  
2 \$4.4 million and it was known that the plaintiffs might  
3 settle for some cash and an apology, at this time do you  
4 agree you should have gone off to mediation?

5 A. I think I've already agreed that we should have gone  
6 off to mediation.

7  
8 Q. Just on that topic, do you know what the final figure  
9 for the costs and disbursements of the State was by the  
10 time these cases settled earlier this year?

11 A. No, I don't.

12  
13 Q. Do you know there's a reference to the figure of about  
14 \$930,000 some time around mid-2013?

15 A. I accept that.

16  
17 Q. Needless to say, the figure, by the time there was  
18 a mediation, would have been higher than that?

19 A. I presume so.

20  
21 Q. Do you know if it exceeded \$1 million?

22 A. No, I don't know.

23  
24 Q. Could tab 118 please be shown in volume 2 of the  
25 tender bundle. This is an email, you see, from  
26 Mr Arblaster to Mr Woods and Ms Vella, Ms Vella being from  
27 the Crown Solicitor's Office, of 28 August 2012?

28 A. Yes.

29  
30 Q. In this email, Mr Arblaster is considering the  
31 question of evidence in reply to the evidence of the  
32 plaintiffs on the availability of witnesses question.

33 A. Yes.

34  
35 Q. Do you see in the third-last paragraph reference is  
36 made, which seems to completely disregard the plaintiffs'  
37 evidentiary onus. Without wanting to be unfair, we all  
38 make mistakes, but would you accept that that would appear,  
39 in terms of the analysis there, to be an error in terms of  
40 who bore the onus on the stay application?

41  
42 MR MENZIES: I object to that. Really, it's not something  
43 for this witness to comment upon. It's not her document.  
44 Mr Arblaster is being called, as I understand it. He can  
45 be asked. It's not going to advance matters to hear  
46 whether this witness thinks it was correct or not.

47

1 MR LLOYD: I press the question because --

2

3 THE CHAIR: I allow the question. I'm not sure where it  
4 goes.

5

6 MR LLOYD: Thank you, your Honour.

7

8 Q. One of the reasons why it's important for the Crown  
9 Solicitor's Office to exercise their own judgment about  
10 matters, including matters counsel has advised upon, is  
11 that barristers, like everyone else, sometimes make errors;  
12 right?

13 A. Yes.

14

15 Q. It's a pretty important question, isn't it, at this  
16 time for the Crown Solicitor's Office, as to the issue of  
17 onus on this application, having regard to the fact that  
18 what is being considered is whether to put on any evidence  
19 in reply to the plaintiffs' evidence showing all this  
20 evidence which is available?

21 A. I think that's a bit unfair. Jodie Vella was  
22 a paralegal at the time.

23

24 Q. I'm not being critical of Ms Vella. This was at  
25 a time when you had resumed supervision of the matter. You  
26 were the supervising solicitor on this day.

27 A. Well, I don't remember seeing that.

28

29 Q. Do you remember being involved in any way in the  
30 question of what evidence to put on in reply?

31 A. No.

32

33 Q. Do you think you should have been?

34 A. No.

35

36 Q. You were content, from the perspective of the Crown  
37 Solicitor's Office, to leave any decisions about that  
38 question to Ms Vella, guided by counsel?

39 A. Yes.

40

41 Q. Sitting here today, and again with the benefit of  
42 hindsight, and reflecting on your approach and knowing all  
43 that you know, do you think now that you should have been  
44 more heavily involved?

45 A. Not in the preparation of an affidavit by an  
46 investigator. That's also addressed to, I presume,  
47 Steven Woods, who's very competent.

1  
2 Q. On 25 October, and if tab 68 of Ms Allison's statement  
3 could be shown - it's in volume 2 of the witness bundle -  
4 you gave some advice to the department about the question  
5 of settlement in relation to Kathleen Biles?

6 A. Correct.

7  
8 Q. Your advice was not to accept an offer of compromise  
9 that she had made of about \$170,000?

10 A. Correct.

11  
12 Q. And you later gave some advice that the offer that the  
13 State should make was to bear their own costs.

14 A. Yes.

15  
16 Q. And for Ms Biles to walk away from the litigation.

17 A. Yes.

18  
19 Q. Were you aware, when you prepared this advice, of the  
20 notice that the department was on from 1983 of allegations  
21 in respect of Mr Gordon?

22 A. Could I see the date of that, please?

23  
24 Q. The date of your letter?

25 A. Yes, please.

26  
27 Q. Absolutely. Can we scroll up.

28 A. Probably not. Look, I don't know. I may have been,  
29 I may not have been at that time. That was around about  
30 the time I started preparing the advice, I think.

31  
32 Q. I've taken you to the evidence about that notice from  
33 1983. You remember that?

34 A. Yes.

35  
36 Q. That would have been an important matter in terms of  
37 the exposure to Ms Biles' claim?

38 A. Yes.

39  
40 Q. I know you said yesterday you hadn't had a chance to  
41 listen to the victims give their evidence, but accept from  
42 me that one of the things that Ms Biles says is that she  
43 was raped in about 1984?

44 A. Yes.

45  
46 Q. If that's right, that would have been a relevant  
47 matter to the question of the State's liability to

1 Ms Biles, wouldn't it?

2 A. Yes.

3

4 Q. That is to say, notice before an incident of terrible  
5 child sexual abuse; correct?

6 A. Yes.

7

8 Q. Do you know whether you took that into account?

9 A. I don't know that. Sorry, could you just scroll down  
10 again, please? And a bit further, please? Well, I think  
11 that details what I understood in terms of what happened.

12

13 Q. And is it fair to say that it doesn't really address  
14 the matters I've just raised with you?

15 A. Sorry, I lost my train of thought.

16

17 Q. That's okay. You were looking at the advice and I was  
18 asking you about whether you were aware and had addressed  
19 in your advice the matters I have just asked you about in  
20 terms of notice of the department in respect of Mr Gordon  
21 by 1983 and evidence that Ms Biles had been raped, after  
22 that notice, by Mr Gordon.

23 A. I don't know, unless it's somewhere else in that  
24 advice that seems to state what I knew.

25

26 Q. Could tab 8 of Ms Allison's statement please be  
27 brought up on the screen. It's in volume 1 of the witness  
28 bundle. Just have a look at the front page. This is an  
29 advice as to quantum and liability that you prepared?

30 A. Yes.

31

32 Q. And it's a very lengthy, comprehensive document;  
33 right?

34 A. Yes.

35

36 Q. Ultimately you expressed the view or made the  
37 recommendation that offers of compromise be served in each  
38 claim on the basis of a judgment for the defendant.

39 A. Yes.

40

41 Q. And at that point you weren't making any  
42 recommendations about making any monetary offers to the  
43 plaintiffs; right?

44 A. Yes.

45

46 Q. Was this the first time that you're aware in your  
47 review of the files that a comprehensive advice on

1 liability and damages had been prepared by the Crown  
2 Solicitor's Office?

3 A. Yes, I - well, I think that's right.  
4

5 Q. Again with the benefit of hindsight and the ability to  
6 reflect sitting there today, in circumstances where the  
7 Crown Solicitor's Office had held instructions for about  
8 four years and ten months, if my maths are correct, do you  
9 think that it was appropriate for that to be the first time  
10 that a comprehensive advice about liability and damages in  
11 proceedings of this sort was prepared?

12 A. Oh, I think it should have been done earlier.  
13

14 Q. How much earlier?

15 A. Probably when all the evidence, or substantial  
16 evidence and particulars, had been received.  
17

18 Q. Should it have been done within - at least  
19 a preliminary advice have been done within months of being  
20 instructed?

21 A. I think Mr Manollaras did give various forms of  
22 advice - not formal advices but forms of advices.  
23

24 Q. I think, in fairness, you made reference to some  
25 letters that I had taken you to which contain advice given  
26 from time to time?

27 A. Yes.  
28

29 Q. But not the sort of comprehensive advice that you did  
30 in April 2013?

31 A. No.  
32

33 Q. I think you've adverted to this already: it was the  
34 department who came back and made the suggestion that the  
35 parties should go to mediation, wasn't it?

36 A. Correct.  
37

38 Q. That was contrary to your advice?

39 A. Yes.  
40

41 Q. The department gave those instructions some time  
42 around June 2013, or thereabouts?

43 A. I'm not sure when the exact instructions were  
44 received. I think there were indications that they were  
45 seeking to resolve it.  
46

47 Q. Could tab 152 in volume 2 of the tender bundle please

1 be shown. This is a briefing note of the department. If  
2 we can scroll down to the bottom, over on page 2, do you  
3 see the date of this is 13 June 2013?

4 A. Yes.

5

6 Q. Do you see the bullet point there above  
7 "Recommendation"?

8 A. Yes.

9

10 Q.

11 *Legal Services recommends that the*  
12 *conclusions of the CSO do not adequately*  
13 *consider the risks of proceeding to*  
14 *a hearing of the substantive matter. It is*  
15 *therefore recommended that advice be sought*  
16 *as to alternative methods to resolve the*  
17 *matter.*

18

19 A. Yes, I see that.

20

21 Q. That, obviously enough, was a view the department had  
22 formed that the advice that they were being given didn't  
23 adequately consider the risks of losing?

24 A. That's what it says.

25

26 Q. That was contrary, I think you've told the Commission,  
27 to the view you expressed?

28 A. Yes.

29

30 Q. But sitting here now, do you accept that the advice  
31 given, including the advice in April 2013, didn't  
32 adequately consider the risks?

33 A. Yes, and I think I've conceded that already.

34

35 Q. Do you remember, on 13 June 2013, sending an email to  
36 Ms Mitchell from the department - and this is found at  
37 tab 87 of Ms Allison's statement in volume 2 of the witness  
38 bundle? If we can scroll down to the third page, in the  
39 middle of the page there is an email from Helen Allison to  
40 Joanna Mitchell of 13 June. Do you see the email there  
41 that's in front of you is from you to Ms Mitchell from the  
42 department. You had discussed the matter with counsel, and  
43 the view of Mr Cashion was that mediation would be  
44 extremely expensive, difficult, and likely to fail, and  
45 that a more cost-effective approach would be for him to  
46 speak with Mr Catsanos and invite an offer?

47 A. Yes, I see that.

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Q. Was that the view that you also held about the benefits of mediation, or the lack of?

A. I didn't have a view, because I hadn't been dealing with the plaintiffs.

Q. You'd had the benefit of doing a very comprehensive advice about two months before then?

A. No, I don't mean that. I mean in terms of - sometimes things can settle easily between conversations between opposite parties who have been dealing with each other through litigation.

Q. In response to that email, again it was the department who came back and gave you instructions to explore mediation, wasn't it?

A. Yes.

Q. Contrary to the view being expressed at the time in the 13 June email.

A. Yes.

Q. Then to complete the chronology, I think it's well known by now that ultimately a mediation occurred on 17 and 18 December 2013?

A. Yes.

Q. Did you attend?

A. Yes.

Q. On that occasion, almost all of the plaintiffs were there?

A. I believe so.

Q. And the case settled with the plaintiffs being paid about \$107,000 each on that day?

A. Correct.

MR LLOYD: I note the time, your Honour.

THE CHAIR: We'll take the morning adjournment.

**SHORT ADJOURNMENT**

MR LLOYD: Q. Just before I ask you some questions about the model litigant policy, Ms Allison, yesterday you recall I asked you about your knowledge of the approach that

1 Mr McCarthy, who took over from your position as the  
2 supervising solicitor between February 2010 and June 2012,  
3 what his approach was to supervision?

4 A. Yes.

5

6 Q. And I think you agreed with me, but tell me if I have  
7 this wrong, that your understanding was that he had adopted  
8 a similar sort of hands-off role in supervising this file?

9 A. I did, but, to be fair, I really had nothing to do  
10 with this file and I don't know what Mr McCarthy's  
11 practices are.

12

13 Q. In the course of your review, you didn't see documents  
14 which would allow you to answer that question about what  
15 level of involvement he had?

16 A. I know there was involvement, but I don't know the  
17 level.

18

19 Q. Could I ask you some questions about the model  
20 litigant policy, and just for convenience I might have  
21 handed to you a hard copy of it. It's located in the  
22 tender bundle at tab 17 of the statement of  
23 Mr Coutts-Trotter in volume 1. There are some other hard  
24 copies available, if your Honour or Commissioner would be  
25 assisted by them.

26

27 THE CHAIR: We have them.

28

29 MR LLOYD: Q. Could I just ask you, Ms Allison, about  
30 some aspects of this policy. You will recall yesterday  
31 his Honour asked you a question to the effect that the  
32 model litigant policy required the State and its agencies  
33 to do more than merely act honestly, and I think you said  
34 that you weren't properly in a position to be able to  
35 respond. Do you remember that?

36 A. I don't remember my response, but I accept that.

37

38 Q. In any event, if you have a look at clause 3.2, or the  
39 chapeau to it, the obligation there is on the State and its  
40 agencies to act honestly and fairly in handling claims and  
41 litigation. Then it sets out a number of particular  
42 respects in which the duty to act honestly and fairly will  
43 arise and there are nine subparagraphs there?

44 A. Yes, I can see that.

45

46 Q. Prior to clause 3.2, there is clause 3.1 which,  
47 amongst other things, requires the State and its agencies

1 to act with complete propriety, fairly and in accordance  
2 with the highest professional standards?

3 A. Yes.

4  
5 Q. I should also take you to clause 3.3, which provides  
6 that nothing in the model litigant policy requires the  
7 State to be prevented from acting firmly and properly to  
8 protect its interests and, in particular, 3.4, the  
9 obligation does not prevent the State or agency from  
10 relying upon privilege claims and pleading limitation  
11 periods.

12 A. Yes, that's what it says.

13  
14 Q. I want to ask you about six instances where the  
15 matters that you have given evidence about to this  
16 Commission might involve breaches of the model litigant  
17 policy and get your comment on that. First, do you accept  
18 that the State, in determining to not admit and put the  
19 plaintiffs to proof in the defence in respect of those  
20 plaintiffs who had complained about Mr Gibson and where  
21 there had been a conviction and also in respect of the  
22 plaintiff where there had been a guilty plea, involved  
23 a breach of clause 3.2(e)(i)?

24 A. Yes, I think I've already conceded that.

25  
26 Q. And 3.2(e)(i) is an obligation to keep the costs of  
27 litigation to a minimum, including by not requiring the  
28 other party to prove a matter which the State or an agency  
29 knows to be true?

30 A. Yes.

31  
32 Q. Secondly, do you agree that the State, in its attempt  
33 to run the permanent stay application on evidence which it  
34 knew omitted matters which were relevant to the  
35 determination of that application in circumstances where  
36 the State bore the onus of proof, involved a breach of  
37 clause 3.1 in that the State did not act with complete  
38 propriety, fairness and in accordance with the highest  
39 professional standards?

40  
41 MR MENZIES: I object to that question in that form,  
42 your Honour. I'm not cavilling that a question of this  
43 nature --

44  
45 THE CHAIR: I will allow the question.

46  
47 MR MENZIES: If your Honour pleases.

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MR LLOYD: Q. Before you answer it, Ms Allison, just to try to deal with what I apprehend is the objection, if there's one of those three individual matters involving propriety, fairness or professional standards that you agree with and you disagree with others, please feel free to identify that in your answer.  
A. I'm not sure I can answer that, to be honest. I know we've discussed it at length.

Q. So you don't feel that you're in a position to respond to whether the matter I've just raised involves a breach of clause 3.1; is that the position?  
A. Yes, that's the position.

Q. Thirdly, may I ask whether you accept that the State, by failing to agree to go to a mediation at a time before December 2013, was in breach of this policy in, particularly, 3.2(a)?  
A. No --

MR MENZIES: Your Honour, again I object to that question because of the broad nature of it, and let me explain why. If one looks, for example, at the events of 2009 where there was some exchange yesterday, Ms Allison's position, as she understood it, was that each plaintiff was seeking something in the region of \$200,000 to \$400,000, whereas what was being put to her was that the plaintiffs were seeking an acknowledgment plus a small amount of money. So because of those differences in the factual matrix, to ask the question in that broad form is unfair.

THE CHAIR: Mr Lloyd?

MR LLOYD: I'll withdraw the question and I'll try to deal with it in this way.

Q. Do you accept that the State, by failing to agree to attend a mediation by August 2010, was in breach of clause 3.2(a)?  
A. No, I don't accept that.

Q. Do you accept that the State, by failing to agree to attend a mediation at any time after August 2010 but before December 2013, was in breach of 3.2(a)?  
A. I accept, in hindsight, we should have gone to a mediation, but I don't accept that it was a breach of the

1 model litigant policy.

2

3 Q. What about 3.2(b)?

4 A. But it's also in the context of the limitation  
5 argument being run.

6

7 Q. Do I take it that you don't accept that the failure to  
8 attend the mediation at a time between August 2010 and  
9 December 2013 was a breach of 3.2(b); is that the position?

10 A. Yes.

11

12 Q. And what about 3.2(d)?

13 A. I don't accept that it was a breach of that, either.

14

15 Q. Could I ask you about the fourth matter, that the  
16 State, in seeking particulars of matters such as the ones  
17 that his Honour raised with you yesterday going to matters  
18 known by the State, was in breach of clause 3.1?

19 A. No, I don't accept that.

20

21 Q. And also a breach of 3.2(a)?

22 A. No, I don't accept that.

23

24 Q. Fifthly, do you accept that the position that the  
25 State took in seeking to require the plaintiffs to each  
26 file a separate statement of claim was a breach of 3.2(a)?

27 A. I don't accept that.

28

29 Q. So by not accepting that, you don't accept that with  
30 the knowledge of the comment made by his Honour Judge Knox  
31 about whether the State's conduct was in accordance with  
32 the model litigant policy?

33 A. I don't accept that it was a breach of the model  
34 litigant policy.

35

36 THE CHAIR: Q. Ms Allison, I take it from the answers  
37 you've given that you don't see that the Crown asking  
38 a plaintiff or other person who is in contest in litigation  
39 with the Crown - you don't see the Crown asking for  
40 particulars of matters that are within the Crown's  
41 knowledge as a breach of the model litigant provisions?

42 A. Yes, that's correct.

43

44 Q. So --

45 A. And for the reason, your Honour, that it's also to  
46 attempt to ascertain what the plaintiffs' case is and  
47 how --

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Q. That's a different issue. Just the simple proposition, asking for particulars of matters that are within the Crown's knowledge, do you see that as not a breach of the model litigant provisions?

A. Yes, for the reason I just said.

Q. But if you already know, why do you waste time and money asking for answers to questions you already know the answer to?

A. But we don't know what the plaintiffs are thinking and how they are approaching it, and they may read the material in a different way to the way we read the material.

Q. But when you're talking about, for example, matters that will be contained within State records, why is it appropriate to ask for the other side to tell you what's in your own records?

A. But it's to tell us what they're relying on in our own records.

Q. Well, I think if you look at the questions asked here, many don't fall into that category, do they? I mean, the simplest one is to ask people for an account of any criminal convictions they have.

A. That's a different question.

Q. Well, that's a matter within the State's knowledge, isn't it?

A. Well, no, not the department that we're acting for. We don't have access to other departments' records, even though we act for the State.

THE CHAIR: Well, anyway - okay.

MR LLOYD: Q. Sixthly, Ms Allison, do you accept that the fact that the State refused, until the mediation on 17 December 2013, to apologise for anything that the State had done - limiting your answer to this question to those plaintiffs in respect of whom there had been a conviction and in respect of the plaintiff in respect of whom there had been a guilty plea - was a breach of clause 3.2(i)?

A. That, I think, is a matter for the department.

Q. Do you not feel able to proffer an opinion in circumstances where you've seen material that I've taken you to where advice was given by the Crown Solicitor's

1 Office that it wouldn't be appropriate to make an apology?  
2 A. I'm not sure I understand your question. I don't  
3 agree with Mr Manollaras that it's not appropriate to make  
4 an apology. The timing of this apology, I don't - the  
5 nature and timing of the apology I think would be a matter  
6 for the department. Certainly in this case an apology was  
7 given, and there was no problem in - in another department  
8 providing that apology.  
9

10 Q. You don't feel in this case that there was a breach by  
11 the Crown Solicitor's Office in respect of the approach  
12 that it took to advice being given to the department about  
13 whether it should make an apology?

14 A. Sorry, I misunderstood I think your question. Are you  
15 referring to Mr Manollaras' advice to the department?  
16

17 Q. Yes.

18 A. Yes, no, I didn't understand that's what you were  
19 saying. I certainly don't agree with him. But a breach of  
20 the model litigant policy? Could you point me to where in  
21 particular you say it's a breach, please? Oh, I see where  
22 you're saying.  
23

24 Q. Clause 3.2(i).

25 A. Yes, I see. Yes, I'd concede that.  
26

27 Q. Sorry, you'd concede that?

28 A. Yes.  
29

30 MR LLOYD: Those are my questions, your Honour.  
31

32 THE CHAIR: Now, does anyone else apart from Mr Menzies  
33 have any questions?  
34

35 MS GERACE: I do, your Honour, just briefly.  
36

37 <EXAMINATION BY MS GERACE:  
38

39 MS GERACE: Q. Ms Allison, I appear for Janet Loughman,  
40 who is the principal solicitor at the Women's Legal  
41 Services NSW. May I ask you the following questions just  
42 on the model litigant policy. At the time of this  
43 litigation, were solicitors at the Crown Solicitor's Office  
44 required to have regard to the principles set out in the  
45 model litigant policy when deciding whether or not to plead  
46 a particular defence?

47 A. Probably, yes.

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Q. When you say "probably", are you able to assist further and say whether you can positively say that was the case when Mr Manollaras was deciding what defence to plead on behalf of the State in answer to these claims?

A. I think I've already conceded the non-admission of the assaults as being a breach, so, yes, there can be a breach.

Q. Ms Allison, particularly in relation to, say, making a decision about pleading the Limitation Act in defence to a claim, let me ask you about that. You understand that it was always at the election of the State whether or not to plead the Limitation Act in defence to these claims?

A. Yes.

Q. In making a decision as to whether or not to plead the Limitation Act, were solicitors of the Crown Solicitor's Office required to turn their mind to the principles set out in the model litigant policy before deciding to plead the Limitation Act in answer to the claims?

A. Well, the model litigant policy provides for pleading limitation periods.

Q. Yes. Was there any requirement to consider a question beyond whether the remedy was available, so to turn your mind to whether it was proper or fair to plead the Limitation Act in defence to the claims?

A. In the context of 3.3, which is:

*The obligation does not require that the State or an agency be prevented from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.*

In that context, it's perfectly appropriate to plead the limitation period.

Q. So is the position, then, as far as you understand the policy, that you are permitted by the model litigant policy to plead the Limitation Act and, beyond that, you are not required to turn your mind to whether or not it is otherwise proper or fair that the State does plead the Limitation Act?

A. Well, unless there's a conflict with 3.1, presumably.

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Q. So you accept that there is an overriding obligation to act fairly when representing the State in whatever steps are being taken?

A. That's what it says. I'm not sure exactly what it means, but that's what it says.

Q. Do you consider that in representing the State subject to a model litigant policy, solicitors should be required to consider whether it is proper and fair that a defence is pleaded in addition to considering whether that particular strategy is available to it?

A. I don't think that that is what we are required to do in this instance. I think we are entitled to rely on defences that are open to be relied on.

Q. Do you accept now, having regard to all the material you've read as well as the evidence you've heard, that Bert Gordon and Colin Gibson were entirely unsuited to be people having the responsibility and care of young children?

A. Yes.

Q. On the plaintiffs' claims as advanced, they alleged that a duty of care existed in the State at the time each of them were placed with or commenced to live with Bert Gordon or with Bert Gordon and Colin Gibson; you understand that was what the plaintiffs alleged?

A. Yes.

Q. You're aware from the information you've read that the State at least funded part of or most of the construction of Bethcar at one stage?

A. I don't know about that.

Q. That the State, for a period of time, entered into a licensing arrangement for Bethcar with the Gordons?

A. Yes.

Q. And for a period of time paid cash grants to the Gordons for the children in their care?

A. Yes.

Q. You're aware that a number of the children came to be placed with the Gordons pursuant to order of the court?

A. Yes.

1 Q. Did you also understand that when the court, in the  
2 ordinary course, made an order to commit a child to the  
3 care of the Gordons, it was done on the recommendation of  
4 an officer of the department?

5 A. I don't know.  
6

7 Q. Did you know how it was that a court came to make an  
8 order placing a child in the care of the Gordons at the  
9 time you prepared your advice to the State?

10 A. No, I didn't know that.  
11

12 Q. Do you accept that it would be relevant to know that  
13 in the ordinary course, if the court was making an order to  
14 commit a minor to the care of someone, the person to whom  
15 their care was committed would ordinarily be done on the  
16 recommendation of an officer of the department?

17 A. I don't know.  
18

19 Q. Would you accept, however, even if you didn't know  
20 then, that if that was in fact the case - sorry, firstly,  
21 do you accept that you should have known what arrangements  
22 were in place or what involvement the department had in any  
23 court order to commit a child to the care of the Gordons  
24 when determining what liability might have existed in the  
25 State to these young children?

26 A. I do know that in relation to one of the children, the  
27 department was going to put them into the care of the  
28 Minister, and I think there was an appeal by the child's  
29 parents, because they wanted them in the care of the  
30 Gordons.  
31

32 Q. Just in the abstract, do you accept that in forming  
33 some view about what liability the State may have had to  
34 these children, you should have known what arrangements  
35 were in place or what involvement officers of the  
36 department had in that process?

37 A. No, I don't accept that.  
38

39 Q. So you don't accept that if, for instance, a child was  
40 taken before a court and there was an issue because the  
41 child was at risk, and the court needed to make  
42 a determination about where to commit that child to live,  
43 if an officer of the department recommended that the child  
44 live with the Gordons, you say you don't think you needed  
45 to know that when determining whether the State had any  
46 responsibility to these children?

47 A. I can't --

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MR MENZIES: I object to that.

THE CHAIR: I allow the question, Mr Menzies.

THE WITNESS: No, I don't accept that.

MS GERACE: Q. Do you say, then, that the question of whether the State had recommended Mr Gordon as being a suitable placement for a child is irrelevant to the question of whether the State had a duty of care to the child?

A. As I understand it, yes.

Q. As I understand it, you say it is irrelevant to that question.

A. That's correct.

Q. Coming back, then, to the Limitation Act defence, all of those matters, irrespective of the view you had about the duty of the State to these young children, were questions that if the matter had proceeded to court would be determined by the judge; do you accept that?

A. Yes.

Q. On one view of the case, if it was in fact the situation that the State did have a responsibility to these children, do you accept that a breach of that duty meant that - sorry, and that there had been a breach of that duty, each of these children had sustained very heinous acts of sexual and physical abuse as a consequence of that breach?

A. I'm sorry, could you repeat the question? I don't understand it.

Q. Yes, of course. On one view of the evidence, which was the plaintiffs' - and I accept you did not accept that view, except to the extent that you have made concessions - the State had a duty of care to very vulnerable children and, on the plaintiffs' case, the State had breached those duties of care; do you accept that was what the plaintiffs had said?

A. Yes.

Q. Now, each of those children were living in a very remote and disadvantaged community; were you aware of that?

A. Yes.

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Q. Brewarrina was considered a very disadvantaged and socially remote part of New South Wales, was it not?  
A. Yes.

Q. Where there were high levels of poverty, alcoholism, and physical and sexual abuse; were you aware of that?  
A. Yes.

Q. These children were considered some of the most socially disadvantaged children within the Australian community; would you agree with that?  
A. Yes, I'd agree with that.

Q. And on one view of the evidence, that is the plaintiffs', the State had failed to fulfil its obligations to those children and, as a result of that, they had sustained physical, sexual, and emotional abuse?  
A. Yes, I understand that.

Q. You understood at the time of the commencement of this litigation that children who are physically and sexually abused can sustain lifelong psychiatric damage as a result of that abuse?  
A. That follows.

Q. You knew that, though, at the time of this litigation in 2008, 2009 and 2010?  
A. Look, I think it would depend on the individual person.

Q. Leaving aside the individual person, did you know in 2008, 2009 and 2010 that children who are sexually and physically abused more often than not sustain lifelong psychiatric consequences as a result of that abuse?  
A. That would follow.

Q. So you knew that then? In 2008, 2009 and 2010, did you know that?  
A. I don't know whether I knew that, to be honest.

Q. And did you know that invariably children who are physically and sexually abused often do not complain until they are adults?  
A. Again, I think it would depend on the individual.

Q. Did you not know, as a matter of course, that it is

1 very common for children who are sexually and physically  
2 abused not to complain until they are adults?

3 A. This is why - one of the reasons why plaintiffs are  
4 referred by defendants to psychiatrists, because they are  
5 the ones with the expertise and they are the ones who would  
6 be in a position to make those points. I'm a solicitor,  
7 I'm not a psychiatrist.

8

9 Q. But you're a solicitor in the employ of the Crown  
10 Solicitor's Office with particular expertise in advising  
11 the State on claims against it, including claims arising  
12 from sexual assault, are you not?

13 A. I don't consider myself to be an expert in the area of  
14 sexual assault.

15

16 Q. Do you accept that if either you or Mr Manollaras were  
17 being given the responsibility of responding to a claim of  
18 this sort, the Crown Solicitor's Office should have  
19 provided you with some training to understand the impact of  
20 child sexual abuse and how it manifests?

21 A. No, I don't agree with you.

22

23 Q. And do you think it would have been useful, then, for  
24 you to know in 2008, 2009 and 2010 that it is very common  
25 for children who are sexually abused not to make  
26 a complaint until many, many years later?

27 A. Again, that's why they're referred to psychiatrists  
28 for a professional opinion.

29

30 Q. And you don't consider that that should be something  
31 that you should know of, as a solicitor, when you're making  
32 a decision to plead the Limitation Act in defence of  
33 a claim?

34 A. That's correct.

35

36 Q. So do I take it, then - what is your view on the  
37 following proposition, that where you are seeking to plead  
38 a Limitation Act defence - sorry, I withdraw that. Will  
39 you accept from me that the literature shows very clearly  
40 that it is common for children who are sexually abused to  
41 not report that abuse until many, many years later, until  
42 they're adults?

43 A. I accept that.

44

45 Q. In those circumstances, do you consider that the model  
46 litigant policy should either be interpreted now or be  
47 amended to have regard to that knowledge when making

1 a decision about whether or not to plead the Limitation Act  
2 in defence of any child sexual assault action?

3  
4 MR MENZIES: I object to that, your Honour. That may or  
5 may not be a valid proposition. But let it be assumed that  
6 it is. It's not for this witness to be asked that  
7 question. This is a policy issue for the State to decide,  
8 and if the State makes that decision, so be it, but  
9 your Honour is not going to be assisted by what a solicitor  
10 has to say about it.

11  
12 THE CHAIR: She is an experienced solicitor. She can give  
13 us her view, Mr Menzies.

14  
15 MR MENZIES: As your Honour pleases.

16  
17 THE CHAIR: Yes?

18  
19 MS GERACE: Thank you, your Honour.

20  
21 THE WITNESS: I would say it's not a matter for me.

22  
23 MS GERACE: Q. Having regard to what you've just heard  
24 from Mr Menzies?

25 A. No, I was going to say that before Mr Menzies stood  
26 up.

27  
28 Q. Do you consider, then, that the model litigant policy  
29 allows you to plead or take an available remedy without  
30 otherwise considering whether it is fair and proper?

31 A. It depends on what the fair and proper is in the  
32 particular circumstances.

33  
34 Q. Even where, on a very strong view of the plaintiffs'  
35 case, the State's breaches led to these children being  
36 abused, the children were born into poverty and continued  
37 to live lives of poverty, were impecunious when they  
38 brought their action, and in circumstances where children  
39 who are sexually and physically abused suffer both injury  
40 at the time and often lifelong consequences, it is  
41 unnecessary, in your opinion, to consider whether pleading  
42 a Limitation Act is not just available but whether it is  
43 proper and fair to plead it?

44  
45 MR MENZIES: I object to that. That's completely unfair.  
46 That's not what the witness said. Her answer was, "It  
47 depends on what the fair and proper is in the

1 circumstances." That's turned around and put back to her,  
2 wrongly, that "it is unnecessary, in your opinion", and it  
3 is an unfair question.

4  
5 MS GERACE: I'll rephrase it.

6  
7 MR MENZIES: If my learned friend wants to ask a question,  
8 she should do it fairly.

9  
10 MS GERACE: I thank my friend. I'll correct it. Thank  
11 you..

12  
13 MR MENZIES: It's not a question of --

14  
15 THE CHAIR: Mr Menzies, I would have allowed the question.

16  
17 MR MENZIES: If your Honour pleases.

18  
19 MS GERACE: Thank you, your Honour.

20  
21 Q. Ms Allison, do you accept, then, that on the  
22 plaintiffs' view of the evidence, in circumstances where  
23 the State's breaches of duty led to these children being  
24 abused, children who were born into poverty and continued  
25 to live lives of poverty and were impecunious when they  
26 brought their action, in circumstances where children who  
27 are sexually and physically abused suffer injury not only  
28 at the time of the abuse but also lifelong consequences,  
29 those subject to a model litigant policy should not just  
30 consider whether the Limitation Act is an available defence  
31 but whether it is also proper and fair for the very  
32 department, very State department, that may have caused  
33 those injuries, to plead it as a bar to their actions?

34 A. I think it's available and can be pleaded. The  
35 department - if the department, on a policy basis, doesn't  
36 want us to plead the limitation defence, then we will not  
37 plead the limitation defence.

38  
39 Q. Do I take it from your answer that, as a solicitor  
40 advising that department, you do not consider yourself  
41 bound to, firstly, turn your mind to the question of  
42 whether or not it is proper and fair for the State to plead  
43 that defence?

44 A. It is important to turn your mind to whether it's  
45 proper and fair, but I don't accept that because the  
46 plaintiffs' solicitors have a particular view of the case,  
47 that should in any way influence the way the State views

1 the case.

2

3 Q. You accept, then, as a proposition, though, that as  
4 a solicitor advising the State, you need to consider not  
5 only whether a defence is available but whether it's proper  
6 and fair?

7 A. Yes, but in that context, I think it's more to do with  
8 the question of getting people to prove something that we  
9 would accept as already being proven - putting people to  
10 proof when they don't need to be. I don't think the  
11 circumstances of the plaintiffs' subjective --

12

13 COMMISSIONER FITZGERALD: Q. Did you ever consider  
14 whether your actions were fair and proper?

15 A. I always consider whether my actions are fair and  
16 proper.

17

18 Q. No, did you actively consider whether your actions  
19 were fair and proper having regard to the nature of the  
20 plaintiffs and their circumstances?

21 A. Yes, I did.

22

23 Q. In what way?

24 A. By - when I took over carriage and prepared the  
25 advice, I was very, very careful in coming to the advice,  
26 applying the law to the facts; when I did the quantum  
27 advice, in that, the assumptions I made in that were that  
28 all the claims were true; when we went to the mediation, we  
29 put a great deal of effort into trying to make sure that  
30 the matter settled on the best terms and in a way that we  
31 hoped would help the plaintiffs get some closure on this  
32 issue.

33

34 Q. Did you consider the circumstances of the plaintiffs  
35 prior to the mediation?

36 A. In some ways.

37

38 COMMISSIONER FITZGERALD: Thank you.

39

40 MS GERACE: Q. Are solicitors within the employ of the  
41 Crown Solicitor's Office required to give an advice to  
42 their clients on whether they consider actions taken in  
43 litigation comply with the model litigant policy?

44 A. No. The agencies are quite aware of the model  
45 litigant policy.

46

47 Q. So is that the present position now that you do not

1 give your clients advice - when giving them advice about  
2 what defences might be available or what steps to take in  
3 litigation, also give them advice as to whether or not  
4 those steps comply with the model litigant policy?

5 A. In the sense that if we think we are getting  
6 instructions that are non-compliant with the model litigant  
7 policy, we will point that out. If we think and understand  
8 that counsel, for example, is doing something that is not  
9 in accordance with the model litigant policy, we would  
10 point that out. We do not routinely sit down and provide  
11 advices on the model litigant policy.  
12

13 Q. You do not routinely, at any stage when you're  
14 recommending a particular course of action or recommending  
15 a defence be pleaded in a particular way, provide any  
16 assurance to the client that what you're recommending  
17 complies with the model litigant policy; is that the  
18 position?

19 A. Well, we wouldn't recommend it if we thought it didn't  
20 comply with the model litigant policy.  
21

22 Q. I think we've heard from your evidence today that's  
23 not always the case, though, is it?

24 A. I'm not sure what you mean by that question.  
25

26 Q. You've already made a number of concessions that steps  
27 taken at various stages by the Crown Solicitor's Office  
28 were breaches of the model litigant policy.

29 A. I did say that.  
30

31 Q. So coming back to my question, do you think it would  
32 be of benefit to your clients to have at least an assurance  
33 that solicitors conducting litigation on their behalf had  
34 turned their mind to the model litigant policy before  
35 determining what strategies to adopt and steps to take in  
36 the litigation?

37 A. No.  
38

39 MS GERACE: They're my questions, your Honour.  
40

41 THE CHAIR: Yes. Do you have any questions, Ms England?  
42

43 MS ENGLAND: No questions, your Honour and Commissioner.  
44

45 THE CHAIR: Mr Menzies?  
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47 MR MENZIES: No, thank you, your Honour.

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THE CHAIR: Mr Lloyd?

MR LLOYD: I have nothing, your Honour.

THE CHAIR: Thank you. Thank you, you are excused.

THE WITNESS: Thank you, your Honour. Can I just say, I've been in the witness box defending the actions of the State in this as a lawyer, but I do understand that what happened at Bethcar was horrible and, as I say, Ms Loughman and myself put a great deal of effort at the mediation into trying to handle that as sensitively as possible to give, as I said, some sort of closure to these plaintiffs.

MR LLOYD: Your Honour, in light of that, may I just ask one question.

<EXAMINATION BY MR LLOYD:

MR LLOYD: Q. Ms Allison, knowing all the things you know now and with the benefit of hindsight, if you now were allocated the role of being the supervising solicitor in a case or cases like this one, would you behave differently?

A. Yes, I think so.

MR LLOYD: That's the evidence, your Honour.

THE CHAIR: Yes. Does anyone have a question on that matter? Yes, thank you, you are excused.

<THE WITNESS WITHDREW

MR LLOYD: Your Honour, I call Mr Michael Coutts-Trotter. His statement is found in tab 8 of volume 1 of the witness bundle.

<MICHAEL PAUL COUTTS-TROTTER, sworn: [12.44pm]

<EXAMINATION BY MR LLOYD:

MR LLOYD: Q. Could you please state your name?

A. Michael Paul Coutts-Trotter.

Q. Mr Coutts-Trotter, you have prepared a detailed statement for the purposes of or at the request of the

1 Royal Commission?

2 A. I have indeed, Mr Lloyd.

3

4 Q. You did that on 29 September 2014?

5 A. Yes.

6

7 Q. Everything you say in that statement is true?

8 A. Yes.

9

10 Q. Are there any clarifications or corrections that you  
11 wish to make?

12 A. No. No, thank you.

13

14 MR LLOYD: I tender that statement, your Honour.

15

16 THE CHAIR: That will be exhibit 19-12.

17

18 **EXHIBIT #19-12 STATEMENT OF MICHAEL PAUL COUTTS-TROTTER**  
19 **DATED 29/09/2014**

20

21 MR LLOYD: Q. You presently, Mr Coutts-Trotter, are the  
22 Secretary of the Department of Family and Community  
23 Services?

24 A. Yes, I am.

25

26 Q. In your capacity as the secretary, you have conducted  
27 a review of the way that the department conducted itself in  
28 relation to the Bethcar litigation?

29 A. Yes, I have.

30

31 Q. That review, it's obvious from your statement, was  
32 a very comprehensive one.

33 A. Yes, it was.

34

35 Q. Just to make it clear, you had no personal involvement  
36 with giving instructions during the course of the  
37 litigation?

38 A. No, I didn't.

39

40 Q. Could I take you to some aspects of your statement.  
41 Could it be brought up on the screen and if we could scroll  
42 down to paragraph 16. Could I just invite you,  
43 Mr Coutts-Trotter, to read, for the benefit of those who  
44 don't have the statement in front of them, what you say in  
45 paragraphs 16 to 20?

46 A. Certainly.

47

1 16. I acknowledge that the terrible  
2 physical and sexual abuse inflicted upon  
3 children and young people by those  
4 entrusted to care for them has had  
5 devastating and life-long impacts on many  
6 individuals.

7  
8 17. I reiterate the apology we gave to the  
9 plaintiffs in the civil litigation matter  
10 discussed later in this statement and  
11 extend it to all victims of abuse in  
12 Bethcar.

13  
14 18. The Department could have done more to  
15 protect those children in Bethcar once  
16 reports had been made.

17  
18 19. I also believe the State could have  
19 managed the civil litigation process better  
20 and I go into this later in my statement.

21  
22 20. The Department is genuinely trying to  
23 learn from the mistakes of the past and  
24 work out ways we can do better.

25  
26 Q. Thank you. Could you go and we scroll down to  
27 paragraph 26 of your statement, please.

28 A. Yes.

29  
30 Q. You talk there about some changes in the structure and  
31 operating model of the department relevant to the way  
32 litigation of this sort is handled.

33 A. Yes.

34  
35 Q. Could you just tell the Commission about that?

36 A. We're making changes to create a much better structure  
37 to govern and manage all legal matters, including matters  
38 of civil litigation. The key change is to establish  
39 a position of general counsel and to have that position  
40 report through a deputy secretary directly to me.

41  
42 My review of this matter revealed that there are many  
43 things about how we govern litigation inside our agency  
44 that need to change, and there are some simple and obvious  
45 things we can do, like creating a general counsel position  
46 and giving that person clear responsibility, with me, to  
47 ensure that we meet the spirit and letter of the model

1 litigation policy. That would dramatically reduce the risk  
2 that we ever repeat the mistakes of this matter.

3  
4 Q. Just so I can understand, and in very broad terms  
5 without engaging with all the detail you've helpfully set  
6 out in your statement, the ultimate responsibility for the  
7 conduct of litigation, that would reside in the general  
8 counsel?

9 A. Yes.

10  
11 Q. And that person would report directly to you?

12 A. On those matters and also report to the executive, the  
13 governing board of the agency, and we would put in place,  
14 and are putting in place, systems and processes that ensure  
15 we have very, very purposeful oversight, very close and  
16 careful oversight, of decisions about major matters of  
17 litigation and how we then handle those matters from that  
18 point onwards.

19  
20 THE CHAIR: Q. Mr Coutts-Trotter, I've acted for many  
21 government departments as a barrister and I've appeared  
22 against them. One of the difficulties that you can see  
23 very often is the relationship between a departmental  
24 lawyer and the departmental officers and the Crown  
25 Solicitor's Office.

26 A. Yes.

27  
28 Q. Is that an issue you've identified in your review  
29 here?

30 A. Yes. I think, with the benefit of being a little  
31 distant from this and reviewing it, we drifted into  
32 a defensive strategy and an adversarial strategy without  
33 carefully thinking through the fundamental issue, and the  
34 fundamental issue was we had a liability, we had  
35 a responsibility to respond far more effectively and far  
36 more quickly than we did to the women and men of Bethcar,  
37 and we fell into a set of narrow technical decisions that  
38 then just seemed to follow their own course over  
39 a five-year period.

40  
41 Q. When you say "we", you're talking about your  
42 department?

43 A. Yes, our department and our legal advisers.

44  
45 Q. Yes, and is this because, in effect, the matter was  
46 left in the hands of the Crown, as you analyse it?

47 A. I think we have to accept our responsibility in this,

1 which is that we have a role to instruct. We as an agency  
2 have a role to understand our obligations under model  
3 litigant policy. I have a responsibility to ensure that  
4 systemically we give effect to those responsibilities. And  
5 as I look back on that matter, we failed in that.

6  
7 MR LLOYD: Q. In paragraph 40 of your statement,  
8 Mr Coutts-Trotter, you make reference to one aspect of the  
9 change in approach being to ensure that decisions on  
10 whether to commence, defend or settle a dispute are  
11 centralised in the Office of General Counsel?

12 A. Yes.

13  
14 Q. And particularly that you would be informed of any  
15 potential non-compliance with the model litigant policy.

16 A. Yes.

17  
18 Q. Is it your expectation that this change would mean  
19 that, for example, where a judicial officer makes an  
20 observation that there has been a breach or an apparent  
21 breach of the model litigant policy, that's something that  
22 you would be told about?

23 A. Yes, absolutely.

24  
25 Q. Or even where a judicial officer makes the observation  
26 that the conduct of the State or the Crown Solicitor's  
27 Office raises the issue about whether the model litigant  
28 policy has been breached, is that something that you would  
29 be expected to be told about?

30 A. I have a very clear responsibility to ensure that that  
31 policy is implemented inside the agency, so that kind of  
32 feedback would be critical.

33  
34 Q. Is it your view, having regard to that evidence, that  
35 what you would do is either conduct or ask someone who is  
36 suitably experienced to conduct some sort of review about  
37 what had led to the comment being made?

38 A. That seems a sensible course of action.

39  
40 Q. Because it's not always the case that a judge who  
41 makes the observation would necessarily have got it right?

42 A. No.

43  
44 Q. But what would be necessary is if that sort of comment  
45 is being made by a judicial officer, there be some sort of  
46 inquiry or review by someone at a senior level into just  
47 what is going on?

1 A. Yes, I think that would be helpful.

2

3 Q. Could I ask you also in respect of paragraph 40, in  
4 terms of decisions on whether to, in these 15 cases, defend  
5 or settle legal disputes, is that something that you would  
6 expect the department and those who act for it to address  
7 at an early stage after proceedings are commenced?

8 A. We should determine the nature of what is in dispute,  
9 determine whether we have liability, before we adopt  
10 defences. We didn't do that in this case. We came to the  
11 determination of liability far too late, and if we had done  
12 it initially, this would have followed a different course,  
13 I'm sure of it.

14

15 Q. In cases like this, if you could comment on this  
16 proposition, please, even before the department or the  
17 Crown Solicitor's Office was in a position to form  
18 conclusive views about what was likely to happen on the  
19 question of liability, there were a few things that were  
20 known at a very early stage which would have led to  
21 consideration being given, I suggest, to the matter being  
22 mediated at a very early stage?

23 A. Yes. My interpretation of our responsibility here  
24 should lead us, I think, in cases like this, to simply  
25 believe people when they come to us, start from belief and  
26 look for evidence to support what is being put to us. If  
27 we had done that, we would have gone to departmental files  
28 and we would have discovered that we had an involvement  
29 here well beyond a narrow regulatory role with Bethcar. We  
30 had received allegations from young girls from Bethcar in  
31 March 1980. We would have discovered that there was  
32 information through victims compensation decisions that  
33 related to the women and men at Bethcar. We would have  
34 discovered that there was a conviction and admissions in  
35 a court case. And we would very rapidly, I think, have  
36 formed the view that we had a liability, we had a duty of  
37 care, we hadn't fully met that duty of care and we would  
38 have moved to settlement.

39

40 Q. Thank you for that. Those matters that you've just  
41 referred to - the documents putting the department on  
42 notice from March 1980 and the conviction in respect of the  
43 offences by Mr Gibson - in your review of the matter, they  
44 were all documents that were available at a very early  
45 stage, weren't they?

46 A. They were, but I think we put a set of blinkers on  
47 when we adopted a defensive and adversarial posture and we

1 didn't go looking for those things that would have  
2 confirmed what the women were telling us.

3  
4 Q. In addition to those matters that you've set out,  
5 there was also a document prepared by Detective PE Freer  
6 about Kathleen Biles dealing with the decision not to  
7 prosecute Mr Gordon, wasn't there?

8 A. Yes.

9  
10 Q. He recorded in that document that no-one should draw  
11 any negative inference from the decision not to prosecute  
12 and that, in his view, Kathleen Biles was a woman of the  
13 utmost integrity who gave a credible account.

14 A. Yes.

15  
16 Q. That was a powerful piece of evidence about whether  
17 ultimately, if the State decided to fight Kathleen Biles'  
18 case, it would be likely that she presented as a witness of  
19 credibility, wasn't it?

20 A. Yes.

21  
22 Q. Could I ask you about paragraph 42, please.

23 A. Yes.

24  
25 Q. There you deal with the new systems component,  
26 including in terms of, it would appear, early advice about  
27 litigation strategy, risks, dispute resolution options,  
28 anticipated costs, et cetera.

29 A. Yes.

30  
31 Q. In your review, were you able to work out when it was  
32 that was the first time that the department received  
33 a comprehensive advice about liability and settlement  
34 options or litigation strategy?

35 A. From recollection, it was several years into the  
36 conduct of the matter.

37  
38 Q. Does it jog your memory if I suggest April 2013?

39 A. Yes.

40  
41 Q. In cases where the Crown Solicitor's Office is acting  
42 for the department involving allegations of child sexual  
43 abuse, would you expect that the Crown Solicitor's Office  
44 might proffer a detailed advice on liability and litigation  
45 strategy before the four year and ten month mark of the  
46 litigation?

47 A. Yes, but I would also equally expect us to ask for it

1 and for us to conduct our own assessment of what we know  
2 that will tell us whether or not we have liability and  
3 therefore how we should behave.

4  
5 Q. Does any part of the new protocol involve there being  
6 an identification of timelines by which particular types of  
7 advice ought to be received?

8 A. Yes.

9  
10 Q. What does that involve?

11 A. Our expectation in the new protocol is that we would  
12 form a view, within three months, of liability, prior to  
13 any decision on defences being adopted, and if we can't  
14 form a view within three months, this system of case  
15 management, this structure of governance, would make sure  
16 that more senior people know and that the officer  
17 responsible has to report up why we haven't produced that  
18 position within three months. The aim is to try to put  
19 some failsafes in so that a matter doesn't drift in the way  
20 that this one did.

21  
22 Q. It might be imagined that there could be circumstances  
23 where it's just not possible, with all the will in the  
24 world, to even form a preliminary view within three months.  
25 In that sort of a situation, there would be a review and  
26 some further time period identified by which that  
27 preliminary advice should be given?

28 A. Indeed.

29  
30 Q. That preliminary advice, I think you've already told  
31 the Commission, would deal with liability, but you would  
32 also expect it to deal with the general strategy to be  
33 adopted?

34 A. Yes.

35  
36 Q. That is to say, whether it looks as though the case is  
37 one the department should be defending or whether it looks  
38 as though it's a case that the department should be  
39 considering settling?

40 A. Yes.

41  
42 Q. And if so, if it's a case where it looks like the  
43 department should be considering settling it, the mode in  
44 which that might be approached, that is to say, including  
45 a mediation?

46 A. Yes.

47

1 Q. Could I ask you, please, to go to paragraph 46.

2 A. Yes.

3

4 Q. In that paragraph, you make reference to one of the  
5 changes that you have implemented as being a review of  
6 victims support services to ensure that victims are treated  
7 with dignity and respect and provided access to appropriate  
8 information and services?

9 A. Yes.

10

11 Q. You were here for all of day one, I think; is that  
12 right?

13 A. Yes.

14

15 Q. And you heard the evidence of Kathleen Biles,  
16 including evidence about the distress that she felt when  
17 the litigation was concluded eventually?

18 A. Yes, I did.

19

20 Q. Has there been any consideration to any offer of  
21 counselling by the department after cases have settled?

22 A. There should be.

23

24 Q. And that's something you would be prepared to adopt?

25 A. Absolutely.

26

27 MR LLOYD: I note the time, your Honour.

28

29 THE CHAIR: We'll take lunch.

30

31 **LUNCHEON ADJOURNMENT**

32

33 MR LLOYD: Q. Mr Coutts-Trotter, could I take you to  
34 paragraph 48 of your statement, please.

35 A. Yes.

36

37 Q. Could I invite you to read that paragraph?

38 A.

39 *In accordance with the Model Litigant*  
40 *Policy, I will, on behalf of the*  
41 *Department, personally offer a written*  
42 *apology in all cases where it is clear that*  
43 *the Department has acted improperly.*

44

45 Q. That statement that you just read out is one of the  
46 changes that you've fairly recently implemented?

47 A. Yes. We've introduced some guidance to interpret the

1 application of the model litigant policy inside the agency.

2  
3 Q. Is it the case that if it's determined that an apology  
4 is appropriate, that might even be offered during the  
5 course of litigation?

6 A. Absolutely.

7  
8 Q. That's, no doubt, with the acknowledgment of the  
9 relevant provision in the Civil Liability Act which permits  
10 that to occur?

11 A. Yes. It was clear from the evidence of one of the  
12 women that the fact that the apology, when it came, came so  
13 late that it really lacked meaning, and if it had been  
14 delivered earlier - the implication was that if it had been  
15 delivered earlier, it might have contained meaning.

16  
17 Q. If you would comment on this, that it might be thought  
18 that one of the real tragedies of the way that this case  
19 was conducted is that from a fairly early time, it was  
20 clear, or at least it seemed, that the plaintiffs were  
21 prepared to settle on the basis of an acknowledgment by the  
22 State about what happened to them and some, evidently,  
23 fairly modest amount of cash?

24 A. Yes.

25  
26 Q. An early apology or acknowledgment in this case might  
27 have seen it settle years before it did?

28 A. And it would have been appropriate to provide an  
29 apology.

30  
31 Q. Quite. Could I take you, please, to paragraph 60?

32 A. Yes.

33  
34 Q. I think you've already told the Commission this, that  
35 the departmental officers first became aware of allegations  
36 of child sexual abuse at Bethcar on 5 March 1980 via  
37 Mr Madden?

38 A. Yes.

39  
40 Q. In paragraph 61, based on the records that you  
41 understand are available, you say that none of the  
42 plaintiffs were admitted to the control of the State, that  
43 is, State wards, at the time the abuse occurred. Does that  
44 include Kathleen Biles?

45 A. To my understanding, yes, it does.

46  
47 Q. Could I take you, please, to paragraphs 73 and 74 and

1 could I invite you to read out those two paragraphs?  
2 A.

3 73. In hindsight, I too am sorry that we,  
4 as a Department, didn't take more decisive  
5 action in relation to the allegations made  
6 by the victims, who were just girls at the  
7 time.

8  
9 74. The girls were courageous in bringing  
10 their allegations to the Police and I also  
11 appreciate the shame and embarrassment they  
12 may have felt in disclosing their stories.  
13 I also appreciate how difficult casework is  
14 now, and was back then, particularly in  
15 matters of child sexual assault. We, as  
16 a Department, will continue to learn from  
17 these events and our mistakes.

18  
19 Q. Could I take you, please, to paragraphs 92 and 93.  
20 There you talk about the fact that Mr Peter Maxwell,  
21 investigator, was employed or retained to investigate the  
22 matters raised in the statements of claim and his three  
23 affidavits in the proceedings.

24 A. Yes.

25  
26 Q. You have heard the evidence given so far in this Royal  
27 Commission to the effect that Mr Maxwell, in his first two  
28 affidavits, only set out people that were unavailable for  
29 one reason or the other and didn't refer to any of the many  
30 people who were available?

31 A. Yes.

32  
33 Q. Do you have a response to the way that Mr Maxwell  
34 approached his task, no doubt on instructions?

35 A. He did the wrong job well. He conducted  
36 investigations that I know at least one plaintiff found  
37 disturbing and intrusive, and it was a pointless piece of  
38 work, because we could have readily established that we had  
39 information and witnesses available to us that would have  
40 enabled us to rapidly decide we shouldn't advance a defence  
41 of limitation.

42  
43 Q. Is the effect of what you're saying, or at least one  
44 aspect of what you're saying to the Commission, about  
45 Mr Maxwell that whilst his affidavits were deployed in the  
46 attempt to permanently stay the actions --

47 A. Yes.

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Q. -- their use could well have been to tell the Crown Solicitor's Office and the department that in fact they were very likely to be exposed to liability and that the abuse had occurred?

A. Yes.

Q. In paragraph 95 - and I think you've already addressed this in your oral evidence - you deal with your view that you should have a greater understanding of the facts and circumstances of the matter at a far earlier stage of the process?

A. Yes.

Q. That includes, by the means you identified before the lunch break, requiring early advices from those solicitors acting for the department dealing with liability and the litigation strategy?

A. Yes. This is a question of how we do our work, but it is fundamentally a question of culture. If inside a civil litigation model we adopt an adversarial stance, that greatly dictates how we behave. If we adopt a different stance, and I think that's particularly appropriate for our agency given the nature of the people we serve, many of those people are very vulnerable and have been or are likely to be the victims of crime, we need to take a different approach.

Q. Thank you. Can you tell me in what proportion of claims against the department involving child sexual abuse is the Crown Solicitor's Office retained?

A. I don't know that. I can find that out and come back to you on it.

Q. In paragraphs 110 and following, you set out the people from the Crown Solicitor's Office who you understood to be acting on behalf of the department in the litigation. In reviewing your files, were you aware that a Mr McCarthy came to adopt the role that Ms Allison had been adopting from about February 2010 to June 2012?

A. No, I wasn't aware of that.

Q. In terms of the way the Crown Solicitor's Office allocates matters to various solicitors within the team when the Crown Solicitor's Office is acting for the department, speaking of the position now, does the department get a say as to who acts?

1 A. I don't know, but I think for both our department, and  
2 I won't speak on behalf of the Crown Solicitor, but this  
3 case study illustrates a range of things that we need to  
4 think more carefully about. These paragraphs and the long  
5 list of people inside our agency who had responsibility at  
6 various points for various aspects of this matter mean that  
7 it took four and a half years for someone of sufficient  
8 authority to look through the narrow legal aspects of it  
9 and look to the substance of it, which is: is there a just  
10 claim here and how are we responding to that? So there are  
11 issues about how we operate with external legal advisers  
12 that we need to think through, and we need to ensure that  
13 people feel confident inside our agency to identify and  
14 escalate issues far, far earlier than we did in this  
15 matter.

16  
17 Q. Does the department, as the client, have any authority  
18 presently to dictate the extent to which junior solicitors  
19 who have day-to-day carriage are supervised?

20 A. I would be very surprised if we did, because we would  
21 be dictating the operations of another organisation, but  
22 I would say that we need to all learn lessons from this  
23 about, upon our own account, the importance of close and  
24 regular supervision of our own legal staff to make sure  
25 that people understand their professional obligations,  
26 understand the value and purpose of this agency and fulfil  
27 their roles accordingly, and I'm sure that's true of other  
28 government agencies as well.

29  
30 Q. Because, as you would be well aware, in the ordinary  
31 situation where you have a client retaining a firm of  
32 solicitors, the client would be well within its rights to  
33 say, "Look, this is a complex case involving 15 plaintiffs  
34 who allege very serious child sexual abuse. I want  
35 a senior solicitor to have day-to-day carriage of it"?

36 A. The way we manage that risk is to ensure that the  
37 people on our side of it who have responsibility for  
38 initiating and engaging external legal advice have the  
39 capability and the experience and the confidence to be  
40 demanding as a client, yes.

41  
42 Q. So if the Crown Solicitor's Office were to act for the  
43 department in a similar case to the Bethcar case now and  
44 the day-to-day carriage was allocated to a grade I-III  
45 solicitor with minimal supervision, the way that the  
46 department would deal with that is to make sure that there  
47 are senior people who are legally qualified within the

1 department who are managing the case?

2 A. Absolutely, who are capable of making a good judgment  
3 about whether we are likely to receive good advice and good  
4 service from our external legal adviser.

5  
6 Q. Do you know whether the department's expectation  
7 between 2008 and 2013 was that there would be more  
8 oversight than you've heard in the evidence by senior  
9 solicitors within the Crown Solicitor's Office?

10 A. In truth, I don't know.

11  
12 Q. Do you agree that there are significant differences in  
13 the approach which might be adopted when acting for the  
14 department in cases of child sexual abuse as compared to  
15 other types of personal injury litigation?

16 A. Yes, I do.

17  
18 Q. Including because the plaintiffs in child sexual abuse  
19 cases are often damaged, vulnerable people?

20 A. We know what children need. Children need safety;  
21 they need love; they need routine; they need people who  
22 encourage and support them in their physical, emotional and  
23 psychological development, and if you are denied that in  
24 childhood, it shapes your experience through life, and we  
25 need to be aware of that and responsive to that.

26  
27 Q. In cases where plaintiffs have suffered child sexual  
28 abuse, there is a greater likelihood, isn't there, that the  
29 litigation process can damage them as compared to other  
30 types of plaintiffs in personal injury cases?

31 A. Yes.

32  
33 Q. That requires a careful approach, I think you accept,  
34 in the way the department and those who act for it deal  
35 with claims such as this?

36 A. If as a child you have been silenced and told you are  
37 a liar when you tell the truth, if as a child no adult has  
38 believed your story, you come forward as an adult and  
39 disclose what happened and you then have a response from  
40 a government agency that looks as if we don't accept what  
41 you are telling us as the truth, that obviously can be  
42 extremely traumatising.

43  
44 Q. Could we scroll down to paragraph 123 of your  
45 statement. In that paragraph, you extract part of the  
46 Torts Procedures document?

47 A. Yes.

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Q. Just to be clear, could you tell the Commission what that document is?

A. That was an internal policy endorsed within our community services legal team that had operation for the people in that team.

Q. The part you've extracted deals with the taking of limitation defences?

A. Yes.

Q. That, in part, says:

*We should only be seeking a separate hearing on the Limitations Act where it is abundantly clear at an early stage that, due to the effluxion of time, we cannot properly defend the matter or that it is equally clear that an application for extension will fail. In all other matters on which the Limitations Act might impact, it should be pleaded. However, the limitations argument should be run with the hearing of the substantive matter.*

A. Yes.

Q. There are a couple of things I want to ask you about that paragraph. I think you accept that in the Bethcar litigation, at the very least, the limitation defence should have been deferred to be dealt with at the final hearing?

A. Yes, at the very least.

Q. You go further, I think, having reviewed the particular circumstances of this case, and say, do you not, that the limitation defence should not have been raised at all?

A. Yes.

Q. In your experience, where this document says, in the first line that you've extracted, "The propensity for the Courts to give plaintiffs their day in Court", is that something that the department experiences in terms of cases where it raises a limitation defence, that is to say, judges generally want to try to allow plaintiffs to have their day in court and not shut them out on the limitation

1 point?

2 A. I can only assume that to be the case, because of the  
3 way this is phrased, but I have no direct knowledge of  
4 that.

5

6 Q. Are you aware whether the department keeps any  
7 statistics about how often it succeeds when a limitation  
8 defence is raised?

9 A. We are trying to gather those at present to inform  
10 some whole-of-government considerations about the issues  
11 around this.

12

13 Q. Presently instructed, do you know when that task is  
14 likely to be completed?

15 A. I would hope that we would be able to report back on  
16 that during next week.

17

18 Q. Thank you. On the question of statistics and, just  
19 aside from statistics, on the time bar question, does the  
20 department keep statistics generally about what proportion  
21 of cases are settled in terms of child sexual abuse cases?

22 A. We hold the information, but we don't report it as  
23 a report to a governing body inside the department, but  
24 obviously what is implicit or explicit in the changes I've  
25 alluded to or described in this evidence is that we need to  
26 make better use of the data that we hold; we need to use  
27 that to ensure that we make good decisions in managing  
28 matters; and we need to use it to have a view of the total  
29 experience of the agency, to think about how we can  
30 continue to improve how we handle civil matters.

31

32 COMMISSIONER FITZGERALD: Q. We may have already asked  
33 this question of you or given notice: do you now have  
34 a knowledge of the number of civil litigation numbers  
35 involving child sexual abuse that have been brought in  
36 relation to the department and its predecessors over any  
37 period of time, or is that part of the  
38 information-gathering task to which you alluded?

39 A. Commissioner, I don't have that knowledge and I would  
40 need to check whether that data is being sought, but if it  
41 isn't, we will gather that information from our records.

42

43 COMMISSIONER FITZGERALD: Thank you.

44

45 MR LLOYD: Q. Mr Coutts-Trotter, I just want to ask you  
46 some questions, in particular, about the effect of this  
47 litigation on [AII]. I'll just remind you --

1 A. You don't need to remind me.

2

3 Q. I'm sure that's right. You've just told the  
4 Commission that, having reviewed the matter, in this case  
5 your view in hindsight is that the limitation point should  
6 not have been raised at all?

7 A. Yes.

8

9 Q. Accept from me, but you probably know this from your  
10 review anyway, that there were a number of occasions after  
11 about the middle part of 2010 where suggestions made either  
12 by the court or by the plaintiffs to mediate were rejected  
13 by the department, through the Crown Solicitor's Office,  
14 primarily on the basis that it was premature to do so with  
15 the time bar question not having been determined.

16 A. Yes.

17

18 Q. With the new policy that you've identified in place,  
19 it's likely, isn't it, that these cases would have gone off  
20 to mediation at least by about the middle part of August  
21 2010?

22 A. At least at that point.

23

24 Q. At the latest?

25 A. At the latest.

26

27 Q. You're obviously aware of the particular circumstances  
28 of [AII], but I might just set these out for convenience.  
29 She was one of the Bethcar girls who made complaints to the  
30 police about Mr Gibson.

31 A. Yes.

32

33 Q. Mr Gibson was charged with an act of indecency on her  
34 when she was between the ages of 10 and 11.

35 A. Yes.

36

37 Q. Mr Gibson pleaded guilty in respect of those offences.

38 A. Yes.

39

40 Q. [AII] in the civil proceedings made allegations in the  
41 particulars that she was repeatedly sexually assaulted  
42 between 1977 and 1984 by Mr Gibson, during which period she  
43 was between 10 and 17 years of age.

44 A. Yes.

45

46 Q. You know, because you've looked at the files  
47 carefully, that she was one of the plaintiffs in the

1 action.

2 A. Yes.

3

4 Q. Just pausing there, having regard to the fact that she  
5 complained to the police and Mr Gibson pleaded guilty, at  
6 least when it came to the question of whether the abuse had  
7 occurred at all, it's right that she would have been in  
8 a very strong position in terms of this group of  
9 plaintiffs, with the benefit of a guilty plea by Mr Gibson?

10 A. She had every right to expect that we would simply  
11 accept what she put to us.

12

13 Q. You know that a subpoena for production was issued by  
14 the department, through the Crown Solicitor's Office, on  
15 her employer in 2012?

16 A. Yes.

17

18 Q. Obviously, a number of years or a couple of years  
19 after the time you've identified that the cases should have  
20 been mediated?

21 A. Yes.

22

23 Q. You also know, no doubt, of the evidence given by  
24 Ms Loughman that when her employer came to her after that  
25 subpoena was received, [AII] thought that she might lose  
26 her job?

27 A. Yes.

28

29 Q. And she thought she might lose her job because of the  
30 fact that her employer might become aware of the  
31 circumstances of the case?

32 A. Yes.

33

34 Q. [AII] then instructed her solicitor to make  
35 a walk-away offer, that is to say, to give up on her case  
36 and not receive any money, on the basis that each party was  
37 to bear their own costs?

38 A. Yes.

39

40 Q. Having regard to those matters, would you regard it as  
41 being an injustice, the result that [AII] received in the  
42 litigation?

43 A. Yes, I would.

44

45 Q. To make it clear, the offer of compromise that she  
46 made was accepted, albeit after advice was obtained about  
47 whether to accept it, by the Crown Solicitor's Office, from

1 three barristers and so the State presently could have no  
2 liability to her; you understand that?

3 A. Yes.

4

5 Q. Notwithstanding that, in your position - and if you're  
6 not in a position to deal with it now, obviously say so -  
7 will any consideration be given to whether there would be  
8 any payment made to her to reflect what happened to her?

9 A. If she or her representative approached us, we would  
10 sit down and discuss it with them.

11

12 Q. Could I ask you, please, to turn to paragraph 134.

13 A. Yes.

14

15 Q. This deals with, as I understand it, but tell me if  
16 I'm wrong, the present policy that it would only be an  
17 exceptional matter where a limitation argument should be  
18 raised?

19 A. This refers to a practice guide that has been  
20 superseded by a legal policy directive, but only very  
21 recently.

22

23 Q. In terms of the circumstances in which a limitation  
24 argument would be raised, what does the later policy  
25 provide for?

26 A. It says plainly in the case of child abuse, sexual  
27 abuse, serious physical abuse, we would not rely on  
28 a limitations defence if we are a sole defendant. Now, the  
29 issue may arise where there is another defendant, and  
30 I think it would be a very rare example, but it could be  
31 that there is another jurisdiction, say, as a defendant,  
32 who was seeking to rely on a limitations defence. In that  
33 circumstance, a circumstance in which, if we adopted the  
34 policy that we would adopt if defending alone, that would  
35 leave State taxpayers liable potentially for another  
36 jurisdiction's liability, so that might be a circumstance  
37 in which it is arguable we may need to look to  
38 a limitations defence. But for our agency dealing with  
39 these kinds of claims and dealing with them alone, our view  
40 is that we should not rely on a limitations defence.

41

42 Q. Is that circumstance that you've just outlined, based  
43 on the present policy, the only situation in which the  
44 department presently would raise a time bar defence in  
45 allegations of child sexual abuse?

46 A. Yes.

47

1 Q. Who, within the department, would be charged with the  
2 responsibility for making the decision, in those limited  
3 circumstances, whether to raise the time bar defence?

4 A. It would be a general counsel in consultation with me  
5 or whoever occupies my role.

6  
7 Q. So the upshot of that is, having regard to the new  
8 policy, that there will be a whole lot less cases, one  
9 would think, where time bar defences will be raised?

10 A. Absolutely.

11  
12 Q. And, where they are raised, it will only be with your  
13 approval?

14 A. Yes.

15  
16 Q. Could I ask you to turn to paragraph 138, please.  
17 I might just invite you, if I could, Mr Coutts-Trotter, to  
18 read paragraphs 138 to 143?

19 A. Certainly.

20  
21 *138. I have reflected significantly, both*  
22 *personally and with those that assist me,*  
23 *on the conduct of the Bethcar Proceedings*  
24 *and how the conduct of the proceedings*  
25 *might affect victims of abuse.*

26  
27 *139. I acknowledge that some of the*  
28 *processes of civil litigation ultimately,*  
29 *in this case, added to the time taken for*  
30 *the proceedings to reach their conclusion.*

31  
32 *140. While I understand that civil*  
33 *litigation processes are complicated and*  
34 *that those processes and procedures are*  
35 *designed to place parties in the best*  
36 *position possible to understand the case*  
37 *they have to answer at a trial, I regret*  
38 *that the Bethcar Proceedings took 5 years*  
39 *to reach a resolution (whether by mediation*  
40 *or determination by the Court).*

41  
42 *141. If circumstances similar to those in*  
43 *the Bethcar Proceedings arose today, my*  
44 *expectation would be that the Department*  
45 *would take what steps it could to ensure*  
46 *the matter progressed as quickly as it*  
47 *could. Applying hindsight and our present*

1 policies, my expectation would be that the  
2 Department would either not plead  
3 a Limitation Act defence or, where that was  
4 deemed necessary, allow any Limitation Act  
5 defence to be heard as part of the final  
6 hearing.

7  
8 142. Similarly, my expectation would be  
9 that my Department would do all they could  
10 to arrange for a mediation to be held  
11 earlier in the proceedings.

12  
13 143. In this regard, we are currently  
14 examining our current Department policies  
15 and procedures in relation to where we can  
16 do things better or in a different way.

17  
18 Q. Thank you. I think you've already made your position  
19 plain about the benefits of mediation in cases like this  
20 and that that should have occurred, I think you've said,  
21 even before mid-2010?

22 A. Yes.

23  
24 Q. Can I get your response to this fact, of which no  
25 doubt you're aware: the parties in these proceedings  
26 incurred something in the order of \$2.1 million to  
27 \$2.2 million in legal fees as a result of these plaintiffs  
28 being fought for five and a half years in the cases that  
29 they brought?

30 A. Yes.

31  
32 Q. Do you have a response to that?

33 A. Yes, I do. It cost taxpayers \$3.7 million all up, and  
34 60 per cent of that went in legal costs, most of which were  
35 avoidable and should have been avoided.

36  
37 Q. Just so I can understand, is the \$3.7 million  
38 calculated by about \$1.4 million being paid to each of the  
39 14 plaintiffs who remained in the action as at December  
40 2013?

41 A. Yes.

42  
43 Q. Your calculation, then, is that \$2.3 million was spent  
44 all up by the State in legal costs?

45 A. Yes, yes, our own costs and the plaintiffs' costs, the  
46 women's costs.

47

1 Q. Could I ask you, please, to go to paragraph 168 of  
2 your statement?

3 A. Yes.  
4

5 Q. There you deal with the way in which the department  
6 characterised the Bethcar proceedings.

7 A. Yes.  
8

9 Q. Can you explain a bit about that?

10 A. You will recall earlier in my statement we referenced  
11 I think it was the Torts Procedures. At paragraph 124, we  
12 talk about what seemed to be the practice inside the  
13 department, although it wasn't really a formal policy, but  
14 it sought to differentiate those matters in which the  
15 department had a regulatory role or a funding role from  
16 those matters where we perceived our duty of care to be  
17 more significant, in other words, where we were engaged as  
18 a child protection agency.  
19

20 THE CHAIR: Q. Can I just understand what lies behind  
21 this. I don't seek to simplify what can be complex  
22 questions, but are you saying that the department doesn't  
23 accept a duty of care when it has a funding or regulatory  
24 relationship with an institution such as this?

25 A. No, no, your Honour. I'm saying that there was a view  
26 inside the agency that we should carefully differentiate  
27 those types of matters from matters that contained other  
28 aspects where there was a foreseeable risk over which we  
29 had a great deal of control. Now, I don't draw that  
30 conceptual distinction. I recognise there could be aspects  
31 where our involvement is so peripheral that, in fairness,  
32 we didn't fail in our duty of care, but I think the  
33 differentiation that we drew on this matter led us down the  
34 wrong track. We stopped looking for readily available  
35 information - the testimony of three young girls in 1980 -  
36 that would have told us, no, we were more deeply engaged in  
37 Bethcar.  
38

39 Q. Just so everyone listening and watching can  
40 understand, the funding role which the department had for  
41 Bethcar was what?

42 A. We provided cash payments. So for children who  
43 weren't wards of the State, we provided payments to the  
44 operators of Bethcar in respect of each child that met some  
45 of the costs of their care.  
46

47 Q. Then in terms of the licensing role of the department,

1 what was that?

2 A. We licensed Bethcar from 1978 onwards, I think, and  
3 I would need to check --

4  
5 Q. That's licensing the institution?

6 A. That's licensing the institution.

7  
8 Q. As opposed to those who ran it?

9 A. No. The licence identified attached conditions, so  
10 that Bert Gordon was the primary person in that licence.  
11 There were conditions limiting the number of children that  
12 could live at Bethcar, and this, I think, was one of the  
13 flaws in our response when the allegations came in 1980 in  
14 respect of Colin Gibson, because our officer who dealt with  
15 that realised there was a problem, felt uncomfortable about  
16 Colin Gibson, but thought that his options were really  
17 quite large-scale responses - shutting down Bethcar,  
18 removing children. He didn't seem to realise that we could  
19 have attached a condition to the licence. We could have,  
20 as a condition of the licence, said Colin Gibson is not to  
21 return to Bethcar.

22  
23 Now, later evidence obviously makes clear that  
24 Colin Gibson wasn't the only abusive adult in Bethcar, but  
25 based on what was available to our officer at that point,  
26 allegations about Colin Gibson, there was a response  
27 available to us as an agency that would have reduced the  
28 risk to the children in the home.

29  
30 Q. Was the licence an annual licence or was it --

31 A. It was a six-monthly permit for a period of a couple  
32 of years, and then it would have been reviewed, but I would  
33 need to check the cycle of review.

34  
35 Q. In terms of whatever the cycle was, in terms of the  
36 review, did that involve, at the time, the department  
37 carrying out any inspection checks or other steps to  
38 satisfy itself that it was appropriate to continue to  
39 licence the premises?

40 A. Yes, it did. However, when you view the role that we  
41 had under legislation at that point, it sits at odds with  
42 the way we would approach these issues today, because the  
43 focus at that time was on the physical facilities, and  
44 there was much less of a focus on the well-being of the  
45 children in the home. So it was a very, very narrow view  
46 about what would support children to thrive in that home.

47

1 COMMISSIONER FITZGERALD: Q. Could I just extend that.  
2 In your statement at paragraph 18, which you've read out,  
3 you say that the department could have done more to protect  
4 those children in Bethcar once reports had been made.

5 A. Yes.

6  
7 Q. Is it your conclusion that the department adequately  
8 performed its role prior to that notification, because that  
9 statement there, whilst it acknowledges some responsibility  
10 in the department's failure post reports, doesn't seem to  
11 indicate that the department believes that there was  
12 a deficiency prior to those reports. Is that your view?

13 A. It's my view, in fairness, in hindsight. The  
14 department didn't establish Bethcar, the department had  
15 a peripheral funding relationship with Bethcar and, until  
16 1980, on the information available to us from searching our  
17 records, had no information to suggest that children were  
18 at risk in Bethcar. But from March 1980 onwards we did,  
19 and further information came in in 1983 and 1984.

20  
21 It's also true that there was similar concerning  
22 information that was available to other agencies at that  
23 time. It strikes you, from the perspective of the present  
24 day, how uncoordinated and how unpurposeful the response  
25 was, how unwilling people were to listen to and believe  
26 children, how it could be that children who were regularly  
27 beaten, who then went to school, I'm sure showing signs of  
28 that physical abuse - that that wasn't picked up. The  
29 challenge, of course, is to be fair in your judgment from  
30 2014, but it was a very different world.

31  
32 Q. Could I also ask this, and you may not be able to  
33 answer it: has the department given consideration to its  
34 liabilities to funded services in that era generally?  
35 Given the number of institutions at which allegations of  
36 child sexual abuse have been made to the Royal Commission,  
37 many of those in New South Wales, has the department  
38 actually gone back and looked at what it believes its  
39 obligations, and its legal obligations, were in the '70s,  
40 '80s and '90s, which is a very different environment to the  
41 regulatory environment we have today? Has that review been  
42 done?

43 A. No, but the work that we do need to do in support of  
44 the government's consideration of whatever discussions the  
45 Commission has and recommendations the Commission may make  
46 about a redress scheme would obviously turn to some  
47 considerations of, if there was a redress scheme, who would

1 have access to it and what do our records tell us about the  
2 likely population of people, the likely number of people,  
3 that might have access to a redress scheme.

4  
5 THE CHAIR: Q. Mr Coutts-Trotter, what's lying behind  
6 both Commissioner Fitzgerald's questions and mine is this:  
7 we fully understand why it is that once the issue of abuse  
8 was raised with the departmental officer, there may have  
9 been a failure to appropriately respond - and again  
10 I stress the question is not without its difficulty, but  
11 when a body such as your predecessor department was  
12 responsible for the funding and licensing of an institution  
13 which had the care of vulnerable children --

14 A. Yes.

15  
16 Q. -- the law would look very carefully at what that  
17 required in the exercise by that department of its  
18 responsibilities and define what might have been its duty  
19 of care. I appreciate you say that maybe people were  
20 looking only at, or mainly at, physical facilities --

21 A. Yes.

22  
23 Q. -- but when you have a licensing regime and a funding  
24 regime that provides for continual renewal, if you like,  
25 it's not hard to see that one needs to look carefully at  
26 whether or not the department should have done more than  
27 just look physical facilities?

28 A. Your Honour makes the point that there were steps in  
29 this process, so there was a period where the agency was  
30 providing money; there was a period where the agency was  
31 actually providing a permit and a licence. I think as  
32 those steps proceed, our duty of care enlarges. It's also  
33 true to say that the Commonwealth Government funded the  
34 organisation, too.

35  
36 Q. Yes, and it may not turn upon funding, but it may be  
37 that scrutiny should be paid in the relevant circumstances  
38 to the licensing regime and what control and  
39 responsibility, before renewing a licence, the department  
40 had.

41 A. Yes.

42  
43 Q. It's not hard to start to frame an obligation to  
44 inspect, an obligation to speak with staff and  
45 an obligation to speak with children and determine whether  
46 or not, apart from its physical facilities, the children  
47 were being appropriately cared for.